IN THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Petition 1186-04

Opario Lemoth Morris et al. (Miskitu Divers)

v.

Honduras

AMICUS BRIEF OF:

THE ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN RIGHTS CLINIC

March 5, 2014

James J. Silk, Esq.

On the brief:
Anna Diakun
Ryan Liss
Celso Javier Perez

Allard K. Lowenstein International Human Rights Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06511
Phone: 203-432-7480
Fax: 203-432-8260

TABLE OF CONTENTS

Table of Authorities iv

I. *Amicus* Statement of Interest in the Case 1

II. Introduction 1

III. Factual Background 3

A. Miskitu Divers Suffer Inhuman Treatment and Risk Death or Disability. 4

B. The Miskitu Indigenous Group Lives in Poverty and Isolation. 4

C. The Miskitu Divers Lack Access to Justice. 5

IV. The Right to a Dignified Life 5

A. The Miskitu Divers Are a Vulnerable Group Susceptible to Abuses That Constitute a Violation of the Right to a Dignified Life. 6

1. The Miskitu Live in Precarious Social and Economic Conditions that Put Them at Risk of Exploitation. 6

2. The Miskitu Are Vulnerable Because They Have Been Unable to Vindicate Their Rights. 8

B. Honduras' *Vida Digna* Obligations Do Not Impose a Disproportionate Burden on State Authorities.. 8

1. The Miskitu Require Special Measures Because the Honduran State Knew or Had Reason to Know of the Miskitus' Condition. 8

2. The Miskitu Require Special Measures because There Is a Causal Relationship between the State's Negligence and the Deplorable Living Conditions of the Community................. 9

V. Judicial Protection and Access to Justice 10

A. The State Violated Its Duty to Make Judicial Protection Accessible to the Miskitu Divers. 10

1. Honduras Violated the Rights of the Disabled Miskitu Divers by Failing to Provide Accommodations to Ensure that They Had Access to Justice. 11

a. Article 13(1) of the Convention on the Rights of Persons with Disabilities Guarantees Individuals with Disabilities Full Access to Justice. 11

b. The United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities Reinforces Honduras's Obligations Toward Disabled Persons............. 12

2. The Miskitu Divers Have Faced Discrimination on Multiple Grounds That Has Prevented Them from Obtaining Judicial Protection.. 13

B. The Excessive Delay in Processing the Petitioners' Claims Has Violated the Petitioners' Right to a Fair Trial.. 14

1. By Imposing Unwarranted Delays on the Miskitu Divers in Judicial Proceedings, Honduras Has Violated Articles 8 and 25 of the American Convention on Human Rights. 14

2. The European Court of Human Rights Has Awarded Pecuniary and Non-Pecuniary Damages to Parties Experiencing Similar Delays. 15

VI. Right to Humane Treatment and Right to Life 16

A. The State Violated the Petitioners' Rights Under Articles 4 and 5 by Failing to Properly Regulate the Conduct of Private Parties. 17

1. The Conduct of the Private Parties That Caused the Death and Disability of the Divers Constitutes Conduct that, if the State is Found to Have Failed to Regulate it, Fulfills the Criteria for Finding a Violation of Their Right to Life and Right to Be Free from Inhuman and Degrading Treatment. 17

a. The Conduct of Petitioners' Employers Constitutes Conduct that, if the State is Found to Have Failed to Regulate it, Fulfills the Criteria for Finding a Violation of Relevant Petitioners' Right to Life Under Article 4. 17

b. The Conduct of the Petitioners' Employers Constitutes Conduct that, if the State is Found to Have Failed to Regulate it, Fulfills the Criteria for Finding a Violation of Relevant Petitioners' Right to Be Free from Inhuman and Degrading Treatment under Article 5. 18

2. Honduras Knew or Should Have Known That the Petitioners' Employers Were Engaged in Human Rights Abuses, Triggering an Obligation to Prevent and Remedy Such Acts. 19

3. Honduras's Actions Fell Short of What Its Due-Diligence Obligation Required in Light of the Petitioners' Particular Vulnerability. 20

B. Honduras Has Violated the Petitioners' Rights Under Article 4 and 5 by Failing to Provide Sufficient Health-Care Treatment. 23

1. Honduras's Failure to Provide Health Services to the Petitioners Constitutes a Violation of Article 5. 23

2. Honduras's Failure to Provide Health Services to the Petitioners Constitutes a Violation of Article 4. 24

VII. The Progressive Realization of the Economic, Social, and Cultural Rights of the Miskitu People 25

A. The Miskitu Are an Indigenous Community Requiring Special Protection of Their Economic, Social, and Cultural Rights. 26

1. Honduras Has an Obligation to Ensure the Special Protection of the Economic, Social, and Cultural Rights of the Miskitu 26

2. Inter-American Jurisprudence and International Law Provide Additional Protections for those Miskitu Divers who Have Been Disabled. 27

B. By Failing to Provide Adequate Employment Regulation, Honduras Has Failed to Progressively Realize the Economic, Social, and Cultural Rights of the Miskitu.................... 29

C. By Failing to Provide Adequate Health Care, Honduras Has Failed to Progressively Realize the Economic, Social, and Cultural Rights of the Miskitu. 30

VIII. Conclusion 32

TABLE OF AUTHORITIES

Cases of the Inter-American Court and Commission

"Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 112 (Sept. 2, 2004) 5, 6

Acevedo Buendía et al. v. Peru, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 198 (July 1, 2009) 26, 27, 30

Cantos v. Argentina, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 97 (Nov. 28, 2002) 13

Comerciantes v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 109 (July 5, 2004) 14

Gómez-Paquiyauri Brothers v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 110 (July 8, 2004) 5, 6

Gonzalez et al. v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 205 (Nov. 16, 2009) 19, 20, 21

Hilaire, Constantine y Benjamin et al. v. Trinidad y Tobago, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 94 (June 21, 2002) 14

Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Ct. H.R., (ser. C) No. 245 (June 27, 2012) 3, 6, 7, 30

Maria Da Penha v. Brazil, Case 12.051, Report No. 54/01, Inter-Am. Comm. H.R., Annual Report 2000, OEA/Ser.L/V.II. 111 Doc.20 rev (2000) 20, 22

Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3 (Sept. 8 1983) 17

Ricardo Canese v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 111 (Aug. 31, 2004) 14

Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 146 (Mar. 29, 2006) ..... passim

Sawhoyamaxa Indigenous Community v. Paraguay, Separate Opinion of Judge Sergio García-Ramírez, Inter-Am. Ct. H.R., (ser. C) No. 146 (Mar. 29, 2006) 14

Serrano Cruz Sisters v. El Salvador, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 131 (Mar. 1, 2005) 14

Ticona Estrada et al. v. Bolivia, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 191 (Nov. 27, 2008) 14

Velásquez Rodriguez Case, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 4 (July 29, 1988) 19

Villagrán-Morales et al. v. Guatemala, Merits, Inter-Am. Ct. H.R., (ser. C) No. 63 (Nov. 19, 1999) 6

Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 214 (August 24, 2010) ..... passim

Yakye Axa Indigenous Community v. Paraguay, Merits and Reparations, Inter-Am. Ct. H.R., (ser. C) No. 125 (June 17, 2005) ..... passim

Cases of Other International Courts and National Courts

A v. United Kingdom, Judgment, Eur. Ct. H.R., Application No. 100/1997/884/1096 (Sept. 23, 1998) 20

Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social, Corte Suprema de Justicia de la Nación de Argentina [CSJN] [National Supreme Court of Justice], Amparo (June 1, 2000) (Arg.) 32
Baylis-Flannery v. Walter DeWilde c.o.b. as TriCommunity Physiotherapy (No. 2), 48 C.H.R.R. D/197 (2003) (Can. Ont. H.R.T.) 2
Calvelli and Ciglio v. Italy, Judgment, Eur. Ct. H.R., Application No. 32967/96 (Jan. 17, 2002) 25
Comingersoll S.A. v. Portugal, Judgment, Eur. Ct. H.R., Application No. 35382/97 (Apr. 6, 2000) 15
Costello-Roberts v. U.K., Judgment, Eur. Ct. H.R., Application No. 13134/87 (Mar. 25, 1993) 18
Cyprus v. Turkey, Judgment, Eur. Ct. H.R., Application No. 25781/94 (May 10, 2001).......... 25
D. v. United Kingdom, Judgment, Eur. Ct. H.R., Application No. 30240/96 (May 2, 1997).......... 24
D.H. and Others v. The Czech Republic, Grand Chamber Judgment, Eur. Ct. H.R., Application No. 57325/00 (Nov. 13, 2007) 13
Farcas v. Romania, Judgment, Eur. Ct. H.R. Application No. 32596/04 (Sept. 14, 2010).......... 12
Frydlender v. France, Judgment, Eur. Ct. H.R., Application No. 30979/96 (June 27, 2000) 15, 16
Glass v. U.K., Judgment, Eur. Ct. H.R., Application No. 61827/00 (Mar. 9, 2004) 25
Handölsdalen Sami village and others v. Sweden, Judgment, Eur. Ct. H.R. Application No. 39013/04 (Mar. 30, 2010) 15
Hassam v Jacobs NO & Others, 2009 (5) SA 572 (CC) (2009) (S. Afr.) 2
Ireland v. the U.K., Judgment, Eur. Ct. H.R. Application No. 5310/71 (Jan. 18, 1978).......... 18
Jefferies v Harris County Community Action Assn, 615 F 2d 1025 (5th Cir 1980) 2
Jordan v. U.K., Eur. Ct. H.R., Application No. Application no. 24746/94 (May 4, 2001).......... 20
Kreuz v. Poland, Judgment, Eur. Ct. H.R., Application No. 28249/95 (June 19, 2001).......... 13
Law v Canada, 1 SCR 497 (1999) (Can.).......... 2
M.C. v Bulgaria, Judgment, Eur. Ct. H.R., Application No. 39272/98 (Dec. 4, 2003).......... 20, 21
Moldovan and Others v. Romania, (No. 2), Judgment, Eur. Ct. H.R., Application Nos. 41138/98 & 64320/01 (July 12, 2005) 16
N. v. U.K., Judgment, Eur. Ct. H.R., Application No. 26565/05 (May 27 2008) 24
National Coalition for Gay and Lesbian Equality v Minister of Justice, (1) SA 6 (CC) (1999) (S. Afr.).......... 2, 3
Opuz v. Turkey, Judgment, Eur. Ct. H.R., Application No. 3340102 (June 9, 2009).......... 18
Oršuš and Others v. Croatia, Grand Chamber Judgment, Eur. Ct. H.R., Applicatoin No. 15766/03 (Mar. 16, 2010) 13
P. and S. v. Poland, Judgment, Eur. Ct. H.R., Application No. 57375/08 (Oct. 30, 2012).......... 24
Peers v. Greece, Judgment, Eur. Ct. H.R., Application No. 28524/95 (Apr. 19, 2001).......... 18
Powell v. U.K., Judgment, Eur. Ct. H.R., Application No. 45305/99 (May 4, 2000).......... 24, 25
Pretty v. UK, Judgment, Eur. Ct. H.R., Application No. 2346/02 (July 29, 2002).......... 18
R.R. v. Poland, Judgment, Eur. Ct. H.R., Application No. 27617/04 (May 26, 2011).......... 24
Rantsev v. Cyprus and Russia, Judgment, Eur. Ct. H.R., Application No. 26965/04 (Jan. 7, 2010) 23
Sentencia T-760/08, Corte Constitucional de Colombia [C.C.] [Constitutional Court] (July 31, 2008) (Colom.).......... 31
Tarariyeva v. Russia, Judgment, Eur. Ct. H.R., Application No. 4353/03 (Dec. 14, 2006).......... 25
Thlimmenos v. Greece, Judgment, Eur. Ct. H.R., Application No. 34369/97 (Apr. 6, 2000) 13
Vo v. France, Judgment, Eur. Ct. H.R., Application No. 53924/00 (July 8, 2004).......... 25

Yigit v. Turkey, Judgment, Eur. Ct. H.R., Application No. 3976/05 (Nov. 2, 2010) 13
Z. v. U.K., Judgment, Eur. Ct. H.R. Application No. 29392/95 (May 10, 2001). 21

International Treaties, Declarations, and Conventions

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," Nov. 17, 1988, O.A.S.T.S. No. 69 .... 28, 30, 31
Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3. 29
Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/106 (2006) 11
Convention on the Rights of Persons with Disabilities, Mar. 30, 2007, 2515 U.N.T.S. 3 28
European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS 5 15
Indigenous and Tribal Peoples Convention, C169 June 27, 1989, 72 ILO Official Bull 59, 28 I.L.M. 1382 (1989) 22, 30
Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica" *adopted* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 .... 1, 26, 29
Standard Rules on the Equalization of Opportunities for Persons with Disabilities, G.A. Res. 48/96, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/96 (1994). 13

