

18 October 2018

Your Excellency  
President Manuel Miranda Canales  
Constitutional Court of Peru  
Lima, Peru

**RE: *Amicus Curiae* - Caso No: 03696-2017-AA/TC**

Dear Esteemed President:

Respectfully, we present this *Amicus Curiae* in favor of the Santa Clara Native Community of Uchunya in its case against the Ucayali Regional Government, the Plantaciones de Pucallpa S.A.C. company, and the Zonal Headquarters of the Registration Zone No. VI of the National Superintendency of Public Records (Case N°: 03696-2017-AA/TC).

The original text is in English and attached to this communication.

We thank you for your consideration of our *amicus* in your deliberations and for the special attention that your esteemed Court offers to the issue of the rights of indigenous peoples in Peru.

Attentively,



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**CONSTITUTIONAL COURT OF PERU**

***Amicus Curiae* Brief**

**in the**

**Case of the Santa Clara Native Community of Uchunya**

**v.**

**Regional Government of Ucayali, Plantaciones de  
Pucallpa S.A.C., and the Zonal Headquarters of the Registration  
Zone No. VI of the National Superintendency of Public Records**

***Case N°: 03696-2017-AA/TC***

18 October 2018

**[ENGLISH ORIGINAL]**

## *Amicus Curiae*

### **Case of the Santa Clara Native Community**

#### **I. Introduction**

1. The Global Justice Clinic of the New York University School of Law (“**GJC**”), an international human rights law clinic based in the United States, and Forest Peoples Programme (“**FPP**”), an international human rights non-profit organization based in the United Kingdom and supporting indigenous peoples worldwide<sup>1</sup>, have the honor of submitting this *amicus curiae* brief to the Constitutional Court of Peru in the case of the *Comunidad Nativa de Santa Clara de Uchunya v. Gobierno Regional de Ucayali, la empresa Plantaciones de Pucallpa S.A.C. y la Jefatura Zonal de la Zona Registral N° VI de la Superintendencia Nacional de los Registros Público* (hereinafter “**Case of the Santa Clara Native Community**”).<sup>2</sup>

2. For several years, FPP has followed closely the *Case of the Santa Clara Native Community* and GJC has recently become acquainted with the key factual and legal issues, beginning with the Peruvian State having dispossessed the Community of large portions of its traditional territory and converted parts of their lands to large-scale palm oil plantations. GJC and FPP understand that this case as a legal matter, began with the initial filing of the constitutional (*amparo*) action by the Community and the Federation of Native Communities of Ucayali (“**FECONAU**”) on 26 May 2016 before the Juzgado Mixto de Coronel Portillo de la Corte Superior de Justicia de Ucayali; the subsequent decision of the Juzgado Mixto del Módulo Básico de Justicia del Distrito de Campo Verde of 1 September 2016 declaring the complaint *improcedente in limine*; the 15 March 2017 affirmation of the decision in the Sala Especializada en lo Civil y Afines de la Corte Superior de Justicia de Ucayali; and finally, the Constitutional Court’s recent resolution of 20 August 2018 (Expediente N ° 03696-2017-PA/TC) reversing the lower courts’ decisions and agreeing to hear the case, pronounce on its merits, and do so in an expedited manner.

3. GJC and FPP welcome the decision of the Constitutional Court which not only recognized the “*special character of urgency*”<sup>3</sup> of the situation facing the Santa Clara Native Community of Uchunya of the Shipibo-Conibo people (“**Santa Clara Native Community**” or “**Community**”), but also the importance of its review of the constitutional rights of the Community to their property that may affect their very physical and cultural survival. GJC and FPP looks forward to the imminent decision of the Constitutional Court on the merits of the underlying action.

4. GJC and FPP have decided to file this *amicus curiae* before the Constitutional Court because we are aware of the significance of this case. This is the first time the Constitutional Court will decide upon the constitutional rights of an indigenous people to their traditional lands (right to property as applied to indigenous peoples). The ruling of this Court will have substantial repercussions for all indigenous peoples living in Peru and potentially define the scope of the State’s duties and responsibilities to manage natural resources in the context of economic development while also respecting, promoting and protecting the rights of native communities.

5. This submission focuses on the duties and obligations of Peru under international laws, bearing in mind that the Constitution provides that “[r]ules concerning the rights and freedoms recognized by this Constitution are construed in accordance with the Universal Declaration of

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<sup>1</sup> For a further description of the submitting organizations of GJC and FPP, please see [Annex 1](#).

<sup>2</sup> For purposes of this *amicus curiae*, references to the “State” and “Government” include the actions of all named regional and national defendants.

<sup>3</sup> Expediente N ° 03696-2017-PA/TC, para. 4.

*Human Rights and the international treaties and agreements regarding those rights that have been ratified by Peru.*<sup>4</sup> The following makes references to critical law and jurisprudence related to the ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (“**ILO 169**”), the American Convention on Human Rights (“**American Convention**”), the International Covenant on Civil and Political Rights (“**ICCPR**”), the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”), the International Convention on the Elimination of All Forms of Racial Discrimination (“**ICERD**”) and several others treaties –each having affirmed the rights of indigenous peoples.<sup>5</sup> The ILO itself has recognized that ILO 169 is not fully compatible with contemporary understandings of indigenous peoples’ rights by deciding that it shall be read congruently with the United Nations Declaration on the Rights of Indigenous Peoples (“**UNDRIP**”),<sup>6</sup> now accepted as articulating “*already existing human rights obligations*”.<sup>7</sup> For this reason, the international law described below will not rely solely on ILO 169, but also draw upon relevant provisions of UNDRIP, in addition to the aforementioned international human rights instruments. As noted above, each of these instruments play an integral part to applying and interpreting the Constitutional rights of indigenous peoples in Peru.

6. As described below, given the clear facts of this case and the applicable law,<sup>8</sup> it is the opinion of GJC and FPP that the State has failed to carry out its duties and obligations under the Constitution as interpreted together with Peru’s international obligations. The failure of the State to title the full extent of the Santa Clara Native Community lands and continue to grant interests on those lands knowing the existence of their claims, have caused them grievous harm. As explained in this *amicus*, while indigenous property rights can be limited, including through grants of interests to others, the State took none of the actions required to lawfully effectuate such limitations. As the Community has always maintained special connection to the claimed traditional territory --including where the State (with the assistance of the Regional Government of Ucayali (“**DRAU**”)) has previously awarded titles, certificates of possessions, authorized property conversions, and classified them as “state forests” -- restitution of the Community’s territory is the preferred remedy. Restitution should be accompanied by an order that the lands be environmentally restored and the Community compensated by the State and/or Empresa Plantaciones de Pucallpa S.A.C. Company (now Ocho Sur P. S.A.C) (“**Plantaciones de Pucallpa (Ocho Sur P)**” or “**Company**”).

7. Through this *amicus*, GJC and FPP argue that there is a clear path for the Constitutional Court to issue a decision in favor of the rule of law in Peru and simultaneously, the Santa Clara Native Community. Indeed, the pending decision of the Constitutional Court can serve as an important precedent for Peru and the region. This Court’s decision, consistent with Title VI of the Constitution can provide an interpretation and application of the national Constitution that facilitates Peru’s compliance with its duties and obligations under international law. In addition,

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<sup>4</sup> Political Constitution of Peru, Title VI, Final and Transitional Provisions, para. 4 (1993 with amendments).

<sup>5</sup> Each international instrument and declaration has been ratified, acceded too, and/or otherwise endorsed by Peru. For example, ILO 169 was ratified by Peru on 2 February 1994. Peru ratified the ICCPR and ICESCR on 28 April 1978. It ratified ICERD on 29 September 1971, the Convention on the Rights of the Child on 4 September 1990, the Convention on all Forms of Discrimination Against Women on 13 September 1982, and the American Convention on 12 July 1978. Peru endorsed UNDRIP on 7 September 2007..

