

Inter-American Court of Human Rights

Case No. 12.449

Teodoro Cabrera Garcia and Rodolfo Montiel Flores

v.

Mexico

Amicus Curiae

presented by:

EarthRights International



Honorable Inter-American Court of Human Rights:

Marco Simons and Jonathan Kaufman, in representation of EarthRights International, 1612 K St. NW Suite 401, Washington, DC, 20006, U.S.A., respectfully submit to this Honorable Court the following *amicus curiae* brief in the case of *Teodoro Cabrera Garcia and Rodolfo Montiel Flores v. Mexico*.

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I. REQUEST TO BE CONSIDERED *AMICUS CURIAE*

Pursuant to Article 44 of the Rules of Procedure of this Honorable Court,¹ EarthRights International (ERI) respectfully requests to be considered *amicus curiae* in this matter and asks this Honorable Court to take into account the issues addressed in this brief.

II. STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus has substantial organizational interest in the issues addressed in this brief, and these issues fall within *amicus*'s areas of expertise. EarthRights International is a non-profit human rights organization based in Washington, D.C., that litigates and advocates on behalf of victims of human rights and environmental abuses worldwide. ERI has represented plaintiffs in several transnational lawsuits in the United States dealing with claims of human rights abuses related to the activities of multinational corporations involved in natural resource extraction. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW) (S.D.N.Y.); *Bowoto v. Chevron Corp.*, No. C 99-02506, (N.D. Cal.), No. 09-15641 (9th Cir.); *Doe I. v. Unocal*, No. CV 96-6959 RAP (BQRx) (C.D. Cal), No. 00-56603 (9th Cir.); *Maynas Carijano v. Occidental Petroleum Corp.*, No. CV 07-5068 PSG (PjWx) (C.D. Cal.), No. 08-56187 (9th Cir.). Additionally, ERI has submitted *amicus* briefs in numerous similar cases, and has previously participated in an *amicus* brief in the instant case before the Commission.²

Amicus therefore has experience with human rights abuses perpetrated in the context of community protest against the impacts of extractive industries. As a non-governmental organization dedicated to the protection of human and environmental rights, *amicus* has a particular interest in the case of Mr. Cabrera and Mr. Montiel, and has closely followed the legal proceedings concerning the violations of the rights of these internationally-recognized environmental defenders. *Amicus* requests that this Honorable Court acknowledge the roots of the violations in the instant case in resource extraction activities when determining the proper remedies for the Petitioners, and consider the responsibility of the Mexican state for failing to respect and protect the Petitioners' substantive right to participate in development decisions affecting them.

III. STATEMENT OF ISSUE TO BE ADDRESSED BY *AMICUS CURIAE*

Amicus submits that Mexico has an obligation under Articles 1.1 and 2 of the American Convention on Human Rights (hereinafter "the Convention"), to take proactive measures to

¹ Rules of Procedure of the Inter-American Court of Human Rights, Art. 44 (December 2009); *see also Case of Kimel v. Argentina. Merits, Reparations, Costs, and Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 177, para 16 (May 2, 2008).

² *See* Brief of Amici Curiae in the case of Teodoro Cabrera Garcia and Rodolfo Montiel Flores v. The State of Mexico, presented by the Center for Human Rights and Environment and the Center for International Environmental Law to the Inter-American Commission on Human Rights, available at <http://www.earthrights.org/sites/default/files/publications/amicus-brief-montiel-and-cabrera-v-mexico.pdf> (hereinafter "CEDHA/CIEL Br."). A list of additional *amicus* briefs filed by ERI can be found at <http://www.earthrights.org/legal/amicus>.

protect the rights of individuals under the Convention from the heightened risks of human rights violations in the context of natural resource extraction by multinational corporations. Through its unlawful arrest, detention, torture and criminal prosecution of Mr. Montiel and Mr. Cabrera, and its systematic intimidation of them and their colleagues at the Organization of Farmer Ecologists of the Sierra of Petatlán and Coyuca of Catalán (OCESP), Mexico sought to silence the environmental activists, who were seeking to influence policies and practices regarding the use of natural resources in their communities. The State's actions violated Petitioners' right to full participation in decisions relating to their own development — a right recognized in international law, protected under the OAS Charter and the Inter-American Democratic Charter, and guaranteed by Articles 23 and 26, in conjunction with Articles 1.1 and 2, of the Convention.

Amicus fully endorses the arguments advanced in the *amicus* brief of the Environmental Defender Law Center (EDLC) in this case (hereinafter “EDLC Br.”), which situates the abuses experienced by Petitioners within a global pattern of threats to the rights of environmentalists. This brief supports and expands upon EDLC's submission by highlighting that these threats to environmental activists and community members, alike, frequently arise in the context of corporate exploitation of natural resources.

IV. SUMMARY OF FACTS

Amicus adopts the factual summaries presented by Petitioner and in the EDLC *amicus* brief, and presents below only those facts most relevant to the particular issues addressed in this brief.

