

In situ visits by the Inter-American Court of Human Rights

Una corte de toga y mochila¹

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Abstract

This thesis investigates the *in situ* visiting practice of the Inter-American Court of Human Rights. This regional human rights court, residing in San José, Costa Rica since 1979, has made multiple fact-finding visits during the proceedings of contentious cases since 2012. This thesis researches the legal framework for these visits, the factors that may influence the – exceptional – decision to undertake a visit, the procedure of the visit and the influence a visit may have on further proceedings. To answer these research questions, seven out of the eight cases with *in situ* visits were evaluated in depth and an interview was conducted with an official at the Inter-American Court of Human Rights. Additionally, throughout the whole process, a literature study was conducted to support the research. This analysis revealed that *in situ* visits did not emerge as a fully developed practice, but grew with each new case where a visit was organized. This thesis gives a detailed account of the legal basis and procedure of *in situ* visits. It also finds that, while visits may be organized with the purpose of obtaining additional evidence, a purpose of hearing local third parties to assess the possible impact of the judgement and a promotional purpose can also be distinguished. The decision to organize a visit is influenced by factors like the facts of the case, the consent of the State Party involved and practical considerations. The lack of consent of victims and their representatives is however not detrimental to the organization of a visit. The influence of *in situ* visits on the cases can be seen in the case runtime, which is always longer than the yearly average, though other factors might also explain this. Moreover, the judgements will mention the visit when assessing the evidence, though it is unclear what weight the findings from these visits hold. Finally, the amount of references to the visit to support the reasoning of the judgement has evolved from almost none, to a more significant number.

Deze thesis onderzoekt de *in situ* bezoeken van het Inter-Amerikaanse Hof voor de Rechten van de Mens. Dit regionale mensenrechtenhof, dat sinds 1979 zetelt in San José, Costa Rica, heeft sinds 2012 al meerdere plaatsbezoeken gedaan tijdens rechtszaken. Deze thesis onderzoekt het juridisch kader van deze plaatsbezoeken en behandelt de factoren die de – uitzonderlijke – beslissing om een plaatsbezoek uit te voeren, beïnvloeden. Daarnaast wordt ook het verloop van een plaatsbezoek uiteengezet en wordt ten slotte de mogelijke invloed van een plaatsbezoek op het verder verloop van de zaak onderzocht. Voor dit onderzoek werden zeven van de acht rechtszaken met een plaatsbezoek uitgebreid bestudeerd en werd een interview afgenomen met een functionaris van het Inter-Amerikaanse Hof voor de Rechten van de Mens. Daarnaast werd doorheen het hele onderzoek literatuur geraadpleegd. Aan de hand van deze methoden werd duidelijk dat dit een langzaam gegroeide praktijk was, ontwikkeld doorheen de zeven rechtszaken. Het juridisch kader en het concrete verloop van de plaatsbezoeken worden uitgebreid beschreven. Uit het onderzoek blijkt dat plaatsbezoeken niet alleen worden georganiseerd om bijkomend bewijs te verzamelen, maar dat ze ook gericht kunnen zijn op het horen van derden of zelfs een publiciteitsdoeleinde zouden kunnen hebben. Het organiseren van een bezoek wordt beïnvloed door factoren zoals de feiten van de rechtszaak, de toestemming van de betrokken Staat en praktische overwegingen. Een gebrek aan toestemming van de slachtoffers en hun vertegenwoordigers is echter niet doorslaggevend. Plaatsbezoeken lijken rechtszaken te beïnvloeden door de duur ervan te verlengen, hoewel hiervoor ook andere verklaringen te vinden zijn. Daarnaast blijkt het nog onduidelijk te zijn welk gewicht er in de uiteindelijke uitspraak wordt gegeven aan het bewijs verzameld tijdens het plaatsbezoek. Ten slotte blijkt ook dat het aantal verwijzingen naar het plaatsbezoek in de uitspraak evolueerde van quasi geen tot een groter aantal.

List of Abbreviations

ACHR: American Convention on Human Rights

APRODEH: Asociación Pro Derechos Humanos

CEJIL: Center for Justice and International Law

CELS: Centro de Estudios Legales y Sociales

COI : Commission of Inquiry

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

FPIC: Free Prior and Informed Consent

IACHR: Inter-American Commission on Human Rights

IACtHR: Inter-American Court of Human Rights

OAS: Organization of American States

RoP IACHR: Rules of Procedure of the Inter-American Commission on Human Rights

RoP IACtHR: Rules of Procedure of the Inter-American Court of Human Rights

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1. Introduction

1.1. Judges in a canoe

1. “Imagine international human rights judges...in a canoe in the Amazon rainforest.” This image is usually enough to pique the interest of anyone asking about the contents of this master thesis. International human rights adjudication often gets criticized for sitting in an ivory tower, far removed from the on-site human rights violations. The Inter-American Court of Human Rights (the IACtHR or the Court) however, has proven that it is possible to get close to where alleged human rights violations have been committed, before returning to its seat in San José to render a judgement. Since 2012 this regional human rights court has conducted fact-finding missions – *in situ* visits – during the contentious phase of its cases. Little has however been written in English about this subject, save a few mentions that this practice exists. This thesis therefore aims to provide a more in-depth analysis of the procedural framework, the reasons for such visits, the way they happen and what they can mean for a case. To begin with, however, a short overview of the Inter-American Human Rights system and the broader field of fact-finding missions will be given.

1.2. Introduction to the Inter-American Human Rights System and fact-finding missions

2. In 1948, the Organization of American States (OAS), of which all 35 American States are member, adopted the American Declaration on the Rights and Duties of Man.² The Inter-American Commission on Human Rights (the IACHR or the Commission) was created as a supervisory organ in 1959 to “*promote the observance and protection of human rights*”, which it, amongst other, does through *in loco* visits and adopting different kinds of reports.³ These reports and the recommendations in the reports are not legally binding. In 1978 however, the American Convention on Human Rights (the ACHR) entered into force, and with it, slightly afterwards the judicial entity of the Inter-American Court of Human Rights was established. The Court, composed out of seven judges, can issue advisory opinions (in the ambit of its advisory jurisdiction) and binding judgements (in the ambit of its contentious jurisdiction).⁴ The IACtHR has its own Secretariat, which provides legal and administrative support to the Court in its judicial work and which consists of around seventy-three permanent officials, led by the current Secretary of the Court Pablo Saavedra Alessandri.⁵ Since 2012, the Court has also developed a practice of so called *in situ* visits, where it organizes a fact-finding mission to elucidate the facts of contentious cases.

3. These *in situ* visits can be placed in the broader field of human rights fact-finding missions. These encompass a broad range of activities. While the focus in this thesis will be on the *in situ* visits of the IACtHR, it is interesting to situate it in its broader context. When defining what

² OAS, ‘OAS - Organization of American States: Democracy for Peace, Security, and Development: Who We Are’ (1 August 2009) <https://www.oas.org/en/about/who_we_are.asp> accessed 19 March 2023.

³ Charter of the Organization of American States 1948 art 106; OAS, ‘What is the IACHR?’ <<https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp>> accessed 19 March 2023.

⁴ OAS, ‘IACHR: Basic Documents: Introduction’ <<https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/intro.asp>> accessed 13 May 2023.

⁵ Pablo González Domínguez, ‘The Role of the Secretariat in the Inter-American Court of Human Rights: A Comparative Analysis’ (2022) 116 American Journal of International Law 390, 391.

the concept of 'human rights fact-finding missions' exactly entails, there are three relevant aspects: 'human rights', 'fact-finding' and 'missions'.

4. *Human rights* can be defined in a practical manner, as the human rights contained in the Universal Declaration of Human Rights and all other treaty standards built on these foundations.⁶ In a thesis researching the Inter-American fact-finding activities, this can be narrowed down to the human rights contained in the ACHR and the rights found in other Inter-American treaties and protocols.⁷

5. Digging deeper into the notion of *facts* is perhaps a more theoretical topic. Mégrét states that facts are defined in opposition to other things.⁸ He proposes that facts can be distinguished from opinions on the basis of three elements: the characteristics of the fact finders, the impact they have on the audience and the method through which they are established.⁹ Firstly, fact-finders who are impartial, neutral and objective, ensure the credibility of the facts. Secondly, their findings need to *convince*, in order to meet the burden of proof that determines whether facts are proven. Thirdly, the fact finders should adhere to certain recognized methods or procedures.¹⁰

6. Lastly, fact-finding *missions* can comprise a range of activities, such as interviews with presidents of countries or journalists, forensic research, collecting physical and documentary evidence, inspecting the scene and speaking with witnesses and civil society actors, either within the country or abroad.¹¹

7. This leads to 'human rights fact-finding missions' being a very broad term that encompasses many practices internationally, with little consistency in terminology. The UN organizes Commissions of Inquiry (COI's), fact-finding missions and other investigations, terms which signify "*a variety of temporary bodies of a non-judicial nature*" that are "*tasked with investigating allegations of violations of international human rights, (...) and making recommendations for corrective action based on their factual and legal findings*."¹² Examples of COI's are the Independent International Commission of Inquiry on the Syrian Arab Republic, on Ukraine and on the Occupied Palestinian Territory and Israel.¹³ Independent international fact-finding missions are currently being organized by the UN in Sudan, Iran, Nicaragua and Venezuela.¹⁴ Many fact-finding initiatives are also undertaken by Human Rights NGO's, which are often the 'first responders', though their findings are not always accepted by international courts due to deficiencies.¹⁵ Other civil society actors, such as ecclesiastical organizations or universities

⁶ Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press 2016) 7.

⁷ American Convention on Human Rights 'Pact of San José, Costa Rica' 22 January 1969, entry into force 18 July 1978.

⁸ Frédéric Mégrét, 'Do Facts Exist, Can They Be Found and Does It Matter?' in Philip Alston and Sarah Knuckey (eds), *The transformation of human rights fact finding* (Oxford University Press) 29–30.

⁹ *ibid* 31.

¹⁰ *ibid*.

¹¹ Alston and Knuckey (n 6) 9.

¹² UN Office of The High Commissioner of Human Rights, 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (2015) HR/PUB/14/7

<https://www.ohchr.org/sites/default/files/Documents/Publications/CoI_Guidance_and_Practice.pdf> accessed 12 May 2023.

¹³ *ibid*.

¹⁴ For a present day overview of all fact finding initiatives see: OHCHR, 'International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding Missions and Other Investigations' (OHCHR, 17 February 2023) <<https://www.ohchr.org/en/hr-bodies/hrc/co-is>> accessed 4 March 2023.

¹⁵ Alston and Knuckey (n 6) 14.

have also contributed to fact finding.¹⁶ On the regional level, other bodies, including judicial organs, can be found organizing human rights fact-finding. For example, the European Court of Human rights (the ECtHR) has done multiple fact-finding missions, which are defined as a combination of on-the-spot investigations and fact-finding hearings.¹⁷ Another regional body next to the IACtHR, is the IACHR, whose history of *in loco* visits must of course also be mentioned (*supra* 2). The IACtHR is therefore not alone in its practice, but since research regarding this subject has been limited, the question to ask is: what is the Court's practice for *in situ* visits?

1.3. Research objective

8. The goal is to get insight into the *in situ* visiting practice of the Court. It would be useful to know under what circumstances *in situ* visits are possible, how they proceed and what they can mean for the case.

1.4. Research questions

- What is the Inter-American Court of Human Rights' practice for *in situ* visits?
 - What is the legal framework for *in situ* visits of the Court?
 - Which factors influence the decision to undertake an *in situ* visit?
 - What is the procedure before and during *in situ* visits?
 - What influence does an *in situ* visit have on the further proceedings?

1.5. Methodology

9. The research for this thesis was done through three methods: continuous literature study, case studies and an interview with a key elite stakeholder. A lot of the literature study was done beforehand, in the research plan, using general handbooks on the Inter-American System and the snowball search method for finding relevant sources.¹⁸ However, some findings from the case studies led to new questions, so consulting literature was a continuous process.

10. Seven case studies were made based on a list of sixteen *in situ* visits (see Annex I).¹⁹ These seven, at the time, represented all known cases with *in situ* visits during the merits phase. For each case the judgements and main briefs in the case were read, together with some discussions in literature and press articles about the cases to grasp the context. After sending an official request, the Archive of the IACtHR also sent over unpublished documents from the case files, which really added value to the research.²⁰ All documents were compiled

¹⁶ Louis Bickford, 'Unofficial Truth Projects' (2007) 29 Human Rights Quarterly 994, 1010, 1018.

¹⁷ Philip Leach, Kōstas Paraskeva and Gordana Uzelac, *International Human Rights & Fact-Finding: An Analysis of the Fact-Finding Missions Conducted by the European Commission and Court of Human Rights* (Human Rights & Social Justice 2009) 24; Philip Leach, Costas Paraskeva and Gordana Uzelac, 'Human Rights Fact-Finding. The European Court of Human Rights at a Crossroads' (2010) 28 Netherlands Quarterly of Human Rights 41.

¹⁸ Wim Hardyns, *Onderzoeksmethoden* (Institute for International Research on Criminal Policy 2019) 193.

¹⁹ The author wishes to thank Nina Kolowratnik and Genaro Andrés Manrique Giacomán for having aided her by providing this key information on *in situ* visits.

²⁰ Archivo Corte IDH, 'Solicitud De Expediente' (*Biblioteca Corte IDH*) <<https://biblioteca.corteidh.or.cr/solicitar-expediente>> accessed 16 April 2024.

into one numbered PDF.²¹ Throughout the case studies, notes were kept of the findings, and a list of 26 questions to answer per case was developed (See Annex II).

11. Finally, in April 2024, an interview was conducted with an official within the IACtHR.²² This open ended interview was conducted through Teams and recorded, with questions based on the findings from the case studies.²³ Informed consent about the purpose of the interview, the recording and the possibility to retract statements was given by the interviewee. Instead of making a transcription, the interviewee was contacted to confirm the information from the interview that would be included and was then also given the opportunity to nuance, amend or retract statements. The interview is anonymized in the thesis.²⁴ During the interview, it became clear that there had been an additional case with an *in situ* visit during the merits which was not included in the case studies. The decision was made not to incorporate this case, as there was not enough time to perform an additional, sufficiently-in depth case study.

12. As a short note on terminology, it must be clarified that this thesis will use the term *in situ* visit (and sometimes just visit or visits) when describing the practice of the Court, even though terms like “on-site visit”, “on-site procedure” or “diligence *in situ*” are also used in the judgements.

13. It is worth mentioning that this thesis was approached from the perspective of a European law student, researching the Inter-American Human Rights system. Besides the immense amount of translations from Spanish to English, it was also a process of understanding that procedural issues must not always be black and white. It was very valuable to be forced to reflect on questions of legal certainty versus the necessary flexibility needed in a human rights context, something that is certainly present in the context of the *in situ* visiting practice of the IACtHR.