<sup>6</sup> See ILO Standards and the UN Declaration on the Rights of Indigenous Peoples. An Information Note for ILO Staff and Partners. Available at: [www.ilo.org/wcmsp5/groups/public/---ed.../wcms\\_100792.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed.../wcms_100792.pdf). See also ILO 169, Art. Article 35 of ILO 169, a provision that is analogous to Article 29(b) of the American Convention providing that the conventions could not be interpreted to prejudice or otherwise adversely affect rights and benefits indigenous peoples have pursuant to other “Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.”

<sup>7</sup> Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural, including the Right to Development, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James P. Anaya, A/HRC/9/9 (11 Aug. 2008), Chapter III.

<sup>8</sup> Reference to *applicable law* in this *amicus* includes national and international law applicable to Peru, whichever standard is higher in a given circumstance.

once a final decision by this Court is issued consistent with the arguments of this *amicus* and those of the Community, the need to bring the Santa Clara Native Community case (consistent with Article 205 of the Constitution) before the Inter-American System or any other international complaint mechanisms (United Nation (“*UN*”), International Labour Organization (“*ILO*”) etc.) can be avoided once the domestic remedies before this Court are exhausted.<sup>9</sup>

## II. Background

8. In addition to the proceedings related to this case, and as pertinent to the analysis and arguments advanced herein (particularly the acts and omissions of the State and the Company), the GJC and FPP have taken into account the following in drafting this *amicus*.

- (a) The complaint against Plantaciones de Pucallpa (Ocho Sur P) brought before the Complaints Panel of the Roundtable on Sustainable Development (“*RSPO*”) (*Mesa Redonda sobre el Aceite de Palma Sostenible*) which initially resulted in a stop work order in April 2016 and ultimately in a decision in April 2017 that the Company had violated RSPO Principles and procedures as a result of its clearance of primary forests. (The Company escaped sanction and further investigation, however, by withdrawing from the RSPO membership).<sup>10</sup>
- (b) The September 2015 resolution of the Directorate General of Agricultural Environmental Affairs of the Ministry of Agriculture and Irrigation of Peru (“*MINAGRI*”) ordering the suspension of Company operations after determining that the Company had illegally deforested at least, 5,301 hectares of mostly primary forests (within the territory claimed by the Santa Clara Native Community).<sup>11</sup> This order was never enforced by the Government.<sup>12</sup>
- (c) The confirmation in May of 2016 by the national forest authority of Peru, *SERFOR*, that the mother company, of which Plantaciones de Pucallpa was a subsidiary, had failed to comply with all required authorizations prior to forest clearance in its plantations in Peru.<sup>13</sup>
- (d) The Precautionary Measures resolution by the Cuarto Juzgado de Investigación Preparatoria Nacional, issued in December 2017 and ordering the suspension of all

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<sup>9</sup> Article 205 of the Constitution provides “Once all legal resorts provided for by national legislation have been used and denied, the party deeming itself injured in terms of the rights granted by the Constitution may appeal to international courts or bodies established by treaties or agreements to which Peru is bound.”

<sup>10</sup> FECONAU complaint to RSPO with the Santa Clara Native Community (5 December 2015) available at <https://www.rspo.org/members/complaints/status-of-complaints/view/88> (select: feconau\_complaint\_plantacionesdepucallpaeng\_5\_dec\_15.pdf) and RSPO Final Decision available at <https://www.rspo.org/members/complaints/status-of-complaints/view/88> (select: Complaints Panel Decision\_Apr17).

<sup>11</sup> Resolution No 270-2015-MINAGRI-DVDIAR-DGAAA (September 4, 2015).

<sup>12</sup> See <http://www.justiciaviva.org.pe/new/feconau-y-comunidad-nativa-shipiba-obtienen-logros-importantes-contras-empresa-del-grupo-melka/>. Further government investigations in May 2016 (see 8(c) below) highlighted a failure to comply with this order including prevention of access to environmental prosecutors triggering fines of over \$150,000.

<sup>13</sup> These include the following according to the statement; ‘Before pursuing deforestation activities, a land classification study (Clasificación de Tierras por su Capacidad de Uso Mayor) that has been approved by the relevant Peruvian national authority (DGAAA) must first be conducted as well as an Environmental Certification that has also been approved by the DGAAA which in the case of large scale agribusiness operations is an EIA (and not a PAMA). Finally, a land use change authorization is required and must be approved by the forest and wildlife Regional authority (ARFFS). See <https://content.eia-global.org/assets/2016/SERFOR+comunicado+05.24.16+ESP.pdf>

“destructive activities of forest clearance and logging” conducted by the Company. This order was never enforced by the Government.<sup>14</sup>

9. GJC and FPP has further taken into account in its analysis that the State has not contested to date that it has:

- (a) failed to title the entirety of the traditional territories of the Santa Clara Native Community and reconstitute their lands held by others (including the failure of the DRAU to provide the formal title extension requested by the Community);
- (b) without the free, prior and informed consent (“*FPIC*”) of the Community (through DRAU) issued at least 222 certificates of possession to private actors (5573 hectares in total) within the traditional lands of the Community and did so without any prior investigations to establish if such certificates would adversely impact claimed, untitled lands of the Community;
- (c) without FPIC and a prior independent environmental and social impact assessment (“*ESIA*”), permitted the licensing of the environmentally-destructive, large scale palm oil operations of Plantaciones de Pucallpa (Ocho Sur P) (which subsequently purchased the 222 lots, added it to its own Estate, and with support from the national and regional governments, converted all to titled property totaling 6845.23 hectares of the Santa Clara Native Community’s traditional territory);
- (d) subsequently failed to enforce its own environmental norms to prevent adverse impacts to the forest, biodiversity and the indigenous people living in and around the Company’s operations;
- (e) declined to revoke the authorizations granted to the Company for continued operations (despite the findings of illegal activity by its own Ministry (MINAGRI), national forest authority (SERFOR) and the issued Precautionary Measures (*see* para. 8 above);
- (f) taken none of the required actions that would make lawful the infringements of the right to property of the Santa Clara Native Community (*see* section IV below); and
- (g) failed to fully investigate and sanction any of the responsible parties carrying out violence and inciting racial hatred against members of the Community and its human rights defenders as they sought and continue to seek a just and fair remedy for these violations (*see* para. 29(3) below and [Annex 3](#)).

10. GJC and FPP also have taken into consideration that there is an administrative process pending in which DRAU has offered an expansion of the current title of the Santa Clara Native Community by approximately 1600 hectares. This is a welcomed initiative that we hope the Constitutional Court will recognize and incorporate into its final decision to order the titling of the full extent of the Community’s lands. Nevertheless, and as has been stated publicly by representatives of DRAU, the criteria used to establish this area did not include the determination of the extent of the community’s traditional lands and a process of FPIC with the Community; instead it was simply based on an identification of lands unclaimed by others and those deemed to be ‘freely available’.<sup>15</sup> In the words of the Director of the DRAU – “*The communities have rights over their titled areas, ancestral property is a thing of the past. Because we are a country and if*

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<sup>14</sup> Resolution No. 1 (file No. 00286-2017-1-5001-JR-PE-04) (15 December 2017).

<sup>15</sup> <https://www.facebook.com/idlpueblosindigenas/posts/2155988607971419>.

not, we would be under the law of the jungle.”<sup>16</sup> Unfortunately, this administrative, partial extension of the Community’s titled lands would leave well over 90,000 hectares of the community’s traditional territory without a title. Moreover, we understand that the vast majority of these lands claimed by the community which currently are classified as a State Permanent Production Forest (*Bosque de produccion Permanente*) lie on the other side of lands held and deforested by Plantaciones de Pucallpa (Ocho Sur P). This means that, even if this extension is issued, Company lands will divide the traditional territory into two and prevent clear access for the Community to the smaller titled area in the south and the much larger area to the north west of the plantation which still remains untitled by the State but subject to their claim. (See the Map at [Annex 2](#)).