General Comments and Observations from Treaty and U.N. Bodies

Committee Against Torture, *Concluding Observations on Indonesia*, U.N. Doc. CAT/C/IDN/CO/2 (July 2, 2008) 21
Committee Against Torture, *Concluding Observations on Kuwait*, U.N. Doc. CAT/C/KWT/CO/2 (June 28, 2011) 21
Committee on Economic, Social and Cultural Rights, *General Comment No. 14 on The right to the highest attainable standard of health*, U.N. Doc. E/C.12/2000/4 (2000) 7, 31
Committee on Economic, Social and Cultural Rights, *General Comment No. 18 on The right to work*, U.N. Doc. E/C.12/GC/18 (2005) 30
Committee on Economic, Social and Cultural Rights, *General Comment No. 3 on The nature of States parties obligations*, U.N. Doc. E/1991/23, Annex III (1991) 27
Committee on Economic, Social and Cultural Rights, *General Comment No. 5 on Persons with disabilities*, U.N. E/1995/22 (1995) 29
Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities: Peru*, Apr. 16-20, 2012, U.N. Doc. CRPD/C/PER/CO/1 (May 9, 2012) 12
Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Argentina as Approved by the Committee at its Eighth Session*, Sept. 17-28, 2012, U.N. Doc. CRPD/C/ARG/CO/1 (Oct. 8, 2012) 12
Human Rights Committee, *Concluding Observations on Kuwait*, U.N. Doc. CCPR/C/KWT/CO/2 (Nov. 18, 2011) 21
Human Rights Committee, *General Comment No. 6 on Right to Life*, U.N. Doc. U.N. Doc. HRI/GEN/1/Rev.1 (1994) 17

Briefs, Annual Reports, and Admissibility Reports

Admissibility Report No. 121/09, *Opario Lemoth Morris et al. v. Honduras*, Petition 1186-04, Inter-Am. Comm. H.R. (Nov. 12, 2009) ... passim

Admissibility Report No. 38/09, *National Association of Ex-employees of the Peruvian Social Security Institute et al. v. Peru*, Inter-Am. Comm. H.R. (Mar. 27, 2009) ... 28

Petitioner's Brief, *Opario Lemoth Morris et al. v. Honduras*, Petition 1186-04, Inter-Am. Comm. H.R. (Dec. 18, 2007) ... 5

Scholarly Works

Alicia Ely Yamin & Oscar Parra-Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, 33 HASTINGS INT'L & COMP. L. REV. 431 (2010) ... 31

Diana M. Barratt & Keith van Meter, *Decompression Sickness in Miskito Indian Divers: Review of 229 Cases*, 75 AVIATION, SPACE, AND ENVIRONMENTAL MED. 350 (2004) ... 4

Dunford, et al., *Diving Methods and Decompression Sickness Incidence of Miskito Indian Underwater Harvesters*, 27 UNDERSEA & HYPERBARIC MED. J. 2 (2002) ... 5

Ellie Palmer, *Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights*, 2 ERASMUS L. REV. 397 (2009) ... 23

Kimberlé Crenshaw, *Demarginalizing the intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics in* UNIVERSITY OF CHICAGO LEGAL FORUM 137 (1989) ... 2

Leonardo Cubillos-Turriago et al., *Universal health coverage and litigation in Latin America*, 26 J HEALTH ORG. MGMT. 390 (2012) ... 32

M. Eaton, *Patently Confused, Complex Inequality and Canada v. Mossop*, 1 REV. CONST. STUD. 203 (1994) ... 2

Sharlene Mollet, *Racial Narratives: Miskito and Colono Land Struggles in the Honduran Mosquitia*, 17 CULTURAL GEOGRAPHIES 43 (2010) ... 5

SUSANNE BURRI & DAGMAR SCHIEK, MULTIPLE DISCRIMINATION IN EU LAW: OPPORTUNITIES FOR LEGAL RESPONSES TO INTERSECTIONAL GENDER DISCRIMINATION? (2009) ... 2

Virginia Mantouvalou, *Are Labour Rights Human Rights?,* UCL LABOUR RIGHTS INSTITUTE ON-LINE WORKING PAPERS LRI WP X/2012 (2012) ... 23

Reports and Other Authorities

CARLOS MAURICIO PALACIOS, BANCO INTERAMERICANO DE DESAROLLO, ESTUDIO SOBRE LA PROBLEMÁTICA DE LOS BUZOS DE LA MOSKITIA HONDUREÑA (2001) ... 4, 5

Convention and Optional Protocol Signatures and Ratifications, UNITED NATIONS ENABLE (2013) ... 11

European Union, *European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, E.P. Doc. A6-0149/2009 (Apr. 2, 2009) ... 2

ONTARIO HUMAN RIGHTS COMMISSION, AN INTERSECTION APPROACH TO DISCRIMINATION (2001) ... 2

Utta von Gleich & Ernesto Gálvez, *Pobreza étnica en Honduras*, INTER-AMERICAN DEVELOPMENT BANK (1999).. 4, 5, 9

I. *AMICUS* STATEMENT OF INTEREST IN THE CASE

The Allard K. Lowenstein International Human Rights Clinic (the Lowenstein Clinic) respectfully submits for the Commission's consideration this *amicus curiae* brief regarding the right to a dignified life of the Miskitu people of Honduras.

The Lowenstein Clinic is a Yale Law School course through which students gain first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Lowenstein Clinic undertakes a number of litigation, research, and advocacy projects on behalf of human rights organizations and individual victims of human rights abuse. Clinic projects are designed to contribute to efforts to protect human rights by providing valuable assistance to organizations and individual clients while giving students practical experience in the range of activities in which lawyers engage to promote respect for human rights. The Lowenstein Clinic has regularly analyzed and addressed issues of human rights, including, in particular, the protection of the rights of indigenous peoples, in submissions to various forums, including the Inter-American Commission and Court.

The present case before the Commission raises an important question: When does a state have a duty to ensure to a particularly vulnerable indigenous community the minimum living conditions necessary for a dignified life? This brief argues that, in line with previous decisions of the Inter-American Court of Human Rights, the Miskitu are especially vulnerable on account of their socially marginalized and economically impoverished condition. As such, they are particularly vulnerable to abuse of their human rights under the American Convention on Human Rights (the American Convention). The Miskitus' condition requires special care on the part of Honduras to ensure the protection of their right to life, right to access to justice, right to humane treatment, and cultural, social, and economic rights.

II. INTRODUCTION

The most immediate concern of an international or domestic human rights regime must be to protect the rights of the most vulnerable members of society. The Miskitu people are among the most vulnerable in Honduran society: They are a physically, socially, and economically marginalized indigenous community. Moreover, their vulnerability has been exacerbated by their dangerous and insufficiently regulated employment conditions, which have led to the death or severe disabling of a significant percentage of the community. Only by accounting for the nature of their particular vulnerability can the Inter-American Commission on Human Rights appropriately protect their rights.

Article 1(1) of the American Convention provides that each state party is obliged to ensure that all persons within its jurisdiction enjoy the full exercise of their rights without discrimination.[1] Only by recognizing the multiple grounds of discrimination facing the Miskitu

[1] Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica" *adopted* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, [hereinafter the Convention], Art. 1(1) ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons

people can Article 1(1) be properly applied. There is a growing appreciation, both within academic literature and the jurisprudence of prominent national courts, that protection from discrimination requires accounting for multiple and intersecting grounds of discrimination that individuals face.[2] Reducing the treatment of an individual to a single ground of discrimination often fails to credibly account for that person's experience and to credibly secure effective protection of his or her rights.

The South African Constitutional Court has described this phenomenon poignantly, stating:

> [R]ights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and analysing them contextually rather than abstractly.
>
> One consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of

---

subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.").

[2] See, *e.g.*, Canada: *Law v. Canada,* 1 SCR 497, 554-55 (1999) (Can.) (observing that "[t]here is no reason in principle . . . why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15(1)"); *Baylis-Flannery v. Walter DeWilde c.o.b. as TriCommunity Physiotherapy (No. 2)*, 48 C.H.R.R. D/197, ¶ 144 (2003) (Can. Ont. H.R.T.) (A case of the Ontario Human Rights Tribunal observing that "reliance on a single axis analysis where multiple grounds of discrimination are found, tends to minimize or even obliterate the impact of racial discrimination on women of colour who have been discriminated against on other grounds." The Tribunal also noted that intersectionality was relevant to determine both "liability" for discrimination and the appropriate remedy.). South Africa: *National Coalition for Gay and Lesbian Equality v. Minister of Justice,* (1) SA 6 (CC), ¶¶ 112-13 (1999) (Justice Sachs) (S. Afr.); *Hassam v. Jacobs NO & Others*, 2009 (5) SA 572 (CC) (2009) (S. Afr.) (recognizing a claim of discrimination involving the overlapping grounds of religion, gender, and marital status). United States: *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980) (recognizing the overlapping grounds of discrimination faced by black women). European Union, *European Parliament Legislative Resolution of 2 April 2009 on the Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*, E.P. Doc. A6-0149/2009 (Apr. 2, 2009) *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0211+0+DOC+XML+V0//EN (resolution on draft directive proposing changes to recognize multiple grounds of discrimination). See also Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics in* UNIVERSITY OF CHICAGO LEGAL FORUM 137, 145 (1989) (invoking for the first time the conception of "intersection" of discrimination in the context of the experiences of black women); Mary Eaton, *Patently Confused, Complex Inequality and Canada v. Mossop*, 1 REV. CONST. STUD. 203, 229 (1994) (describing an intersectional approach as one that views discrimination as "intersectional oppression [that] arises out of the combination of various oppressions, which, together, produce something unique and distinct from any one form of discrimination standing alone"); SUSANNE BURRI & DAGMAR SCHIEK, MULTIPLE DISCRIMINATION IN EU LAW: OPPORTUNITIES FOR LEGAL RESPONSES TO INTERSECTIONAL GENDER DISCRIMINATION? 15-16 (2009) (noting cases where the concept of "multiple discrimination" has been recognized or alluded to by European courts, but also noting examples where courts resisted considering such claims); ONTARIO HUMAN RIGHTS COMMISSION, AN INTERSECTION APPROACH TO DISCRIMINATION 16 (2001) (noting examples of Canadian courts and tribunals recognizing the significance of overlapping grounds of discrimination).

> discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly.[3]

Only by taking a "persons-centred" view of the Miskitu people's experience and by understanding the violation of their rights "contextually rather than abstractly" can the Commission properly do justice and ensure that the rights of the petitioners are protected.

This brief seeks to demonstrate how the particular vulnerability of the petitioners—based on their multiple and intersecting grounds of discrimination—informs a proper adjudication of their rights under the American Convention. The brief draws extensively on foreign and international law. This reliance on international and comparative sources follows the Inter-American Court's "evolutionary interpretation" of human rights treaties.[4] As the Court has observed, human rights treaties "are living instruments," the dynamic interpretation of which requires taking into account other instruments within the inter-American system, as well as other international instruments binding on member states, even if those instruments are not strictly part of the regional regime.[5] Other comparative sources, while not binding, can provide useful and persuasive guidance in interpreting the American Convention.

This brief argues that, in light of the petitioners' vulnerability and taking the petitioners' assertion of facts to be true, the State's conduct violates many of the petitioners' rights guaranteed under the American Convention. The brief focuses only on a subset of the possible violations,[6] specifically the violation of the petitioners' right to life (Article 4), right of access to justice (Articles 8 and 25), right to be free from inhuman and degrading treatment (Article 5), and right to progressive realization of economic, social, and cultural rights (Article 26). The brief also argues that, in light of the petitioners' particular vulnerability, the Court's emerging jurisprudence concerning states' obligation to secure *vida digna* under Article 4 of the American Convention provides a particularly useful framework through which to cognize the harms experienced by the petitioners. Each of the violations of petitioners' rights mentioned above both constitutes a violation in itself and informs the manner in which petitioners' right to live a dignified life has been violated by the State.

III. FACTUAL BACKGROUND

The Miskitu people are an economically, socially, and geographically marginalized indigenous group living in the department of Gracias a Dios, Honduras. Facing an underdeveloped economy and few opportunities for legal employment, a large number of Miskitu men rely on diving for lobster and other seafood to earn income. Boat captains subject divers to subhuman conditions and force the Miskitu to dive to unsafe depths, risking serious

---

[3] *National Coalition for Gay and Lesbian Equality*, *supra* note 2, ¶¶ 112-13 (Justice Sachs).

[4] See, *e.g.*, *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations*, Inter-Am. Ct. H.R., (ser. C) No. 245, ¶ 161 (June 27, 2012) (discussing the "evolutionary interpretation" of the Convention and the relevance of other instruments).

[5] *Id.*

[6] While this *amicus* brief does not engage with all the rights claims that the Commission found to be admissible, this does not indicate that *amicus* has a negative view of these other claims. Rather, *amicus* has simply chosen to focus on those claims for which consideration of international and foreign law is particularly useful.

disability or even death from decompression syndrome. These men are often unable to gain access to administrative bodies to file claims for their injuries and subsequent disabilities; those who have been able to do so face protracted delay, with no ultimate resolution of their claims.

A. Miskitu Divers Suffer Inhuman Treatment and Risk Death or Disability.

To earn a living, Miskitu divers participate in diving trips lasting as long as ten to twelve days[7] on crowded boats filled beyond capacity.[8] Divers receive food of poor quality from boat captains, at times causing the divers to suffer food poisoning.[9] Because there are not enough beds on the boats, boat captains often reward divers who bring in the most lucrative catch by providing them with beds to sleep in.[10] This gives divers an incentive to dive deeper and for dangerous periods of time.[11] Employers sometimes force divers, at gunpoint,[12] several times a day, to dive to depths of up to 140 feet, well beyond the depths recommended for safety. Employers often fail to provide divers with properly functioning equipment. As a result, the divers have no way of gauging exactly how long they have been underwater, how deep they are, or how much oxygen they have left in their tanks. The divers have an indication of these dangers only when they find it difficult to breathe and are forced to resurface quickly, risking decompression syndrome.

The symptoms of decompression syndrome include joint pain, headaches, back pain, fatigue, dizziness, generalized pain, and paralysis; ultimately, the condition can result in death.[13] Of the estimated 9,000 Miskitu divers in Gracias a Dios, at least 4,200 are disabled.[14] Many have died while or soon after diving, as a result of decompression syndrome.