²¹ This is pdf document is on file with the author. When referencing these documents, the following addendum will be added: “Archive case file p[first page number of referenced document in the pdf]”. It should be noted that for *Sarayaku* the full case file was received, but that for the other cases, the amount of received documents was much lower.

²² The author wishes to thank her supervisor professor Clara Burbano-Herrera for contacting this key elite stakeholder.

²³ Olga Petintseva, Rita Faria and Yarin Eski, *Interviewing Elites, Experts and the Powerful in Criminology* (Palgrave Pivot Cham 2019) 38.

²⁴ *ibid* 153–156.

2. Legal framework for *in situ* visits by the IACtHR

2.1. Previous practice and precedents

14. While a practice of visiting the site of the facts during contentious cases seems to be in need of a corresponding provision in the ACHR or the Rules of Procedure of the Court (RoP IACtHR), no explicit provision exists mentioning *in situ* visits by the Court.²⁵ The first official *in situ* visit of the Court, in *Kichwa Indigenous People of Sarayaku v. Ecuador* in 2012, did therefore not have an explicit legal basis, but was built on an amalgamation of the Court's practices.

15. In earlier cases, the Court used visits to determine what reparations were in order, such as sending the Deputy Secretary of the Court to verify the loss of earnings figures.²⁶ In the context of monitoring compliance with its judgments, the Court can organize hearings with IACHR members, victim(s) and State representatives, while sometimes also organizing seminars in the country.²⁷ There is a similar possibility for monitoring provisional measures.²⁸ The Court has also developed a practice of organizing *in situ* visits for these last two purposes.²⁹ These will however not be examined in depth in this master thesis.

16. In the context of the merits of contentious cases, the Court's judicial practice for *in situ* visits was gradually built up. In *Caballero Delgado and Santana*, in 1994, law school professor Bernardo Gaitán Mahecha (Javeriana University) was appointed to question a witness who, due to her health, was unable to travel to San José.³⁰ In *Loayza Tamayo*, in 1997, expert Dr. Eduardo Ferrero-Costa was appointed to interrogate witnesses imprisoned in different Peruvian jails.³¹ In *Bámaca Velásquez*, in 2000, a witness was unable to travel to San José because of legal reasons surrounding his migratory status.³² A public hearing was held in Washington D.C., with three members of the Court taking testimony.³³ In *Las Palmeras*, in 2001, the Court ordered the exhumation of an alleged deceased person by expert Mr. Daniel Michael O'Donnell, appointed as representative of the Court.³⁴

2.2. Eight instances of *in situ* visits in contentious cases

17. On the 21st of April 2012, "for the first time in the history of the Inter-American Court's judicial practice", the Court proceedings were conducted at the site of the events.³⁵ In *Kichwa Indigenous People of Sarayaku v. Ecuador*, the State had invited the Court to "make a field

²⁵ Torsten Stirner, *The Procedural Law Governing Facts and Evidence in International Human Rights Proceedings: Developing a Contextualized Approach to Address Recurring Problems in the Context of Facts and Evidence* (Brill Nijhoff 2021) 351.

²⁶ *Aloeboetoe et al v Suriname* (IACtHR) [87] 10 September 1993; Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2013) 232.

²⁷ Rules of Procedure of the Inter-American Court of Human Rights art 69(3); Pasqualucci (n 26) 304, 331.

²⁸ RoP IACtHR art 27(9).

²⁹ IACtHR, 'In Situ Visits' (*Inter-American Court of Human Rights*)

<https://www.corteidh.or.cr/visitas_in_loco.cfm?lang=en> accessed 10 April 2023. Annex I also lists these visits.

³⁰ *Caballero Delgado and Santana v Colombia* (Order of the President of the Court) (IACtHR) [2] 18 July 1994.

³¹ *Loayza Tamayo v Peru* (Merits) (IACtHR) [15] 17 September 1997.

³² *Bámaca Velásquez v Guatemala* (IACtHR) [30] 25 November 2000.

³³ *ibid* 44, 48.

³⁴ *Las Palmeras v Colombia* (IACtHR) [27] 6 December 2001.

³⁵ *Kichwa Indigenous People of Sarayaku v Ecuador* (IACtHR) [21] 27 June 2012.

visit” to the territory of the indigenous Sarayaku people, an invitation which was also supported by one of the victims.³⁶ The case dealt, among other matters, with the issue of free, prior and informed consent (FPIC) of indigenous peoples affected by extractive projects. The visit was approved through an Order of the President of the Court (the Order), which referred to the precedents of the Court itself, as discussed above.³⁷ The Order, authored by then-president of the Court Diego García-Sayán, also cited precedents of other international courts, namely, the visit of the International Court of Justice to the dam in the *Gabcikovo-Nagymaros Project* case and the practice of the ECtHR.³⁸

18. There have been eight *in situ* visits in contentious cases. This thesis will discuss *Sarayaku*, and six other of these cases. The second case was in 2014, in *Cruz Sanchez v. Peru*, about the Japanese embassy hostage crisis of 1997.³⁹ During this crisis, the personnel of the Japanese embassy in Lima was held hostage within the embassy premises by members of the Túpac Amaru Revolutionary Movement. The hostages were freed by a military intervention which was criticized for violating the human rights of the hostage-takers. The Peruvian government invited a delegation of the Court to a reconstruction of the events in Lima, which took place in a replica of the embassy building. In 2015, at the invite of the respective States, three visits to indigenous territories took place, in *Kaliña and Lokono Peoples v. Suriname*, *Garifuna Community of Triunfo de la Cruz and its members v. Honduras* and *Punta Piedra Garifuna Community and its members v. Honduras*. In these cases, with their own distinct contexts, but all related to territorial disputes, the then-president of the Court, Judge Humberto Sierra Porto, accompanied by some Court staff, traveled by plane, boat and on foot to visit the community villages, attend traditional ceremonies and talk to all relevant parties.⁴⁰ Then, in 2016, the Court decided of its own motion to organize an *in situ* visit in the *Hacienda Brasil Verde Workers v. Brazil* case which dealt with slavery-like working conditions on a Brazilian cattle ranch.⁴¹ The visit in this case took the form of hearing the testimonies of five victims and five state agents.⁴² In 2019, at the request of the petitioners, the Court sent a delegation of judges to visit indigenous territories and settler villagers in *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*.⁴³ This case was about territorial disputes, but also dealt with an (alleged) violation of Article 26 ACHR, i.e. the right to progressive development, which includes the right to take part in cultural life.⁴⁴

³⁶ *ibid* 18–19. This thesis will use the term ‘victims’ when talking about persons who were actually ‘alleged’ victims at that phase of the case, as they were pronounced victims when the final judgement found violations.

³⁷ *Kichwa Indigenous People of Sarayaku v Ecuador (Order of the president of the IACtHR)* (IACtHR) [12] 20 January 2012.

³⁸ *ibid* 13.

³⁹ *Cruz Sanchez e.a v Peru* (IACtHR) [9] 17 April 2015.

⁴⁰ *Punta Piedra Garifuna Community and its members v Honduras* (IACtHR) [19] 5 October 2015; *Garifuna Community of Triunfo de la Cruz and its members v Honduras* (IACtHR) [16] 8 October 2015; *Kaliña and Lokono Peoples v Suriname* (IACtHR) [14] 25 november 2015.

⁴¹ *Hacienda Brasil Verde Workers v Brazil* (IACtHR) [11] 20 October 2016.

⁴² *ibid*.

⁴³ *Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina* (IACtHR) [10] 24 November 2020.

⁴⁴ *ibid* 370; Article 26 ACHR is formulated as a duty for States to adopt measures to achieve progressively the full realization of rights implicit in the economic, social, educational and cultural standards recognized in the OAS Charter. Calling it a right to progressive development is evidently a simplification of the complex background of the justiciability of this provision. On this development, see for example: Paola Patarroyo, ‘Justiciability of “Implicit” Rights: Developments on the Right to a Healthy Environment at the Inter-American Court of Human Rights’ (*EJIL: Talk!*, 11 May 2020) <<https://www.ejiltalk.org/justiciability-of-implicit-rights-developments-on-the-right-to-a-healthy-environment-at-the-inter-american-court-of-human-rights/>> accessed 10 May 2024.

19. In 2023, the Court also conducted an *in situ* visit in the *Garifuna Community of San Juan v. Honduras*, a case about land titling in the same geographical region as *Garifuna Triunfo de la Cruz*.⁴⁵ Due to the recent character of this case, it was not included in the case studies. Additionally, a visit was requested in *Taegari and Taromenane Indigenous Peoples v. Ecuador*, but the interviewed Court official clarified that this visit is not to be expected.⁴⁶

2.3. Rules of Procedure of the Court

20. The presumed legal basis for ordering the visit can be found in the operative part of the *Sarayaku, Cruz Sanchez and Hacienda Brasil Verde Orders of the President*.⁴⁷ The President of the Court refers to articles in the Rules of Procedure of the Court that relate to the function and competence of the president, organizing hearings, cooperation of the State, protection of victims, witnesses and representatives, minutes of the hearings, the procedure for taking evidence, and the handling of costs and expenses.⁴⁸

21. Article 58(a) and (b) RoP IACtHR is explicitly used in the Order itself to justify the visit.⁴⁹ Article 58(a) has the broad provision that the Court can, on its own motion, obtain any evidence it considers helpful and necessary. Article 58(b) lets the Court request the parties to submit any evidence that may be useful in the Court's opinion. Also worth mentioning, is Article 58(d), which allows the Court to organize hearings at a different location than the seat of the Court, a provision it has used in earlier cases to send personnel or a delegation to States.⁵⁰ In conclusion, Article 58 can be seen as the current legal basis for *in situ* visits.⁵¹ The interviewed Court official considered Article 58 RoP IACtHR a sufficiently explicit basis for the Court to exercise its competence, and did not consider a new article in the Rules of Procedure to be necessary.⁵² Having more detailed provisions, like those of the Commission regarding *in loco* visits, could however be a possibility in the future.⁵³

The case studies confirm the use of Article 58 as the main legal basis, though in *Garifuna Punta Piedra, Kaliña and Lokono* and *Lhaka Honhat*, no legal basis can be found in the judgement or in public preparatory documents. Remarkably, the appointed subsections of Article 58 vary. As mentioned, in *Sarayaku*, subsections (a) and (b) are applied, while in *Cruz Sanchez*, subsections (a) and (d) are used.⁵⁴ *Garifuna Triunfo de la Cruz* then uses (a) and (b) again, while in *Hacienda Brazil Verde* (a) and (d) are once again used.⁵⁵ While the *in situ* visit in this last case took the form of a hearing, which certainly corresponds with the content of

⁴⁵ *Comunidad Garifuna de San Juan y sus miembros v Honduras* (IACtHR) 29 August 2023.

⁴⁶ *Pueblos Indígenas Tagaeri y Taromenane v Ecuador (Resolución del Presidente convocatoria a audiencia)* (IACtHR) [64] 19 July 2022; Interview with Staff member of IACtHR, 'Interview about in Situ Visiting Practice of IACtHR' (9 April 2024).

⁴⁷ *Sarayaku Order of the President* (n 37) 7; *Cruz Sanchez e.a v Peru (Order of the president)* (IACtHR) 10; *Hacienda Brasil Verde Workers v Brazil (Order of the President)* (IACtHR) 3.

⁴⁸ Respectively: arts. 4 and 31(2), art. 15(1), art. 26(1) and (2), art. 53, art. 55, art. 58 and art. 60 RoP IACtHR.

⁴⁹ *Sarayaku Order of the President* (n 37) para 15.

⁵⁰ Stirner (n 25) 351–352.

⁵¹ Nina Kolowratnik, "Seeing It with Your Own Eyes": The Value and Limits of the Inter-American Court's in-Situ Visits to Indigenous Communities' (*DISSECT Evidence in human rights adjudication*, 31 January 2023) <<https://dissect.ugent.be/seeing-it-with-your-own-eyes/>> accessed 4 March 2023.

⁵² Interview with Staff member of IACtHR (n 46).

⁵³ *ibid*; The provisions referred to are: Rules of Procedure of the Inter-American Commission on Human Rights arts 51–55.

⁵⁴ *Sarayaku Order of the President* (n 37) 6, para 15; *Cruz Sanchez* (n 39) para 9; *Cruz Sanchez Order of the President* (n 47) 6, para 8.

⁵⁵ *Garifuna Triunfo de la Cruz* (n 40) [15]; *Hacienda Brasil Verde Order of the President* (n 47) para 1 23 February 2016.

Article 58(d), it is unclear why this legal basis was used in Cruz Sanchez. Regardless of this relative inconsistency in indicating subsections of the article, it would be advisable for the Court to strive to always mention the legal basis for the *in situ* visit in its judgement, as this would provide a clear and coherent picture for the stakeholders.

22. Interestingly, Article 58 RoP IACtHR is often used by the Court to admit untimely evidence.⁵⁶ Normally, parties have to submit their evidence in the two month term provided in Article 40 RoP IACtHR, that starts when they learn of the Commission's submission of the case to the Court. If they miss this deadline, they need an authorized excuse to submit additional evidence, such as force majeure or the emergence of an event that occurred after the deadline.⁵⁷ Article 58 RoP IACtHR, however, bypasses this system, and gives the Court discretion to admit untimely evidence, without the need for an authorized excuse.⁵⁸ This exception is however stated to be curbed by two principles: the principle of legal certainty and the balanced procedural rights of the parties.⁵⁹ This type of flexibility regarding evidence is typical for the IACtHR, which does not wish to "*sacrifice truth and justice for the sake of mere formalities*".⁶⁰

This late admission of evidence can also be detected in the case studies. The *in situ* visits never happened within the two month period of Article 40 RoP IACtHR, even though they generated new evidence. In *Sarayaku*, the representatives were heavily against a visit, because this would unnecessarily prolong the proceedings and was seen as an excuse of the State to introduce time-barred evidence.⁶¹ The untimeliness of the evidence was however effectively surpassed by using Article 58 RoP IACtHR. In all the other cases, except for *Hacienda Brasil Verde*, the *in situ* visit was used by the parties to submit additional documentary evidence.⁶²

23. While Article 58 RoP IACtHR can be considered as the main legal basis of *in situ* visits, it is also important to discuss Article 26(2) RoP IACtHR, which was cited in *Sarayaku*.⁶³ This provision obliges States to cooperate in any proceeding conducted by the Court on its territory. This cooperation can involve making administrative and logistic preparations, guaranteeing access to locations, providing security, organizing facilities for holding preparatory meetings and providing means for making audio and video recordings of the *in situ* visit.⁶⁴

In the case studies, the States requested the *in situ* visits themselves in the first five cases, making the application of Article 26(2) RoP IACtHR redundant in these situations. In *Hacienda Brasil Verde* however, where the Court ordered an *in situ* visit of its own motion for the first time, this provision was applied to ask the State to carry out the preparations and provide security, translation and means for recording.⁶⁵ In *Lhaka Honhat*, where the petitioners requested the *in situ* visit themselves, no documents can be found that distribute the

⁵⁶ Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects* (3. ed., Inter-American Institute of Human Rights, 2008) 675.