### **III. As construed consistent with the State’s international duties and obligations, the Constitutional rights of the Santa Clara Native Community have been violated due to the failure of the State to title their traditional territory and its decision to permit others to occupy and use their lands and resources to their detriment**

11. The right to property for “peasant and native communities” recognized by the Political Constitution of Perú (1993) (Articles 2(16), 70 and 89), are to be construed consistent with the internationally recognized human right to property that has rightfully been applied to indigenous peoples (native communities) such as the Santa Clara Native Community. This right has been interpreted to mean that indigenous peoples (native communities) in Peru, as elsewhere in the world, have the right to the lands, natural resources and territories which they have traditionally owned, occupied or otherwise used or acquired.<sup>17</sup> Indigenous peoples’ right to property is based on the native communities’ historic and customary use and occupation of those lands.<sup>18</sup> Indigenous peoples’ collective human right to their ancestral lands even include areas from which they may have been involuntarily displaced (physically or economically) and no longer occupy; consequently, in such cases, possession is not a prerequisite to the right to recover indigenous lands currently in the hands of others.<sup>19</sup>

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<sup>16</sup> <https://revistaideele.com/ideele/content/santa-clara-entre-la-palma-y-el-tr%C3%A1fico-de-tierras> (“Las comunidades tienen derecho sobre las áreas tituladas: la propiedad ancestral pasó a la historia. ¡Porque somos un país! Sino estaríamos bajo la ley de la selva!”).

<sup>17</sup> See UNDRIP, Art. 26. See also the following articles of the listed international treaties and conventions, which address the right to property, and their resulting interpretations: ICCPR, Art. 27 (as interpreted by the UN Human Rights Committee), ICESCR, Art. 15 (as interpreted by the Committee on Economic, Social and Cultural Rights, Art. 5 of the Convention on the Elimination of All Forms of Racial Discrimination (as interpreted by the Committee on the Elimination of Racial Discrimination); ILO 169 (Arts. 13-19); Art. 21 of the American Convention on Human Rights (as interpreted by the Interamerican Court on Human Rights); Art. 21 of the African Charter on Human and Peoples’ Rights (as interpreted by the African Court on Human and Peoples’ Rights). For a compilation of the jurisprudence of UN human rights treaty bodies related to indigenous peoples’ and local community rights to the territories they have traditionally used and occupied, see: Indigenous Peoples and United Nations Human Rights Treaty Bodies - A Compilation of UN Treaty Body Jurisprudence and the Recommendations of the Human Rights Council (Volumes I thru VII) available at: [http://www.forestpeoples.org/en/resources?Publications%5B0%5D=type%3Areport&Publications%5B1%5D=type%3Atraining&Publications%5B2%5D=type%3Aannual\\_report&Publications%5B3%5D=type%3Abriefing&Publications%5B4%5D=language%3Aen&Publications%5B5%5D=work\\_theme\\_and\\_topics\\_publication%3A2&search\\_api\\_fulltext=un+jurisprudence&sort\\_by=search\\_api\\_relevance&=Search](http://www.forestpeoples.org/en/resources?Publications%5B0%5D=type%3Areport&Publications%5B1%5D=type%3Atraining&Publications%5B2%5D=type%3Aannual_report&Publications%5B3%5D=type%3Abriefing&Publications%5B4%5D=language%3Aen&Publications%5B5%5D=work_theme_and_topics_publication%3A2&search_api_fulltext=un+jurisprudence&sort_by=search_api_relevance&=Search).

<sup>18</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R.(, (Ser. C) No. 79, para. 151 y 153 (“*Awas Tingni*”); *Saramaka People. v. Suriname*, Judgment of November 28, 2007, Inter-Am. Ct. H.R.(Ser. C) No. 172, para. 96 (“*Saramaka Merits*”); IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, para. 115; IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Awas Tingni*, par. 140(a) & 140(c).

<sup>19</sup> *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Inter-Am. Ct. H.R.(Series C) No. 146, para. 128 (“*Sawhoyamaya*”). See also *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2015, Inter-Am. Ct. H.R. (Series C) No 125, para. 217 (“*Yakye Axa*”) (ordering the state to preference the restitution of the lands now in the hand of third parties after considering the “values, uses customs and customary laws” of the peoples in question as against the “legality, necessity, and proportionality of the expropriation”). Of course, in the instant case, Peru cannot evaluate the legality, necessity and proportionality of the expropriation as

12. It is well established that indigenous peoples and local communities have a special connection to their lands, resources and territories which are indispensable to their physical and cultural survival. “*For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.*”<sup>20</sup> This connection means that indigenous peoples’ rights to their traditional lands are inextricably linked to other fundamental rights, like rights to life and right to culture. Affect one right, and you affect other rights.<sup>21</sup>

13. Furthermore, international law has clarified that the mere existence of this human right to property --based on traditional use and occupation-- gives rise to the State’s duty and obligation to delimit, demarcate and title such lands in accordance with the norms, values and customs of the peoples and communities concerned and in consultation with the affected peoples.<sup>22</sup> The title issued by the State is *a legally required affirmation* of an already existing right, *not a State award or grant* of a new right.<sup>23</sup> Therefore, the property rights of the Santa Clara Native Community over its traditional territory exist even if not titled has been issued yet. International law is further clear, especially in the Americas, that until that titling occurs, State must “*abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the [indigenous peoples concerned] live and carry out their activities*” (including concessions to natural resources).<sup>24</sup> Furthermore, the Inter-American Court of Human Rights (“**Inter-American Court**”) is clear that in the execution of its duty to delimit, demarcate and title indigenous lands, “[a]t no time should the decision of the domestic authorities be based exclusively on the fact that the land is owned privately or that it is being rationally exploited.”<sup>25</sup>

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none of the activities associated with such conditions took place. *See also Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Inter-Am. Ct. H.R. (Series C) No. 214, para. 109-110 (“*Xákmok Kásek*”) (finding that “as established in the cases of the *Yakye Axa* and *Sawhoyamaya* indigenous communities, Paraguay recognizes the right of the indigenous peoples to request the return of the traditional lands they have lost, even when they are under private ownership and the indigenous peoples do not have full possession of them.”).

<sup>20</sup> *See Awas Tingni*, para. 149; see also *Conservation and indigenous peoples' rights. Report to the General Assembly*, A/71/150. July 29, 2016 (2016), Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz, para. 15 (2016) (“Indigenous peoples retain strong spiritual links with the plants, trees and animals on their lands and protecting their lands is a sacred duty.”)

<sup>21</sup> *Yakye Axa*, at para. 147 & 167 (affirming that denial of indigenous peoples’ access to the lands and natural resources on which they depend, can erode other basic rights such as the right to health, a decent life, survival itself, nutrition, education and culture identity).

<sup>22</sup> *Awas Tingni*, at para. 138 y 164; *Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005, Inter-Am. Ct. H.R. (Series C) No. 124, para. 209-210; y *Saramaka*, at para. 115 & 194(a).

<sup>23</sup> *Awas Tingni*, at para. 151; *Sawhoyamaya*, at para. 127-28; *See also Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, para. 69 (30 December 2009) (hereinafter “*IACHR Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources*”) (clarifying that “[g]iven that the foundation of territorial property lies in the historical use and occupation which gave rise to customary land tenure systems, indigenous and tribal peoples’ territorial rights ‘exist even without State actions which specify them’ or without a formal title to property.” Official recognition “should be seen as a process of ‘production of evidence establishing the prior ownership of the communities’” and not as a grant of new rights. Territorial titling and demarcation are thus complex acts that do not constitute rights, but merely recognize and guarantee rights that appertain to indigenous peoples on account of their customary use.”) (*footnotes to Inter-American Court cases omitted*).