B. The Miskitu Indigenous Group Lives in Poverty and Isolation.

Despite the subhuman conditions and risks involved in diving, the extreme poverty and lack of alternative employment options in Gracias a Dios compel the Miskitu divers to keep working.[15] Even previously disabled divers continue diving to the best of their abilities until they are physically unable,[16] as the families of inactive disabled divers and deceased divers often plunge into poverty.[17]

---

[7] Utta von Gleich & Ernesto Gálvez, *Pobreza étnica en Honduras*, INTER-AMERICAN DEVELOPMENT BANK (1999), *available at* http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1481892.
[8] CARLOS MAURICIO PALACIOS, BANCO INTERAMERICANO DE DESAROLLO, ESTUDIO SOBRE LA PROBLEMÁTICA DE LOS BUZOS DE LA MOSKITIA HONDUREÑA 2 (2001), *available at* http://m.monografias.com/trabajos81/problematica-buzos-moskitia-hondurena/problematica-buzos-moskitia-hondurena3.shtml.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Diana M. Barratt & Keith van Meter, *Decompression Sickness in Miskito Indian Divers: Review of 229 Cases*, 75 AVIATION, SPACE, AND ENVIRONMENTAL MED. 350, 352 (2004).
[14] PALACIOS, *supra* note 8, at 1.
[15] Divers are paid per pound of catch; earnings from one twelve-day dive trip could exceed the amount a person working in agriculture in Gracias a Dios makes in a year. Barratt & van Meter, *supra* note 13, at 350.
[16] *See id.*; R. Dunford, et al., *Diving Methods and Decompression Sickness Incidence of Miskito Indian Underwater Harvesters*, 27 UNDERSEA & HYPERBARIC MED. J. 2, 74 (2002).
[17] Von Gleich & Gálvez, *supra* note 7, at 35. Von Gleich & Gálvez report that some divers and their families have received compensation payments. It is, however, unclear whether these are informal payments distributed on the

Compounding the poverty of families and individuals affected by decompression syndrome is the geographic and social isolation of this indigenous group. Because Gracias a Dios is accessible only by sea or by air, the Miskitu are geographically isolated from the rest of Honduras. This compromises their access to critical health services, which exacerbates the effect of decompression syndrome, because those affected by it must obtain treatment within the first 72 hours following injury in order to prevent long-term damage.[18] Racial discrimination further perpetuates the community's marginalization; in 2004, the United Nations Special Rapporteur on Racism and Racial Discrimination identified the Miskitu as one of the two groups in Honduras experiencing the highest levels of discrimination.[19]

C. The Miskitu Divers Lack Access to Justice.

Adding to these problems is the Miskitus' lack of access to justice. While the courts in La Ceiba and Tegucigalpa prove to be impossible to reach for many of the disabled divers because of financial barriers and the physical demands of travel, those who have managed to reach the courts face judicial backlog or find their claims ignored. Although Miskitu divers filed dozens of legal actions between 1994 and 2004, only one has been resolved; however, the result of even this case has yet to be enforced despite having been adjudicated in 1996.[20] An Inter-American Development Bank report has suggested that one cause of the failure to resolve or enforce the Miskitus' claims is the "complicit silence" of past and current municipal authorities in Gracias a Dios, many of whom have family or political ties to boat owners.[21]

IV. THE RIGHT TO A DIGNIFIED LIFE

Honduras has an obligation under Article 4 of the American Convention to protect the right to a dignified life of the Miskitu people. The Inter-American Court has understood the right to life as fundamental to the realization of all other rights.[22] The Court has interpreted the right to life as a two-fold right: All persons have both a right not to be arbitrarily deprived of their life and a right to be free from conditions "that impede or obstruct access to a decent existence," or a "dignified life."[23] Correspondingly, under Article 4, Honduras has obligations to create minimum conditions for the dignified life, or *vida digna*, of the Miskitu community. The Inter-American Court has recognized states' obligations to ensure *vida digna* in cases where: (1) a vulnerable

initiative of the employers or reparations required by the State. These payments are reported to have been no greater than $400. It is impossible to assign an exact monetary value to human life and damages for disabilities, but the suggestion that such meager payments can compensate for life only serves to undermine respect for a dignified life.

[18] PALACIOS, *supra* note 8, at 2.

[19] Sharlene Mollet, *Racial Narratives: Miskito and Colono Land Struggles in the Honduran Mosquitia*, 17 CULTURAL GEOGRAPHIES 43, 44 (2010).

[20] Admissibility Report No. 121/09, *Opario Lemoth Morris et al. v. Honduras*, Petition 1186-04, Inter-Am. Comm. H.R., ¶ 32 (Nov. 12, 2009) [hereinafter Admissibility Report].

[21] PALACIOS, *supra* note 8, at 2.

[22] *Yakye Axa Indigenous Community v. Paraguay*, Merits and Reparations, Inter-Am. Ct. H.R., (ser. C) No. 125, ¶ 161 (June 17, 2005). *See also "Juvenile Reeducation Institute" v. Paraguay*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 112, ¶ 156 (Sept. 2, 2004); *Gómez-Paquiyauri Brothers v. Peru*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 110, ¶ 128 (July 8, 2004).

[23] *Yakye Axa v. Paraguay*, *supra* note 22, at ¶ 161.

population is involved; and (2) fulfilling the obligation does not impose a disproportionate burden on the state. Because the Miskitu are a vulnerable population and because Honduras's obligations do not create a disproportionate burden, we believe that the evidence presented indicates that Honduras violated the Article 4 rights of the Miskitu.

A. The Miskitu Divers Are a Vulnerable Group Susceptible to Abuses That Constitute a Violation of the Right to a Dignified Life.

According to the facts presented by petitioners, the Miskitu are a vulnerable population. The Inter-American Court has recognized vulnerable groups as those that are particularly susceptible to abuse that violates their rights and are unable to vindicate their rights when a violation has taken place.[24] The Miskitu are both.

1. The Miskitu Live in Precarious Social and Economic Conditions that Put Them at Risk of Exploitation.

The Miskitu people are an impoverished and socially marginalized indigenous population living in a geographically isolated region of Honduras. They are vulnerable to exploitation on several counts. As an impoverished population living in an economically depressed region, the Miskitu face limited employment opportunities. Their economic situation, particularly the lack of alternatives to very low-paying agricultural work, puts great pressure on Miskitu to work as divers in unsafe conditions and diminishes their bargaining power in the workplace.[25] Thus, those individuals who dive for a living are subject to exploitation by their employers. Their geographic isolation renders the Miskitu physically unable to gain access to many basic services. Due to travel costs, for example, many Miskitu are effectively cut off from adequate health care.[26] Those injured as a result of unsafe diving practices, particularly those who suffer decompression syndrome, cannot secure adequate treatment. Furthermore, the Miskitu are vulnerable on account of their status as indigenous people. As an indigenous people, the Miskitu are socially marginalized and face linguistic and cultural barriers in their interactions with the State.

The Court has recognized similar situations of poverty and social marginalization as grounds for finding that a group is vulnerable in a *vida digna* analysis. In cases brought by the Yakye Axa and Sawhoyamaxa indigenous communities, for example, the Court considered claims regarding indigenous peoples displaced from their lands. The Court found that these communities were vulnerable because displacement denied them basic necessities such as food,

---

[24] The earliest *vida digna* cases dealt mainly with vulnerable groups in the custody of the state. *See, e.g.*, *"Juvenile Reeducation Institute" v. Paraguay*, *supra* note 22, ¶ 2 (case of children who perished while in the custody of a state in a state juvenile detention facility); *Gómez-Paquiyauri Brothers v. Peru*, *supra* note 22, at ¶ 3 (case of children abducted and killed by state agents); *Villagrán-Morales et al. v. Guatemala*, Merits, Inter-Am. Ct. H.R., (ser. C) No. 63, ¶¶ 1–3, ¶ 79, ¶ 144 (Nov. 19, 1999) (case of street children abducted and murdered by state agents). The Court has also repeatedly recognized indigenous groups marginalized by State policies as vulnerable groups for the purposes of *vida digna*. *See e.g.*, *Yakye Axa v. Paraguay*, *supra* note 22, at ¶ 164; *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 146, ¶¶ 163–166 (Mar. 29, 2006); *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 214, ¶ 189 (August 24, 2010); *Sarayaku v. Ecuador*, *supra* note 4, at ¶ 164.

[25] *See supra* Section III.

[26] *Id.*

water, and health care.[27] In its vulnerability analysis in *Yakye Axa*, the Court referred to General Comment 14 of the U.N. Committee on Economic, Social and Cultural Rights (ESCR Committee),[28] which notes that indigenous communities deprived of their lands face such vulnerabilities as a lack of access to vital plants, animals and minerals necessary for their enjoyment of health.[29]According to the Court, these deprivations constituted sufficient vulnerability for the purpose of *vida digna* analysis. The Miskitu face harsh living conditions similar to those faced by the Yakye Axa community. Moreover, in *Sawhoyamaxa*, the Court noted that an indigenous group need not be forcefully displaced to be considered vulnerable.[30] The Court considered the Sawhoyamaxa a vulnerable community even though they were not "induced or encouraged" to resettle by the State.[31] Rather, they had "powerful reasons" to move, given the harsh living conditions they faced prior to resettlement.[32] Similarly, in the present case, the Miskitu have not been forced to work in an unregulated industry by state officials. Rather, their lack of employment options and overall vulnerability has led them into this kind of unregulated work.

The Miskitu are further vulnerable on account of their indigeneity. In the case of the *Kichwa Indigenous People of Sarayaku*, the Court illustrated how indigenous peoples and communities can be particularly vulnerable. The Sarayaku brought claims against Ecuador for granting a private oil company a permit to drill in Sarayaku territory without properly consulting the local population.[33] In the proceedings, the Sarayaku's representatives alleged that the permit violated the right to a dignified life because it placed the Sarayaku community in a vulnerable position vis-à-vis the oil company.[34] Specifically, the company's drilling disrupted the community's daily activities in various ways, including by hindering access to water and food sources and by interfering with communal economic activities, administrative functions of community officials, and the running of schools in the community.[35] The Court found that the oil company's operations in Sarayaku lands jeopardized the integrity of the community.[36] The Sarayaku were particularly vulnerable given their communitarian practices and collective land ownership.[37]

In the present case, the State's inadequate oversight of private parties has contributed to the exploitation of the Miskitu divers and threatened the integrity of the Miskitu community. By failing to adequately oversee employers in the fishing industry, Honduras's current regulatory scheme allows the Miskitu to be exploited in the workplace. This exploitation has exacerbated an existing situation of vulnerability caused by extreme poverty, geographic isolation, and social marginalization. Exploitation of the Miskitu divers has also threatened the integrity of the

---

[27] *Yakye Axa v. Paraguay*, *supra* note 22, at ¶ 164, ¶ 167; *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 24, at ¶¶ 145–147, 155.
[28] *Yakye Axa v. Paraguay*, *supra* note 22, at ¶ 166.
[29] Committee on Economic, Social and Cultural Rights, *General Comment No. 14 on The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4 ¶ 27 (2000).
[30] *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 24, at ¶ 163.
[31] *Id.*
[32] *Id.*
[33] *Sarayaku v. Ecuador*, *supra* note 4, at ¶ 2.
[34] *Id.* at ¶ 234.
[35] *Id.* at ¶ 233.
[36] *Id.* at ¶¶ 246–248.
[37] *Id.* at ¶¶ 145–147, 155.

Miskitu community. Almost half of Miskitu divers have become disabled or have died as a result of their work. Their condition prevents the disabled divers from participating fully in the life of the community. Their disabilities also tax other members of the community who must act as their caretakers, further disrupting community life. Therefore, the Miskitu are particularly susceptible to a violation of their right to a dignified life.

2. The Miskitu Are Vulnerable Because They Have Been Unable to Vindicate Their Rights.

The Miskitu are further vulnerable because they have been unable to vindicate their rights through State bodies, including the General Labor Bureau and the Labor Courts.[38] Due to unwarranted delays in the judicial system, physical isolation, and linguistic barriers, the Miskitu have been unable to have their claims properly adjudicated in Honduras. As demonstrated below, these obstacles and delays constitute an independent violation of Articles 8 and 25 of the American Convention.[39] The Inter-American Court has, in addition, recognized these violations as factors that make a population such as the Miskitu further vulnerable for the purposes of *vida digna* analysis.

According to the Court, a vulnerable group is also defined by its lack of access to mechanisms that ensure the protection of its rights. In the *Xákmok Kásek* case, for example, the Court noted that the community's situation of extreme vulnerability was due, in part, to "the lack of adequate and effective remedies that protect the rights of the indigenous peoples."[40] Similarly, in the present case, the lack of access to judicial remedies has further exacerbated the situation of vulnerability of the Miskitu community.

B. Honduras' *Vida Digna* Obligations Do Not Impose a Disproportionate Burden on State Authorities.

Under Article 4, the *vida digna* obligations of states, such as Honduras, must not impose an impossible or disproportionate burden on authorities. As the Court has noted, to show that the *vida digna* obligation does not impose such a burden, a petitioner must establish that: (1) the State knew, or should have known, of the situation of real and immediate risk to the life of individuals or groups and (2) the State did not take necessary measures within its powers that could have been expected to prevent or avoid the risk.[41] Petitioners' claims demonstrate that the State's obligation to provide the Miskitu with conditions that would guarantee their right to life does not impose a disproportionate burden on Honduran authorities.[42]

1. The Miskitu Require Special Measures Because the Honduran State Knew or Had Reason to Know of the Miskitus' Condition.