OCESP was founded in April 1998 to advocate for the protection of the Costa Grande forests in Guerrero, Mexico; Rodolfo Montiel Flores and Teodoro Cabrera García were two of its most active members. In 1995, the Governor of Guerrero signed an agreement with the multinational company Boise Cascade authorizing logging in Costa Grande.³ It was widely believed that the contract with Boise Cascade was designed to benefit Ruben Figueroa Ejido Union, a group of twenty-four *ejidos* headed by a powerful local landowner, Bernardo Bautista.⁴ Official national statistics documented the loss of 40% of the area's forest, or 86,000 hectares, in just the eight years from 1992-2000.⁵ In 2003, the U.N. High Commissioner for Human Rights noted that the spread of environmental degradation — described by the government itself as “apocalyptic” — in Guerrero and other areas of the country was a result of the government's unsustainable policy of natural resource development.⁶

Under the auspices of OCESP, Mr. Cabrera and Mr. Montiel lodged multiple formal complaints with local, state and national government officials about the excessive logging operations and the

³ Centro Prodh *et al.*, Caso Cabrera García y Montiel Flores vs. México: *Escrito de solicitudes, argumentos y pruebas de los representantes de las víctimas y sus familiares*, 27 (Nov. 2, 2009) (hereinafter “Pet'rs' Br”).

⁴ See Pet'rs' Br. at 99 n.273; CEDHA/ CIEL Br. at 4.

⁵ Pet'rs' Br. at 28-29 & Annexes 9 & 10.

⁶ See Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos en México, *Diagnóstico sobre la Situación de los Derechos Humanos en México* (2003) at 120, available at http://www.hchr.org.mx/5_1diagdhmex.htm.

improper influence of powerful private interests, and appealed for environmental protection measures such as reforestation.⁷ OCESP's repeated appeals to government officials went largely unanswered. They then attempted to exercise their right to a voice in decisions affecting their own development by engaging directly with the company. Petitioners organized the local community to protest the loss of the forest and the consequent drying up of streams and springs.⁸

These efforts resulted in the withdrawal of Boise Cascade and the temporary suspension of logging. Soon thereafter, however, other companies recommenced logging the forests at an unsustainable rate. *Caciques* in the Ruben Figueroa Ejido Union, who were reportedly often seen in the company of soldiers, reacted against this popular resistance. As early as 1997, before OCESP was formed, soldiers had threatened Mr. Montiel and his family in his home.⁹ The *caciques* retaliated in other ways, including by burning forests belonging to landowners who resisted logging.¹⁰

During this same period, Guerrero saw increasing militarization and persecution of environmental defenders.¹¹ In 1998, witnesses documented multiple instances of detention, torture and murder of environmental activists in the region. In at least two cases, the violence was committed by Mexican soldiers.¹² On May 2, 1999, the Mexican Army raided the town of Pizotla and detained the Petitioners. Mr. Cabrera and Mr. Montiel were detained and tortured by members of 40th Battalion, who extracted false confessions from them following days of ill treatment. The ensuing months of arbitrary detention, denial of process, and torture are fully documented in the Petitioners' Brief.

Petitioners' treatment was not an isolated incident of military misconduct, but occurred in the context of increased repression of environmental activists in Mexico.¹³ The criminalization, threats, and harassment of members of OCESP did not stop with the Petitioners' imprisonment or their ultimate release.¹⁴ In the face of additional false criminal charges and armed attacks against other OCESP members, many activists were forced to abandon their homes and their

⁷ See Pet'rs' Br. Annexes 11-17 (letters sent by OCESP to government and military officials regarding logging activities and reforestation efforts).

⁸ See Letter from OCESP to the Delegate of PROFEPA (Procuraduría Federal de Protección al Medio Ambiente) in Guerrero, Pet'rs' Br., Annex 15.

⁹ See CEDHA/CIEL Br. at 4.

¹⁰ *Id.* at 5.

¹¹ Pet'rs' Br. at 6.

¹² See CEDHA/CIEL Br. at 5.

¹³ See Pet'rs' Br. at 14-17; Inter-American Commission on Human Rights, *Country Report on Mexico*, ch. 10 para. 662 (1998) ("The arbitrary arrest and detention of human rights defenders is especially common in the state of Guerrero.") See also EDLC Br. at 10.

See Amnesty Int'l, *Standing up for Justice and Dignity: Human Rights Defenders in Mexico*, AMR 41/032/2009 (Jan. 2010) at 2, available at <http://www.amnesty.org/en/library/info/AMR41/032/2009/en> (documenting numerous instances of abuses perpetrated against Mexican human rights defenders, including environmental activists like Petitioners, promoting the economic, social, and cultural rights of their communities).

¹⁴ See Pet'rs' Br. at 30, 59, 188.

environmental campaigns. Eventually, fearing for their safety, Petitioners themselves were forced into exile and OCESP's work came to a halt.¹⁵ The efforts of Mr. Cabrera, Mr. Montiel and their OCESP colleagues to take part in governance decisions regarding the use of their forests threatened powerful economic interests, which ultimately led to the violations at issue in this case.¹⁶

V. SUMMARY OF ARGUMENT

The abuses perpetrated against Petitioners occurred in the context of community resistance to state-sanctioned logging operations in the Costa Grande, where Mr. Cabrera and Mr. Montiel resided. The link between resource extraction by corporations, such as logging companies, and human rights abuses is widely recognized and well-documented; the highly profitable nature of corporate resource extraction often leads to a heightened risk and incidence of abuses against environmental activists opposing these activities. Such abuses may occur with or without the corporation's direct involvement, often by government agents acting for the benefit of powerful private economic interests.