<sup>24</sup> *See Awas Tingni*, para. 158(2) & 164; *Saramaka Merits*, at para. 194(a); Report No. 79/13, Case 12.639, Merits, *Kaliña and Lokono Peoples (Suriname)*, 18 July 2013, para. 132. *See also African Court of Human and Peoples’ Rights*, the case of the African Commission on Human and Peoples’ Rights v. Kenya, Application No. 006/2012, Judgment, para. 43(E)(i)(b) (26 May 2017) (involving the Ogiek peoples of Kenya).

<sup>25</sup> *Xákmok Kásek*, at para. 284.

14. As a result of the above-stated law, the Santa Clara Native Community has pre-existing collective human rights to their full ancestral territory – the 92.554.32 hectares they have requested that the Peruvian State recognize and protect through the issuance of a title to their lands.<sup>26</sup>

15. The State has failed to title the full extent of the Community's land and international human rights bodies have deemed the nation's laws and policies related to indigenous peoples' title inadequate. In 2000, the Inter-American Commission on Human Rights ("**IACHR**") concluded that with respect to Peru, "[t]he procedure in place for titling indigenous communal lands is long and reiterative. Many native communities have suffered years of red tape and high costs, excessive legal rigor, that ends up being prejudicial to the interested parties."<sup>27</sup> The inadequate procedure referenced by the IACHR has not been rectified to date. Indeed, affirming Peru's lack of progress on this matter, in its most recent review of Peru's compliance with ICERD, the Committee on the Elimination of Racial Discrimination ("**CERD Committee**") expressed the following:

*The [CERD] Committee is concerned by the absence of effective mechanisms [in Peru] for the protection of indigenous peoples' rights to their lands, territories and resources. This is, in part, attributable to the lack of proper procedures for the recognition of ownership and for land titling and to the widespread concentration of land and the exploitation of natural resources by private entities, companies and individuals – a situation which continues to provoke serious social conflicts. The Committee is also concerned about the fact that the development of natural resources continues to have a negative impact on the territories, lands and resources of indigenous peoples, particularly in the form of the pollution of water resources, which significantly impinges upon their traditional means of subsistence (art. 5).<sup>28</sup>*

16. It is well-documented and highly publicized, including in a 2014 report by Peru's human rights ombudsman (*Defensoría del Pueblo*), that indigenous community land titles in Peru frequently bear little or no resemblance to the customary lands of communities owing to a historical failure on the part of the Peruvian state to fully recognize indigenous peoples' traditional lands and territories.<sup>29</sup> Indeed, a detailed study of the national indigenous organization prepared by *la Asociación Interétnica de Desarrollo de la Selva Peruana* ("**AIDSESP**") in 2014, documented at least 1174 native communities whose applications for titling are still pending and an area of more than 20 million hectares of traditional indigenous lands that remains without legal recognition.<sup>30</sup>

17. The 2014 report from Peru's human rights ombudsman has acknowledged that this insecure tenure is a threat to forest governance and a cause of social conflict in Peru<sup>31</sup> as has happened with the Santa Clara Native Community and the forests within their lands. The ombudsman's 2014

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<sup>26</sup> GJC and FPP understand that the Community has repeatedly insisted that their traditional territory extends to the so-called "*pampa de sacramento*" a geographic feature identified as occupied by the Shipibo-Conibo people for hundreds of years. (See historic maps provided by the Community in its pleadings).

<sup>27</sup> IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., Chapter X, para. 21 & 39(4) (June 2, 2000) (recommending that Peru "adopt appropriate measures to guarantee the process of legal demarcation, recognition, and issuance to the indigenous communities of land titles, and to ensure that this process not prejudice the normal development of property and community life").

<sup>28</sup> CERD Concluding observations on the combined twenty-second and twenty-third periodic reports of Peru, CERD/C/PER/CO/22-23, para. 16 (23 May 2018) available at:

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fPER%2fCO%2f22-23&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fPER%2fCO%2f22-23&Lang=en) (hereinafter "*CERD Concluding observations on Peru (2018)*").

<sup>29</sup> *Análisis de la política pública sobre reconocimiento y titulación de las comunidades campesinas y nativas*, Defensoría del pueblo Informe No. 002-2014-DP/AMASPPI-PPI (2014).

<sup>30</sup> *La demanda territorial de los pueblos indígenas de la Amazonía peruana* (AIDSESP, 2014).

<sup>31</sup> <http://www.defensoria.gob.pe/Downloads/descarga/Informe-002-2014-DP-AMASPPI-PPI.pdf>.

report highlights some of the key problems that afflict the tenure of indigenous territory in Peru (several demonstrated in this case). These include:

- Multiple overlaps exist between indigenous territories particularly customary untitled lands and other land use categories (protected areas, economic concessions, private lands etc)
- Legal framework for land titling and recognition is contradictory
- Lack of oversight from the Ministry of Agriculture
- There is no single land registry that establishes the extent of the problem
- Decentralised government agencies responsible for titling and demarcation process do not have specialized staff capable of doing this work
- Communities are not informed about their rights during these processes
- Inadequate budget to resolve the matter
- No grievance or conflict resolution mechanisms particularly to resolve multiple land overlaps or to address arbitrary and erroneous demarcation and titling procedures.<sup>32</sup>

18. The recognition through titling of indigenous peoples' traditional territories is a duty of the State that must be reflected in its national laws and effectively implemented.<sup>33</sup> Nevertheless, Peru has failed in this respect. Most relevant to this case, international law does not qualify this duty by saying that the State *only* has to title traditional territories if such lands are not otherwise encumbered (i.e. titled to others) or where it does not wish to use the lands and resources for other public purposes. Indeed, States have an obligation to guarantee, respect and protect indigenous and tribal peoples' right to effectively control their territories without outside interference, including through freely determining how best to use that territory for their economic, social and cultural development.<sup>34</sup> Consequently, the Inter-American Court, interpreting the American Convention (binding on the State of Peru), is quite clear that pursuant to Article 21 of the American Convention, the right to property may be restricted only "*under very specific, exceptional circumstances, particularly when indigenous or tribal land rights are involved.*"<sup>35</sup> These exceptional circumstances and the pre-conditions to effectuating such infringement have not existed in Peru, or been complied with by the State in the case of the Santa Clara Native Community.

#### **IV. At no time has the State lawfully limited or extinguished the Right to Property of the Santa Clara Native Community**

19. Since Peru's initial titling of less than 0.2% of the Santa Clara Native Community's lands in 1986 (only 218 hectares of their 92,554.32 hectares of traditional territory), through the subsequent State titling, reclassification as "State forests" and licensing of the remaining parts of the Community's lands without their FPIC, the State has never lawfully limited or extinguished the property rights of the Community. Further, the Community has never agreed to having their rights extinguished or limited. Consistent with the Constitution and the international laws that bind Peru, the Community is now asking the Constitutional Court to order the State to recognize the remainder of its untitled lands in its ruling on the merits.

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<sup>32</sup> *Análisis de la política pública sobre reconocimiento y titulación de las comunidades campesinas y nativas*, Defensoría del pueblo Informe No. 002-2014-DP/AMASPPI-PPI (2014).

<sup>33</sup> This is a duty of the State as reflected in Articles 1 and 2 of the American Convention, Article 2(2) of the ICCPR, and similar provisions in other international treaties ratified by Peru.

<sup>34</sup> *Saramaka Merits*, at para. 93, 95, 194 and 214(7).