⁵⁷ RoP IACtHR art 57(2); Pasqualucci (n 26) 152.

⁵⁸ Pasqualucci (n 26) 153.

⁵⁹ *Loayza Tamayo v Peru (Reparations and Costs)* (IACtHR) [38]; Pasqualucci (n 26) 154.

⁶⁰ *Cayara v Peru (Preliminary objections)* (IACtHR) [42] 3 February 1993; Álvaro Paúl, 'An Overview of the Inter-American Court's Evaluation of Evidence' in Yves Haeck, Oswaldo Ruiz Chiriboga and Clara Burbano-Herrera (eds), *The Inter-American Court of Human Rights: theory and practice, present and future* (Intersentia 2015) 28.

⁶¹ CEJIL, 'Communication of the representatives' (18 October 2011) 4 (Archive case file p167).

⁶² *Cruz Sanchez* (n 39) para 9; *Garifuna Triunfo de la Cruz* (n 40) para 28; *Garifuna Punta Piedra* (n 40) paras 71, 75; *Kaliña and Lokono* (n 40) paras 16, 20; *Lhaka Honhat* (n 43) para 37.

⁶³ *Sarayaku Order of the President* (n 37) 7; *Sarayaku* (n 35) para 19.

⁶⁴ *Sarayaku Order of the President* (n 37) para 18.

⁶⁵ *Hacienda Brasil Verde Order of the President* (n 47) para 9.

responsibilities of the parties in this way. However, the judgement of the case refers to both the petitioners and the State having made the recordings of the *in situ* visit, indicating that States evidently still have obligations even when the petitioners request an *in situ* visit.⁶⁶

24. Another relevant set of rules are those regarding hearings. In the *Sarayaku* Order of the President and in a Communication of the Secretariat of the Court regarding the *Garifuna* cases, it was stated that the relevant Rules of Procedure related to hearings would apply during the *in situ* visits to these two communities.⁶⁷ It is difficult to know which rules this concerns, and to what extent they can be followed during the visits. For example, the rule in Article 51(5) RoP IACtHR, which requires witnesses to take an oath to speak the truth and nothing but the truth, was honored in *Hacienda Brasil Verde*, the only case with an available recording of an *in situ* visit.⁶⁸ One may wonder about the feasibility for example, of the rule contained in Article 51(6) RoP IACtHR, which stipulates that victims may not be present at the hearing of another witness before they have given their own testimony. On the other hand, rules regarding the role of the Court's president during hearings or the protection of (expert) witnesses and alleged victims who testify, are evidently relevant for *in situ* visits.⁶⁹

The interviewed Court official indicated there were indeed practical difficulties to following these rules during the visits to indigenous communities.⁷⁰ During the visit, the delegation will sometimes spontaneously ask questions to people in the street, making it difficult for both parties to also have an opportunity to interrogate this witness or these witnesses.⁷¹ The hearings organized in indigenous villages also do not have the same formality as the usual hearing organized by the Court, ranging from resembling a hearing to being very chaotic, with everyone talking at the same time.⁷²

2.4. Procedural principles of procedural equality and immediacy

25. When discussing the legal framework of visits, it is also important to pay attention to some procedural principles. As an international court, the IACtHR has a normative autonomy to develop its own rules of evidence.⁷³ However, because of demands of due process and consistency, the Court has to adhere to some procedural principles.⁷⁴ Two principles come back throughout the case studies, namely the principle of procedural equality and the principle of immediacy.

26. The principle of procedural equality between the parties in cases before the Court, sometimes referred to as procedural balance, is well established in the Court's jurisprudence regarding evidence.⁷⁵ At the same time, the principle has to be balanced with the protection of human rights itself, according to the Court.⁷⁶ The *in situ* visits of the Court almost by definition

⁶⁶ *Lhaka Honhat* (n 43) paras 39–40.

⁶⁷ *Sarayaku Order of the President* (n 37) para 20; Secretariat of the Court, 'Communication regarding Garifuna cases' (30 June 2015) 2 (Archive case file p379).

⁶⁸ *Diligencia in Situ. Caso Trabajadores de La Hacienda Brasil Verde Vs. Brasil. Parte 3* (2016) loc 00:05:38 <<https://vimeo.com/showcase/3986799/video/169934142>> accessed 5 March 2024.

⁶⁹ RoP IACtHR art 52(2) and (4), 53.

⁷⁰ Interview with Staff member of IACtHR (n 46).

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ Paúl (n 60) 27; Pasqualucci (n 26) 150–151.

⁷⁴ Paúl (n 60) 27.

⁷⁵ *Almonacid-Arellano et al v Chile* (IACtHR) [67] 26 September 2006; *Ximenes-Lopes v Brazil* (IACtHR) [42] 4 July 2006; *Furlan and family v Argentina* (IACtHR) [45] 31 August 2012.

⁷⁶ *Baena-Ricardo et al v Panama* (IACtHR) [50] 2 February 2001.

constitute a late submission of evidence (*supra* 22), which leads to some tension with procedural equality.

This tension was also observed in the case studies. In *Sarayaku* the representatives of the victims asked the Court to reduce the number of State representatives that would be present during the *in situ* visit, invoking procedural equality.⁷⁷ The State had proposed 17 delegates originally, which seems to have been reduced to four delegates in the actual visit.⁷⁸ In later cases, the number of delegates varies, as can be seen in Figure 1, though the sources are not always consistent in exhaustively naming who was present. In *Garifuna Triunfo* and *Lhaka Honhat*, significant imbalances can be seen in both directions, but in the case files no complaints can be found about procedural equality. In *Garifuna Triunfo* (and possibly *Garifuna Punta Piedra*) much more people were present as part of the representatives' delegation than on behalf of the State, while in *Lhaka Honhat* the opposite was the case (see Figure 1).

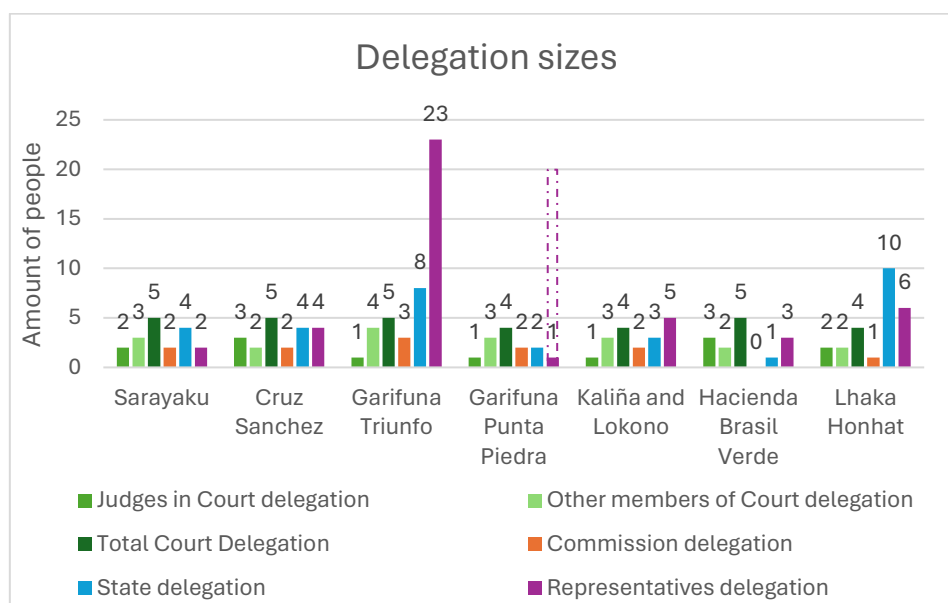


Figure 1: Delegation sizes⁷⁹

In Cruz Sanchez, the principle of procedural balance was also invoked to make Peru pay for the transport costs of the representatives from the Center for Justice and International Law (CEJIL) to Lima, in accordance with Article 60 RoP IACtHR.⁸⁰ The procedural balance would, according to the Court have been unnecessarily limited if the only representatives present were from APRODEH, la Asociación Pro Derechos Humanos – situated in the Peruvian capital

⁷⁷ CEJIL, 'Reply of the Representatives' (28 March 2012) 1 (Archive case file p284).

⁷⁸ Ministry of foreign affairs, commerce and integration of Ecuador, 'Information on the Technical Visit Related to the Sarayaku Case' (12 March 2012) 1–2 (Archive case file p266).

⁷⁹ This information was sourced from the footnotes of the judgements, and in the case of *Hacienda Brasil Verde* supplemented the recording of the *in situ* visit. The judgements however were not always exhaustive: in *Garifuna Punta Piedra*, the footnote says that "Miriam Miranda and other community leaders were present", meaning the amount of people may have been similar to *Garifuna Triunfo de la Cruz*. Including community leaders in the amount of people present is however not done in the other cases, so the high amount of people present must be looked at critically.

⁸⁰ 'Resolution of the IACtHR' (28 November 2013) para 4 (Archive case file p377); CEJIL is one of the most active NGO's in the Inter-American System, having acted as a representative of the victims in at least 40% of the cases. See more on its role in: Clara Burbano-Herrera and Yves Haeck, 'The Historical and Present-Day Role of Non-Governmental Organisations before the Inter-American Human Rights System in Documenting Serious Human Rights Violations and Protecting Human Rights and the Rule of Law Through Ensuring Accountability' (2021) 17 Utrecht Law Review 8, 18.

Lima.⁸¹ However, in the *Garifuna* cases, the Secretariat of the Court communicated that the representatives could be present during the *in situ* visit to maintain procedural balance, but that they should cover their own costs.⁸²

An important factor in guaranteeing the procedural balance, may be the possibility for the parties to submit comments on the *in situ* visit before the Court issues its final judgement. While there was no mention of this in the *Sarayaku* and *Garifuna Triunfo* cases, in *Cruz Sanchez*, *Hacienda Brasil Verde* and *Lhaka Honhat*, the final written arguments and observations were (re)scheduled after the visit, allowing all parties to comment on the visit in the process.⁸³ In *Garifuna Punta Piedra* and *Kaliña and Lokono*, the parties submitted observations on the visit specifically.⁸⁴ This practice is to be applauded, as it may also allow some comparison between the emphasis the parties put on the *in situ* visits and the final judgement of the Court. From the interview it also became clear that these comments are especially important for guaranteeing the *audi alteram partem* principle, due to the difficulties of honoring this during *in situ* visits (*supra* 26).⁸⁵

27. A second relevant procedural principle is that of immediacy. The principle of immediacy originates from domestic civil criminal law, and stipulates that proof must be received by all procedural subjects in the most direct way, without alteration.⁸⁶ It was considered by judge Humberto Sierra Porto in his concurring opinion in *Garifuna Triunfo*, where he argued that this principle should not be reduced to public hearings, but also applies to conducting *in situ* visits in complex cases.⁸⁷ A division can be made between the formal and material immediacy.⁸⁸ The formal principle of immediacy stipulates that the judges issuing the judgement must have been part of the entirety of the proceedings.⁸⁹ The material principle of immediacy, on the other hand, focusses on the evidence itself, which must be presented in the form closest to its original form as possible.⁹⁰ This is linked to the possible distortion that a reproduction of the evidence brings.⁹¹ For example, an oral testimony would be preferred over the transcript of one. Having an oral stage in proceedings, is therefore closely linked to the principle of immediacy.⁹²

The IACtHR may not be a criminal court, but the typical oral phase in its cases reflects the principle of immediacy, as does Article 21 (3) RoP IACtHR, which makes the disqualification

⁸¹ (n 80) para 5; APRODEH is a Peruvian NGO, founded in 1983 as a response to the violent years between 1980 and 2000. More on this: 'APRODEH - Asociación Pro Derechos Humanos' <<https://www.aprodeh.org.pe/>> accessed 12 December 2023.

⁸² Secretariat of the Court, 'Communication regarding Garifuna cases' (n 67) 2 (Archive case file p380).

⁸³ *Cruz Sanchez* (n 39) para 13; *Hacienda Brasil Verde* (n 41) para 12; *Lhaka Honhat* (n 43) para 11 (footnote 15).

⁸⁴ *Garifuna Punta Piedra* (n 40) para 19; *Kaliña and Lokono* (n 40) para 15.

⁸⁵ Interview with Staff member of IACtHR (n 46).

⁸⁶ Víctor Manuel Rodríguez Rescia, 'El Debido Proceso Legal y La Convención Americana Sobre Derechos Humanos', *Liber Amicorum: Héctor Fix-Zamudio* (IACtHR 1998) 1320 <<https://www.corteidh.or.cr/tablas/a17762.pdf>>..

⁸⁷ *Garifuna Triunfo de la Cruz* (n 40) para 11 (Concurring opinion of judge Humberto Sierra Porto) .

⁸⁸ Marc S Groenhuijsen and Hatice Selçuk, 'The Principle of Immediacy in Dutch Criminal Procedure in the Perspective of European Human Rights Law' (2014) 126 *Zeitschrift für die gesamte Strafrechtswissenschaft* 248, 249–250.

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ *ibid* 250.

⁹² *Palamara Iribarne v Chile* (IACtHR) [167] 22 November 2005; Rodríguez Rescia (n 86) 1320.

of a judge possible if that judge was not present at one of the hearings in that case.⁹³ The application of – the formal dimension of – this principle was however pushed to its limits in *San Miguel Sosa e.a v. Venezuela*.⁹⁴ The representatives demanded in their final brief that Judge Roberto Caldas should not deliberate on the case, as he had been absent during the hearing of the case.⁹⁵ The Court clarified its obligations regarding immediacy, stating there existed no rule requiring evidentiary immediacy for all its members during the entirety of the proceedings.⁹⁶ *In situ* visits, where the delegation is often composed of only one or three of the judges and Secretariat personnel, were given as an example to strengthen this point.⁹⁷ If the principle of immediacy would be applied in the strict sense, as these representatives demanded, all seven judges would have to join the delegation during *in situ* visits, and would have to be present during every conversation with bystanders during a walk in an indigenous village.

This formal dimension of immediacy is however not the immediacy judge Humberto Sierra Porto was talking about in *Garifuna Triunfo de la Cruz*. The material principle of immediacy values the convenience of receiving evidence directly from the source, “*first-hand knowledge*”.⁹⁸ This was also the way the principle was emphasized by the State in *Cruz Sanchez*, and by the Court in *Lhaka Honhat*.⁹⁹ Whether this means the material principle of immediacy can be used by parties to demand an *in situ* visit, is another question.