Given the prevalence of conflict between communities and private companies over resource extraction both worldwide and in Mexico in particular, the Mexican government should have taken precautions against the increased likelihood of human rights violations relating to logging operations in Guerrero. Mexico has a duty to protect the rights of citizens like Mr. Montiel and Mr. Cabrera against abuses of which it is aware or should be aware—including by taking proactive steps to prevent risks of human rights violations from materializing. That duty encompasses protection against not only the actions of third parties that threaten rights, but also the actions of agents of the state in the service of third parties. Such obligation requires that the state take measures to guarantee an environment in which the free exercise of rights is possible.

Amicus agrees with EDLC that Mexico violated Petitioners' associational rights. Additionally, Petitioners' repeated communication of their concerns about the adverse impacts of logging on the environment and their livelihoods to both the government and the company were a lawful exercise of their right to participate in development decisions affecting them. That right is reflected in the Inter-American Democratic Charter and is protected under Article 23 of the Convention as a form of participation in government. Moreover, because of its chilling effect on all those in Mexico who would exercise their right of participation, the unlawful detention, torture and prosecution of Petitioners not only violated their individual rights to take part in decisions affecting their own development, but constituted regressive measures in violation of the government's obligation under Article 26 to progressively realize the rights implicit in the economic, social, and cultural standards contained in the OAS Charter.¹⁷

VI. ARGUMENT

A. The Operations of Multinational Extractive Enterprises Create a Heightened Risk

¹⁵ See Pet'rs' Br. at 102.

¹⁶ See Pet'rs' Br. at 27.

¹⁷ See EDLC Br. Part IV.

of Human Rights Abuse That Must Be Proactively Mitigated by the State.

1. Corporate extraction of natural resources increases the risk of human rights abuses.

The operations of multinational extractive enterprises often create conditions that make human rights abuses more likely, regardless of whether the corporations are directly involved in the abuses. This is due to a combination of factors. Extractive activities frequently degrade or destroy the natural resources on which local communities rely, leading to local resistance.¹⁸ Additionally, they create powerful economic interests, thereby empowering and entrenching local elites, opening opportunities for corruption, and generating financial incentives to protect the profitability of the investment — sometimes at the expense of human rights. As in this case, unsustainable and nonconsensual resource extraction can set communities on a collision course with powerful interests that too often results in human rights abuses, such as those alleged by Petitioners.¹⁹ Mexico is obligated under Articles 1.1 and 2 of the Convention to take steps to safeguard the ability of individuals to freely exercise their rights in this context.

a. The connection between extractive industries and human rights abuses is internationally recognized.

The heightened risk of human rights violations in the context of extractive activities is well documented. A 2005 U.N. study observed that the presence of extractive industries strains human rights, particularly in situations of weak governance and where local communities rely on land and water resources.²⁰ As a result, in the eyes of local communities, “powerful oil and mining companies often appear to benefit when police or the security forces violently repress protests by affected communities about the operations of extractive industries.”²¹

Consistent with these findings, a global survey revealed that allegations of corporate-related

¹⁸ This type of degradation-inspired opposition was the genesis of OCESP. *See* Pet’rs’ Br. at 28. Excessive logging can deplete soil quality, thereby lowering farm production levels, and encroach upon land available to communities, prompting opposition.

¹⁹ *See* Pet’rs’ Br. ch. 3; EDLC Br. Part IV; Inter-Am. C.H.R., Application Filed by the Inter-American Commission of Human Rights with the Inter-American Court of Human Rights Against the United Mexican States, Case 12,449, Teodoro Cabrera Garcia and Rodolfo Montiel Flores, Part VIII (Jun. 2009). *See also* Amnesty Int’l, *Mexico: Daring to Raise their Voices*, AMR 41/040/2001 (Dec. 2001); Amnesty Int’l, *Mexico: New Reports of Human Rights Violations by the Military*, AMR 41/058/2009 (Dec. 2009).

²⁰ U.N. Econ. & Soc. Council [ECOSOC], Hum. Rts. Comm., *Report of the United Nations High Commissioner for Human Rights on the sectoral consultation entitled: Human rights and the extractive industry*, 3-4, U.N. Doc. E/CN.4/2006/92 (Dec. 19, 2005). *See also* Extractive Industries Review, *Striking a Better Balance*, Vol. 1, at 6 (2004), available at [http://irispublic.worldbank.org/85257559006C22E9/All+Documents/85257559006C22E985256FF6006843AB/\\$File/volume1english.pdf](http://irispublic.worldbank.org/85257559006C22E9/All+Documents/85257559006C22E985256FF6006843AB/$File/volume1english.pdf).