---

[38] Admissibility Report, *supra* note 20, at ¶¶ 12–13.
[39] *See infra* Section V.A.
[40] *Xákmok Kásek v. Paraguay*, *supra* note 24, at ¶ 273. *See also Villagrán-Morales et al. v. Guatemala*, *supra* note 24, at ¶ 185 (noting the inability of children to ensure respect for their rights).
[41] *Xákmok Kásek v. Paraguay*, *supra* note 24, at ¶ 188.
[42] For further analysis of why the situation of the Miskitu does not impose a disproportionate burden on Honduras, see the discussion in Section VI.A. concerning the state's role in regulating private parties.

The evidence petitioners have presented indicates that Honduras was aware of the vulnerable situation of the Miskitu before the filing of the current petition. On April 13, 1993, Mr. Flaviano Martinez, one of the petitioners, filed a labor claim with the Secretariat of Labor; he received a favorable judgment on October 22, 1996.[43] Between 1994 and 2004, other petitioners also filed claims with various Honduran government offices.[44] Also, in 1999, the Inter-American Development Bank (IDB) published a detailed report concerning the situation of the Miskitu and other indigenous peoples in Honduras. The IDB report made public the condition of exceptional vulnerability faced by the Miskitu.[45] In its own brief, the State notes that the situation of the Miskitu was a "human tragedy" that was "not unknown to the state, and is a matter of concern."[46]

For the purposes of understanding Honduras's *vida digna* obligations toward the Miskitu during the time at issue, the State knew of their vulnerability. In the *Xákmok Kásek* case, the Court analyzed what constituted sufficient notification of the State for the purpose of finding a violation of *vida digna*. There, representatives of the Xákmok Kásek community notified the Paraguayan State multiple times of their vulnerable condition.[47] Subsequently, state officials made public statements recognizing this vulnerable condition. The Court found that this constituted adequate knowledge.[48] Similarly, in the *Sawhoyamaxa* case, the Sawhoyamaxa community repeatedly notified the relevant government authorities of the community's situation. The Court considered the government effectively notified when community leaders submitted a report to government authorities, apprising them of the situation.[49] In the present case, community members have notified the State of Honduras through claims filed in Honduran courts and administrative tribunals. Public reports such as that of the IDB have also served to publicize the situation of the Miskitu.[50]

2. The Miskitu Require Special Measures because There Is a Causal Relationship between the State's Negligence and the Deplorable Living Conditions of the Community.

The State's inaction has directly resulted in the vulnerable condition of Miskitu divers and their families. First, Honduras has failed to establish an adequate regulatory scheme to oversee the working conditions of the divers. Second, Honduras has failed to provide adequate health care for divers injured as a result of unsafe working conditions. As noted below, these failures are independent violations of the Miskitus' rights to progressive development under Article 26. They also violate the State's obligation to protect the Miskitus' right to a dignified life.

The Inter-American Court has found that similar state inaction violates the right to a dignified life. In the *Sawhoyamaxa* case, the State had not directly displaced the Sawhoyamaxa

[43] Admissibility Report, *supra* note 20, at ¶ 32.
[44] *Id.*
[45] Von Gleich & Gálvez, *supra* note 7, at 63.
[46] Admissibility Report, *supra* note 20, at ¶ 17.
[47] *Xákmok Kásek v. Paraguay*, *supra* note 24, at ¶ 189.
[48] *Id.* at ¶ 192.
[49] *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 24, at ¶ 159.
[50] *See supra* Section III.

community nor forced them to settle on the side of the road.[51] Rather, the Court noted, the community had "powerful reasons" to abandon the land on which they had lived, "due to the extremely hard physical and labor conditions they had to endure."[52] However, the fact that the community chose to move was "not enough for the State to disregard its duty to protect and guarantee the right to life of the alleged victims."[53] In the present case, the State did not directly force the Miskitu to work in unsafe working conditions. Rather, economic necessity forces the Miskitu to work in these conditions. Nevertheless, under Article 4, the State has a duty to ensure minimum living conditions and to protect the Miskitu from harmful working conditions.

Similarly, in *Xákmok Kásek*, the Court considered the Paraguayan State's obligation under Article 4 to provide health services to a displaced indigenous population.[54] While the Paraguayan State did not directly cause community members' poor health, the State's inaction led to a continued critical health situation in the community. In its analysis, the Court recognized Paraguay's ongoing efforts to remedy the situation. However, because these measures were largely "temporary and transitory" and provided no continued access to acceptable treatment,[55] the Court found that Paraguay continued to violate the right to a dignified life. Likewise, in the present case, Honduras has failed to provide adequate health services to divers injured as a result of their employment conditions.

If the petitioner's allegations are correct, Honduras's failures violate the Miskitu divers' right to a dignified life. The Miskitu are a vulnerable group susceptible to abuses that constitute a violation of the right to life. Their vulnerability is evident in both their precarious socioeconomic conditions and their inability to vindicate their rights. Because of this vulnerability, Honduras has an obligation to guarantee minimum conditions for a dignified life. Furthermore, Honduras's obligation does not impose a disproportionate burden on Honduran authorities. The State of Honduras knew or had reason to know of the Miskitus' condition. Furthermore, there is a causal relationship between Honduras's negligence and the Miskitus' poor living conditions. As petitioners' factual claims show, Honduras has failed to meet its obligations under Article 4.

V. JUDICIAL PROTECTION AND ACCESS TO JUSTICE

A. The State Violated Its Duty to Make Judicial Protection Accessible to the Miskitu Divers.

The Miskitu divers are disabled, live in conditions of extreme poverty, and inhabit a remote area of Honduras that is accessible only by sea or air. Together, these factors have made it impossible for most members of the community to seek redress through administrative or judicial processes. Those who have managed to gain access to the high courts in La Ceiba or Tegucigalpa have experienced delays lasting several years, and the vast majority of cases have yet to be resolved. The American Convention and well-established international law obligate states to ensure access to justice to all people without discrimination and, in particular, to people

---

[51] *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 24, at ¶ 163.
[52] *Id.*
[53] *Id.*
[54] *Xákmok Kásek v. Paraguay*, *supra* note 24, at ¶ 203.
[55] *Id.* at ¶ 208.

with disabilities. Honduras's failure to provide accommodation to ensure the Miskitu divers had access to justice has violated its duty under Articles 8 and 25 of the American Convention, as informed by international law, to make judicial protection accessible to the Miskitu divers.

1. Honduras Violated the Rights of the Disabled Miskitu Divers by Failing to Provide Accommodations to Ensure that They Had Access to Justice.

Of approximately 9,000 Miskitu divers in the department of Gracias a Dios, as many as 4,200 of them have experienced some degree of disability due to the sub-human conditions in which they are forced to work. Because of their disabilities, however, these divers are unable to gain access to administrative or judicial remedies. The high costs, long distances, and lack of transportation that can accommodate disabled persons have effectively deprived the divers of their right of access to justice. In assessing Honduras's duty to provide accommodations to ensure that this vulnerable population has access to redress through the courts, guidance can be drawn from the obligations and values enshrined in the Convention on the Rights of Persons with Disabilities and the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities. The facts alleged by petitioners in the present case show that Honduras has failed to fulfill its duty under Articles 8 and 25, as informed by these international instruments, to provide the accommodation to disabled Miskitu that are necessary to ensure their access to justice.

a. Article 13(1) of the Convention on the Rights of Persons with Disabilities Guarantees Individuals with Disabilities Full Access to Justice.

Honduras ratified the Convention on the Rights of Persons with Disabilities (CRPD) on April 14, 2008,[56] thereby pledging to

> ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural . . . accommodations, in order to facilitate their effective role as direct and indirect participants . . . in all legal proceedings, including at investigative and other preliminary stages.[57]

Despite these assurances, disabled Miskitu divers are often unable to gain access to the high courts in La Ceiba or Tegucigalpa. This bars them from any administrative or judicial remedies. The geographic isolation of Gracias a Dios, the costliness of travel for the disabled and out-of-work divers, and the inability of small aircraft to accommodate disabled passengers have together made access to justice impossible for the vast majority of disabled Miskitu divers.[58]

---

[56] *Convention and Optional Protocol Signatures and Ratifications*, UNITED NATIONS ENABLE (2013), *available at* http://www.un.org/disabilities/countries.asp?navid=17&pid=166.
[57] Convention on the Rights of Persons with Disabilities Art. 13(1), G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/106 (2006).
[58] Although the European Court of Human Rights found in *Farcas v. Romania* that the applicant's physical disability did not prevent him from *indirectly* securing access to the courts, meaning that he was not denied access to justice, the European Court's ruling was based, in part, on the court's suspicion that the applicant did not have a genuine desire to challenge the decision in court. Furthermore, the European Court noted that the applicant was able to rely on his relatives or the post to gain access to the courts, whereas in the present case, the distance and extreme

The unique problems that befall disabled members of indigenous groups have been noted by the CRPD monitoring body, the Committee on the Rights of Persons with Disabilities. In particular, in its 2012 Concluding Observations on Argentina, the Committee noted its concern at "the lack of information on measures and actions designed to address the specific situations of persons with disabilities who belong to indigenous peoples."[59] Moreover, the Committee recommended that "the State party devote special attention to the development of policies and programmes for persons with disabilities who belong to indigenous peoples . . . with a view to putting an end to the many forms of discrimination to which these persons may be subjected."[60] The position taken by the Committee suggests that to fulfill its obligations under the CRPD, Honduras must take extra measures to ensure that the disabled Miskitu divers have access to the courts. The State's duty to safeguard the right of access to justice in the present case is even greater because the divers are members of a geographically isolated, impoverished indigenous group.

b. The United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities Reinforces Honduras's Obligations Toward Disabled Persons.

The United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the UN General Assembly in 1993, reinforces the obligation of states to make an effort to accommodate and integrate disabled individuals fully into society. The resolution states:

> The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation. Persons with disabilities are members of society and have the right to remain within their local communities. They should receive the support they need within the ordinary structures of education, health, employment and social services.[61]

The U.N. Standard Rules further inform Honduras's obligation to ensure that Miskitu are not barred from access to government services or otherwise isolated from society. The State has an

---

poverty of the indigenous population prevent the disabled divers from securing, even indirectly, access to the courts. *See Farcas v. Romania*, Judgment, Eur. Ct. H.R. Application No. 32596/04, ¶¶ 50-55 (Sept. 14, 2010).

[59] Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Argentina as Approved by the Committee at its Eighth Session*, Sept. 17-28, 2012, CRPD/C/ARG/CO/1, ¶ 11 (Oct. 8, 2012). *See also* Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities: Peru*, Apr. 16-20, 2012, CRPD/C/PER/CO/1, ¶ 13 (May 9, 2012) ("[t]he Committee recommends that the State party place emphasis on the development of policies and programmes on indigenous and minority persons with disabilities . . . in order to address the multiple forms of discrimination that these persons may suffer.").

[60] Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Argentina as Approved by the Committee at its Eighth Session*, *supra* note 59, at ¶ 12.

[61] Standard Rules on the Equalization of Opportunities for Persons with Disabilities, G.A. Res. 48/96, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/96, ¶¶ 25-26 (1994).

obligation to ensure that all individuals, including disabled persons, are able to take advantage of the programs and services, including institutions of justice, that the State has in place.

2. The Miskitu Divers Have Faced Discrimination on Multiple Grounds That Has Prevented Them from Obtaining Judicial Protection.

The Miskitu divers live in a geographically isolated location in one of the poorest communities in Honduras. Their extreme level of poverty has prevented them and their families from gaining access to courts. They cannot afford the high costs of the proceedings, which include expenses for travel and legal representation. Contrary to the jurisprudence of both the Inter-American Court and the European Court of Human Rights, which indicates that states must ensure that poverty does not prevent access to justice,[62] the Miskitu divers' lack of resources has prevented them from securing access to courts and administrative processes that have the authority to provide them with remedies for the harms they have suffered.

Because the State has failed to take action to resolve these problems, the Miskitu divers have been victims of indirect discrimination for years. The European Court has held that discrimination occurs not only when people in similar situations are treated differently, but also "when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."[63] The poverty, indigeneity, and remote location of the Miskitu divers have situated them in a vulnerable position that is different from the position of others in Honduras. Consequently, the State is obligated to take positive measures to ensure that the Miskitu divers and their families have full access to the courts.

The Separate Opinion of Judge Sergio Garcia-Ramirez in *Sawhoyamaxa Indigenous Community v. Paraguay* supports this conclusion. He wrote:

> The impossibility of accessing justice is precisely a typical characteristic of inequality and marginalization. This is where it appears most evidently that there is need for the State – as the benefactor of those who could not proceed by their

---

[62] *See generally Cantos v. Argentina, Merits*, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 97, ¶ 62 (Nov. 28, 2002) ("[Argentina] should adopt a series of measures so that the filing fee and professional fees do not become obstacles to effective observance and exercise of the rights to judicial guarantees and to judicial protection, both protected under the American Convention."); *Kreuz v. Poland*, Judgment, Eur. Ct. H.R., Application No. 28249/95, ¶ 61 (June 19, 2001) (finding that the fees imposed on a Polish man seeking access to a court were excessive and "impaired the very essence of his right of access").