⁹³ Alirio Abreu Burelli, ‘La prueba en los procesos ante la Corte Interamericana de Derechos Humanos’, *El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI* (Universidad Nacional Autónoma de México Instituto de Investigaciones Jurídicas 2003) 120 <<http://ru.juridicas.unam.mx:80/xmlui/handle/123456789/28023>> accessed 14 April 2024.

⁹⁴ *San Miguel Sosa e.a v Venezuela* (IACtHR) 8 February 2018. This case was about three civil servants who were fired for signing a petition in 2003 which recalled Hugo Chavez as president.

⁹⁵ *San Miguel Sosa e.a v Venezuela (Order of the Court)* (IACtHR) 3, para 7 18 May 2017.

⁹⁶ *San Miguel Sosa Order of the Court* (n 95).

⁹⁷ *ibid* 3, para 8.

⁹⁸ *Garifuna Triunfo de la Cruz* (n 40) para 11 (Concurring opinion of judge Humberto Sierra Porto).

⁹⁹ Ministry of Justice and Human Rights of Peru, ‘Final Written Arguments and Observations of the State’ (4 March 2014) 32; *Lhaka Honhat* (n 43) paras 10, 40.

3. *In situ* visiting practice of the IACtHR

3.1. The decision to undertake an *in situ* visit

28. In the *in situ* visits the Court has organized, an interesting question is *why* these visits took place. A preliminary answer presents itself in the Rules of Procedure, where the fact-finding capacities of the Court are linked to a requirement of necessity.¹⁰⁰ Most cases are judged on the basis of documentary evidence and, possibly, testimonies from hearings held by the Commission in Washington, DC or the public hearing held by the Court in San José or abroad.¹⁰¹ According to Pasqualucci, fact-finding missions will therefore solely be organized when the facts can only be uncovered by visiting a State in person.¹⁰² This still leaves a considerable gap of appreciation. Other purposes than a strictly legal evidence-gathering purpose can be observed, and there are several circumstantial factors in play that might generate a favorable environment for the organization of an *in situ* visit.

3.1.1. Purpose of visits

3.1.1.1. *Obtaining additional evidence*

29. In the case studies, the purpose of the *in situ* visit seems to vary. When looking at the Orders of the President organizing a visit or the judgements in the cases, different purposes are highlighted. In *Sarayaku*, the visit was aimed at obtaining additional information about the situation of the presumed victims and the location of the event.¹⁰³ In *Cruz Sanchez*, the Court highlighted the controversy surrounding the facts which necessitated a better understanding of physical space to verify the way the facts could have taken place.¹⁰⁴ In *Hacienda Brasil Verde*, the President of the Court also referenced the controversial nature of the facts as a reason for needing further clarification.¹⁰⁵ In *Garifuna Triunfo*, *Garifuna Punta Piedra* and *Kaliña and Lokono*, the purpose was described as verifying the location and nature of the areas in the dispute and meeting all involved parties.¹⁰⁶ The *Lhaka Honhat* judgement itself does not explicitly reference a purpose, but the Court's Annual Report of 2019 states that the purpose of the visit was also observing the territory and learning about the territorial problems through direct contact with all parties.¹⁰⁷ The connection with gathering additional evidence always seems to be present, but perhaps other reasons also drive the organization of *in situ* visits.

3.1.1.2. *Hearing third parties and impact assessment for land decisions*

30. Most of the cases dealt with indigenous land conflicts. In these kinds of cases, the Court's decisions affect a whole territory and many people, not just the petitioners. Performing an *in situ* visit can add another dimension to the collection of evidence. By visiting the disputed territory, the Court can really see what the impact of its decision could be. A major aspect of this is hearing third parties. During the interview, this was described as the Court recognizing its responsibility in relation to the decision it has to make.¹⁰⁸ Granting land rights to an indigenous community can after all result in evictions, displacements and expropriation of other

¹⁰⁰ RoP IACtHR art 58(a).

¹⁰¹ Pasqualucci (n 26) 101, 104, 159.

¹⁰² *ibid* 104.

¹⁰³ *Sarayaku Order of the President* (n 37) para 15.

¹⁰⁴ *Cruz Sanchez Order of the President* (n 47) para 12.

¹⁰⁵ *Hacienda Brasil Verde Order of the President* (n 47) para 6.

¹⁰⁶ *Garifuna Triunfo de la Cruz* (n 40) paras 15–16; *Garifuna Punta Piedra* (n 40) para 19; *Kaliña and Lokono* (n 40) para 14.

¹⁰⁷ IACtHR, 'Annual Report 2019' (IACtHR 2019) 29

<https://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2019.pdf>.

¹⁰⁸ Interview with Staff member of IACtHR (n 46).

population groups.¹⁰⁹ This is why the delegation often also talks to third parties during *in situ* visits, i.e. rights holders who are usually not visible to human rights bodies. While the IACtHR does not have a possibility to pronounce itself on the rights of these third parties, it uses *in situ* visits to hear them so it can take their situation into account when deciding. This was also signaled by judge Humberto Sierra Porto, in his concurring opinion to the *Garifuna Triunfo* judgement. He considered that “*Visits in situ by the Court that allow it to get to know, analyze, and broaden its understanding of the situations of third parties residing in the lands claimed by the Community, may be helpful in this sense. This is necessary to try to avoid, within the Court’s duties or procedural competences, that the decision offered by its result [is] ineffective or unfair regarding those third parties that are not part of the litigation before the Court*”.¹¹⁰

In *Sarayaku*, hearing third parties was not a significant part of the visit, as only some non-Sarayaku people and Sarayaku people with differing opinions from the majority were heard.¹¹¹ However, in *Garifuna Triunfo*, the Court delegation talked to representatives of the local workers’ union, who had received blocks of land in the indigenous territory from the government, and to representatives of the companies who had bought plots of this land from the government.¹¹² The reparations ordered these actors to be expropriated – with compensation.¹¹³ In *Garifuna Punta Piedra*, the delegation listened to the opinion of some inhabitants of the Rio Miel settler community.¹¹⁴ Contrary to what the petitioners had stated, the Rio Miel inhabitants claimed during the *in situ* visit that there was no conflict with the Punta Piedra community.¹¹⁵ The State was ordered to relocate these settlers, expropriate them if necessary and to draw up rules for peaceful coexistence between the communities in the meantime.¹¹⁶ These two cases led to negative outcomes for these third party groups, but the Court had been able to take their perspective into account to take a more responsible and substantiated decision.

In *Kaliña and Lokono*, the settlements of Maroon communities in the territory were also visited by the delegation and the opinions of their representatives were heard.¹¹⁷ Some of these tribal communities had traditional claims to lands in this area similar to those of the indigenous peoples and their legal status in Suriname was similar to that of the vulnerable indigenous groups.¹¹⁸ In *Lhaka Honhat*, the delegation talked to the criollo families who explained their situation. The *in situ* visit made clear that these peasant farmers, who erected fencing and kept livestock on indigenous territories, were also a vulnerable group in Argentina.¹¹⁹ These two cases show that *in situ* visits provide the opportunity to include vulnerable groups in the proceedings, while these same groups would perhaps not realistically have been able to submit a third party intervention. In *Lhaka Honhat*, this even led judge Humberto Sierra Porto – who was part of the delegation – to argue for rethinking the proceedings in these cases, where there are multiple parties with conflicting interests.¹²⁰

¹⁰⁹ *ibid.*

¹¹⁰ *Garifuna Triunfo de la Cruz* (n 40) para 17 (Concurring opinion).

¹¹¹ Interview with Staff member of IACtHR (n 46).

¹¹² Secretariat of the Court, ‘Communication regarding Garifuna cases’ (n 67) 1 (Archive case file p379).

¹¹³ *Garifuna Triunfo de la Cruz* (n 40) para 261.

¹¹⁴ *Garifuna Punta Piedra* (n 40) para 19.

¹¹⁵ *ibid* 130–131.

¹¹⁶ *ibid* 324, 326.

¹¹⁷ *Kaliña and Lokono* (n 40) para 14.

¹¹⁸ *ibid* 40, 50–57.

¹¹⁹ *Lhaka Honhat* (n 43) para 13 (Partially dissenting opinion of judge Humberto Sierra Porto).

¹²⁰ *ibid* 14.

3.1.1.3. A promotional purpose?

31. There may also be a promotional purpose to *in situ* visits, as part of the Court's general policy on publicity. Pablo Saavedra Alessandri, the Executive Secretary of the IACtHR, has described the need for a more promotional, communicative role of the Court.¹²¹ He developed the idea of “*una corte de toga y mochila*” (a Court with robes and a backpack).¹²² In 2004, when Saavedra became Secretary, he felt the Court needed to become more well known and increase its contact with civil society and academia.¹²³ This is exactly what it did, through ‘putting on its backpack’ and visiting the States Parties, organizing open public hearings and increasing its interaction with universities and civil society.¹²⁴ This increased both the Court's visibility and, hopefully, its legitimacy.¹²⁵ This publicity objective was initially met with criticism, as some judges feared this would look like tourism and that they would become a media court.¹²⁶ However, since 2005, organizing extraordinary sessions away from the seat of the Court became a common practice.¹²⁷ As the IACtHR is not a permanent court, it works in sessions, with ordinary sessions being those that are scheduled regularly each year, and extraordinary (or special) sessions being those that can be organized in addition.¹²⁸ While the main purpose of these extraordinary sessions remains the exercise of the Court's judicial function, the promotional aspect – academic and outreach activities – is complementary.¹²⁹

32. *In situ* visits could fit into this strategy. By travelling to the site of the alleged violations, the Court not only has the opportunity to gather evidence, it can also become more visible to the people and civil society in the countries it visits, and promote its work. The *Sarayaku* case, for example, drew a lot of journalists towards the indigenous community.¹³⁰ The interviewed Court official, however, did not see increasing visibility as a direct purpose of *in situ* visits, but more as a potential side benefit, though some cases may have a political dimension that makes them more visible (*infra* 37).¹³¹ The existence of a promotional purpose can also be questioned in the light of the Court's limited communication practice about *in situ* visits (*infra* 52).

3.1.2. Factors influencing the decision to organize a visit

33. The existing literature on fact-finding visits by other human rights monitoring bodies such as the ECtHR and the Commission, suggests several factors that influence the organization of visits. Leach found that the ECtHR's fact-finding practice was influenced by case-related factors such as the gravity of the violations, the prospects of success – both in finding a

¹²¹ Silvia Steininger, ‘Creating Loyalty: Communication Practices in the European and Inter-American Human Rights Regimes’ (2022) 11 Global Constitutionalism 161, 176–177.

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ *ibid.* 177.

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ Mariana Clemente, ‘Título I. De la organización y del funcionamiento de la Corte’ in Marie-Christine Fuchs, Hartmut Rank and Miguel Barboza López (eds), *Comentario al procedimiento ante el sistema interamericano de derechos humanos* (Konrad Adenauer Stiftung 2023) 506.

¹²⁸ *ibid.* 505.

¹²⁹ Gabriela Pacheco Arias and Pablo Saavedra Alessandri, ‘Las sesiones “itinerantes” de la Corte Interamericana de Derechos Humanos: un largo y fecundo caminar por América’ in Sergio García Ramírez and Mireya Hernández Castañeda (eds), *Varios, Recepción nacional del Derecho Internacional de los Derechos Humanos y admisión de la competencia contenciosa de la Corte Interamericana* (IIJ-UNAM/SRE/CorteIDH 2009)

<<http://ru.juridicas.unam.mx:80/xmlui/handle/123456789/30508>> accessed 17 March 2024.

¹³⁰ ‘Jungle Justice: Ecuador Recognizes Rights Violations in Sarayaku Case | Amazon Watch’ (16 May 2012) <<https://amazonwatch.org/news/2012/0515-jungle-justice-ecuador-recognizes-rights-violations-in-sarayaku-case>> accessed 8 April 2024.

¹³¹ Interview with Staff member of IACtHR (n 46).

violation and in actually conducting the mission – and the passage of time between the violations and the possible visit.¹³² Non-case related factors are the time and cost, a culture that is not fact-finding friendly and pedagogical factors.¹³³ Norris, in 1980, found that within the Inter-American System for non-contentious visits, the Commission considered the number, seriousness, imminent character and public knowledge of the violations.¹³⁴ The IACtHR also considered the governments' histories of cooperation, actions undertaken by the government, changes of government, and the state of (imminent) civil war.¹³⁵ Timeliness, feasibility and institutional considerations such as funding also played a role.¹³⁶

3.1.2.1. *Facts of the case*

34. It cannot be ignored that five out of the seven *in situ* visits have happened in cases regarding indigenous territorial disputes. The fact that these cases often include complex land disputes also lends itself to a visit to clear things up. In *Sarayaku* specifically, the case centered around the lack of FPIC, as the Kichwa people had not been properly consulted with regard to the oil extraction projects in the Sarayaku region.¹³⁷ It could be said that the Court, by actually visiting the community and listening to everyone, sent a strong message about indigenous peoples' right to be heard in this context. The same can be said for *Garifuna Triunfo de La Cruz*, *Kaliña and Lokono* and *Lhaka Honhat*, which also dealt with a lack of FPIC, amongst other problems.¹³⁸ The indigenous cases also often included allegations of certain restrictions to the indigenous territories or encumbrances on the land, like tourism projects, settler occupations, nature reserves and livestock fencing.¹³⁹ The *in situ* visits provided the delegation of the Court with an opportunity to verify these claims. Additionally, visiting communities as a whole can be linked to the typical collective character of indigenous rights involved.¹⁴⁰ Contrary to hearings where only a select few members of the community are heard, *in situ* visits allow for the participation of the entire community.¹⁴¹

35. There are however two cases that did not include indigenous peoples. Both *Cruz Sanchez* and *Hacienda Brasil Verde* may function as outliers in the *in situ* visiting practice of the Court, but together, they can be put in the category of having highly sensitive factual backgrounds. *Cruz Sanchez* dealt with the Japanese Embassy crisis, where the embassy personnel in Lima was held hostage within the embassy premises by members of the Túpac Amaru Revolutionary Movement. They were then freed following a military operation, and the whole situation received major international attention. The Court had to pronounce itself on Peru's responsibility for alleged executions of some of the hostage-takers *hors de combat*. The members of the military operation had however been considered for amnesties, and some had led the annual military parade of Peru, (probably) making it a sensitive matter to find violations

¹³² Leach, Paraskeva and Uzelac (n 17) 49–51.

¹³³ *ibid* 51–52.

¹³⁴ Robert E Norris, 'Observations in Loco: Practice and Procedure of the Inter-American Commission on Human Rights' (1980) 15 Texas International Law Journal 46, 79.

¹³⁵ *ibid*.

¹³⁶ *ibid*.

¹³⁷ *Sarayaku* (n 35) para 2.

¹³⁸ *Garifuna Triunfo de la Cruz* (n 40) para 1; *Kaliña and Lokono* (n 40) para 1; *Lhaka Honhat* (n 43) para 1.