²¹ ECSR-Net Corporate Accountability Working Group, Joint NGO Submission to the Consultation on Human Rights and Extractive Industries, at 10 (Nov. 2005), available at http://www.escri-net.org/usr_doc/ESCR-Net_on_HR_and_Extractive_Industry.pdf.

human rights abuses arise in the context of extractive industries more often than in any other sector.²² John Ruggie, the U.N. Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, found that business connections to human rights violations encompass situations “where the State committed the violation in connection with the company’s project, violating rights in the course of making way for the project *or during the project, in order to eliminate or silence project opponents.*”²³ Such tactics of intimidation and repression at the hands of government actors, as in the case of OCESP, contribute to community perceptions that the mere presence of companies can fuel violations by leading states to “actively violate rights for gains from corporate investment.”²⁴

b. The types of human rights violations perpetrated against Petitioners are consistent with the pattern of abuse observed in the context of corporate extraction of natural resources around the world.

As described above, Mr. Montiel and Mr. Cabrera were protesting the operations of Boise Cascade, a multinational logging company. Such opposition frequently leads to human rights abuses, whether by private actors or state actors protecting powerful economic interests. While the facts of individual cases vary, the frequency of abuses related to resource extraction illustrate that the connection between the corporate logging activities in Guerrero, the efforts of Petitioners to protect the forests, and the repressive acts by the Mexican armed forces, is not merely coincidental. Following are brief descriptions of cases from around the world in which human rights abuses have arisen in connection with community opposition to the destructive effects of extractive activities. This list, which draws heavily on the annex to the EDLC Brief²⁵ and *amicus’s* own experience, is not exhaustive, but is intended to demonstrate a global pattern of natural resource-related violations of human rights, underscoring the fact that Mexico should have known of the high risk of such abuses occurring in Guerrero.

Mexico²⁶

- Violence against and false prosecution of Zamora brothers, Baldenegro, and Arreaga²⁷
- Murder of Aniceto Martinez, who was mistaken for OCESP founder Celso Figueroa
- Murder of Elena Barajas, Romualdo Gómez García and Salomé Sánchez Ortiz
- Torture of Jesús Cervantes Luviano²⁸

²² See UNGAOR, Hum. Rts. Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic Social and Cultural Rights, Including the Right to Development: Addendum - Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse*, at 9, U.N. Doc. A/HRC/8/5/Add.2 (May 23, 2008) (finding that 28% of the alleged human rights abuses committed by corporations were in the extractive sector).

²³ *Id.* at 27 (emphasis added).

²⁴ UNGAOR, Hum. Rts. Council, *Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya*, para. 40, U.N. Doc. A/HRC/13/22 (Dec. 30, 2009).

²⁵ See generally, EDLC Br. Appendix 1 (“Violations of the Human Rights of Environmental Defenders in Different Countries”).

²⁶ See EDLC Br. at 9-13; Amnesty Int’l, *Daring to Raise Their Voices*.

²⁷ EDLC Br. at 12; EDLC, Isidro Baldenegro, at <http://www.edlc.org/cases/individuals/isidro-baldenegro/>; EDLC, Felipe Arreaga, at <http://www.edlc.org/cases/individuals/felipe-arreaga/>.

Central and South America

- Threats and violence against Sipicapa communities in Guatemala for protesting environmental harm from gold mine operated by subsidiary of Canadian company²⁹
- Killing of at least four community members protesting or resisting mining or logging in Guatemalan Mayan communities
- Shooting of Guatemalan environmental lawyer Yuri Melini
- Murder of prominent anti-mining activists in El Salvador opposing a gold mine owned by the Pacific Rim Mining Corporation
- Threats against Argentine opponents of logging and mining by multinational companies
- Threats against Bolivian activists working on negative impacts of a mine owned by a multinational company
- Multiple murders and threats of physical violence against opponents of logging in the Brazilian Amazon, including the killing of Sister Dorothy Stang, and threats against Greenpeace activist Paulo Adario
- Killing of three indigenous activists for protesting petroleum exploration in Colombia³⁰
- Wrongful imprisonment, abduction, and murder of Ecuadorian activist Angel Shingre, who protested Texaco's oil exploitation activities, and murder, assault, and threats against opponents of a Canadian copper mine in Ecuador

Asia and Africa

- Crimes against humanity committed against opponents to mining by British company Rio Tinto in Papua New Guinea
- Torture of an activist protesting operations of U.S. mining company Freeport McMoRan in Indonesia
- Arbitrary detention and torture of Chadian parliamentarian opposed to oil exploration by ExxonMobil and Chevron
- Rampant land confiscation, forced labor, environmental destruction, and water contamination associated with oil, gas, and mining in Burma³¹
- Torture, arbitrary detention, extrajudicial killings, forced labor, and violations of freedom

²⁸ Amnesty International, *El Costo Humano de Defender el Planeta* (Apr. 2002), at http://www.cedha.org.ar/docs/doc82-spa.htm#_ftn23.

²⁹ In response to the community's petition, the Inter-American Commission on Human Rights recently granted preliminary measures calling on the government of Guatemala to suspend the mine's operation. See Inter-Am. C.H.R., PM 260-07 – Communities of the Maya People (Sipakense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala (May 20, 2010), at <http://www.cidh.org/medidas/2010.eng.htm>.

³⁰ ERI submitted an *amicus* brief in the case of *Galvis Mujica v. Occidental Petroleum Corp.*, No. 05-65056 (9th Cir.), involving an incident in which the Colombian military bombed a village using an airplane provided by the company and piloted by the company's security contractor.