[63] *Thlimmenos v. Greece*, Judgment, Eur. Ct. H.R., Application No. 34369/97, ¶ 44 (Apr. 6, 2000). *See also Yigit v. Turkey*, Judgment, Eur. Ct. H.R., Application No. 3976/05, ¶ 69 (Nov. 2, 2010). ("The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."); *Oršuš and Others v. Croatia*, Grand Chamber Judgment, Eur. Ct. H.R., Application No. 15766/03, ¶ 150 (Mar. 16, 2010). ("The Court has also accepted that a general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who, as for instance in the present case, are identifiable only on the basis of an ethnic criterion, may be considered discriminatory . . . ."); *D.H. and Others v. The Czech Republic*, Grand Chamber Judgment, Eur. Ct. H.R., Application No. 57325/00, ¶ 175 (Nov. 13, 2007) ("[A] general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group . . . .").

own means – to help overcome obstacles and inequalities, providing material and formal means for compensation to open the gateway to justice.[64]

By not providing additional mechanisms to ensure access to the courts, the State has further entrenched the Miskitu divers in their situation of vulnerability.

B. The Excessive Delay in Processing the Petitioners' Claims Has Violated the Petitioners' Right to a Fair Trial.

While most Miskitu divers have not had access to administrative or judicial remedies at all, those who have had access have faced substantial delays. The inaction and passive approaches of administrative and judicial authorities have stymied various parts of the proceedings. Of at least thirty individuals who sought administrative or judicial remedies, only one person received a judgment in his favor. Although the Secretariat of Labor in La Ceiba reached this decision in 1996, the judgment still has not been enforced. Miskitu divers' claims filed throughout the 1990s and early 2000s remain unresolved, and the unwarranted delays have denied these Miskitu divers their right to a fair trial.

1. By Imposing Unwarranted Delays on the Miskitu Divers in Judicial Proceedings, Honduras Has Violated Articles 8 and 25 of the American Convention on Human Rights.

Article 8, Section 1, of the American Convention grants "[e]very person . . . the right to a hearing, with due guarantees and within a reasonable time." The Inter-American Court has, on many occasions, recognized that "the right to access to justice implies that the controversy be solved within a reasonable time; an extended delay may constitute, in itself, a violation of the judicial guarantees."[65] Some of the individuals in this case have been waiting for more than fifteen years for their claims to be resolved, and the State has offered no reasonable justification for these delays. The Court has previously found a violation of Articles 8 and 25 in cases involving indigenous communities where the delays were shorter than the delays in the present case.[66]

---

[64] *Sawhoyamaxa Indigenous Community v. Paraguay*, Separate Opinion of Judge Sergio García- Ramírez, Inter-Am. Ct. H.R., (ser. C) No. 146, ¶ 4, (Mar. 29, 2006).

[65] *Ticona Estrada et al. v. Bolivia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 191, ¶ 79 (Nov. 27, 2008). *See, e.g.*, *Serrano Cruz Sisters v. El Salvador*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 131, ¶ 69 (Mar. 1, 2005) ("The Court considers that a prolonged delay, such as the delay in this case, constitutes, in itself, a violation of the right to a fair trial."); *Ricardo Canese v. Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 111, ¶ 142 (Aug. 31, 2004) ("The Court considers that, in certain cases, a prolonged delay may, in itself, constitute a violation of judicial guarantees."); *Nineteen Merchants v. Colombia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 109, ¶ 191 (July 5, 2004) ("The Court considers that a prolonged delay may, in some cases, constitute a violation of the right to a fair trial."); *Hilaire, Constantine & Benjamin et al. v. Trinidad & Tobago*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 94, ¶ 145 (June 21, 2002) ("It is the view of this Court that in certain cases a prolonged delay in itself can constitute a violation of the right to fair trial.").

[66] *See, e.g.*, *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 24, at ¶¶ 88-89; *Yakye Axa v. Paraguay*, *supra* note 22, at ¶¶ 85-98.

2. The European Court of Human Rights Has Awarded Pecuniary and Non-Pecuniary Damages to Parties Experiencing Similar Delays.

European Court of Human Rights jurisprudence supports a conclusion that by failing to respond to legal actions filed by Miskitu divers between 1994 and 2004, Honduras has imposed unwarranted delays and violated petitioners' right to a fair trial.[67] The European Court has awarded damages to parties who suffered shorter delays than the Miskitu divers, even though the cases involved acknowledged complexities. The European Court evaluates whether the length of proceedings is reasonable "in light of the circumstances of the case and with reference to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and what was at stake for the applicant in the dispute."[68]

In *Handölsdalen Sami village and others v. Sweden*, the applicant Sami villages had been engaged in a protracted legal battle with private land owners involving the right to use land and water for reindeer grazing in certain areas of Sweden. After the legal proceedings lasted a total of 13 years and 7 months, the Sami villages alleged that the length of the proceedings violated Article 6 of the European Convention of Human Rights, which provides that "everyone is entitled to a fair and public hearing within a reasonable time."[69] The European Court acknowledged that the case was complex[70] and found that "some of the delays . . . were . . . clearly attributable to the parties."[71] Despite this, the Court found that there were unnecessary delays and awarded both pecuniary and non-pecuniary damages for this violation of Article 6(1).[72]

The European Court has stressed that one of the factors determining the reasonableness of the length of proceedings is what is at stake for the parties. In *Handölsdalen Sami village*, the court found that reindeer grazing, a key component of the livelihood of these villages, was of "great importance" to the parties.[73] Following this logic, the plight of the Miskitu divers, whose cases sought remedies for disability and death suffered at the hands of private employers, rises to and even surpasses what the European Court would deem to be of sufficient importance.

---

[67] Article 6(1) of the ECHR reads: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." European Convention for the Protection of Human Rights and Fundamental Freedoms Art. 6(1), Nov. 4, 1950, ETS 5.

[68] *Comingersoll S.A. v. Portugal*, Judgment, Eur. Ct. H.R., Application No. 35382/97, ¶ 19 (Apr. 6, 2000). *See also Handölsdalen Sami village and others v. Sweden*, Judgment, Eur. Ct. H.R. Application No. 39013/04, ¶ 63 (Mar. 30, 2010); *Frydlender v. France*, Judgment, Eur. Ct. H.R., Application No. 30979/96, ¶ 43 (June 27, 2000).

[69] *Handölsdalen Sami village and others v. Sweden*, *supra* note 68, at ¶¶ 3, 48.

[70] *Id*. at ¶ 63.

[71] *Id*. at ¶ 64.

[72] *Id*. at ¶ 70.

[73] *Id.* at ¶¶ 63-65.

Even more relevant for the case at hand is *Frydlender v. France*. In this case, it took the French *Conseil d'Etat* almost ten years to resolve a case involving the dismissal of an individual contracted by the Economic Development Department of the Ministry for Economic Affairs in France. Finding that there was an unreasonable delay amounting to a violation of Article 6(1), the ECtHR noted that

> an employee who considers that he has been wrongly suspended or dismissed by his employer has an important personal interest in securing a judicial decision on the lawfulness of that measure promptly since employment disputes by their nature call for expeditious decision, in view of what is at stake for the person concerned, who through dismissal loses his means of subsistence.[74]

The cases of the Miskitu divers also involve employment-related disputes in which individuals have lost their means of subsistence, but the circumstances are much graver. Not only has the disability and death suffered by these divers during the course of their employment deprived them and their families of their livelihood from diving, but the sub-human treatment and conditions they experienced have, in many cases, prevented them from working in any capacity.

In determining whether delays were reasonable or unreasonable, the European Court has also considered whether ethnic discrimination was a factor contributing to the delays. In the case of *Moldovan and Others v. Romania (No.2)*, seven Romanian nationals of Roma origin sought damages for the destruction of their homes and other possessions after an angry mob set fire to them.[75] Finding that the excessive delays in resolving criminal and civil proceedings amounted to a violation of Article 6, the European Court noted that "the applicants' Roma ethnicity appears to have been decisive for the length and the result of the domestic proceedings."[76] The Miskitu divers not only faced significant barriers to gaining access to the courts physically; they were also met with inaction once they filed their claims. Instead of being offered extra protection in light of their status as an impoverished indigenous group, they were offered none at all.

VI. RIGHT TO HUMANE TREATMENT AND RIGHT TO LIFE

The facts set out in the *Admissibility Report* indicate that, as a result of dangerous and unregulated working conditions and, at times, coercion by their employers, the Miskitu divers have been exposed to serious and repeated risks to their bodily integrity. This has resulted in the death of many of the divers. For others, it has resulted in severe and lasting disability. The conditions are so pervasive that "[o]f the 9,000 divers, 47% (4,200) have been disabled as a result of decompression syndrome."[77]

Assuming that the facts as presented are true, the State has violated Article 4 (right to life) and Article 5 (right to humane treatment) of the American Convention, both for its own

---

[74] *Frydlender v. France*, *supra* note 68, ¶ 43.
[75] *Moldovan and Others v. Romania*, (No. 2), Judgment, Eur. Ct. H.R., Application Nos. 41138/98 & 64320/01, ¶ 18 (July 12, 2005).
[76] *Id*. ¶ 139.
[77] Admissibility Report, *supra* note 20, at ¶ 11.

actions and omissions, and for its failure to adequately regulate the actions of the petitioners' employers. In assessing whether a violation of the petitioners' rights under Articles 4 and 5 has occurred, the Commission's analysis must account for the particular vulnerability of the petitioners.

A. The State Violated the Petitioners' Rights Under Articles 4 and 5 by Failing to Properly Regulate the Conduct of Private Parties.

1. The Conduct of the Private Parties That Caused the Death and Disability of the Divers Constitutes Conduct that, if the State is Found to Have Failed to Regulate it, Fulfills the Criteria for Finding a Violation of Their Right to Life and Right to Be Free from Inhuman and Degrading Treatment.

The employers' treatment of the petitioners, as alleged, constitutes a violation of the petitioners' right to life and right to be free from inhuman and degrading treatment. As the subsequent section discusses, international responsibility for this conduct can be attributed to the State due to its failure to properly regulate the employers' conduct.

a. The Conduct of Petitioners' Employers Constitutes Conduct that, if the State is Found to Have Failed to Regulate it, Fulfills the Criteria for Finding a Violation of Relevant Petitioners' Right to Life Under Article 4.[78]

The Inter-American Court has previously held that the right to life under Article 4 involves "a substantive principle laid down in the first paragraph, which proclaims that 'every person has the right to have his life respected,' and . . . the procedural principle that 'no one shall be arbitrarily deprived of his life.'"[79] The UN Human Rights Committee has stated with regard to the similar formulation of the right to life protected under the ICCPR that, given its foundational importance in the protection of all other rights, the right "should not be interpreted narrowly"[80] and "cannot properly be understood in a restrictive manner."[81] Consequently, the scope of the right should not be restricted to intentional killing, but should also protect against other conduct that arbitrarily deprives individuals of life.[82]

Thus, if the Commission finds that the actions of the petitioners' employers, through intention or recklessness, caused the deaths of the deceased victims listed at paragraph 15(a) of the *Admissibility Report*, who died in the course of employment or as a consequence of employment, this conduct would meet the threshold for finding that it constituted a deprivation of their right to life guaranteed under Article 4 of the American Convention.[83]

---

[78] The claim discussed in this section concerns the actual deprivation of life of a number of petitioners. This presents a violation of Article 4 additional to the broader violation of the right to a dignified life discussed above.
[79] *Restrictions to the Death Penalty* (Arts. 4.2 and 4.4 American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 53 (Sept. 8 1983).
[80] Human Rights Committee, *General Comment No. 6 on Right to Life*, U.N. Doc. U.N. Doc. HRI/GEN/1/Rev.1 at 6 ¶ 1 (1994).
[81] *Id.* at ¶ 5.
[82] *Id.*
[83] As noted above, whether international responsibility can be attributed to the state for this deprivation of life will be discussed in the section immediately below.

b. The Conduct of the Petitioners' Employers Constitutes Conduct that, if the State is Found to Have Failed to Regulate it, Fulfills the Criteria for Finding a Violation of Relevant Petitioners' Right to Be Free from Inhuman and Degrading Treatment under Article 5.

The jurisprudence of the European Court of Human Rights under Article 3 of the European Convention on Human Rights, which is similar to Article 5(2) of the American Convention, provides useful guidance for interpreting the standard of inhuman or degrading treatment. The European Court has noted that

> ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.[84]

Moreover, in considering whether particular conduct constitutes degrading treatment, the European Court has concluded that, although the specific intention of the relevant actors to debase or humiliate the victim is a relevant factor, it is not a necessary one.[85] Thus, the absence of such an intention does not preclude a finding that the particular conduct at issue amounts to a violation of the prohibition on inhuman and degrading treatment. In *Opuz v. Turkey*, for example, the European Court found that repeated domestic abuse of a wife by her husband met this standard. As the court stated, "the violence suffered by the applicant, in the form of physical injuries and psychological pressure, were [sic] sufficiently serious to amount to ill-treatment."[86] Conduct resulting in severe psychological or physical harm may amount to inhuman treatment notwithstanding the apparent lack of an intention to debase.

Moreover, as the Court held in *Opuz*, the assessment of inhuman and degrading treatment is a relative one, which is informed by the nature and context of the treatment in each particular case.[87] Among the factors to be considered are the specific characteristics of the victims.