¹³⁹ Respectively: *Garifuna Triunfo de la Cruz* (n 40) para 27; *Garifuna Punta Piedra* (n 40) para 102; *Kaliña and Lokono* (n 40) para 183; *Lhaka Honhat* (n 43) para 268.

¹⁴⁰ Salvador Herencia Carrasco, 'Public Interest Litigation in The Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap Between Legal Victories and Social Change' [2020] *Revue Québécoise de Droit International* 199, 217.

¹⁴¹ *ibid* 214.

of international law in Peru's conduct.¹⁴² This sensitivity could have had an influence on the decision to accept Peru's invitation to attend a reconstruction of the facts in Lima, despite the arguments of the representatives regarding the unnecessary character of such reconstruction.¹⁴³ In *Hacienda Brasil Verde*, the Court was heading towards its first ground-breaking judgement on Article 6 ACHR, the prohibition of slavery, slavery-like situations and human trafficking. The sensitivity of this case may have influenced the decision to organize an additional hearing, in the form of an *in situ* visit.¹⁴⁴

3.1.2.2. State consent and political circumstances

36. A lot has been written on the consent of the State in the context of visits by the IACtHR.¹⁴⁵ In research with regard to the ECtHR it was concluded that, despite there not being a formal requirement of consent, a lack of cooperation of States would make visits practically impossible.¹⁴⁶ The same can be said for the IACtHR. In theory, Article 26(2) RoP IACtHR requires States to cooperate in any proceeding that the Court decides to conduct on their territory, but trying to enforce this provision against the will of the States would be without results. Indeed, the consent of the State was deemed to be a *conditio sine qua non* in the interview.¹⁴⁷ In the case studies too, no visit seems to have taken place without the consent or an invitation of the respondent State.¹⁴⁸ The only cases that are unclear on this are *Kaliña and Lokono* and *Hacienda Brasil Verde*, though no documents suggest the visit was against the will of the State.

Requiring consent, however, does not mean the State can dictate how the proceedings have to go. The role of the Ecuadorian government is especially interesting in the *Sarayaku* case, which resulted in the first official *in situ* visit. Ecuador asked for a visit during the hearing and in its final briefs, and the president of Ecuador at the time, Rafael Correa, sent a personal letter to ratify and formalize this invitation.¹⁴⁹ The representatives, however, did not welcome this invitation, as it would unnecessarily prolong the proceedings and introduce extratemporal evidence (*infra* 38).¹⁵⁰ Nevertheless, in the months leading up to the Order of the IACtHR's President, the Secretariat of the Court asked the State to quickly provide all the necessary information for the organization of a visit, like when it would best be organized, how the delegation and parties would travel, a suggested itinerary, the security and which vaccines were necessary.¹⁵¹ The State complied relatively swiftly, though throughout this process, it

¹⁴² *Human Rights Watch World Report 2003: Events of 2002 (November 2001-November 2002)* (Human Rights Watch 2003) 160.

¹⁴³ *Cruz Sanchez Order of the President* (n 47) para 5.

¹⁴⁴ Ma Auxiliadora Solano Monge, 'Diligencias "In Situ"' in César I Astudillo Reyes and Sergio García Ramírez (eds), *Corte Interamericana de Derechos Humanos: organización, funcionamiento y trascendencia* (Tirant lo Blanch 2021) 468.

¹⁴⁵ Faúndez Ledesma (n 56) 38–39, 397; Edmundo Vargas, 'Las Observaciones in Loco Practicadas Por La Comisión Interamericana de Derechos Humanos' in OAS (ed), *Derechos humanos en las Américas: homenaje a la memoria de Carlos A. Dunshee de Abranches* (Organización de los Estados Americanos 1984) 292–293 <<http://archive.org/details/derechoshumanose0000unse>> accessed 5 April 2023.

¹⁴⁶ Leach, Paraskeva and Uzelac (n 17) 76.

¹⁴⁷ Interview with Staff member of IACtHR (n 46).

¹⁴⁸ *Sarayaku* (n 35) para 18; *Cruz Sanchez* (n 39) paras 6, 9; *Garifuna Triunfo de la Cruz* (n 40) para 15; *Garifuna Punta Piedra* (n 40) para 19; *Lhaka Honhat* (n 43) para 10.

¹⁴⁹ *Sarayaku* (n 35) para 18; Ministry of foreign affairs, commerce and integration of Ecuador, 'Final Brief of the State' (5 August 2011) 2, 55; Rafael Correa, 'Letter of the Constitutional President of the Republic of Ecuador' (20 September 2011) (Archive case file p146).

¹⁵⁰ CEJIL, 'Communication of the representatives' (n 61) (Archive case file p164); CEJIL, 'Observations of the representatives' (27 October 2011) (Archive case file p187).

¹⁵¹ Secretariat of the Court, 'Note to the State' (28 November 2011) (Archive case file p204).

pointedly used the term “*mission técnica*” to describe the visit.¹⁵² This can be linked to the fact that the State viewed the visit as a technical occurrence, where the State would bring along technical experts and the Court would give guidance on how to correctly comply with the provisional measures that had been ordered earlier in the case.¹⁵³ When the Secretariat informed the State that this would not be the case, around ten days before the visit, Ecuador sent a letter questioning the Secretariat’s authority to decide on this matter.¹⁵⁴ This letter was only received during the visit, so it did not change anything, but it can certainly be said that, despite the State’s enthusiastic consent in organizing the visit, it did not go fully according to their plan.

37. It is very likely that the consent of the State will be influenced by the political circumstances in the country. This research does not purport to uncover what exactly led States to allow *in situ* visits in the concrete cases, but highlighting the political events lends context to some of the cases. For example, the notable personal letter of president Correa in *Sarayaku* must be framed within the extractive policies of his government. Though the president enjoyed support from indigenous communities in Ecuador at his election in 2007, this support had decreased partly due to disputes about FPIC and mining projects.¹⁵⁵ In March 2012 – a month before the visit of the Court – indigenous peoples marched to Quito to protest mining concessions granted by the Correa government.¹⁵⁶ In *Cruz Sanchez*, the sensitive nature of the facts (*supra* 35) certainly could have had some political implications.¹⁵⁷ For Honduras, in both *Garifuna* cases, the controversial authorization of the creation of ‘Zones of Economic Development and Employment’ (ZEDE’s) in Indigenous lands in 2013 must be mentioned.¹⁵⁸ These autonomous economic enclaves, open for large-scale mining, energy and tourism projects, were meant to attract foreign investors.¹⁵⁹ This created a critical threat to indigenous peoples in Honduras.¹⁶⁰ The slavery-like conditions in *Hacienda Brasil Verde* were not only highly sensitive, they were also very political. Then president Dilma Rousseff had shown goodwill to remedy Brazil’s legacy of slavery, but was impeached during the proceedings of the case, for reasons unrelated to

¹⁵² Ministry of foreign affairs, commerce and integration of Ecuador, ‘Communication of the State’ (30 November 2011) (Archive case file p208); Ministry of foreign affairs, commerce and integration of Ecuador, ‘Communication of the State on the Official Visit to Ecuador’ (1 December 2011) (Archive case file p213).

¹⁵³ Ministry of foreign affairs, commerce and integration of Ecuador, ‘State Observations to the Annexes’ (1 September 2011) 2 (Archive case file p66); Ministry of foreign affairs, commerce and integration of Ecuador, ‘Observations of the State’ (27 October 2011) (Archive case file p191).

¹⁵⁴ Secretariat of the Court, ‘Note on the Visit to the Sarayaku Territory’ (12 April 2012) 2 (Archive case file p305); Ministry of foreign affairs, commerce and integration of Ecuador, ‘Official Letter on the in Situ Visit to Sarayaku’ (19 April 2012) (Archive case file p337).

¹⁵⁵ Daniel Denvir and Thea Riofrancos, ‘Ecuador: CONAIE Indigenous Movement Condemns President Correa’ (*Upside Down World*) <<https://upsidedownworld.org/archives/ecuador/ecuador-conaie-indigenous-movement-condemns-president-correa/>> accessed 2 April 2024.

¹⁵⁶ ‘Native Ecuadorans Protest Amazon Mining’ *Al Jazeera* (9 March 2012) <<https://www.aljazeera.com/news/2012/3/9/native-ecuadorans-protest-amazon-mining>> accessed 2 April 2024.

¹⁵⁷ Rory Carroll and Latin America correspondent, ‘Leftwinger Ollanta Humala’s Narrow Win in Peru Unnerves Markets’ *The Guardian* (6 June 2011) <<https://www.theguardian.com/world/2011/jun/06/leftwinger-narrow-win-peru-markets>> accessed 2 April 2024.

¹⁵⁸ Torivio A Fodder, ‘History, Enterprise, and Reform: Honduran ZEDE Regimes and Indigenous Peoples’ Rights’ (2019) 10 *Arizona Journal of Environmental Law and Policy* 68, 69–70.

¹⁵⁹ Christopher Clark, ‘Honduran Minority Fights for a Threatened Way of Life’ *Reuters* (28 August 2018) <<https://www.reuters.com/article/idUSKCN1LD167/>> accessed 2 April 2024.

¹⁶⁰ Fodder (n 158) 69.

her position on slavery.¹⁶¹ She was then succeeded by Michel Temer, who allegedly received donations from companies participating in this modern day slavery, and who issued decrees that weakened the country's means to fight this slavery.¹⁶²

For *Kaliña and Lokono* and *Lhaka Honhat*, it was difficult to find specific, striking political circumstances that can be linked to the visits in these cases. However, in both countries the indigenous peoples still face many struggles, which may end up on the political agenda.¹⁶³ In relation to this, it should be noted that in 2007, in *Saramaka People v. Suriname*, the IACtHR had already held the State responsible for human rights violations regarding the tribal Saramaka community.¹⁶⁴ In *Kaliña and Lokono*, indigenous communities faced the same issues – a lack of recognition, FPIC and territorial demarcation – as the State had still not implemented the *Saramaka* judgement.¹⁶⁵

3.1.2.3. Consent of victims and representatives

38. While State consent may be essential for the practical possibility of *in situ* visits, the consent of the victims and their representatives is a different matter. In *Sarayaku* and *Cruz Sanchez*, the representatives argued against a visit up until an official decision had been made, after which they cooperated. In *Sarayaku*, the representatives argued that all the necessary evidence for the Court to render an informed judgement was present and that the State was trying to introduce extemporaneous evidence, as the deadline from Article 40 RoP IACtHR had already passed, without one of the reasons from Article 57(2) RoP IACtHR.¹⁶⁶ According to them, the State was also – once again – unnecessarily prolonging the procedure in a rush to tender two new oil blocks in the region.¹⁶⁷ The Order of the President, however, invoked Article 58 RoP IACtHR as a basis (*supra* 21) and referenced the hearing, where one of the victims, Ena Santi, had welcomed such a visit by the Court.¹⁶⁸

In *Cruz Sanchez*, the representatives held the opinion that a reconstruction of the facts would be unnecessary, onerous, lacking the condition of necessity and likely dangerous for the parties.¹⁶⁹ The Commission also had doubts about the necessity of the *in situ* visit and questioned its suitability, as the reconstruction would happen in a replica of the real embassy, with no guarantees of it being exactly the same.¹⁷⁰ The Order of the President however, cited the controversial nature of the facts, and assured the Commission that the Court would critically

¹⁶¹ Eugene Scott, 'Brazilian President: Our Countries Share Fight against "Blemish of Slavery"' *CNN* (1 July 2015) <<https://www.cnn.com/2015/07/01/politics/brazilian-president-discusses-overcoming-slavery/index.html>> accessed 3 April 2024; Greg Grandin, 'A Slavers' Coup in Brazil?' [2016] *The Nation* <<https://www.thenation.com/article/archive/a-slavers-coup-in-brazil/>> accessed 3 April 2024; Jonathan Watts, 'Dilma Rousseff Impeachment: What You Need to Know' *The Guardian* (31 August 2016) <<https://www.theguardian.com/news/2016/aug/31/dilma-rousseff-impeachment-brazil-what-you-need-to-know>> accessed 3 April 2024.

¹⁶² Anna Sophie Gross, 'One in 10 Senior Politicians in Brazil Funded by Companies "Linked to Slavery"' *The Guardian* (16 February 2018) <<https://www.theguardian.com/global-development/2018/feb/16/one-in-10-senior-politicians-in-brazil-funded-by-companies-linked-to-slavery>> accessed 3 April 2024; 'Brazil Government to Rework Controversial Slavery Decree' *Reuters* (20 October 2017) <<https://www.reuters.com/article/idUSKBN1CP2PA/>> accessed 3 April 2024.

¹⁶³ Euritha Tjan A Way, 'Oudste bewoners van Suriname geven strijd voor grondrechten en erkenning niet op' *MO* Mondiaal Nieuws* (26 April 2021) <<https://www.mo.be/analyse/oudste-bewoners-van-suriname-geven-strijd-niet-op>> accessed 24 April 2024; 'Argentina: Current Issues' (*Minority rights group*, 2 November 2023) <<https://minorityrights.org/country/argentina/>> accessed 24 April 2024.

¹⁶⁴ *Saramaka People v Suriname* (IACtHR) 28 November 2007.

¹⁶⁵ *Kaliña and Lokono* (n 40) paras 113, 134, 201, 244.

¹⁶⁶ CEJIL, 'Communication of the representatives' (n 61) (Archive case file p164).

¹⁶⁷ *ibid.*

¹⁶⁸ *Sarayaku Order of the President* (n 37) paras 11, 14–15.

¹⁶⁹ *Cruz Sanchez Order of the President* (n 47) 4, para 5.

¹⁷⁰ *ibid* 5, para 6.

consider the reconstruction – according to the rules of *sana crítica* (*infra* 55).¹⁷¹ In both these cases, the representatives had the opportunity to give their opinions on organizing a visit, but it cannot be said their consent is necessary for the organization of a visit.

During the interview with the Court official, it was clarified that there was often communication and negotiation with representatives about the organization of a visit beyond the documentation – through phone calls or WhatsApp messages.¹⁷² The lack of consent of the representatives is however not something that will make the Court refrain from ordering a visit.¹⁷³ This can be linked to the impact assessment purpose of *in situ* visits (*supra* 30). The IACtHR aims to find out what the truth is, and go beyond the version of the facts presented by the petitioners, especially in land-related cases where a decision will impact people other than the petitioners.¹⁷⁴ It is essential to be able to listen to these third parties even when the petitioners are opposing this.