³¹ See, e.g., ERI, *Turning Treasure Into Tears: Mining, Dams and Deforestation in Shwegyin Township, Pegu Division, Burma* (2007); ERI, *Capitalizing on Conflict: How Logging and Mining Contribute to Environmental Destruction in Burma* (2003), all available at <http://www.earthrights.org/publications>.

- of movement for villagers along Yadana gas pipeline corridor in Burma³²
- Murder, torture, and assault on non-violent protesters on a Chevron oil platform in Nigeria, by government soldiers paid, housed, transported, and supervised by the company
- Arbitrary detention, torture, and murder of environmental activists and Ogoni community members protesting Shell oil exploration activities by Nigerian security forces

c. The link between extractive industries and human rights abuses is evident in prior cases before this Court and the Commission.

This Honorable Court and the Commission have been asked on several occasions to consider the tensions and potential for abuse that arise in the context of unconsented, unsustainable resource extraction. In a situation closely analogous to the one before the Court today, petitioners in the *Case of Kawas-Fernández v. Honduras* sought remedy for the assassination of a defender of human rights and the environment, Jeannette Kawas-Fernández, who had denounced illegal logging operations in Punta Sal National Park and opposed economic development projects in the area on environmental grounds.³³ In the *Case of Saramaka People v. Suriname*, indigenous communities sought remedy for violations of their right to property and participation in development decisions affecting them, citing harms to their way of life associated with logging on their lands that was authorized by the state without their consent.³⁴ In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, conflict over traditional land rights arose as a result of the presence of commercial interests in natural resource extraction.³⁵ Similarly, in *Yanomami v. Brazil*, the Inter-American Commission recognized that the discovery of minerals in the region where the Yanomami live precipitated serious conflicts between prospectors and miners on the one side, and community members on the other, resulting in numerous human rights violations.³⁶

2. Mexico had a duty to take proactive steps to prevent likely human rights violations.

This Court has found that, in the context of the right to freedom of association, the State has a duty to take measures to “prevent attacks on [freedom of association]”³⁷ and to ensure that

³² See reports by ERI, including *Energy Insecurity* (2010), *Total Impact* (2009), and *The Human Cost of Energy* (2008), available at <http://www.earthrights.org/publications>; see also ERI, Universal Periodic Review – Myanmar (Burma) Submission to the Office of the High Commissioner for Human Rights – July 2010.

³³ *Case of Kawas-Fernández v. Honduras*, Inter-Am. Ct. H.R. Judgment of Apr. 3, 2009. Series C No. 196, paras. 50, 52, 69-70, 149.

³⁴ *Case of Saramaka People v. Suriname*, Inter-Am. Ct. H.R. Judgment of Nov. 28, 2007. Series C No. 172.

³⁵ *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. Judgment of Aug. 21, 2001, Series C No. 79, paras. 148-52.

³⁶ *Case of the Yanomami v. Brazil*, Case 7615, Inter-Am. C.H.R., Report. No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. (1985), available at <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>.

³⁷ *Kawas-Fernández*, Series C No. 196, para. 144.

individuals have “the power to choose how to exercise it.”³⁸ In its 2009 *Report on Citizen Security and Human Rights*, the Commission describes the state’s obligation to protect under the Convention:

[T]he general duty under Article 2 of the American Convention implies the . . . *promulgation of norms and the development of practices conducive to effective observance of those guarantees.... In situations of serious and systematic violations of human rights, the State’s obligation to adopt positive measures of prevention and protection under Article 1(1) of the American Convention are enhanced.*³⁹

In other words, Articles 1(1) and 2 of the Convention include an obligation to prevent known risks of abuse from materializing.⁴⁰

The high rate of abuse of environmental defenders, carried out with impunity throughout Mexico at the time of the events complained of in this case, constituted a “situation[] of serious and systematic violations of human rights” that triggered the State’s obligation to proactively prevent such abuses from occurring in the region where Petitioners were active. Mexico violated this duty; instead of protecting the Petitioners’ rights, the evidence suggests that public officials subjected Petitioners to intimidation, detention and torture in order to silence Petitioners’ environmental activism and its impacts on private logging companies.⁴¹

This pattern of abuse supports Petitioners’ request for a remedy, similar to that ordered by the Court in *Kawas-Fernandez*, of a sensitization campaign.⁴² Education of the public and government officials regarding the work of human rights defenders is one way in which Mexico can meet its obligation to protect against abuses in a context where they are likely to occur.

B. Mexico’s Arrest and Detention of Rodolfo Montiel and Teodoro Cabrera, Along with Its Intimidation of Their Colleagues, Constitute a Violation of the Right to Participate in Development Decisions.

³⁸ *Case of Huilca-Tecse v. Peru*, Inter-Am Ct. H.R. Judgment of 3 March 2005. Series C No. 121, para. 77.

³⁹ OEA/Ser.L/V/II. Doc.57, paras 37-44 (31 December 2009) (emphasis added).