<sup>35</sup> *Saramaka People v. Suriname*. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of 12 August 2008. Inter-Am. Ct. H.R.(Series C) No. 185, at para. 49 ("*Saramaka Interpretation*").

20. As noted above, the possible subordination of indigenous peoples' human right to property may occur only in the most "exceptional circumstances". The Santa Clara Native Community has the right to own and effectively control their traditionally owned lands and territory, through their own institutions and in accordance with their own customs and norms. International law binding on Peru is clear that only in exceptional circumstances and where the State seeks to fulfil a necessary and compelling public interest may it seek to restrict the exercise and enjoyment of those rights.

21. More specifically, the Inter-American Court held that in addition to demonstrating that a particular activity (such as a large scale palm oil project) is necessary to achieve a compelling public interest and designed in a proportionate manner (tailored narrowly to the interest so as to avoid undue limitations to rights), the State also must demonstrate that the authorized activity does not threaten the survival of indigenous and tribal peoples, which is understood to mean their "ability to 'preserve, protect and guarantee the special relationship that they have with their territory', so that 'they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected'."<sup>36</sup> This has been followed by the UN Human Rights Committee, which held in 2009 while interpreting the ICCPR, that in the case of indigenous peoples, State parties "must respect the principle of proportionality so as not to endanger the very survival of the community and its members."<sup>37</sup> This is also implicit in Article 27 of the ICCPR, which provides that members of indigenous peoples shall not be denied the right to enjoy their culture in community with other members of the collective and the right to culture is inextricably linked with their right to property.<sup>38</sup> The same link to culture and property has been interpreted as arising from Article 15(1)(a) of the ICESCR providing persons with a right to take part in culture.<sup>39</sup> There are thus some State agricultural and economic initiatives that will be deemed impermissible under international human rights law. GJC and FPP argue that this is the case of the impermissible palm oil expansion in Peru currently overlapping the traditional territory claimed by the Santa Clara Native Community.

22. Only under "specific, exceptional circumstances" can the State legitimately limit the property rights of indigenous peoples and native communities to their traditional territories, and to do so, it first must comply with the conditions set forth in the Inter-American Court's jurisprudence (which are firmly supported by existing international human rights law as clarified by universal and other human rights bodies).<sup>40</sup> While the right to property of indigenous peoples is not absolute, neither is the authority of the State to infringe on those rights. That is, it is not enough that the State declares an economic initiative (for example, palm oil expansion) a national or public interest. The State's decision to restrict the enjoyment and exercise of the property rights of the Santa Clara Native Community, also must be:

- (a) established by law that it fulfils a useful and timely purpose;
- (b) necessary;

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<sup>36</sup> *Saramaka Merits*, at para. 129-134; *Saramaka Interpretation*, at para. 37.

<sup>37</sup> *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009, at para. 7.6.

<sup>38</sup> *Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada*, Report of the Human Rights Committee, 45 UN GAOR Supp. (No.43), UN Doc. A/45/40, vol. 2 (1990), 1. See also, *Kitok vs. Sweden*, Report of the Human Rights Committee, 43 UN GAOR Supp. (No.40) UN Doc. A/43/40; *Lovelace vs. Canada* (No. 24/1977), Report of the Human Rights Committee, 36 UN GAOR Supp. (No. 40) 166, UN Doc. A/36/40 (1981). *I. Lansman et al. vs. Finland* (Communication No. 511/1992), CCPR/C/52/D/511/1992; *J. Lansman et al. vs. Finland* (Communication No. 671/1995), UN Doc. CCPR/C/58/D/671/1995; and *General Comment No. 23* (50) (art. 27), adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994. UN Doc. CCPR/C/21/Rev.1/Add.5.

<sup>39</sup> See *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*. 10/12/98. E/C.12/1/Add.31, at para. 43.

<sup>40</sup> *Saramaka Interpretation*, at para. 49.

- (c) proportional; and
- (d) with the aim of achieving a legitimate purpose in a democratic society.<sup>41</sup>

In addition, the American Convention requires that to ensure that a State's restrictions do not amount to the denial of their "survival as a tribal people"<sup>42</sup>, the State must:

- (e) secure the *effective participation* of the Santa Clara Native Community, which in this case, especially given the cumulative effect of joining 222 land titles under a State-authorized large-scale agricultural palm oil scheme, includes obtaining its FPIC;
- (f) conduct, and share with the Community, *an independent ESIA* carried out prior to the infringement(s) and with the full participation of the Community in accordance with relevant international standards;
- (g) provide the community with a reasonable benefit from the activity producing the restriction; and
- (h) put into place "adequate safeguards and mechanism" (i.e. effective mitigation measures) to avoid, and if not possible, mitigate against adverse harms to the Santa Clara Native Community.<sup>43</sup>

23. Each of the preceding circumstances and conditions, when complied with as a whole, are all cumulatively intended to secure the physical and cultural survival of the indigenous people in question (in this case the Santa Clara Native Community), and ensure that any projects or activities carried out on their lands (whether by the State, its regional governments, or a private actor with State authorization or acquiescence) are proportional with respect to the legitimate ends and impacts so as to be permissible under human rights law.

24. To GJC and FPP's knowledge, the State has presented no evidence that in its decision to delay titling the entirety of the Santa Clara Native Community lands, and to instead grant rights of ownership and use to others, did it conduct or otherwise satisfy any of the activities and conditions described above. The State has presented no evidence that it took a deliberate and proportional decision pursuant to national law and with full due process and compensation to the Community. The State presents no evidence showing that it secured FPIC from the Community; reached an agreement with the Community on equitable, reasonable benefit sharing; conducted an independent participatory ESIA; and required the development and implementation of mitigation measures. All evidence to date clarifies that the State instead, took repeated decisions to erode the Community's land rights by a series of titling and licensing activities culminating in a large scale palm oil production that not only deprived the Santa Clara Native Community of their right to own, use and control their lands, resources and territories, but prejudiced and continues to threaten their very physical and cultural survival, and hence other human rights.

25. In preparing this *amicus*, GJC and FPP remained concerned that there might be those that would try to characterize this case as one about indigenous peoples' rights versus national economic development. The two are not mutually exclusive and this characterization minimizes

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<sup>41</sup> *Yakye Axa Indigenous Community v. Paraguay*, Judgement of 17 June 2015, Series C No 125, para. 144; *Saramaka Merits*, at para. 127

<sup>42</sup> The Court explained that the term "survival" means more than physical survival but rather the ability of the indigenous or tribal peoples in question to "preserve, protect and guarantee the special relationship that [they] have with their territory", so that "they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected..." *Saramaka Interpretation*, at para. 37.

<sup>43</sup> *Saramaka Merits*, at para. 128, 129, 139, & 158.

the Constitutional rights and freedoms at issue in this case. This case is not a referendum on whether a properly regulated and enforced palm oil industry is good or bad for the nation. The issue is whether applicable law permits a State to carry out an economic agenda by not complying with its duties and obligations related to the fundamental human rights and freedoms guaranteed by both its Constitution and the international laws to which it is bound and through which those constitutional rights are construed. In this case, Peru has violated the Santa Clara Native Community's right to property (among other human rights), leaving their lands and resources without legal protection and their physical and cultural survival in jeopardy. This case is about Peru knowingly violating human rights and then capitalizing on those violations by allowing primary forests to be used for palm oil expansion. In its final decision, GJC and FPP respectfully ask this Constitutional Court to affirm that sustainable development is never a product of the violation of constitutional rights.