Applying this standard to the present case suggests that the Commission should consider, in particular, the following factors when determining whether the conduct at issue constitutes ill-treatment in violation of Article 5: the nature of the employment relationship between the divers

---

[84] *Opuz v. Turkey*, Judgment, Eur. Ct. H.R., Application No. 33401/02, ¶ 158 (June 9, 2009) citing *Costello-Roberts v. U.K.*, Judgment, Eur. Ct. H.R., Application No. 13134/87, ¶ 30 (Mar. 25, 1993); *Ireland v. U.K.*, Judgment, Eur. Ct. H.R. Application No. 5310/71, ¶ 162 (Jan. 18, 1978). The Court has elsewhere summarized the treatment meeting this standard by stating that ill-treatment prohibited by Article 3 includes that which "attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering" or which "humiliates or debases an individual showing lack of respect for, or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance." It can also include "[t]he suffering which flows from naturally occurring illness, physical or mental … where it is, or risks being, exacerbated by treatment … for which the authorities can be held responsible." *Pretty v. UK, Judgment*, Eur. Ct. H.R., Application No. 2346/02, ¶ 52 (July 29, 2002).

[85] *Peers v. Greece*, Judgment, Eur. Ct. H.R., Application No. 28524/95, ¶ 74 (Apr. 19, 2001).

[86] *Opuz, supra* note 84, ¶ 161.

[87] *Id.* ¶ 158.

and their employers, including the vulnerability of the divers and the general inequality of the positions of the parties, and the severe and long-lasting physical effects of the treatment on the petitioners. In light of the petitioners' particular vulnerability, the treatment that they suffered at the hands of their employers met the standard for ill-treatment set out in *Opuz*. Specifically, the employers capitalized on the vulnerability of the divers, forcing them, against their will, sometimes at gunpoint, to dive to extreme depths, refusing to return to land for proper medical treatment, and engaging in other similarly abusive acts. This conduct resulted in severe and indefinite physical injuries and constitutes ill-treatment prohibited by Article 5.

Thus, the treatment experienced in the course of employment by the victims listed in paragraph 15(b) of the *Admissibility Report*, which resulted in their severe disability, constitutes a violation of these petitioners' right to be free from inhuman and degrading treatment under Article 5 of the Convention.

2. Honduras Knew or Should Have Known That the Petitioners' Employers Were Engaged in Human Rights Abuses, Triggering an Obligation to Prevent and Remedy Such Acts.

Under the American Convention, states possess an obligation to exercise due diligence to prevent, prosecute and remedy human rights violations perpetrated by private parties. Where a state fails to do so, it may incur international responsibility for the human rights abuses, even though the offending act cannot be directly imputed to the state.[88]

States do not incur responsibility for human rights abuses committed by *all* individuals within their jurisdiction.[89] Rather, as the Inter-American Court has stated in the context of Article 4 in *Xákmok Kásek Indigenous Community v. Paraguay*,

> [t]o give rise to this positive obligation, it must be established that, at the time of the facts, *the authorities knew or should have known of the existence of a situation of real and immediate risk* to the life of an individual or a group of specific individuals, and that they did not take the necessary measures within their powers that could reasonably be expected to prevent or avoid that risk.[90]

This Commission has observed that this due-diligence principle extends to the state's obligations under the Article 5 prohibition on inhuman and degrading treatment.[91] The right to life, too, involves a "'procedural obligation' to carry out an effective official investigation in cases of the

---

[88] *Velásquez-Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 4, ¶ 172 (July 29, 1988) ("[A]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.")

[89] *Gonzalez et al. v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 205, ¶ 280 (Nov. 16, 2009) (noting that the state is not responsible for "every human rights violation committed between private individuals within its jurisdiction").

[90] *Xákmok Kásek v. Paraguay*, *supra* note 24, at ¶ 188 (emphasis added).

[91] *Maria Da Penha v. Brazil*, Case 12.051, Report No. 54/01, Inter-Am. Comm. H.R., Annual Report 2000, OEA/Ser.L/V.II. 111 Doc.20 rev, ¶¶ 55-56 (2000).

violation of that right."[92] Because it failed to effectively investigate the conduct of the petitioners' employers that amounted to violations of Article 4 and 5 of the American Convention, Honduras can be found internationally responsible for the violations they perpetrated.

The European Court of Human Rights has also adopted a due diligence standard. It has held that the right to life and the right to be free from inhuman treatment impose positive obligations on the state to prevent violations and to provide redress for any violations that do occur.[93] In confirming that this obligation extends to the actions of private parties, the Court stated in *M.C. v. Bulgaria* that

> the obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals.[94]

The facts presented in the *Admissibility Report* and discussed above indicate that from at least the early 1990s, the state authorities knew or should have known of ongoing violations of the petitioners' rights by their employers. Specifically, the State knew or should have known that: (1) many of the petitioners suffered a real and immediate risk of death or of inhuman and degrading treatment; and (2) many of the petitioners and their family members *did* experience a violation of the right to life or right to be free from inhuman and degrading treatment. The various legal and administrative actions initiated by injured divers and their families over the last two decades were sufficient to bring the violations to the State's attention. Moreover, the State's assertions that it has made efforts to remedy the conditions facing the divers constitute evidence that the State was aware of the conditions that required a remedy.

This knowledge required, as established in *Xákmok Kásek*, the State to prosecute those responsible and to provide a remedy to those affected.

3. Honduras's Actions Fell Short of What Its Due-Diligence Obligation Required in Light of the Petitioners' Particular Vulnerability.

An assessment of whether Honduras met its due-diligence obligation must consider the particular vulnerability of the Miskitu people as an indigenous, remote, and indigent group, without any viable economic opportunities other than diving.

---

[92] *Gonzalez et al. v. Mexico*, *supra* note 89, ¶ 292.
[93] The Court set out six factors which are relevant for determining whether an investigation met the due diligence standard in *Jordan v. U.K.*: (1) state initiative (the State must act of its own motion to initiate an investigation) (2) independence (investors must be independent from those implicated in death); (3) effectiveness (must be capable of determining the culpability of those responsible); (4) promptness (investigation must proceed promptly); (5) transparency (investigation must be open to public scrutiny); and (6) family participation (the deceased's family must be involved as required to protect his or her interests'). *Jordan v. U.K.*, Judgment, Eur. Ct. H.R., Application No. 24746/94, ¶¶ 105-109 (May 4, 2001).
[94] *M.C. v. Bulgaria*, Judgment, Eur. Ct. H.R., Application No. 39272/98, ¶ 149 (Dec. 4, 2003) citing *A v. United Kingdom*, Judgment, Eur. Ct. H.R., Application No. 100/1997/884/1096, ¶ 22 (Sept. 23, 1998).

The Inter-American Court has held that because of women's *particular vulnerability*, the State's obligation to investigate breaches of their right to life by private parties takes on a "wider scope."[95] The Court's holding logically requires a "wider scope" in the State's due-diligence obligation to prevent and punish human rights violations by private parties against all people who are members of particularly vulnerable groups.

The European Court of Human Rights has also recognized that, where the State possesses a *positive* obligation to protect an individual's rights, the obligation is heightened when it concerns vulnerable individuals. In *Z. v. U.K.*, for instance, the European Court noted the State's heightened obligation to prevent harm to children and other vulnerable persons, where the authorities knew there was a real risk of such conduct, under the European Convention's prohibition against inhuman and degrading treatment.[96] The European Court has extended this principle to other rights that give rise to a positive State obligation. For example, with regard to the right to private life protected under Article 8 of the European Convention, the Court stated in *M.C. v Bulgaria* that "[c]hildren and other vulnerable individuals, in particular, are entitled to effective protection."[97]

Similarly, the Committee Against Torture, the body established by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to monitor state parties' compliance with the convention's provisions, has observed that the State's positive obligations under the prohibition on inhuman and degrading treatment require States to take measures to ensure proper regulation of migrant workers' working conditions, in light of that group's particular vulnerability.[98]

Honduras's obligation to provide special protections to the petitioners (as members of a vulnerable group) from violations of their right to life and right to be free from inhuman and degrading treatment should also be informed by Honduras's commitments under ILO Convention 169.[99] Convention 169 provides, in Article 20(1), that states "shall . . . adopt special measures to ensure the effective protection with regard to the . . . conditions of employment of [indigenous] workers . . . to the extent that they are not effectively protected by the laws applicable to workers in general."[100] Further, in Article 20(3), the Convention also establishes that the measures to be adopted by the State pursuant to this obligation "shall include measures to ensure . . . that [indigenous] workers . . . are not subjected to working conditions hazardous to

---

[95] *Gonzalez et al. v. Mexico*, *supra* note 89, ¶ 293.
[96] *Z. v. U.K.*, Judgment, Eur. Ct. H.R. Application No. 29392/95, ¶¶ 73-75 (May 10, 2001).
[97] *M.C. v Bulgaria*, *supra* note 94, ¶ 150.
[98] See, e.g., Committee Against Torture, *Concluding Observations on Kuwait*, U.N. Doc. CAT/C/KWT/CO/2, ¶ 22 (June 28, 2011); Committee Against Torture, *Concluding Observations on Indonesia*, U.N. Doc. CAT/C/IDN/CO/2, ¶ 20 (July 2, 2008). *See also* Human Rights Committee, *Concluding Observations on Kuwait*, U.N. Doc. CCPR/C/KWT/CO/2, ¶ 18 (Nov. 18, 2011) (noting that the absence of "effective control mechanisms ensuring the respect for employment regulations by employers" of migrant workers raised concerns under Articles 7 and 8 of the International Covenant on Civil and Political Rights, which establish the prohibitions on torture and inhuman treatment, and forced labor, respectively).
[99] As Honduras is a party to ILO Convention 169, Convention 169 can be considered by the Commission in assessing Honduras's obligations under Article 29 of the American Convention.
[100] Indigenous and Tribal Peoples Convention, C169, Art. 20(1), June 27, 1989, 72 ILO Official Bull 59, 28 I.L.M. 1382 (1989) [hereinafter ILO Convention 169].

their health."[101] Article 20(4) provides that states parties have an obligation to establish an inspection regime to assess the working conditions of indigenous peoples who are employed as wage laborers.[102] Consistent with Article 29 of the American Convention and with the Inter-American Court's evolutionary interpretation of human rights treaties, Honduras' due-diligence obligations to petitioners, as a particularly vulnerable population, should include, at the very least, regulatory measures consistent with the requirements of ILO Convention 169.

Ultimately, whether Honduras's actions have met the due-diligence standard is a factual question that depends on an examination of facts that the summary record in the Commission's *Admissibility Report* does not adequately describe. However, the fact that the violations perpetrated against the Miskitu community have been far from isolated suggests that the due-diligence standard has not been met. The conduct of the private employers, if petitioners' allegations are accurate, shows that the State has consistently failed to prevent the deaths and inhuman treatment of this community and to either ensure the prosecution of those responsible or provide sufficient redress to those affected.

In *Maria Da Penha v. Brazil*, this Commission concluded that the State had failed to live up to its due-diligence obligation to prevent violence against women. It emphasized the pervasive nature of the State's failures to protect women. The Commission stated:

> [T]olerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.
>
> . . . .
>
> Given the fact that the violence suffered by [the petitioner] is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfil the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.[103]

The Commission's reasoning about Brazil's failure to prevent violence against women and to prosecute its perpetrators logically applies to states' failures to protect other vulnerable groups. The ongoing failure by the State of Honduras to respond to the degrading treatment and deaths of the Miskitu has likely resulted in a prevailing view that no private actor will be held accountable for these abuses. Thus, by creating a culture of impunity, the State has not only failed to fulfill,

---

[101] *Id.* Art. 20(3)(b).
[102] *Id.* Art. 20(4).
[103] *Maria Da Penha v. Brazil, supra* note 91, ¶¶ 55-56.

but has undermined, its obligation to prevent and punish these practices; by doing so, it has perpetuated the harm experienced by the petitioners.

Finally, while the State has asserted that is has undertaken measures (through legislation and regulation) to provide remedies for the Miskitus' situation, such regulation, without appropriate and effective enforcement, is inadequate. European Court of Human Rights jurisprudence on this point is instructive. In its decision in *Rantsev v. Cyprus and Russia*,[104] the European Court concluded that enacting legislation to prohibit forced labor did not meet the due-diligence standard where it failed to adequately prevent violations by private parties. Rather, the Court held, protection of the victim's rights required that the State also endeavor to "make the legislative measures operational."[105] Until Honduras takes the appropriate action to ensure that any legislative or regulatory reform protecting the Miskitu is enforced effectively, such reform is insufficient to fulfil its due-diligence obligation under Article 4 and 5.

B. Honduras Has Violated the Petitioners' Rights Under Article 4 and 5 by Failing to Provide Sufficient Health-Care Treatment.

Particularly in light of the Miskitu divers' vulnerability, Honduras's alleged failure to provide sufficient health-care treatment to the petitioners' community also constitutes a violation of Articles 4 and 5 of the American Convention. The State's failure to provide health services led to the worsening of some petitioner's severe disability and to the preventable death of many of those suffering from decompression syndrome. These failures constitute violations of the right to be free from inhuman and degrading treatment and the right to life, respectively.