⁴⁰ This principle is also reflected in numerous other international and regional systems. These include the International Covenant on Civil and Political Rights (ICCPR), *see* U.N. Hum. Rts. Comm, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); and the European Court of Human Rights, *see, e.g., Kiliç v. Turkey*, App. No. 22492/93, judgment of 28 March 2000, paras. 62 – 63; *Savage v. South Essex Partnership NHS Foundation Trust*, [2008] UKHL 74, para. 36 (“Fundamentally, art 2 [of the European Convention] requires a state to have in place a structure of laws which will help protect life. ...[T]he European court identified the ‘primary duty’ of a state under the article as being ... whether, given the circumstances of the case, the state did all that could have been required of it to prevent the applicant’s life from being avoidably put at risk.”).

⁴¹ *See* Pet’rs’ Br. at 99, 26-27; EDLC Br. at 29.; CEDHA/CIEL Br. at 4-5.

⁴² *Kawas-Fernández*, Series C No. 196, para. 213-14.

Petitioners, together with their OCESP colleagues, made many attempts to contact government officials and influence the resource management decisions of the logging company.⁴³ These activities were an effort to have a voice in state-sanctioned resource extraction that affected the development of the region and the economic, social and cultural wellbeing of Petitioners and their communities. Petitioners' activities therefore constituted efforts to participate in development decisions that affect them.

Participation in development decisions is a core element of the right to participation in government, protected by Article 23 of the Convention. The centrality of participation in development decisions to democratic governance is demonstrated by its inclusion in both the OAS Charter and in the more recent Inter-American Democratic Charter. Moreover, to the extent that the right to participation in development decisions is not expressly protected by Article 23, it is central to the progressive realization of the economic, social and cultural rights implicit in the OAS Charter, protected under Article 26 of the Convention. The treatment that Petitioners received from the Mexican State not only violated their individual rights to such participation under Article 23, but also was part of a pattern of abuse that had a chilling effect on the ability of others to exercise their rights to participation, therefore constituting unjustified regressive measures in violation of Article 26.

1. The right to participate in development decisions is central to the right to participate in government.

The foundational documents of the Inter-American system support the existence and justiciability of a right to participation in development decisions. The preamble to the OAS Charter, for example, emphasizes member states' conviction that "representative democracy is an indispensable condition for the stability, peace and development of the region"; Article 34 places participation in decision-making squarely at the center of the "integral development" which member states pledge to ensure.⁴⁴ The American Declaration on the Rights and Duties also recognizes the right through a conjunction of Articles XX, XXII, and XXIV, which protect the right to participate in and petition government, and to associate with others to promote one's economic and social interests.

The Inter-American Democratic Charter (hereinafter "Democratic Charter"), which was unanimously adopted in September 2001 by the General Assembly of the OAS, confirms that member States intended to recognize the ability to participate in development decisions as a substantive right. Article 6 of this instrument states: "It is the right and responsibility of all citizens to participate in decisions relating to their own development." Thus the States of the OAS have recognized that the right to participate in development decisions is central to democratic governance itself.

⁴³ See Pet'rs' Br. Annexes 11-17, as evidence of such efforts to participate in public affairs.

⁴⁴ Charter of the Organization of American States, Preamble, Art. 34, 119 U.N.T.S. 3, *entered into force* December 13, 1951 (as amended).

2. Because the right to participate in government encompasses the right to participate in development decision-making, Mexico violated Article 23 of the Convention.⁴⁵

Because participation in development decisionmaking is central to democratic governance, it should be directly protected by Article 23 of the Convention. While much of the Court’s jurisprudence on Article 23 focuses on voting and electoral politics, its decisions make clear that the right extends to individual or organized activities aimed at “influencing the elaboration of State policy through direct participation mechanisms.”⁴⁶ As the Commission has recognized, this right is particularly crucial when individuals exercise it in the context of state decisions that affect them, including natural resource extraction that impinges on their environment and personal health.⁴⁷ The activities of Petitioners and other members of OCESP fall within this right — a right Mexico clearly violated when it not only failed to afford a safe space for OCESP’s advocacy, but also took violent actions against the environmentalists.

The justiciability of the right to participate in development decisions under Article 23 is clear when the Convention is read in light of the Inter-American Democratic Charter. The Convention expressly refers to the necessity of interpreting the Convention so as not to exclude or limit the effect that “the American Declaration of the Rights and Duties of Man and *other international acts of the same nature may have*.”⁴⁸ Just as this Court has used the Declaration as a guide to the meaning of the fundamental rights protected by the OAS Charter and the Convention,⁴⁹ it is also appropriate for the Court to look to the Democratic Charter to interpret provisions relating to participatory governance and human rights.

In fact, this Court has repeatedly referred to the Democratic Charter to shed light on the meaning of Article 23.⁵⁰ Moreover, in his concurring opinion in *Yatama*, Judge Garcia-Sayan explicitly evoked the Democratic Charter to interpret the evolving content of Article 23, finding that the Democratic Charter provided clarification for norms already agreed to in the Convention, and that it was therefore appropriate to read the Convention in light of these “conceptual

⁴⁵ See EDLC Br. at 35-40.

⁴⁶ *Case of Yatama v. Nicaragua*, Inter-Am. Ct. H.R. Judgment of June 23, 2005. Series C No. 127, para. 196.