## V. The Santa Clara Native Community maintains a Right to Restitution of all Lands previously titled or ceded to Others by the State

26. International law requires that anyone that has suffered a violation of his/her human rights has a right to a remedy.<sup>44</sup> As the IACHR has affirmed in its Situation Report on Peru of 2000, restitution of land previously taken from indigenous peoples in whole or part, is a necessary right to ensure the cultural survival and maintain the integrity of the community."<sup>45</sup> This is further confirmed by the CERD Committee calling upon "*States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories*".<sup>46</sup> As highlighted by the IACHR's Special Rapporteur on the Situation of Indigenous Peoples Indigenous ("**IACHR Special Rapporteur**"), indigenous peoples "*who lose total or partial possession of their territories preserve their property rights over such territories, and have a preferential right to recover them, even when they are in hands of third parties.*"<sup>47</sup> In a manner directly applicable to the facts and circumstances of this case, the IACHR Special Rapporteur has explained (while referencing jurisprudence of the Inter-American Court interpreting the American Convention):

*One frequent source of conflict between the property rights of indigenous or tribal peoples and third parties arises when possession of indigenous territory has been lost by a given indigenous group and the legal title to the property has been conferred on third-party owners. In such cases, the Court has explained that **"the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality."** The preferential option for recovery of ancestral lands in favor of the corresponding indigenous or tribal group must be the starting point. It is a right of indigenous and tribal peoples for their territorial property not to be trumped, on principle, by third parties' property rights. Implicit in this approach is the corollary that third parties who do not hold title in good faith have no legitimate expectations or bona fide property*

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<sup>44</sup> See Universal Declaration of Human Rights, Art. 8; ICCPR, Art. 2; ICERD, Art. 6, Convention on the Rights of the Child, Art. 39; American Convention, Art. 25; African Charter on Human and Peoples' Rights, Art. 27; and the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 13.

<sup>45</sup> IACHR, Second Report on the Situation of Human Rights in Peru. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., Chapter X, para. 16 (June 2, 2000).

<sup>46</sup> General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122, para. 5 (1997) (interpreting Article 5 of ICERD).

<sup>47</sup> IACHR *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources*, at para. 123. See also *Xákmok Kásek*, at para. 286 (providing that "alternative lands" rather than restitution of ancestral lands "will only be admissible when it has been adequately assessed, as indicated in this judgment, that the expropriation is not appropriate and that the negotiations to purchase the land have failed.")

rights. Such is the case, for example, of settlements or land grants made to individuals without regard to the indigenous peoples who have always lived there.<sup>48</sup>

27. Indeed, the Inter-American Court not only affirmed that indigenous peoples still have rights to lands from which they have been displaced or from which they had to unwillingly depart, but that even if those lands were since transferred to third parties in good faith (i.e. the parties did not know those lands were previously claimed by the indigenous peoples' in question), the preferential option is still a return of those lands to the indigenous peoples and not the so-called innocent third parties.<sup>49</sup> As noted above, indigenous peoples' possession of the lands they claim is not actually a pre-requisite to exercise the right of property and demand the remedy of recuperating those very same lands.<sup>50</sup>

28. In this case of the Santa Clara Native Community, it is highly questionable whether any of the parties who received titles within the traditional territories can be classified as good faith third parties, especially the current owners of the 222 titles, Plantaciones de Pucallpa (Ocho Sur P). As such, the threshold for returning those lands is arguably more favourable to the Community rather than the third parties involved. Indeed, GJC and FPP understand that investigations by independent journalists and claims by local politicians and communities and local prosecutors all point to a widespread system of organised land trafficking in the Peruvian amazon including in Ucayali.<sup>51</sup> These investigations point to a system of land grabbing in which local officials, often outside of their mandate and in a fraudulent manner, issue so called possession certificates to lands in view supposedly of many years of use and occupation. These lands are then converted into land titles by agrarian authorities and then registered in the land registry. In the case of the Santa Clara Native Community, much of the land in the immediate vicinity of their settlements has been issued with possession certificates claimed by individuals the Community say are working with Plantaciones de Pucallpa (Ocho Sur P). The lawsuit by the FECONAU and the Community also identify that the majority of the 222 individual possession certificates were converted to land titles and then subsequently purchased by Plantaciones de Pucallpa in individual transactions which oddly, all took place over only two or three days --suggesting the organised nature of this land acquisition involving government and private actor coordination and the presumption that the third parties are not good faith purchasers.

29. Regardless, there is no justifiable reason why the State cannot end the authorizations permitting the company to continue its activities, especially in light of:

- (a) the findings of its own Ministry of Environment, investigations of its own Prosecutor, and SEFOR;
- (b) the findings of its own human rights ombudsman (*Defensoria del pueblo*);
- (c) the Precautionary Measures issued and ordering immediate cessation of operations;
- (d) the resolution of the RSPO Complaints Panel unfavourable to the Company;

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<sup>48</sup> See IACHR, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources*, par. 120 (30 December 2009) emphasis added (referencing *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs. Judgment of March 29th, 2006, Inter-Am. Ct. H.R.(Series C) No. 146, para. 128, and I/A Court H.R., *Saramaka Merits*, at para. 115)).

<sup>49</sup> *Sawhoyamaxa*, at para. 128.

<sup>50</sup> *Ibid.* See also IACHR *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources*, footnote 358, (explaining that compensation with alternative lands is only where restitution is "not materially possible due to objective and justified reasons").

<sup>51</sup> See <https://news.mongabay.com/2017/10/then-they-shot-me-land-conflict-and-murder-in-ucayali-peru/>

- (e) the perpetrators of violence against members of the Santa Clara Native Community human rights defenders (“**HRDs**”) that the State has not fully investigated or sanctioned (see Annex 3 for a summary of that violence as reported to the UN CERD Committee<sup>52</sup> as well as the UN Special Rapporteur on the Human Rights Defenders<sup>53</sup> (see also CERD Committee concerns and recommendations to Peru regarding HRDs”)<sup>54</sup>;
- (f) the feasibility of providing compensation to the few, if any innocent third party titled holders within the claimed area; and
- (g) the need for a contiguously titled territory to ensure the use and enjoyment of the Community’s rights to property (given that any exclusion of the lands titled to Plantaciones de Pucallpa (Ocho Sur P) would reward the State’s prior bad acts and geographically result in restrictions on the freedom of movement and access between the already titled and soon-to-be titled remainder of their lands). (See Annex 2).

## VI. Conclusion

30. This year, in its most recent examination of Peru’s compliance with the ICERD, the CERD Committee recommended that Peru:

*Establish an appropriate and effective mechanism for filing land claims and for the restitution of ancestral territories and lands and ensure that adequate human, technical and financial resources are allocated for the proper operation of that mechanism;*

*Ensure the protection of indigenous peoples’ right to own, use, develop and exercise full control over their lands, territories and resources by, inter alia, providing the necessary legal recognition and safeguards in line with international standards;*

*Step up its efforts to conduct timely and appropriate social and environmental impact assessments of natural resource development projects sited in indigenous peoples’ territories with a view to protecting those peoples’ traditional means of subsistence;*

*Ensure that affected communities receive compensation for any harm suffered and that they have access to a share in the benefits to be derived from such activities;*

...

*Ensure that indigenous peoples... are consulted about all administrative and legislative measures that may affect their rights with a view to obtaining their free, prior and informed consent; and*

...

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<sup>52</sup> Report of FECONAU, Ethnic Council of the Kichwa Peoples of the Amazon (CEPKA), National Coordinator for Human Rights (CNDDHH), Legal Defense Institute (IDL), and FPP to the Committee on the Elimination of Racial Discrimination regarding the rights of Indigenous Peoples in Peru in anticipation of its 95<sup>th</sup> Session (30 March 2018), available at [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fNGO%2fPER%2f30812&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fNGO%2fPER%2f30812&Lang=en).