39. While the opinions of the representatives will not prevent a visit, their refusal can be understood. As strategic litigants, representatives must consider factors like the length of the proceedings, a limited litigation budget, possible proof that is not in their own favor, and the risk of revictimization.¹⁷⁵ Such risk assessments are not unwarranted. The proceedings were prolonged in *Sarayaku*: the judgement was issued ten months after the final written arguments had been submitted.¹⁷⁶ The arrangement of the costs can also be unpredictable for the representatives (*supra* 26, *infra* 53). In *Garifuna Triunfo de la Cruz*, the *in situ* visit proved that one of the tourism projects was too far away from the community for the Court to pronounce itself on alleged violations, which shows that visits can sometimes also weaken the victim's cases.¹⁷⁷ On the subject of revictimization, it could be considered that the visits often involve bringing along State security forces to communities which have had previous bad experiences with the military.¹⁷⁸ In *Garifuna Triunfo de la Cruz*, the representatives also criticized the racist attitudes the State had shown towards the Garifuna during the *in situ* visit.¹⁷⁹

3.1.2.4. Practical considerations: special sessions and Covid-19

40. Practical aspects will surely be important during the planning of a visit (*infra* 46), but might also create a favorable – or unfavorable – climate for actually deciding to organize an *in situ* visit. The special sessions organized by the Court could be a consideration, as the ordinary and special sessions are usually planned by the Court at the end of the previous year.¹⁸⁰ If the Court already knows it will be traveling to a certain country, the simultaneous organization of an *in situ* visit there might be more efficient. In the case studies it can be observed there were

¹⁷¹ *ibid* 7, para 12–14.

¹⁷² Interview with Staff member of IACtHR (n 46).

¹⁷³ *ibid*.

¹⁷⁴ *ibid*.

¹⁷⁵ Eslava Gabriela and others, *Manual de litigio estratégico: De la teoría a la práctica, las lecciones de Colombia y Líbano* (Dejusticia 2021) 37–39 <https://www.dejusticia.org/wp-content/uploads/2022/02/Manual_Litigio_Estrategico_Web.pdf> accessed 3 April 2024.

¹⁷⁶ *Sarayaku* (n 35) para 14.

¹⁷⁷ *Garifuna Triunfo de la Cruz* (n 40) para 27.

¹⁷⁸ See for example, representatives in *Sarayaku* asking to reduce the security personnel to a minimum: CEJIL, 'Reply of the Representatives' (n 77) 2 (Archive case file p284).

¹⁷⁹ OFRANEH, 'Observations of the Representatives on the in Situ Visit' (22 September 2015) 5–6 (Archive case file p393).

¹⁸⁰ Clemente (n 127) 505.

special sessions hosted in the corresponding States right after, or during the visits in *Sarayaku*, *Garifuna Triunfo de la Cruz*, *Garifuna Punta Piedra* and *Lhaka Honhat*.¹⁸¹

41. Another interesting practical aspect can be found in *Manuela e.a. v. El Salvador*, a case from 2021 about a woman charged with homicide after suffering an obstetric emergency, which led to the loss of her pregnancy.¹⁸² During the proceedings of this case, in 2020, the representatives requested an *in situ* visit to collect statements of victims and a reconstruction of the facts.¹⁸³ However, the President of the Court decided an *in situ* visit was not necessary in this case, particularly citing the circumstances generated by the pandemic and the spread of Covid-19.¹⁸⁴ Other factors may have played a role, but a pandemic clearly does not lend itself to *in situ* visits.

3.2. The procedure of *in situ* visits

42. The procedure of *in situ* visits can be divided into four phases: the decision, the preparation, the visit itself and the result of the visit. Solano Monge, Staff Attorney at the IACtHR, has described most aspects of this process, and the case studies confirm these observations, while adding some details. Additionally, the resolution of the costs will also be discussed.

3.2.1. The decision to organize a visit

43. The decision to organize an *in situ* visit is preceded by a request from the State, representatives or Commission, unless the Court decides of its own motion to order a visit.¹⁸⁵ It does not seem to matter when exactly in the proceedings this is requested, as long as it is before the judgement.¹⁸⁶ In *Sarayaku*, for example, the request to organize a visit was first made during the hearings on the 6th and 7th of June 2011, more or less a year after the case had been submitted by the Commission, and was not welcomed by the representatives (*supra* 38).¹⁸⁷ In *Garifuna Triunfo de la Cruz*, the request by the State was also made during the hearing and in its final brief, though the representatives welcomed an *in situ* visit in this case.¹⁸⁸ By contrast, in *Cruz Sanchez*, *Garifuna Punta Piedra* and *Lhaka Honhat*, the *in situ* visit was requested in the first brief submitted by the parties.¹⁸⁹ In the recent *Tagaeri and Taromenane* case, the Court has also stated that the appropriate procedural time for submitting the request for a visit is the first pleadings, arguments and evidence brief, pursuant to Articles 40(b) and 57 RoP IACtHR.¹⁹⁰ Late requests can however still be granted, as the Court can *ex officio* order any evidentiary measure at any stage of the cases in accordance with Article 58 RoP IACtHR.¹⁹¹

¹⁸¹ IACtHR, 'Annual Report 2012' (IACtHR 2012) 33 <https://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2012.pdf>; IACtHR, 'Annual Report 2015' (IACtHR 2015) 24 <https://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2015.pdf>; IACtHR, 'Annual Report 2019' (n 107) 28–29.

¹⁸² *Manuela e.a v El Salvador* (IACtHR) 2 November 2021.

¹⁸³ *Manuela y otros v El Salvador (Resolución de la Presidenta convocatoria a audiencia)* (IACtHR) 6, para 26 2 December 2020.

¹⁸⁴ *ibid* 7, para 29.

¹⁸⁵ Solano Monge (n 144) 459–460.

¹⁸⁶ *ibid*.

¹⁸⁷ *Sarayaku* (n 35) paras 12, 15.

¹⁸⁸ *Garifuna Triunfo de la Cruz* (n 40) para 15.

¹⁸⁹ *Cruz Sanchez* (n 39) para 6; *Garifuna Punta Piedra* (n 40) para 19; *Lhaka Honhat* (n 43) para 10.

¹⁹⁰ *Pueblos Indígenas Tagaeri y Taromenane v. Ecuador (Resolución del Presidente convocatoria a audiencia)* (n 46) para 63.

¹⁹¹ *ibid*.

44. After the request, the parties and the Commission usually have an opportunity to comment on this, be it in their briefs or in separate communications.¹⁹² During this phase further additional information about the suggested visit is also gathered.¹⁹³ In *Sarayaku*, for example, the Secretariat of the Court asked the State which time of the year the weather conditions would be best for a visit, what the agenda would look like, how security would be organized, what vaccines were necessary and how the costs would be arranged.¹⁹⁴

45. Subsequently, the Plenary of the Court will take this information and the opinions of the parties into account to decide on the request.¹⁹⁵ This decision will usually be issued in the form of an Order of the President of the IACtHR or a communication of the Secretariat of the Court.¹⁹⁶ In *Lhaka Honhat*, the decision was relayed during the hearing.¹⁹⁷ The decision will usually cite the relevant precedents and dictate how the costs will be arranged.¹⁹⁸ Most importantly, it will establish the date, duration, location and objective of the visit.¹⁹⁹

3.2.2. The preparation of *in situ* visits

46. As mentioned above, a part of the preparation will often be done before a decision is made. Other details are however arranged afterwards, and the preliminary agenda is often refined. The case file in *Sarayaku* provides examples of how this might play out. Both parties and the Commission had to submit the names of their participants, which spurred discussions about procedural equality (*supra* 26) during this phase.²⁰⁰ The representatives also made suggestions for possible activities during the visit and asked if their expenses would be covered by the State.²⁰¹ Both parties got the opportunity to propose impartial interpreters to translate the Kichwa language into Spanish.²⁰² The logistics for the transport also had to be prepared, e.g. where the helicopter should land in order not to blow the roofs of nearby houses or that the *Sarayaku* people had to provide the canoes for crossing the river.²⁰³ It is also interesting that the representatives proposed an overnight stay in the community, which the Commission had no issues with, but which was rejected by the State and the IACtHR's Secretariat for

¹⁹² CEJIL, 'Observations of the representatives' (n 150) (Archive case file p164); *Cruz Sanchez Order of the President* (n 47) 4, para 5; *Garifuna Triunfo de la Cruz* (n 40) para 15; *Lhaka Honhat* (n 43) 10.

¹⁹³ Solano Monge (n 144) 460.

¹⁹⁴ Secretariat of the Court, 'Note to the State' (n 151) (Archive case file p204).

¹⁹⁵ Solano Monge (n 144) 460; Secretariat of the Court, 'Communication regarding Garifuna cases' (n 67) 1; *Hacienda Brasil Verde Order of the President* (n 47) paras 3, 5.

¹⁹⁶ *Sarayaku Order of the President* (n 37); *Cruz Sanchez Order of the President* (n 47); Secretariat of the Court, 'Communication regarding Garifuna cases' (n 67) (Archive case file p379); *Hacienda Brasil Verde Order of the President* (n 47). The case files of the *Kaliña and Lokono* and *Lhaka Honhat* cases did not provide information on how the decision was communicated.

¹⁹⁷ Solano Monge (n 144) 460; *Lhaka Honhat* (n 43) paras 11, footnote 15.

¹⁹⁸ *Sarayaku Order of the President* (n 37) 7; *Cruz Sanchez Order of the President* (n 47) 9–10; Secretariat of the Court, 'Communication regarding Garifuna cases' (n 67); *Hacienda Brasil Verde Order of the President* (n 47) 3.

¹⁹⁹ Solano Monge (n 144) 460.

²⁰⁰ Secretariat of the Court, 'Communication on the Order of the President' (20 January 2012) (Archive case file p239); CEJIL, 'Reply of the Representatives' (n 77) 1 (Archive case file p284).

²⁰¹ CEJIL, 'Communication of the representatives on the visit to Sarayaku' (20 February 2012) 2–3 (Archive case file p249).

²⁰² Secretariat of the Court, 'Note on the Visit to the Sarayaku Territory' (n 154) (Archive case file p305).

²⁰³ CEJIL, 'Reply of the Representatives' (n 77) 3 (Archive case file p284); Secretariat of the Court, 'Note on the Visit to the Sarayaku Territory' (n 154) (Archive case file p305).

security reasons.²⁰⁴ The visit was also narrowed down to only visiting the Sarayaku community, and not the community of Jatun Molino, to the dismay of the State.²⁰⁵

47. To represent the Court, a delegation will be composed of judges, Secretariat personnel and possibly external experts.²⁰⁶ As mentioned before (*supra* 26), the size and composition of the delegation varies. The Secretariat lawyers in the delegation will correspond with the team working on the present case, and the Secretary of the Court and the Legal Director will also often join.²⁰⁷ Judges will join depending on their availability and willingness to come.²⁰⁸ The biggest *repeat players* are judge Humberto Sierra Porto (who was president of the Court during four out of his five visits), Secretary of the Court Pablo Saavedra Alessandri and Legal Director Alexei Julio Estrada (see Figure 2). The maximum number of judges that has accompanied a visit, is three. Usually, the president of the Court is part of the delegation, as *Hacienda Brasil Verde* and *Lhaka Honhat* were the only cases where a president of the Court was not present.²⁰⁹ In none of the cases, a national judge of the State that was visited, was part of the delegation. This is logical, as Articles 19(1) RoP IACtHR and 19(2) Statute of the IACtHR prohibit these judges to take part in deliberations of a judgement concerning their own country.

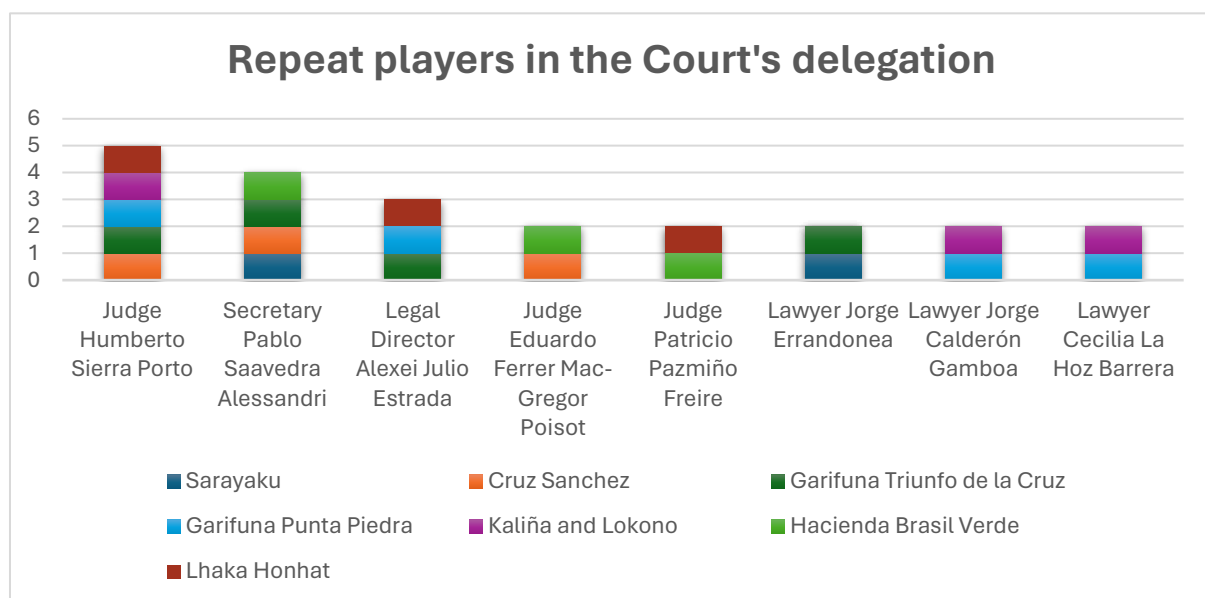


Figure 2: Repeat players in the Court's delegation²¹⁰

3.2.3. The *in situ* visit itself

48. The *in situ* visits can take different forms, and one visit may encompass multiple activities. It can include a re-enactment of the facts, a tour of the site, a visit to an indigenous village,

²⁰⁴ CEJIL, 'Reply of the Representatives' (n 77) 2 (Archive case file p284); IACHR, 'Communication of the Commission' (4 April 2012) (Archive case file p298); Ministry of foreign affairs, commerce and integration of Ecuador, 'Observation of the State on the Technical Visit' (9 April 2012) 2 (Archive case file p300); Secretariat of the Court, 'Note on the Visit to the Sarayaku Territory' (n 154) (Archive case file p305).

²⁰⁵ Secretariat of the Court, 'Note on the Visit to the Sarayaku Territory' (n 154) (Archive Case file p305); Ministry of foreign affairs, commerce and integration of Ecuador, 'Official Letter on the in Situ Visit to Sarayaku' (n 154) (Archive case file p337).

²⁰⁶ Solano Monge (n 144) 460.

²⁰⁷ Interview with Staff member of IACtHR (n 46).

²⁰⁸ *ibid.*

²⁰⁹ *Lhaka Honhat* (n 43) paras 10, footnote 14; *Hacienda Brasil Verde* (n 41) paras 11, footnote 17.