⁴⁷ *Report on Citizen Security*, OEA/Ser.L/V/II., Doc. 57 (Dec. 31, 2009) (citing “A Human Rights Based Approach To Development Cooperation: Towards a Common Understanding Among UN Agencies,” available at http://www.undg.org/archive_docs/3069-Common_understanding_of_a_rights-based_approach.doc).

⁴⁸ American Convention, Art. 29(d) (emphasis added).

⁴⁹ See *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, July 14, 1989, Inter-Am. Ct. H.R., Series A No. 10, paras. 43-44 (1989).

⁵⁰ See, e.g., *Case of Castañeda-Gutman v. Mexico*, Inter-Am. Ct. H.R. Judgment of Aug. 6, 2008. Series C No. 184, paras. 140-43 (Democratic Charter established, for the Inter-American system, the relationship between human rights, representative democracy and political rights); *Yatama*, Series C No. 127, paras. 192, 193, 207 (referring to Article 6 of Democratic Charter when assessing conformity of Nicaraguan electoral law with Article 23 of the Convention).

evolutions.”⁵¹ The preamble to the Democratic Charter confirms that one of its prime purposes was to serve as a tool for interpreting the provisions of the OAS Charter and other comparable agreements in the Inter-American system, noting the advisability of “*clarifying the provisions set forth in the OAS Charter and related basic instruments* on the preservation and defense of democratic institutions, according to established practice.” Thus the Democratic Charter — which explicitly includes the right to participate in development decision-making — should inform this Court’s reading of the provisions in the Convention that are related to the defense of democratic institutions, including those pertaining to participation in democratic society.

Given the broad sweep of participation in public affairs recognized in the Convention and the Democratic Charter, there is no question that the actions which precipitated the violation of Petitioners’ rights, including their repeated communication of concerns to the government and public protests, constituted an exercise of their right to take part in public affairs. By ignoring their appeals and instead brutally retaliating against them, the State violated Article 23 of the Convention, in conjunction with Articles 1.1 and 2.

3. To the extent that Petitioners’ activities are not encompassed by Article 23, Mexico violated Article 26 of the Convention, which protects participation in development decisions against regressive measures.

a. The right to participate in development decisions is integral to the progressive realization of the economic, social and cultural rights implicit in the OAS Charter, and its infringement violates Article 26 of the American Convention on Human Rights.

If the Court agrees that the right to participate in development decisions is directly protected under Article 23, there is no need to examine the extent to which it is also protected pursuant to Article 26 of the Convention. However, if the Petitioners’ activities do not fall under Article 23, they should be entitled to protection under Article 26, which incorporates by reference the rights implicit in the economic, social and cultural standards established in the OAS Charter. As discussed above, the Democratic Charter should inform this Honorable Court’s reading of both the text of the Convention and that of the OAS Charter, to which Article 26 refers.

Article 26 commits States to the progressive realization “of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.” Participation by individuals in decisions relating to their own development is just such a right, as it explicitly underlies the economic and social standards set forth in the OAS Charter. Thus far, this Court has considered whether Article 26 protects the right to progressive realization of social security,⁵² education,⁵³

⁵¹ *Yatama*, Series C No. 127, Garcia-Sayan, J., concurring, at para. 23

⁵² *Case of the “Five Pensioners” v. Perú*, Inter-Am. Ct. H.R. Judgment of Feb. 28, 2003. Series C No. 98 (recognizing that Article 26 protects right to social security but declining to pronounce on it in the context of the case).

⁵³ *Case of the Girls Yean and Bosico v. Dominican Republic*, Inter-Am. Ct. H.R. Judgment of Sept. 8, 2005. Series C No. 130, para. 29.

health,⁵⁴ and recreation.⁵⁵ It is no great leap to determine that the right to participate in development decisions should join this list. Indeed, such participation is expressly mentioned in the OAS Charter as the underlying objective of the enumerated economic and social standards.

Article 34 of the OAS Charter notes that “full participation of . . . [each State’s] peoples in decisions relating to their own development” is one of the basic objectives of “integral development” and enumerates a list of standards relevant to the achievement of that goal. The text of Article 34 does not limit the right of participation to state decisions, but in fact implies that governments must provide opportunities for participation by affected communities in the private development activities that affect them. Petitioners and other members of the communities represented by OCESP were clearly affected by the activities of the logging companies, which were depleting their forests and water resources, and affecting their livelihoods. Thus by acting to halt excessive logging, Mr. Cabrera and Mr. Montiel were seeking to influence forestry policies and practices relating to their own development.⁵⁶

The right to take part in development decisions is again underscored in Article 45(d) of the OAS Charter, which commits member states to the development of “[f]air and efficient systems and procedures for *consultation* and collaboration among the sectors of production, with due regard for safeguarding the interests of the entire society.” Furthermore, Article 45(f) of the OAS Charter states that members will make efforts to ensure “the incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation,” and “[t]he encouragement of all efforts of popular promotion and cooperation that have as their purpose the development and progress of the community.”

By virtue of these references, then, the right to participate in development decisions stands with the rights to social security, education, health and recreation as economic and social rights whose progressive realization is guaranteed under Article 26.

b. The State’s actions violated Petitioners’ individual rights to participate in development decisions and contributed to systematic silencing and intimidation of environmental activists, constituting regressive measures in violation of Article 26 of the Convention.