<sup>53</sup> Submissions to the Special Rapporteur on Human Rights Defenders and the Special Rapporteur on the Rights of Indigenous Peoples (20/10/2017) and supplementary information 12/12/2017 (Caso No: 685cha06) available in Annex 4 of Report of FECONAU, Ethnic Council of the Kichwa Peoples of the Amazon (CEPKA), National Coordinator for Human Rights (CNDDHH), Legal Defense Institute (IDL), and FPP to the CERD Committee regarding the rights of Indigenous Peoples in Peru in anticipation of its 95<sup>th</sup> Session (30 March 2018), available at [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fNGO%2fPER%2f30812&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fNGO%2fPER%2f30812&Lang=en).

<sup>54</sup> CERD Concluding observations on the combined twenty-second and twenty-third periodic reports of Peru, CERD/C/PER/CO/22-23, par. 22-23 (23 May 2018) available at: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fPER%2fCO%2f22-23&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fPER%2fCO%2f22-23&Lang=en).

*Ensure that prior consultations on the implementation of natural resource development projects, including mining projects, that are to be conducted on indigenous peoples' lands or in their territories are carried out in each and every case and in a systematic, timely and reasonable manner and that the indigenous peoples concerned are provided with sufficient and appropriate information.*<sup>55</sup>

**31. The facts, law and jurisprudence described above, along with the recommendations of the CERD Committee, compels the conclusion that the State's and the Company's actions and omissions with respect to the Santa Clara Native Community have been and continue to be, unconstitutional. Consequently, consistent with the petition of the Community (and FECONAU), GJC and FPP respectfully requests that the Constitutional Court order the State to:**

- (a) immediately title, within a specified period, the extension of Santa Clara Native Community lands as requested by the Community (in consultation with the Community and in accordance with their norms, values and customs), with no carve outs for alleged private title holders (providing for whatever compensation is required under the law to such holders);
- (b) revoke any authorizations for continued operations of the Plantaciones Pulcalpa (Ocho Sur P);
- (c) restore the environment within the territory of the Santa Clara Native Community and provide compensation for harms incurred (alone or in cooperation with the Plantaciones de Pucallpa (Ocho Sur P); and
- (d) reform its laws and policies to avoid undue delays in the delimitation, demarcation and titling of indigenous lands in the future and ensure that until such processes are concluded, abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the members of the Santa Clara Native Community are entitled.

**And further order that Plantaciones de Pucallpa (Ocho Sur P):**

- (a) cease its operation;
- (b) work with the State to restore any damage it has caused to the environment in a manner that is consistent with best practices, applicable law, and the obligations to provide a just and fair remedy for human rights violations;
- (c) compensate the original owners of the property damaged, the Santa Clara Native Community;
- (d) pay any other damages the Court believes necessary, and within its competence to order, to deter similar activities from occurring again.

**32. The GJC and FPP are confident that the Constitutional Court will apply the Constitution, national laws and duties and obligations of Peru under international law and find in favor of the Santa Clara Native Community.**

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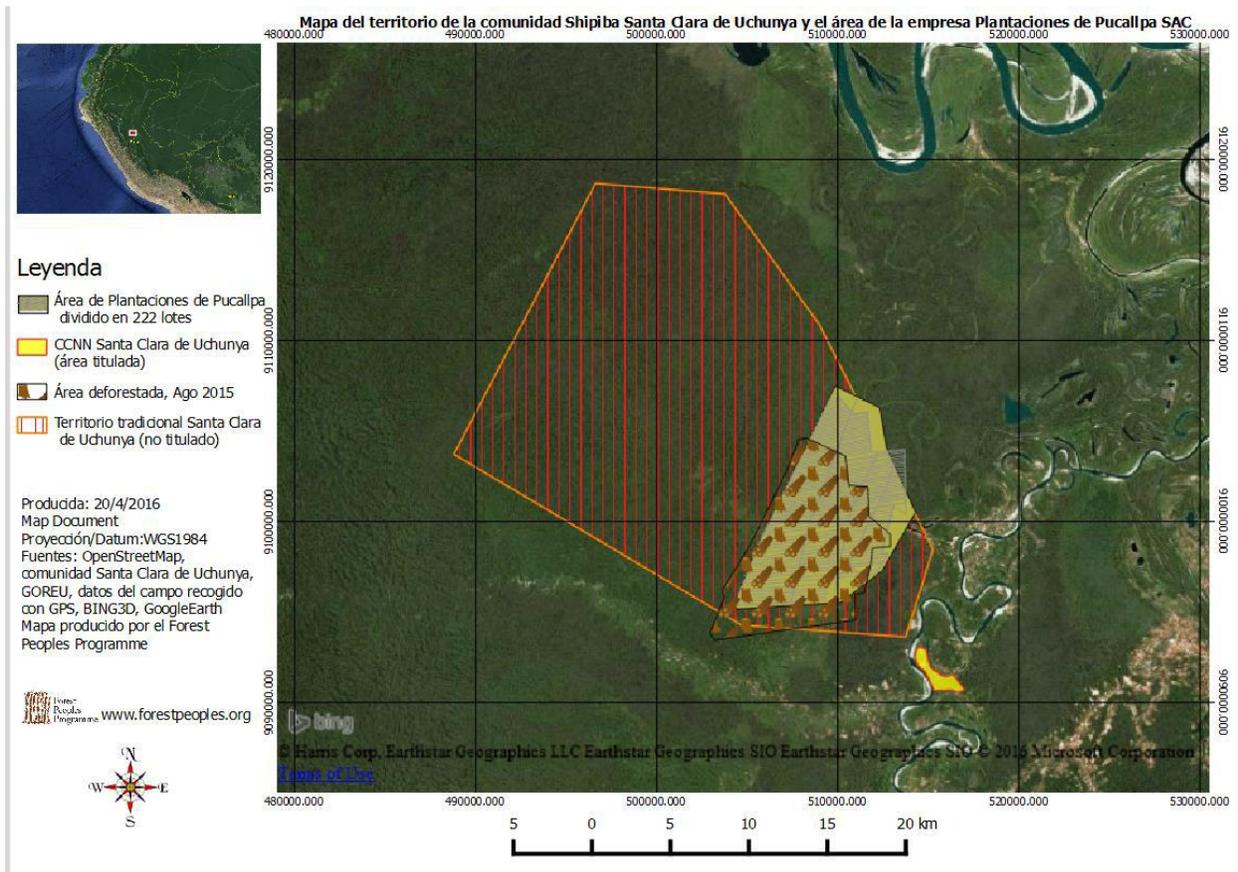
<sup>55</sup> CERD Concluding observations on Peru (2018), para. 17 and 21.

## **ANNEX 1: Description of the mandate or nature of the Presenting Organizations**

**GLOBAL JUSTICE CLINIC, NYU SCHOOL OF LAW:** The Global Justice Clinic (GJC) is an official program of NYU School of Law. GJC works to prevent, challenge, and redress human rights violations in situations of global inequality. Taking on cases and projects that involve cross-border human rights violations, the harmful impacts of activities by state and non-state actors, and emerging problems that require close collaboration between actors at the local and international levels, GJC engages in human rights investigation, advocacy, and litigation in domestic and international settings. GJC has represented individuals and groups before the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, U.N. human rights bodies, the World Bank Inspection Panel, and U.S. federal court.