European Court of Human Rights jurisprudence provides useful guidance on this point. The European Court has found that a state's failure to provide proper health care may, in specific circumstances, constitute a violation of both the right to life and the right to be free from inhuman and degrading treatment. This jurisprudence is part of the European Court's trend toward recognizing that the prohibition on inhuman and degrading treatment requires that all individuals be treated "with dignity in relation to their basic needs."[106]

1. Honduras's Failure to Provide Health Services to the Petitioners Constitutes a Violation of Article 5.

In considering an alleged violation of Article 3 of the European Convention on Human Rights, which prohibits inhuman and degrading treatment, the European Court of Human Rights held that "acts and omissions of the authorities in the field of health-care policy may in certain circumstances engage their responsibility under Article 3 by reason of their failure to provide appropriate medical treatment."[107] In two recent decisions, *R.R. v. Poland* and *P. and S. v.*

---

[104] *Rantsev v. Cyprus and Russia*, Judgment, Eur. Ct. H.R., Application No. 26965/04 ¶ 284 (Jan. 7, 2010).
[105] *See* Virginia Mantouvalou, *Are Labour Rights Human Rights?*, UCL LABOUR RIGHTS INSTITUTE ON-LINE WORKING PAPERS LRI WP X/2012 10 (2012) (discussing the *Rantsev* case).
[106] Ellie Palmer, *Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights*, 2 ERASMUS L. REV. 397, 410 (2009).
[107] *R.R. v. Poland*, Judgment, Eur. Ct. H.R., Application No. 27617/04, ¶ 152 (May 26, 2011) citing *Powell v. U.K.*, Judgment, Eur. Ct. H.R., Application No. 45305/99 (May 4, 2000) (concluding, in the abstract, that it was possible that a violation of Article 3 could arise from a failure to provide health care, although finding the case before it to be inadmissible for other reasons).

Poland, the European Court found that the failure of health professionals to provide sufficient and timely testing or information to an individual to facilitate an abortion constituted a violation of the prohibition against inhuman treatment.[108] In particular, in *P. and S.*, the Court stated that to determine whether the actions of health-care professionals violated the right to be free of inhuman and degrading treatment, it was necessary to "hav[e] regard to the circumstances of the case as whole," including not only "procrastination, confusion and lack of proper and objective counselling and information" by professionals and the ongoing suffering the victim experienced, but also the vulnerability of the young victim.[109]

The European Court's finding that failure to provide individuals with appropriate health care may make a state responsible for violating those individuals' right to be free from inhuman and degrading treatment is relevant to the Commission's evaluation of the petitioners' claims in the present case. In assessing the petitioners' claim, the Commission must consider their circumstances as a whole, including their particular vulnerability due to their disability, indigeneity, poverty, and remoteness. To the extent that the failure to provide proper health care to the petitioners exacerbated their suffering, this Commission should find that Honduras violated Article 5 of the American Convention. In light of their particular vulnerability, the challenges the Miskitu have faced in obtaining health services and the pervasive disability and suffering that the lack of such services has caused them suggest that such a violation has occurred.

2. Honduras's Failure to Provide Health Services to the Petitioners Constitutes a Violation of Article 4.

The European Court has held that there are two ways in which the failure to provide effective health services may amount to a violation of the right to life. Specifically, a violation may be found where the state either: (1) fails to properly regulate the provision of medical services; or (2) fails to ensure equal access to medical services to all groups within the state. As this section discusses, depending on the facts that the Commission finds, Honduras's treatment of the petitioners may have violated their right to life in both respects.

First, the European Court concluded in *Tarariyeva v. Russia* that the right to life obligates "States to make regulations compelling hospitals, whether private or public, to adopt appropriate

---

[108] *R.R. v. Poland*, *supra* note 107, ¶¶ 153-162 (finding that failure to provide testing concerning fetal health in a timely manner, which prevented pregnant woman from making a decision about continuing the pregnancy in time to secure an abortion, violated Article 3); *P. and S. v. Poland*, Judgment, Eur. Ct. H.R., Application No. 57375/08 ¶¶ 166-68 (Oct. 30, 2012) (concerning, first, the "procrastination, confusion and lack of proper and objective counselling and information" by health professionals to a young women who had been raped and was seeking an abortion and, second, the "deplorable manner" in which the woman was treated).

[109] *P. and S. v. Poland*, *supra* note 108, ¶¶ 166-68. Previously, the European Court had also found that where a particularly ill individual is receiving health care from the state, deporting that individual to a state that would be unable to provide similar care would amount to a violation of Article 3 of the European Convention. *See D. v. United Kingdom*, Judgment, Eur. Ct. H.R., Application No. 30240/96 (May 2, 1997) (concerning the potential deportation of an individual suffering from AIDS from the United Kingdom to St. Kitts). *See also N. v. United Kingdom*, Judgment, Eur. Ct. H.R., Application No. 26565/05, ¶¶ 47-51 (May 27, 2008) (reaffirming the holding from *D. v. United Kingdom* concerning the potential relationship between health services and violations of Article 3 in cases of deportation, but also emphasizing the severity of the illness that must be demonstrated to prove a violation).

measures for the protection of patients' lives."[110] If, in the present case, Honduras's failure to sufficiently regulate the provision of medical care to the petitioners, including the failure to require that hyperbaric chambers were accessible where necessary, is shown to have led to some of the Miskitu divers' deaths, this would, applying the European Court's reasoning to the American Convention's similar right-to-life provision, constitute a violation of the State's obligations under Article 4.

Second, although the right to life does not entail a free-standing obligation on the state to provide health care to its population, it does, when read in combination with the prohibition on the discriminatory provision of rights, require the state to ensure that health care is accessible equally to all groups. In *Cyprus v. Turkey*, the European Court indicated that the failure to ensure that a given subset of the population has access to medical treatment equal to that available to the rest of the population may constitute a violation of the right to life. In the Court's words, "an issue may arise under Article 2 of the [European] Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally."[111] However, the Court emphasized that to find a violation of the right to life, such disparate treatment must actually result in a risk to the applicant's life and the relevant groups must have been prevented, *de jure* or *de facto*, from securing access to medical care.[112]

As noted in the discussion above, in Section V, regarding indirect discrimination in access to justice, the Commission, in assessing what constitutes de facto inaccessibility in the present case, must account for the particular conditions facing the Miskitu divers. Specifically, their position as a remote, indigenous and impoverished community suffering disabilities must inform the question of whether the Miskitu truly had access to health services provided in other regions. As noted in the analysis in Section V, above, the facts in the *Admissibility Report* indicate that these conditions of marginalization effectively prevent access to services outside of Gracias a Dios. In light of this reality, Honduras has an obligation to either make the services available in Gracias a Dios or take special measures to facilitate the Miskitus' access to services provided elsewhere. If it is shown that medical services that were provided to others in Honduras were not made accessible to the Miskitu and that such conditions resulted in the deaths of Miskitu divers, this would amount to a violation by Honduras of the petitioners' right to life under Article 4, as interpreted in light of Article 1(1).

VII. THE PROGRESSIVE REALIZATION OF THE ECONOMIC, SOCIAL, AND CULTURAL RIGHTS OF THE MISKITU PEOPLE

If petitioner's allegations are correct, the State of Honduras has failed to take measures to ensure that the Miskitu can progressively realize their economic, social, and cultural rights. Article 26 of the American Convention requires states parties to the convention to adopt

---

[110] See, e.g., *Tarariyeva v. Russia*, Judgment, Eur. Ct. H.R., Application No. 4353/03, ¶ 74 (Dec. 14, 2006) citing *Vo v. France*, Judgment, Eur. Ct. H.R., Application No. 53924/00, ¶ 89 (July 8, 2004), *Calvelli and Ciglio v. Italy*, Judgment, Eur. Ct. H.R., Application No. 32967/96, ¶ 49 (Jan. 17, 2002), and *Powell v. U.K.*, *supra* note 107. f, *supra* note 110, ¶ 74 citing *Glass v. U.K.*, Judgment, Eur. Ct. H.R., Application No. 61827/00, ¶ 71 (Mar. 9, 2004).
[111] *Cyprus v. Turkey*, Judgment, Eur. Ct. H.R., Application No. 25781/94, ¶ 219 (May 10, 2001).
[112] *Id.*

measures "with a view to achieving progressively . . . the full 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."[113] The Inter-American Court has interpreted the scope of a state's obligations under Article 26 in light of developments in international jurisprudence addressing economic, social, and cultural rights.[114] As members of an indigenous group, petitioners are entitled to special protection of their rights. As the Court has held, when considering the rights of indigenous people such as the Miskitu, as a general principle, states must account for their specific economic and social characteristics, as well as situations of special vulnerability.[115] Thus, Honduras has an Article 26 obligation to implement measures that guarantee the Miskitus' progressive realization of their economic, cultural and social rights, in a manner that accounts for their specific circumstances of extreme need.[116] Additionally, Miskitu petitioners who have been disabled require even greater protection on account of their disability.

The Honduran State has fallen short of its obligations under Article 26 in two ways: First, the State has failed to adequately regulate the employment conditions of the Miskitu divers. This failure has allowed abusive practices by employers, resulting in severe injuries and many deaths. Second, Honduras has failed to provide adequate health-care measures for the injured divers. Miskitu divers suffering from the effects of decompression syndrome have been disabled, but they have been unable to obtain appropriate treatment for their disability.[117]

A. The Miskitu Are an Indigenous Community Requiring Special Protection of Their Economic, Social, and Cultural Rights.

1. Honduras Has an Obligation to Ensure the Special Protection of the Economic, Social, and Cultural Rights of the Miskitu.

Under Article 26 of the American Convention, Honduras has a general obligation to take measures to achieve the progressive realization of economic, cultural, and social rights. Honduras also has specific obligations to protect the rights of the Miskitu as an indigenous population entitled to special protection of their rights.

In *Acevedo Buendia v. Peru*, the Inter-American Court interpreted the general meaning of "progressive realization" in light of both European Court of Human Rights jurisprudence and general comments of the ESCR Committee. [118] Consistent with the European Court's holding in *Airey*, the Inter-American Court has noted that economic, social, and cultural rights "should be fully understood as human rights . . . enforceable in all cases before competent authorities."[119] The Inter-American Court has stated that economic, social, and cultural rights deserve full

---

[113] Convention, *supra* note 1, at Art. 26.
[114] *See Acevedo Buendía et al. v. Peru*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 198, ¶¶ 101–102 (July 1, 2009); Admissibility Report No. 38/09, *National Association of Ex-employees of the Peruvian Social Security Institute et al. v. Peru*, Inter-Am. Comm. H.R., ¶¶ 136–138 (Mar. 27, 2009).
[115] *Yakye Axa v. Paraguay*, *supra* note 22, at ¶¶ 51, 63.
[116] *Id.*
[117] As suggested by the discussion in Section VI, Honduras's Article 26 obligations are, separate from, although related to, its obligations to protect the right to life and right to humane treatment.
[118] *Acevedo Buendía et al. v. Peru*, *supra* note 114, at ¶¶ 101–102.
[119] *Id.* at ¶ 101.

protection under the American Convention.[120] Following the Inter-American Court's use of the principle of *Airey*, the Miskitus' economic, social, and cultural rights are enforceable at the Inter-American Court of Human Rights. Moreover, the Inter-American Court has also used the ESCR Committee's General Comment 3 to analyze the relationship between a state's financial limitations and its obligation to progressively realize economic, social, and cultural rights.[121] General Comment 3 notes that under a doctrine of progressive realization, a state must take steps to guarantee the rights at issue.[122] That is, although the full, immediate realization of a particular right might not be feasible, a state must take "deliberate, concrete, and targeted" measures toward meeting its obligation to achieve full realization of the right.[123] Appropriate measures may be legislative, administrative, financial, educational, or social.[124] In the present case, Honduras has an obligation to take such measures to comply with its Article 26 obligations.

Moreover, in adjudicating the rights of indigenous groups such as the Miskitu, the Inter-American Court has held that these groups require protections that take "into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs."[125] In explaining the content of these special protections generally, the Inter-American Court has looked to the Additional Protocol of San Salvador, ILO Convention 169, and general comments of the ESCR Committee.[126] In *Yakye Axa v. Paraguay*, for example, the Court interpreted the State's obligations to an indigenous community under Article 4 of the American Convention in light of all three instruments.[127] Similarly, the Court has elsewhere interpreted Article 21 of the American Convention in light of ILO Convention 169 and Article 4 in light of the Protocol of San Salvador.[128] While the Court has not applied any of these instruments directly to Article 26, it has interpreted Article 26 obligations in light of relevant bodies of international law. Thus, as described below, the Additional Protocol of San Salvador, ILO Convention 169, and general comments of the ESCR Committee all serve to inform the scope of Honduras's Article 26 obligations.

2. Inter-American Jurisprudence and International Law Provide Additional Protections for those Miskitu Divers who Have Been Disabled.

Beyond its general Article 26 obligations, Honduras has specific obligations to the Miskitu divers who have been disabled. The Protocol of San Salvador provides that "[e]veryone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality."[129]

---

[120] *Id.* at ¶ 102.
[121] *Id.* at ¶ 102; Committee on Economic, Social and Cultural Rights, *General Comment No. 3 on The Nature of States Parties Obligations*, U.N. Doc. E/1991/23, Annex III, ¶ 9 (1990).
[122] *General Comment No. 3*, *supra* note 121, at ¶ 9..
[123] *Id*. at ¶ 2.
[124] *Id.* at ¶¶ 7, 8.
[125] *Yakye Axa v. Paraguay*, *supra* note 22, at ¶¶ 63, 51.
[126] *Id.* at ¶¶ 163, 166.
[127] *Id.*
[128] *Xákmok Kásek v. Paraguay*, *supra* note 24, at ¶¶ 124-131. *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 24, at ¶¶ 117–119, 150–151.
[129] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," Nov. 17, 1988, O.A.S.T.S. No. 69, Art. 18 [hereinafter Protocol of San Salvador].

The Protocol obligates states parties to take positive action to ensure this development by providing work programs and other resources for persons with disabilities.[130] Honduras thus has an obligation to take affirmative steps to provide the disabled Miskitu divers with additional resources to overcome their disabilities. However, these disabled divers have been living for many years in conditions of extreme poverty and largely isolated from the rest of Honduran society.