Article 26 protects against individual violations of economic and social rights where such violations hinder the progressive realization of such rights across all society. This Court has found violations where a State takes actions that are regressive (actively setting back the realization of Article 26 rights) and unjustified. The imprisonment and torture of Petitioners, which intimidated individuals, communities, and activists nationwide from attempting to

⁵⁴ *Case of the “Juvenile Reeducation Institute” v. Paraguay*, Inter-Am. Ct. H.R. Judgment of Sept. 2, 2004. Series C No. 112, para. 255.

⁵⁵ *Id.*

⁵⁶ The use of the word “peoples” instead of “persons” suggests that in this context, the term “development” is construed broadly to refer to actions that affect the life, health, and environment of a community, such as the management of natural resources.

participate in development decisions, fits this definition of Article 26 violations precisely.

This Court has repeatedly affirmed that its contentious competence extends to Article 26 claims *on behalf of specific persons alleging violation of their human rights*,⁵⁷ while clarifying that the State's fulfillment of its obligation to progressively realize economic, social and cultural rights can only be assessed *with respect to effects on the population as a whole*, rather than impacts on an individual or limited group of individuals.⁵⁸ In the instant case, Petitioners do not complain of a general social or economic policy, the content of which this Court would not have the competence to review. Instead, Petitioners suffered individual harm — intimidation, arrest, and torture with the intention of preventing them from exercising their right to participate in development decisions affecting them and their community. However, because the evidence suggests that Mexico's actions were taken in order to deter other activists and formed part of a well-documented pattern of abuse, they had society-wide impacts.⁵⁹ The abuses against Petitioners therefore constitute *measures adopted by the State that hinder the progressive realization of economic, social and cultural rights* by infringing on the ability of persons to take part in decisions regarding their own development.

Violations of Article 26 can be found upon evidence of unjustified regressive action.⁶⁰ When a State's actions have a regressive effect on the realization of protected rights, the State bears the burden of justifying its actions as a response to a pressing public or social need that is proportionate to its objective, and necessary to promote the general welfare in a democratic society.⁶¹ The abuses perpetrated in this case responded to no public or social needs, but rather to private economic interests. They further diminished social welfare by delaying action to address the environmental problems raised by Petitioners, and deterring others from voicing concerns about extractive industry activities.

As former Commissioner Claudio Grossman has explained, the violent suppression of one individual can affect an entire nation. Thus, brutally “‘silencing’ journalists . . . also intimidates nations as a whole by demonstrating the possible tragic consequences that can result from the

⁵⁷ See, e.g., *Case of Acevedo-Buendía et al.* (“Discharged and Retired Employees of the Comptroller”) v. *Perú*, Inter-Am. Ct. H.R. Judgment of July 1, 2009, Series C No. 198, para. 97.

⁵⁸ See *Five Pensioners*, Series C No. 98 (“progressive development . . . should be measured in function of the growing coverage of economic, social and cultural rights in general . . . , over the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group . . . who do not necessarily represent the prevailing situation.”).

⁵⁹ This Court has noted that attacks on organizers and activists can chill the exercise of rights of large groups of people. See, e.g., *Huilca-Tecse*, Series C No. 121, para. 69; *Kawas-Fernández*, Series C No. 196, para. 153.

⁶⁰ See *Acevedo-Buendía*, Series C No. 198, para. 103.

⁶¹ See Alicia Ely Yamin, *Not Just a Tragedy: Access to Medications As a Right Under International Law*, 21 B.U. INT'L L.J. 325, 354 (2003).

free expression of ideas.”⁶² Similarly, the detention and torture of Mr. Cabrera and Mr. Montiel, and other reprisals against OCESP,⁶³ not only violated the victims’ rights, but effectively intimidated and silenced other environmental activists and all those who would exercise their right to take part in development decisions affecting them. The virtual cessation of OCESP’s activities in the wake of ongoing violence and harassment evinces the collective consequences of these individual violations and stands as tragic proof of the violation of Petitioners’ right to the progressive realization of their right to participate in development decisions.

VII. PETITUM

In the hope and belief that this contribution will assist the Court to reach a just decision for the parties involved in this case, ERI respectfully requests that this Honorable Court:

- 1) admit EarthRights International as *Amicus Curiae* for this case;
- 2) attach this brief to the case file; and
- 3) adopt the views set forth in this brief.

September 9, 2010

Date

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⁶² Claudio Grossman, *The 2000 Goodwin Seminar Article & Essay: Freedom of Expression in the Inter-American System for the Protection of Human Rights*, 7 ILSA J.INT’L & COMPL. 619, 621 (2001).

⁶³ In addition to the abuse perpetrated against the two petitioners individually, other acts of intimidation include three assassinations of members of OCESP prior to the events of May 1999, one attempt on the life of another member (who received a gunshot to the head), and the disappearance of a fifth member of the organization. *See Pet’rs’ Br.* at 30.

⁶⁴ Counsel for *amicus* gratefully acknowledge the assistance of Nikki Reisch, law student at New York University, with the research and drafting of this brief.