**FOREST PEOPLES PROGRAMME (FPP):** Forest Peoples Programme works to create political space for forest peoples to secure their rights, control their lands and decide their own futures. FPP supports the rights of peoples who live in forests and depend on them for their livelihoods, to promote an alternative vision of how forests should be managed and controlled, based on respect for the rights of the peoples who know them best. FPP was founded in 1990 in response to the forest crisis, specifically to support indigenous forest peoples' struggles to defend their lands and livelihoods. FPP is registered as a non-governmental human rights Dutch Stichting in 1997 (KvK 41265889, RSIN 805925673), and then later in 2000, as a UK charity, No. 1082158, and a company limited by guarantee (England & Wales) Reg. No. 3868836, with a registered office in the UK and an administrative office in the Netherlands (Hoofdstraat 58, 6974AX Leuvenheim). Through advocacy, practical projects and capacity building, FPP supports forest peoples to deal directly with the outside powers, regionally, nationally, and internationally that shape their lives and futures. FPP has contributed to, and continues supporting, the growing indigenous peoples' movement whose voice is gaining influence and attention on the world-wide stage. FPP's Legal and Human Rights Programme has brought numerous complaints on behalf of the indigenous peoples around the world to the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the African Commission on Human Rights, the International Labour Organization, the UN Committee on the Elimination of Racial Discrimination, the Roundtable on Sustainable Palm Oil, and other international complaint mechanisms.

## ANNEX 2: Map of lands of Plantaciones de Pucallpa (Ocho Sur P) and the titled and untitled lands of the Santa Clara Native Community



### **ANNEX 3: Summary Threats and Acts of Violence against the Community of Santa Clara de Uchunya<sup>56</sup>**

*1 January 2014:* Threats to Huber Flores, his wife Nazalith Mozombite and their son, Carlos Antonio – house burnt down after the family repeatedly refused to leave the traditional land which was wanted by PP/Ocho Sur. *September 2014:* four (4) indigenous leaders from Saweto, Ucayali, were murdered for their fight against illegal logging and the titling of their ancestral land.

*9 April 2016:* Six people armed with sticks and machetes, known associates of PP/Ocho Sur, threatened a group from the community of Santa Clara responsible for demarcating their ancestral lands (including their then President). When the group tried to return home, their aggressors had blocked their way by felling trees across the road. The six people threatened them saying: “If you try to pass through here along the same path that you used to enter, you will be killed and you will die. If you come back here again we will not permit it. Anything might happen to any of your leaders.” The indigenous group had to look for an alternative way back to their community and it took them three days to walk home. (In September 2016, one of the community members (who would prefer to remain anonymous) was threatened by three individuals after he confiscated the chainsaws from some people found felling trees on the traditional land of the Shipibo without their prior authorisation. They threatened him saying “If we ever find you again – whether on the river or on a trail - you will not make it out alive.”)

*11 February 2017:* Huber Flores was beaten up by a group of armed men, who withdrew after being frightened off by passers-by. *15 March 2017:* The same community member from Santa Clara mentioned above, who wishes to remain anonymous, was followed by two men on motorbikes at around six o’clock at night while he was on the way home from Nueva Requena (the district capital). The men told him that they had a contract to kill him because of the time he had confiscated the chainsaws. They said they had been sent by Bernado Evaristo Agurto Rojas, an ‘enforcer’ known to be linked to PP/Ocho Sur.

*5 May 2017:* During a visit from the government environmental district attorneys, investigating fraudulent possession orders issued by DRAU within the traditional territory of the community, they found people (who weren’t from the community) felling trees (one of whom had requested one of the orders under investigation). This individual told the community members guiding the attorneys (who prefers to remain anonymous) “You son of a bitch we will find you sometime and make you pay, you think you are so great.”

*27 May 2017:* representatives from the DRAU and members of the community of Santa Clara embarked upon the first stage of demarcating their traditional lands - only 750 hectares - when they were aggressively confronted by approximately 400 people who wouldn’t let them through to carry out their work. The following was overheard: “If the authorities and the community members try to enter here, then blood will flow.” When they returned to the village, the delegation from the DRAU and the community members were again intercepted by another group which included employees of PP/Ocho Sur, among them Bernado Evaristo Agurto Rojas and his two sons, who told them, “You do not pass one metre further, if you do, blood will flow.”

*June 2017:* FECONAU visited the community of Santa Clara. During their visit, a group of 30 community members, accompanied by civil servants from the district attorney’s office, went to inspect the lands which were subject to possession certificates recently issued by the DRAU.

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<sup>56</sup> For further details and source material, see Reports to the UN Special Rapporteur on Human Rights Defenders, *supra* note 52.)

During the inspection, they were intercepted by a group of approximately 100 people armed with stakes and machetes. The armed group told them, “If you want to pass through here you will not be able to.” The community members and attorneys had to put an end to their inspection, fearing for their lives.

*20 August 2017:* A community delegation went to maintain a traditional maize farm and were met there by 20 strangers from a recently established settlement, who said to them, “The community cannot take one step forward because this territory is not yours, it is ours and if the community enters again anything might happen.”

*1 September 2017:* Three men who were unknown to the victim came at night to Richard Fasabi’s house where he lived with his wife. They said to him, “This land is ours...we were looking for you to tell you this, Richard, two things: you’re going to leave here, because these lands belong to the company...if not, you’re going to have to face the consequences.” For his safety, Fasabi went to live with his father, where an old school friend came to see him. The friend is the General Manager of PP/Ocho Sur and came with the message, “Why don’t you sell these lands? This company is mercenary and you’re going to have to face the consequences.” Fasabi and others feel as though they have become the company’s “targets.”

*7 September 2017:* Armed men knocked on the door of the home of Robert Guimaraes, President of FECONAU, asking for him. Given that he was not at home (because he knew of the likelihood he would be threatened), the henchmen left an intimidating message with his daughter.

*8 September 2017:* Two hooded men, one driving a rickshaw and the other sitting in the back, stopped behind Policarpo Sánchez when he was waiting at the traffic lights on his motorbike. Seeing that he was wearing a FECONAU t-shirt, they said to him “Ahh, you’re from FECONAU too, you already know what’s coming to you.” At that exact moment, the lights turned green and he took off on his bike.

*23 September 2017:* Fifteen (15) men who are known associates of PP/Ocho Sur arrived at Huber Flores’ house and asked him to leave. He responded, “If you want me to leave, you will have to kill me.” They answered, “Then you know what will happen.”

*11 December 2017:* Land invaders who are thought to be associated with palm oil operations, shot at a community delegation who were collecting evidence of the destruction of community forests. This delegation included community members from Santa Clara, representatives from FECONAU and a representative from IDL. As a result, one representative from FECONAU, Edinson Mahua, narrowly avoided a very serious injury. Mr Hoyos, Chief de Santa Clara de Uchunya, issued a call to action by local authorities, who continue to be unable to guarantee the safety of the community, quoting the fact that even if community leaders reported the incident of the 11 December to the Campo Verde district attorney, they still have not notified the police in Nueva Requena.

*5 January 2018:* two armed and hooded persons arrived at the home of a community elder (a man who has been subject to threats since his involvement in the protests around the expansion of palm oil plantations), whose house lies on the edge of the village closest to the expanding plantations. They went on to question his daughter-in-law, who was alone at the house, asking whether she was a community member. Concerned for her safety, she denied this. They then showed her a shotgun and told her they were looking for the community leaders and any community members, because “we are ready to kill”.

*20 January 2018:* several hooded figures made an attempted attack against the same household.

*7 July 2018:* At dawn, community chief Carlos Hoyos Soria and one of his brothers, Benjamin Hoyos Soria, made their way to the community's forest to monitor the boundaries of their territory. They travelled by boat, then walked for several hours. At 08:30am, close to the area known as "Tres Mil", they found a new trail, which turned out to be have been cut by land-traffickers operating in the area. The brothers were intercepted by three unknown men. Their faces were covered and they were dressed entirely in black. They fired shots twice. Carlos managed to run some thirty metres, before he fell to the ground. More shots were fired while Carlos managed to escape along with his brother. None of the bullets hit the community members, however both men experienced shock and Carlos dislocated his shoulder. Carlos, his wife and Benjamin left the community to seek refuge in the city in the hours following the attack. A criminal complaint was presented against those responsible; this complaint remains at the stage of preliminary investigations.