²¹⁰ The data for this graph was sourced from the footnotes of the judgements.

attending indigenous ceremonies, a flight over the territory in contention, meetings with government authorities, or visits to nature reserves and the talking to third parties in the case who might be influenced by its outcome.²¹¹ Before the *in situ* visit itself, there is sometimes also a preparatory meeting, to talk with the parties and the Commission about the organization and coordination of the visit.²¹² Travel can happen by plane, helicopter, boat, canoe, car and on foot.²¹³

49. The agenda that was prepared beforehand is usually followed, but it permits some flexibility.²¹⁴ The visit is led by the Court's delegation, with the president of the Court taking decisions on how to proceed and ordering additional evidentiary actions, if necessary.²¹⁵ In *Garifuna Triunfo de la Cruz*, for example, the delegation spontaneously decided to talk to local residents, leaders and authorities when visiting some areas of the territory in dispute.²¹⁶

50. During the visits, videos and audio recordings can be made by the parties and photos are made by the Court.²¹⁷ The Secretariat of the Court will also keep minutes of the visit.²¹⁸ In practice, the representatives do not always make video recordings and in accordance with Article 26(2) RoP IACtHR, it is often the State that is ordered to provide the logistic and technological means to make recordings of the visit.²¹⁹ *Lhaka Honhat* is the only case that mentions recordings made by the representatives.²²⁰ The recordings of *in situ* visits are, in general, not publicly available (*infra* 52).

3.2.4. Post-visit proceedings

51. After a visit has taken place, the delegation members will prepare a confidential report for the plenary Court.²²¹ Sometimes there will also be an extensive presentation with photographs, videos, maps and descriptions of what was seen.²²² The parties will send their recordings to the Court, Commission and the other party. Both parties usually have a chance to comment on the visit (*supra* 26). Sometimes additional documents are also requested of the parties.²²³ The case will then be taken into deliberation.

52. In terms of publicity, the communication by the Court about its visits seems to be limited. Of the seven cases, there are only press releases for *Sarayaku* and *Hacienda Brasil Verde*.²²⁴ Pictures of the visits are sparingly published in press articles, on the social media of the

²¹¹ Solano Monge (n 144) 456; *Cruz Sanchez Order of the President* (n 47) para 134; *Garifuna Triunfo de la Cruz* (n 40) para 16; *Garifuna Punta Piedra* (n 40) para 19; *Kaliña and Lokono* (n 40) para 14.

²¹² Solano Monge (n 144) 461; IACtHR, 'Visit to the Sarayaku Territory (Evidentiary Measure): Script of the President (Preparatory Meeting to the Visit)' (20 April 2012).

²¹³ *Sarayaku* (n 35) para 22; *Garifuna Triunfo de la Cruz* (n 40) para 16.

²¹⁴ Solano Monge (n 144) 461.

²¹⁵ *ibid*; *Sarayaku Order of the President* (n 37) 7, para 20; *Cruz Sanchez Order of the President* (n 47) 9, para 19.

²¹⁶ *Garifuna Triunfo de la Cruz* (n 40) para 16.

²¹⁷ Solano Monge (n 144) 462.

²¹⁸ *ibid* 461.

²¹⁹ *Garifuna Punta Piedra* (n 40) para 79; *Kaliña and Lokono* (n 40) para 15; *Sarayaku Order of the President* (n 37) 6–7, para 18, e); *Cruz Sanchez Order of the President* (n 47) 8–9, para 18, e).

²²⁰ *Lhaka Honhat* (n 43) 9, footnote 14.

²²¹ Solano Monge (n 144) 642; Interview with Staff member of IACtHR (n 46).

²²² Interview with Staff member of IACtHR (n 46).

²²³ *Kaliña and Lokono* (n 40) para 16.

²²⁴ Press release from Secretariat of the Court, 'Paso Histórico: Diligencia En El Pueblo Indígena Kichwa de Sarayaku En El Amazonas Ecuatoriano' (25 April 2012) <https://www.corteidh.or.cr/docs/comunicados/cp_07_12.pdf> accessed 24 April 2024; Press release from Secretariat of the Court, 'Corte Interamericana Realizará Diligencia In Situ En Brasil (Caso Trabajadores de La Hacienda Brasil Verde v. Brasil)' (3 June 2016) <https://www.corteidh.or.cr/docs/comunicados/cp_14_16.pdf> accessed 24 April 2024.

representatives (see images 1-2) and in the 2015 Annual Report of the Court (see images 5-10).²²⁵ The only available video recording of a visit, is that of the hearing in *Hacienda Brasil Verde*.²²⁶ This may be due to restrictions on the files, requested by representatives or judges to protect the personal data of victims and participants in the process.²²⁷



Images 1 and 2: Judge Diego García-Sayán during the Sarayaku visit. Source: Amazonwatch.org



Images 3 and 4: Visit in Kaliña and Lokono case. Source: Annual Report IACtHR 2015



Images 5 and 6: Visit in Garifuna Triunfo de la Cruz case. Source: Annual Report IACtHR 2015

²²⁵ 'Jungle Justice: Ecuador Recognizes Rights Violations in Sarayaku Case | Amazon Watch' (n 130); CEJIL and The Amazon Conservation Team, 'Sarayaku: In Defense of Territory' (*Amazonteam.org*) <<https://www.amazonteam.org/maps/sarayaku-en/>> accessed 19 April 2024; CELS, 'Lhaka Honhat: La Corte IDH Visitó a Las Comunidades Indígenas' (*CELS Argentina Instagram*, 22 May 2019) <https://www.instagram.com/p/Bxx0nIXACmK/?igshid=1glj639rm5s0p9&img_index=1>; IACtHR, 'Annual Report 2015' (n 181) 37–39.

²²⁶ *Diligencia in Situ. Caso Trabajadores de La Hacienda Brasil Verde Vs. Brasil. Parte 1* (2016) <<https://vimeo.com/showcase/3986799/video/169712056>> accessed 5 March 2024.

²²⁷ Email from Archive of the Court to author (18 December 2023).



Images 7 and 8: Visit in Garifuna Triunfo de la Cruz case. Source: Annual Report IACtHR 2015

3.2.5. Costs

53. *In situ* visits imply travel, accommodation and food costs for the Court, the Commission and the parties, which might especially affect the representatives, who often have limited litigation funds. Article 60 RoP IACtHR gives a straightforward answer to this question: the one who requests a probative measure must cover the costs generated by its production. In practice, there may be agreements between the Court, parties and the Commission.²²⁸ In the early cases there seems to have been some uncertainty for the representatives about this. In *Sarayaku*, the Order of the President cited Article 60 RoP IACtHR, but this apparently left some confusion, as the representatives asked for clarification on whether their costs were covered by this.²²⁹ In the end though, Ecuador seems to have paid for everything.²³⁰

In *Cruz Sanchez*, a separate Order of the President had to be issued to clarify that the State had to cover the costs of both organizations representing the victims.²³¹ In the *Garifuna* cases, the Secretariat of the Court communicated that the State would cover the costs of the Court, but that the representatives would have to pay their own costs.²³² In *Hacienda Brasil Verde*, where the Court was the one to “request” the visit, the representatives and the Commission were also instructed to cover their own costs.²³³ In reality, the Court aims to not make the petitioners pay their own costs if they did not request a visit, and will often use money from the Court’s own budget and from the international cooperation budget to pay for airfares and accommodation.²³⁴ Security and transport in military vehicles such as helicopters are covered by the State, as it is the one to provide these services.²³⁵

²²⁸ Solano Monge (n 144) 462.

²²⁹ *Sarayaku Order of the President* (n 37) 7, para 21; CEJIL, ‘Reply of the Representatives’ (n 77) 3 (Archive case file p284).

²³⁰ Interview with Staff member of IACtHR (n 46).

²³¹ *Cruz Sanchez e.a v Peru (Order of the president on costs)* (IACtHR) 2, para 2 (Archive case file p376).

²³² Secretariat of the Court, ‘Communication regarding Garifuna cases’ (n 67) 2 (Archive case file p379).

²³³ *Hacienda Brasil Verde Order of the President* (n 47) 3, para 8. The IACHR was not present during the *in situ* visit in this case.

²³⁴ Interview with Staff member of IACtHR (n 46). The ‘international cooperation budget’ consists of contributions from international cooperation projects, which is different from the regular funding received from the OAS or voluntary member state contributions. In the latest Annual Report of the Court (2022), for example, the international cooperation budget corresponded to around 34% of the Court’s total budget, with donations from Spain, Norway, the European Commission, Switzerland and others.

²³⁵ *ibid.*

3.3. Influence of *in situ* visits on outcome of the case

The occurrence of an *in situ* visit may influence the rest of the case. This section will first analyze how the runtime of cases might be influenced by having a visit during the proceedings. Secondly, while it may be hard to establish causal links between the exact outcome of the case and the *in situ* visits, it is pertinent to look at how the Court took the visits into account in its judgements on the merits. This will be done through looking at how the Court assessed the weight of the new evidence gathered during the visit, and how the Court referenced the *in situ* visit in the judgement to support its final decision.

3.3.1. Case runtime

54. The organization of *in situ* visits may affect the runtime of cases. This was a possible issue in *Sarayaku*, where the representatives were against a visit because the proceedings had already taken so long.²³⁶ In the Annual Report issued that year, the Court indicated the average runtime of cases had increased because of the *Sarayaku* case that went on longer due to the *in situ* visit.²³⁷ It therefore may be interesting to compare the runtime of all cases with *in situ* visits to the average runtime of cases that year, though a lot of different factors can affect case runtimes. Figure 4 shows this comparison. All cases indeed took longer than the average of that year, though the duration of *Hacienda Brasil Verde* stayed under the median of 2016. There is a ten month difference between the average of 2015 and the runtime of *Garifuna Triunfo de la Cruz*. This might be explained by the Court connecting the visit of this case to *Garifuna Punta Piedra*, which was submitted eight months later. The longer duration of the cases in *Cruz Sanchez*, *Hacienda Brasil Verde* and *Lhaka Honhat* must be nuanced however. In these cases, the visit was not the final step in the proceedings, as final briefs were submitted later, and it was after this that the case took around thirteen, four and eight months until a judgement was issued. In conclusion, the runtime of cases with an *in situ* visit has always been longer than the average, but this is not always directly linked to the visit that took place.

²³⁶ CEJIL, 'Communication of the representatives' (n 61) 6 (Archive case file p164).

²³⁷ IACtHR, 'Annual Report 2012' (n 181) 8, footnote 2.

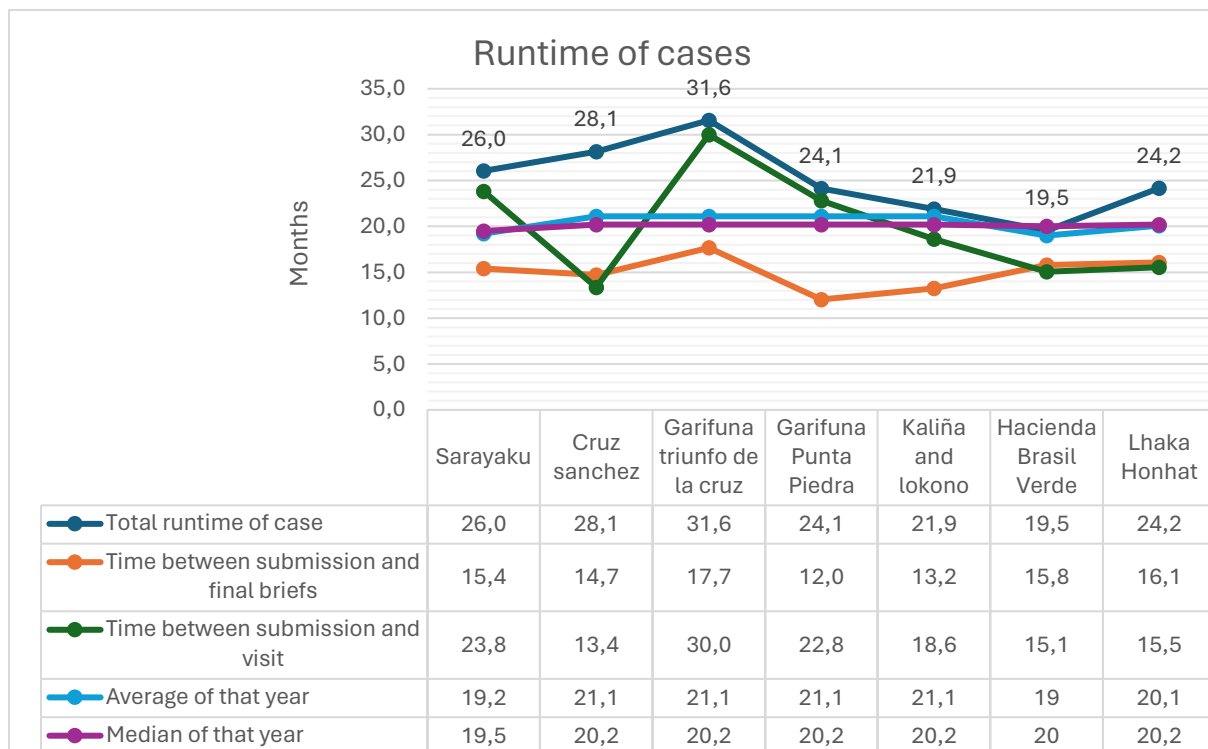


Figure 3: Runtime of cases²³⁸

3.3.2. Assessment of the *in situ* visits as evidence in judgements

55. The IACtHR will often evaluate the evidentiary value of the evidence in a case, under the section “assessment of evidence” in its judgements. It has also done this for the new evidence gathered during *in situ* visits. This is not a question about the burden of proof, admissibility of evidence or the standard of proof, but about the weight that can be given to “seeing the facts with your own eyes”.²³⁹ The Court does not have a system of *legal proof* where there are written rules prescribing the precise weight that can be given to certain evidence.²⁴⁰ Instead, it often refers to the system of *sana crítica*, which can be translated as *sound judicial discretion*.²⁴¹ This allows a free evaluation of evidence by the judges, within the constraints of logic and experience.²⁴² This does not mean all proof has the same value, the Court can use the rules of logic and experience to explain why something has more weight.²⁴³ For example, in *Vera-Vera v. Ecuador*, the Court *has* considered that a Commission report based on an *in loco* visit did not constitute enough proof, based on the way it was produced.²⁴⁴ *Sana crítica* is therefore not a free pass for judges to assess evidence in any way they want.

²³⁸ ‘Runtime’ is the time between the submission of the case by the IACHR and the judgement on the merits of the IACtHR. The baseline of the graph, at zero months, represents the submission by the Commission. The averages and medians were calculated based on the submission and judgement dates of all cases mentioned in the Annual Reports. The data of the final briefs were found in the judgements, and were added to nuance the influence the visits may have on the length of the proceedings.

²³⁹ Kolowratnik (n 51).