International law outside the inter-American system confirms Honduras's duty to protect this vulnerable group of disabled Miskitu divers. Under Article 26 of the Convention on the Rights of Persons with Disabilities,[131] Honduras has an obligation to "take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational abilities, and full inclusion and participation in all aspects of life."[132] The CRPD requires additional safeguards for the health of disabled persons.

> States Parties shall:
>
> . . . .
>
> b. provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and *services designed to minimize and prevent further disabilities* . . . ; [and]
> c. provide these health services as close as possible to people's own communities, including in rural areas.[133]

Honduras, however, has not taken such measures to safeguard the independence, inclusion, and health of the disabled Miskitu divers. Left isolated, without health care, and unable to provide for their families, many disabled divers continue diving despite their symptoms of decompression syndrome, dramatically increasing the risk of more extensive injury in the future. Although aware of the risks, sub-human employment conditions, and high disability rates facing this community, the State has not taken measures to ensure that adequate services are provided to prevent future disability.[134]

The ICESCR does not explicitly mention the rights of disabled persons, but the Committee on Economic, Social and Cultural Rights has addressed this topic in its General

---

[130] *Id.* at Art. 18(a). Article 18(a) states: "The States Parties agree to adopt such measures as may be necessary for this purpose and, especially, to: Undertake programs specifically aimed at providing the handicapped with the resources and environment needed for attaining this goal, including work programs consistent with their possibilities and freely accepted by them or their legal representatives, as the case may be." *Id.*
[131] Honduras ratified the CRPD after the petitioner's complaint was received. However, as noted below, the Court has used treaties as interpretative tools regardless of a state party's accession. *See infra* note 139.
[132] Convention on the Rights of Persons with Disabilities, *supra* note 57, at Art. 26. Article 26 on Habilitation and Rehabilitation continues: "To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation service and programmes, particularly in the areas of health, employment, education and social services . . . ." Convention on the Rights of Persons with Disabilities.
[133] *Id.* at Art. 25 (b-c) (emphasis added).
[134] *See supra* Section III.

Comment 5 on Persons with Disabilities. The Committee explained that "in so far as special treatment is necessary [for disabled persons], States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability."[135] The Miskitu divers present a clear case in which the provision of special treatment by Honduras *is* necessary: The State has a duty to structure social programs to ensure that the divers get the treatment and resources they need to be integrated into society.

B. By Failing to Provide Adequate Employment Regulation, Honduras Has Failed to Progressively Realize the Economic, Social, and Cultural Rights of the Miskitu.

Honduras's failure to adequately regulate the Miskitus' employment violates the progressive realization of their economic, social, and cultural rights. The jurisprudence of the Inter-American Court has not yet clarified the relationship between Article 26 and a state's obligation to provide safe working conditions, but a number of relevant international instruments offer guidance in this respect.

First, the text of Article 26 explicitly refers to the Charter of the Organization of American States (OAS), as amended by the Protocol of Buenos Aires, as the source of economic, social, and cultural rights—including the right to safe working conditions. According to the text of Article 26, the American Convention protects the economic and social rights set out in the amended Charter.[136] The amended Charter, includes states parties' agreement to "devote their utmost efforts" to provide "[f]air wages, employment opportunities, and acceptable working conditions for all."[137] Similarly, the amended Charter provides that states "agree to dedicate every effort" to implement the general principle that work "be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family."[138]

Second, as interpretative tools, the Protocol of San Salvador,[139] General Comment 18 of the ESCR, and ILO Convention 169[140] further clarify the scope of Honduras's obligations under the Convention.[141] Under the San Salvador Protocol, state parties commit to adopting necessary

---

[135] Committee on Economic, Social and Cultural Rights, *General Comment No. 5 on Persons with Disabilities*, U.N. Doc. E/1995/22 at 19,,¶ 5 (1995).
[136] Convention, *supra* note 1, at Art. 26.
[137] Charter of the Organization of American States Art. 34(g), Apr. 30, 1948, 119 U.N.T.S. 3.
[138] *Id.* at Art. 45(b).
[139] Honduras had not ratified the Protocol of San Salvador when this case began but subsequently did ratify the treaty. Regardless of whether the Protocol can be applied retroactively, the Court has interpreted state obligations in light of treaties that the state concerned has not ratified. In these cases, the Court has noted that such treaties can be used as interpretative tools to understand a state's obligations under the American Convention. Such treaties do not create independent obligations for a state that has not signed them. *See Sarayaku v. Ecuador*, *supra* note 4, at ¶¶ 128, 160. In the *Sarayaku* case, Ecuador had not ratified ILO Convention 169 at the time of the harm in question. However, the Court still used the ILO Convention to interpret Ecuador's obligations.
[140] Although the Inter-American Court does not directly apply the ICESCR or ILO Convention 169, Honduras has signed and ratified both conventions.
[141] As a general principle, the Court has interpreted a state's human rights obligations under Article 26 of the American Convention in light of other human rights treaties and international law. In *Acevedo Buendia*, the Court interpreted Article 26 obligations in light of the *Airey* case of the European Court of Human Rights and General

legislative measures to achieve the progressive and full observance of the rights recognized in the Protocol.[142] Among these rights is the right to "just, equitable, and satisfactory" conditions of work, including the right to "safety and hygiene at work."[143] Furthermore, General Comment 18 of the ESCR Committee interprets the right to work under the ICESCR. General Comment 18 repeatedly stresses states' obligations to provide safe working conditions.[144] Similarly, ILO Convention 169 requires state parties to adopt special measures to ensure the effective protection of employment conditions for indigenous people such as the Miskitu.[145] These special measures include processes to ensure "that workers belonging to these peoples are not subjected to working conditions hazardous to their health."[146] The Convention specifies the need for adequate inspection services to ensure compliance.[147] Interpreted in light of the OAS Charter, the Protocol of San Salvador, General Comments of the ESCR Committee, and ILO Convention 169, Article 26 requires Honduras to provide the Miskitu with safe employment conditions.

By not adequately regulating the Miskitus' employment conditions, Honduras has failed to meet its obligations under Article 26 of the Convention. On paper, Honduras's Labor Code provides workplace protections, but, in practice, the Miskitu divers do not work under adequate conditions and lack access to appropriate mechanisms to ensure proper working conditions.[148] Employers often hire so many Miskitu divers that they exceed the capacity of the boat, leaving some of the divers to sleep on deck. After nights exposed to the elements, employers expect, and often force, divers to complete dives at depths far deeper and for much longer periods of time than recommended for health and safety purposes. Employers often provide divers with poorly maintained equipment, which can cause problems that require them to resurface quickly, drastically increasing the likelihood of decompression syndrome. Once their rights have been violated, the Miskitu do not have adequate access to mechanisms to remedy their situation. In practice, the State's failure to regulate these working conditions constitutes a violation of the economic, social, and cultural rights of the Miskitu.

C. By Failing to Provide Adequate Health Care, Honduras Has Failed to Progressively Realize the Economic, Social, and Cultural Rights of the Miskitu.

In not providing the Miskitu with adequate health care and social welfare measures, Honduras failed to ensure the progressive realization of their economic, social, and cultural rights and thus violated its obligations under Article 26 of the American Convention. Despite the

---

Comments of the U.N. Committee on Economic, Social and Cultural Rights. *Acevedo Buendía et al. v. Peru*, *supra* note 114, at ¶¶ 100–103. The Court has also used ILO Convention 169 and the Protocol of San Salvador to interpret state obligations under the American Convention, although not specifically Article 26 obligations. *See, e.g.*, *Xákmok Kásek v. Paraguay*, *supra* note 24, at ¶¶ 211, 296 (using the Protocol of San Salvador to interpret Article 4 obligations); *Sarayaku v. Ecuador*, *supra* note 4, at ¶ 161 (interpreting Article 21 of the American Convention in light of ILO 169); *Yakye Axa v. Paraguay*, *supra* note 22, at ¶¶ 127, 130 (also using ILO Convention 169 to interpret Article 21).

[142] Protocol of San Salvador, *supra* note 129, arts. 1–2.

[143] *Id.* at Art. 7.

[144] Committee on Economic, Social and Cultural Rights, *General Comment No. 18 on The Right to Work*, U.N. Doc. E/C.12/GC/18, ¶¶ 2, 7, 12(c) (2005).

[145] ILO Convention 169, *supra* note 100, at Art. 20(1).

[146] *Id.* at Art. 20(3)(b).

[147] *Id.* at Art. 20(4).

[148] Admissibility Report, *supra* note 20, at ¶¶ 35–36.

particular vulnerabilities of the Miskitu, the State has failed to provide adequate health care for the injured divers.

The Miskitus' Article 26 rights must be understood in light of Article 10 of the Protocol of San Salvador and General Comment 14 of the ESCR Committee. As noted above, both the Protocol and General Comments of the ESCR Committee have been used to interpret a state party's obligations under Article 26.[149] The Protocol of San Salvador obligates states parties to adopt measures to ensure the health of their citizens.[150] States have a particular obligation to meet "the health needs of the highest risk groups and of those whose poverty makes them most vulnerable."[151] Similarly, the ESCR Committee's General Comment 14 interprets ICESCR article 12 on the right to health as requiring states to take measures to improve the accessibility of health facilities, particularly to vulnerable or marginalized sections of the population.[152] The Committee stated explicitly that "indigenous peoples have the right to specific measures to improve their access to health services and care."[153]

National courts in Latin America have enforced the right to health as articulated in the ICESCR. In Colombia, for example, the Constitutional Court, in interpreting the right to health, explicitly adopted the framework of the ESCR Committee.[154] In case T-760/08, the Colombian Constitutional Court addressed the government's responsibility to regulate the health system in a way that will guarantee the right to health to all Colombians.[155] The Colombian Court stressed the government's obligations to make services accessible to all members of the population, particularly the poorest and most marginalized.[156] In light of this obligation, the Court required the State to take a series of positive actions to ensure the availability of services.[157] Similarly, the Supreme Court of Argentina has held that the right to health requires the government to ensure access to health to some of the most vulnerable members of Argentinian society.[158] In *Benghalensis Associacion et al. v. Minister of Health*, the Court considered whether the State was required to provide antiretroviral treatment to people with HIV/AIDS. The Court held that the State had an obligation under both the Argentinian constitution and the ICESCR to provide access to these treatments.[159] More broadly, across Latin America, experts have noted the growing "judicialization" of the right to health,[160] with individuals filing court cases to gain

[149] *See supra* notes 139, 141.
[150] Protocol of San Salvador, *supra* note 129, Art. 10.
[151] *Id.* at 10(f).
[152] *General Comment No. 14*, *supra* note 29, at ¶ 12(b).
[153] *Id.* at ¶ 27.
[154] *Sentencia T-760/08*, Corte Constitucional de Colombia [C.C.] [Constitutional Court] (July 31, 2008) (Colom.) *available at* http://www.corteconstitucional.gov.co/relatoria/2008/t%2D760%2D08.htm.
[155] *Id.* at ¶ 3.4.2.6.
[156] *Id.*
[157] T-760/08 requires one of the most extensive health reforms required by a court in the Colombian judicial system. *See* Alicia Ely Yamin & Oscar Parra-Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates* 33 HASTINGS INT'L & COMP. L. REV. 431, 432 (2010).
[158] *Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social,* Corte Suprema de Justicia de la Nación de Argentina [CSJN] [National Supreme Court of Justice], Amparo, ¶ X (June 1, 2000) (Arg.) *available at* http://www.derechoshumanos.unlp.edu.ar/assets/files/documentos/asociacion-benghalensis-y-otros-c-estado-nacional-2.pdf.
[159] *Id.*
[160] Leonardo Cubillos-Turriago et al., *Universal health coverage and litigation in Latin America* 26 J HEALTH ORG. MGMT. 390 (2012).

access to medical treatment or services by asserting their right to health. In Brazil, for example, the Ministry of Health reported 240,000 cases in 2010 at the federal level, most of these having to do with individuals seeking access to medicines.[161] In Costa Rica, as of 2010, there were an estimated 4,000 accumulated cases seeking a range of services, medicines, and, in some cases, the opportunity to bypass long waiting lists.[162] As of 2010, Uruguay had litigated only fifty such cases, but numbers are increasing.[163] By enforcing the right to health, Latin American courts have increasingly influenced the health policies of their respective national governments and highlighted the need for countries like Honduras to similarly fulfill their right-to-health obligations.

Honduras has failed to meet its obligation to provide measures to ensure the Miskitus' progressive realization of their right to health under Article 26. Many divers have been injured as a result of their work and suffer from symptoms of decompression syndrome: joint pain, headaches, back pain, fatigue, dizziness, generalized pain, and paralysis. Of the estimated 9,000 Miskitu divers in Gracias a Dios, at least 4,200 are disabled. Despite these disabilities, injured divers lack access to decompression chambers and other health facilities that could aid in their recovery and rehabilitation. As a result of this lack of access to necessary health care, their symptoms worsen. Honduras's continued violation of the Article 26 right to health thus continues to cause harm to the petitioners.

VIII. CONCLUSION

The Miskitu people are among the most vulnerable members of Honduran society. Under the American Convention, their vulnerability requires the State to guarantee minimum living conditions for a dignified life. According to the facts alleged by petitioners, Honduras has failed in to meet its obligation and, in doing so, has violated the Miskitus' rights to life (Article 4), to humane treatment (Article 5), to judicial protection (Articles 8 and 25) and to the progressive realization of their economic, cultural, and social rights (Article 26). The ongoing failure of the Honduran government to fulfill its obligations continues to harm the Miskitu as new divers become injured and injured divers continue to suffer without treatment.

[161] *Id.* at 395.
[162] *Id.*
[163] *Id.*