²⁴⁰ Álvaro Paúl, ‘Sana Crítica: The System for Weighing Evidence Utilized by the Inter-American Court of Human Rights’ 200.

²⁴¹ Paúl (n 60) 34–35.

²⁴² Paúl (n 240) 211.

²⁴³ *ibid* 212.

²⁴⁴ *Vera-Vera v Ecuador* (IACtHR) [81] 19 May 2011; Paúl (n 240) para 219.

In the case studies, there was always an assessment of the evidence received during the *in situ* visit. In *Cruz Sanchez*, *Garifuna Triunfo*, *Garifuna Punta Piedra* and *Hacienda Brasil Verde*, reference was made to sound judicial discretion and sound judgement, *sana crítica* in the Spanish versions of the judgements.²⁴⁵ In *Sarayaku*, *Garifuna Triunfo*, *Garifuna Punta Piedra* and *Kaliña and Lokono*, the Court stated it would assess the evidence “based on the particular circumstances in which it was produced”.²⁴⁶ Other phrases the Court used were “will assess it within the overall body of evidence”, “[the statements will be assessed] within the context of the evidence as a whole, insofar as they provide additional information”, “will analyze this (...) insofar as it complements the specific objectives of the visit”.²⁴⁷

The Court, however, never clarifies what these particular circumstances were and whether they led to the *in situ* visit having less or more weight as proof. It could be possible that the modalities of an *in situ* visit, for example, made it hard to maintain the same rigor as when cross-examining witnesses (*supra* 24), which could lead to testimonies being less trustworthy, therefore holding less weight. The interviewed Court official believed that proof gathered during visits subconsciously may hold *more* weight because the members of the delegation really saw, sensed and felt the circumstances, which can be powerful.²⁴⁸ Either way, it is unclear to the reader of the judgements what weight the proof from the *in situ* visit held. It would be valuable to see more transparency on this matter.

3.3.3. References made to the *in situ* visits in judgements

56. While the *in situ* visit was admitted as evidence in each case, the Court does not always *visibly* rely on the findings to the same extent (see Figure 3). An *in situ* visit might affect the internal conviction of the judges, but in earlier cases there is little transparency on how it affected the decision. In the merits part of *Sarayaku*, the Court only refers to the visit to affirm that the indigenous communities exist and to cite the State’s acceptance of international responsibility during the visit.²⁴⁹ Based on the text of the judgement, the experiences during the visit seem to have had no influence on finding violations in the case. During the interview, this was explained by the novelty of *in situ* visits.²⁵⁰ As this was the first case, dealing with these findings was not very ingrained in the system. In the second case, *Cruz Sanchez*, the Court also did not reference what the delegation had seen during the reconstruction to come to its conclusions on the merits of the case. Only documentary evidence submitted in the context of the *in situ* visit was used.²⁵¹ This can however be explained by the issues that both the representatives and the Commission had raised concerning the quality of this reconstruction (*supra* 38).

²⁴⁵ *Cruz Sanchez* (n 39) para 138; *Garifuna Triunfo de la Cruz* (n 40) para 38; *Garifuna Punta Piedra* (n 40) para 80.

²⁴⁶ *Sarayaku* (n 35) para 49; *Garifuna Triunfo de la Cruz* (n 40) para 37; *Garifuna Punta Piedra* (n 40) para 79; *Kaliña and Lokono* (n 40) para 26.

²⁴⁷ *Cruz Sanchez* (n 39) para 138; *Garifuna Triunfo de la Cruz* (n 40) para 37; *Garifuna Punta Piedra* (n 40) para 80.

²⁴⁸ Interview with Staff member of IACtHR (n 46).

²⁴⁹ *Sarayaku* (n 35) paras 52, 189, 282.

²⁵⁰ Interview with Staff member of IACtHR (n 46).

²⁵¹ *Cruz Sanchez* (n 39) para 306 and footnotes 150, 151, 153, 155, 156, 157, 158, 160, 166, 362.

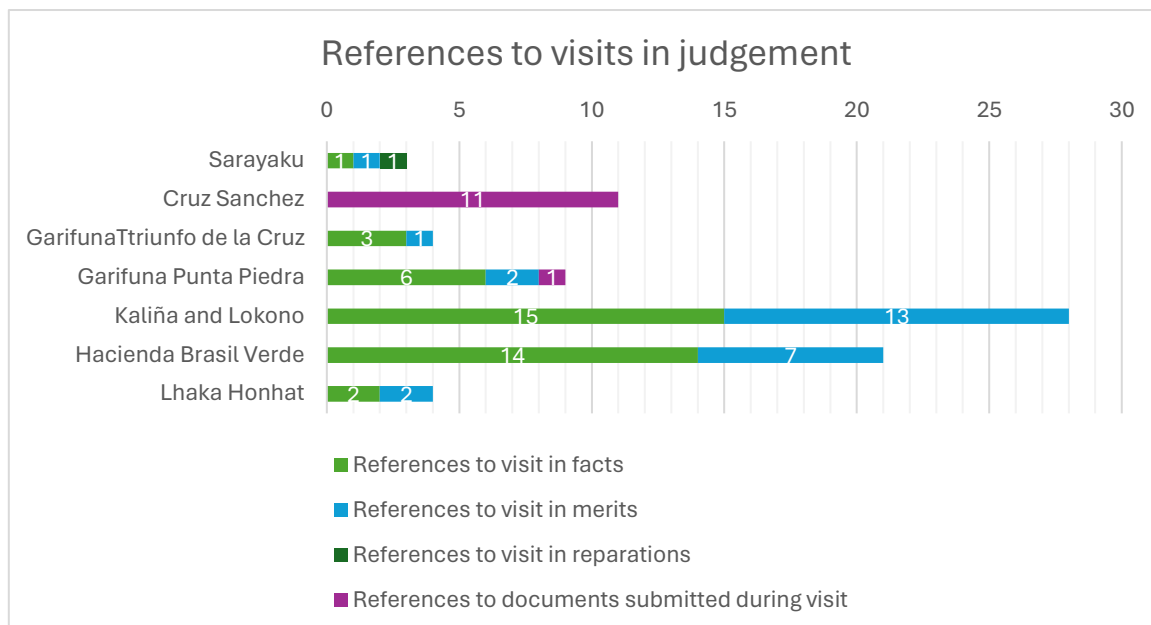


Figure 4: References to visits in judgement²⁵²

In *Garifuna Triunfo de la Cruz*, there were three references to the visit when establishing the facts, and one reference in the merits part of the case.²⁵³ In *Garifuna Punta Piedra*, the establishment of the facts contained six references to the visit, and three references in the merits part.²⁵⁴ This is certainly an improvement, but perhaps does not fully represent the impact the visit may have had. In the next case, *Kaliña and Lokono*, mentions of the visit are abundant in both facts and merits.²⁵⁵ The judgement refers to the statements given by State officials and members of the communities, but also to the elements the Court's delegation was able to verify with their own eyes, such as the existence of certain buildings.²⁵⁶ The findings from the visit seem instrumental in finding certain violations, something that was less present in the former cases.²⁵⁷ The next case, *Hacienda Brasil Verde* continues this trend, as the testimonies of the victims were referenced extensively.²⁵⁸ Noticeably though, the testimonies of the five government officials received during the *in situ* visit are never referenced. In *Lhaka Honhat*, the references to the visit are limited again, with two in the facts and two in the merits part of the case, about the fences in indigenous territory that were observed and their meetings with the *criollos*.²⁵⁹ However, these few mentions seem to encompass the main concerns in the final brief of the representatives - which mentioned the fences, “*alambrados*”, 50 times -, though the Court did not include the testimonies heard during the visit, like the representatives did.²⁶⁰ In conclusion, the referencing practice with regard to *in situ* visits has gradually

²⁵² The references were counted through searching the paragraphs and footnotes of the judgements. When the visit was referenced in the facts section, and the merits referred back to these paragraphs ('supra para ...'), this was counted as a mention in the merits section. This figure is a quantitative representation of the references, and is not able to represent the qualitative value of each individual reference in relation to the whole judgement.

²⁵³ *Garifuna Triunfo de la Cruz* (n 40) paras 27, 82, 89 and 165.

²⁵⁴ *Garifuna Punta Piedra* (n 40) paras 90, 102, 103, 105, 107, 131 and 183, 201, 280. Para 201 concerns two mentions of documentary evidence submitted during the visit.

²⁵⁵ *Kaliña and Lokono* (n 40) paras 40, 41, 42, 45, 46, 50, 68, 78, 80, 84, 87, 93, 95, 98, 99 and 112, 119, 126, 136, 147, 148, 152, 183, 194, 219, 220, 235, 236.

²⁵⁶ See for example *ibid* 147, 152.

²⁵⁷ *ibid* 147–160, 220.

²⁵⁸ *Hacienda Brasil Verde* (n 41) paras 164–177, 203 and 297–302, 305, 387.

²⁵⁹ *Lhaka Honhat* (n 43) paras 36, 52 and 135, 268.

²⁶⁰ CELS, 'Final Brief of the Representatives' (3 June 2019) paras 12–13.

increased throughout the cases. However, having more detailed references would promote a better understanding of how the visit influenced the final judgement, and could make the jurisprudence of the Court more tethered to what happens on the ground.

4. Conclusion

57. It is hard to tell what exactly the Ecuadorian government hoped to achieve when they insisted a delegation of the Court should perform an *in situ* visit in the *Sarayaku* case. What is certain however, is that this invitation led the emergence of a new practice, which has developed with each new case and will probably continue to evolve. This thesis set out to answer the question “What is the Inter-American Court of Human Right’s practice for *in situ* visits?”, through the sub questions “What is the legal framework for *in situ* visits of the Court?”, “Which factors influence the decision to undertake an *in situ* visit?”, “What is the procedure before and during *in situ* visits?” and “What influence does an *in situ* visit have on the further proceedings of a case?”. Through literature study, case studies and an open-ended interview, answers to these questions were gathered. The following conclusions can therefore be made:

58. The answer to the main research question lies in the entirety of this thesis. The Court’s practice for *in situ* visits cannot be isolated from its legal framework, the factors that influence it, its procedure and its consequences. Simply put though, the *in situ* visiting practice of the Court for contentious cases can be described as a flexible, evolving, evidence gathering practice that allows for a deeper understanding of the reality on the ground.

59. For the legal framework of the *in situ* visits of the Court, it became clear there are no articles in the Rules of Procedure of the Court which explicitly describe the practice. Article 58 RoP IACtHR can however be considered the main legal basis. Rules regarding hearings and the procedural principles of procedural equality and immediacy also play a supporting role in the legal framework. The development of a more detailed framework in possible future versions of the Rules of Procedure could be interesting to see.

60. *In situ* visits are always organized with an evidentiary purpose. However, arguably one of the most important findings of this thesis is that visits may also be organized to more accurately assess the impact of a forthcoming judgement. This is done through visiting the site of the facts and through hearing local third parties who would otherwise not be involved in the case. A promotional purpose of visits could be possible, but is currently not observed. Factors that influence the organization of visits, are the facts of the case – with an emphasis on indigenous land cases – the consent of the respondent State and practical considerations like Covid-19 or the co-occurrence of special sessions. The lack of consent of the victims and representatives, however, will not decisively influence the Court’s decision to visit.

61. Looking into the procedure of the visits themselves revealed a flexible practice. Late requests to come visit are possible and preparations are made in cooperation with the parties. The *in situ* visits themselves can have varying forms, but were visits to indigenous communities most often, which used almost all forms of transport – including canoes. During the visits there was often room for spontaneity. The costs of the visits, too, are subject to a flexible arrangement. The communication practice of the Court regarding visits was evaluated as limited.

62. As for the influence the visits had on the further proceedings of the cases, an increased runtime of the cases was observed, but other explanations were however also found to explain this increase. In the judgements, it seems like the Court never goes into detail when assessing the gathered evidence, leaving open questions about the evidentiary value of *in situ* visits. The research also revealed that at first, there were very few detailed references to the evidence that was gathered during the visits. However, this practice grew throughout the years, though even more references could strengthen the jurisprudence of the Court.

63. This thesis offered a new contribution by giving a detailed account of the legal framework and procedure of *in situ* visits, something that was not clear in the literature. Researching the factors influencing the decision to visit and the influence the visit could have on the rest of the case provided a more in-depth analysis of the past *in situ* visits. The Inter-American Court of Human Rights has a flexible and evolving practice regarding *in situ* visits, and future research will without doubt lead to additional interesting discoveries.

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Annex I: List of *in situ* visits by the IACtHR

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2. Cruz Sanchez et. al. v. Peru, 2014, reconstruction of the facts.
3. Garífuna de Punta Pieda and its members v. Honduras; and
4. Garífuna Triunfo de la Cruz and its members v. Honduras, 2015
5. Kaliña and Lokono, in Suriname, 2015 (same month as Garífuna)
6. *Workers of Hacienda Brasil Verde v. Brazil (evidences for judgment – 2016)*;
7. Lhaka Honat v. Argentina, 2019

In situ visitations during the supervision of judgement stage:

1. Caso de los Pueblos indígenas Kuna de Madungandí y Emberá de Bayano v. Panama
2. Plan de Sanchez and Rio Negro cases of massacres in Guatemala
3. Case of the massacre of El Mozote vs. El Salvador
4. Case of Artavia Murillo et al. (In Vitro Fertilization) and Case of Gómez Murillo et al. both cases v. Costa Rica

In situ visitations for provisional measures:

1. Visit to Complejo Penitenciario Curado, Brazil
2. Plácido de Sá Carvalho Prison Complex (implementation of provisional measures – 2017)

Not ‘formal’ in situ visitations, but some members of the Court travelled:

1. Bámaca Velásquez v. Guatemala, 3 judges travelled to DC in order to hear the testimony of a witness (who was unable to travel due to immigration issues)
2. Aloeboetoe et. al. v. Suriname, Secretary of the Court travelled to the state to gather some information (about economic situation of the state)
3. Atala Riffo v. Chile, Secretary of the Court travelled to meet the victims and informed them about their right to be heard

Annex II: List of questions during case studies

1. Period(s) of sessions:
2. Application date:
3. Public hearing date:
4. Date(s) of *in situ* visit (isv):
5. Judgement on merits:
6. Articles found violated:
7. Reparations:
8. Circumstances of case:
9. Country president at the time of case:
10. Location of isv:
11. Type of isv:
12. Delegation composition:
 - Court:
 - IACHR:
 - State:
 - Representatives:
13. Court composition:
14. Representatives:
15. Number of witnesses:
16. Request to organize isv by:
17. Phase of proceedings request:
18. Who carried costs:
19. State consent:
20. Petitioners consent:
21. Probative value given to visit:
22. Acceptance of international responsibility:
23. Precautionary/provisional measures in place:
24. Legal basis given in judgement/order of president for isv:
25. Costs and expenses amount:
26. Separate opinions: