Global Justice Center
Human Rights Through Rule of Law

Forest Peoples Programme

12 December 2018

Your Excellency
President José Antonio Vargas Martínez
Civil Court of the Province of San Martin
Tarapoto, Peru

RE: *Amicus Curiae* - Case No: 0649-2017-0-2208-JR-CI-01

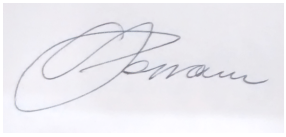
Dear Esteemed President:

Respectfully, we present this *Amicus Curiae* in favor of the Nuevo Lamas de Shapaja Native Community and the Ethnic Council of Kichwa Peoples of the Amazon (CEPKA) in their case against the National Service of Natural Protected Areas, the Regional Government of San Martin, the San Martin Regional Agrarian Agency, the Ministry of Agriculture, the Directors of the Regional Conservation Area Cordillera Escalera and the Ministry of the Environment (Case No. 0649-2017-0-2208-JR-CI-01).

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,



Meg Satterthwaite
Director
Global Justice Clinic
NYU School of Law

Anouska Perram
Legal Counsel
Forest Peoples Programme

LA SALA CIVIL
DE LA
CORTE SUPERIOR DE SAN MARTIN
CON SEDE EN TARAPOTO

Amicus Curiae Brief

in

Proceso constitucional de amparo interpuesto por la Comunidad Nativa de Nuevo Lamas de Shapaja y el Consejo Étnico de los Pueblos Kichwa de la Amazonía (CEPKA) contra el el Servicio Nacional de Áreas Naturales Protegidas, Gobierno Regional de San Martin, Dirección Regional de Agricultura, Ministerio de Agricultura y Riego, Jefatura del Área de Conservación Regional Cordillera Escalera y Ministerio del Ambiente

Case No. 0649-2017-0-2208-JR-CI-01

12 December 2018

Moreton-in-Marsh

[ENGLISH ORIGINAL]

Amicus Curiae

Comunidad Nativa de Nuevo Lamas

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 NGO based in the United Kingdom and the Netherlands which supports the rights of indigenous and tribal peoples throughout the world, has the honour of submitting this *amicus curiae* brief to La Sala Civil de la Corte Superior de San Martín con sede en Tarapoto ("the Court"). FPP has previously had the privilege of acting as victims' representative before the Inter-American Court of Human Rights in the cases of, inter alia, *Moiwana Village* (2005), *Saramaka People* (2007) and *Kaliña and Lokono Peoples* (2015).

2. FPP has previously been involved in providing some advice on the application of international law provisions related to indigenous peoples to the appellants in this appeal, and GJC has recently become acquainted with the key factual and legal issues. This brief has been prepared in order to provide the Court with a more detailed explanation of the legal position under international instruments, within the Interamerican system and internationally.

3. In preparing this amicus brief, GJC and FPP have seen the following documents pertaining to the case in question:

   - The original amparo claim filed on 7 August 2017.
   - The response to the claim filed by the Ministry of Agriculture on 10 October 2017 (not including medios probatorios);
   - The response to the claim by the management of the Regional Conversation Area of Cordillera Escalera to the appeal, filed on 22 September 2017 (not including medios probatorios);
   - The response to the claim by the *Servicio Nacional de Áreas Naturales protegidas por el Estado – SERNANP* filed on 29 September 2017 (not including medios probatorios);
   - The response to the claim by the *Ministerio del Ambiente* filed on 29 September 2017 (not including medios probatorios);
   - The documents filed by the appellants in the appeal;
   - The expert anthropological report accompanying the amparo claim;
   - The *cesión en uso* agreement signed between the community of Nuevo Lamas de Shapaja and the Regional Government of San Martín.

4. GJC and FPP submit this amicus brief to highlight relevant regional and international jurisprudence and its potential application to the facts arising in this appeal. The brief focuses in particular on principles of international human rights law arising under the American Convention on Human Rights (the "**American Convention**") and ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries ("**ILO 169**"), but also draws more widely on other instruments of international human rights law and international jurisprudence.

5. Peru has ratified and is bound by both the American Convention[1] and ILO 169.[2] Certain provisions of the latter convention (in particular those related to prior consultation of indigenous peoples) have been transformed into national law in Peru by virtue of

[1] On 28 July 1978.
[2] On 2 February 1994.

Reglamento 29785 de la Ley del derecho a la consulta previa a los pueblos indígenas u originarios reconocido en el Convenio 169 e la Organización Internacional de Trabajo[3] (as well as being referred to in some other national laws)[4]. As international human rights treaties, both of these conventions (as well as other human rights instruments we will refer to below) also have a "constitutional status" (*rango constitucional*).[5] In addition, of course, Peru's own constitution provides a range of additional protections to human rights (including property rights),[6] and of course, the fourth paragraph of the final and transitory provisions of the Constitution also provides that: "Las normas relativas a los derechos y a las libertades que la Constitución reconoce se interpretan de conformidad con la Declaración Universal de Derechos Humanos y con los tratados y acuerdos internacionales sobre las mismas materias ratificados por el Perú."

6. There is a well-established line of jurisprudence and commentary in relation to indigenous and tribal peoples interpreting the American Convention and ILO 169 jointly and interdependently, and this brief will draw in particular on leading cases from the Inter-American Court of Human Rights ("**IACtHR**" or the "**Inter-American Court**"). The jurisprudence of the IACtHR demonstrates the considerable progress in the development of the recognition and protection of the rights of indigenous peoples that has occurred in the more than 20 years since ILO 169 was adopted, much of which is captured in the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**").[7] A conjunctive reading of ILO 169, the American Convention and UNDRIP is consistent with Article 35[8] of ILO 169, a provision that is analogous to Article 29(b) of the American Convention.[9]

7. The brief will also refer to jurisprudence from the African Court and African Commission of Human and Peoples' Rights. Although not binding on Peru, this jurisprudence is illustrative as it addresses many of the same issues as those before the Court in this case, and such jurisprudence has moreover developed with significant reliance on the jurisprudence of the Interamerican system (which is binding on the State of Peru). We suggest the Court should therefore consider this jurisprudence persuasive, although not binding.

8. In fact, the human rights violations arising in the case before the Court are primarily connected with the underlying violation of the right to property of the Kichwa people (of which the Nuevo Lamas Community forms part). This submission sets out the basis and extent of that right, and focuses on the following 5 points in connection with it, which GJC and FPP consider are raised by the facts set out in the *amparo* claim before the Court:

    - The failure over many years of the Government of Peru to delimit, demarcate and title the customary territories of the Kichwa people, including in particular the territory of the Nuevo Lamas Community (the "**Community**");
    - The failure to provide equal treatment and protection of untitled indigenous lands and territories;

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[3] Adopted by Decreto Supremo No 1 001-2012-MC.

[4] Including for example, Law No. 29763 (Ley Forestal y de Fauna Silvestre), article 2 of which includes ILO Convention no. 169 as a general principle. Further references can be found in arts 3, 12, 26, 141, and in the 11th final supplementary provisions (*dispociones complementarias finales)*. Law No. 30754 (Ley marco sobre el cambio climático) also refers to ILO Convention no. 169: see art 22.

[5] See for example the decision of the Constitutional Court of Peru in N.º 03343-2007-PA/TC (f.j. 33).

[6] Including in articles 2, 44, 70 and 88.

[7] The Peruvian government voted in favour of the adoption of UNDRIP in 2007.

[8] Article 35 of ILO 169 provides that: "La aplicación de las disposiciones del presente Convenio no deberá menoscabar los derechos y las ventajas garantizados a los pueblos interesados en virtud de otros convenios y recomendaciones, instrumentos internacionales, tratados, o leyes, laudos, costumbres o acuerdos nacionales."

[9] Article 29(b) of the American Convention provides that: "Ninguna disposición de la presente Convención puede ser interpretada en el sentido de: … (b) limitar el goce y ejercicio de cualquier derecho o libertad que pueda estar reconocido de acuerdo con las leyes de cualquiera de los Estados Partes o de acuerdo con otra convención en que sea parte uno de dichos Estados".

- The maintenance of a legislative scheme for titling of indigenous peoples' territories which prevents the effective titling of any territories with forest cover – permitting only a "use agreement" which does not provide property rights – therefore depriving the Community of the possibility to receive a genuine property title for the vast majority of its customary territory and rendering the legislative scheme and its application on the facts discriminatory;
- The imposition of a new regional conservation area (*área de conservación regional*), notably the Regional Conservation Area *Cordillera Escalera* ("**ACR-CE**"), overlapping the territory of the Community, resulting in significant restrictions on use and access of natural resources within their customary territories, without the effective participation (including consultation and the free, prior and informed consent) of the Nuevo Lamas Community and other affected indigenous peoples including other Kichwa communities, without having conducted an economic and social impact assessment, without providing any benefit sharing mechanisms, and without providing any compensation to the Nuevo Lamas Community in relation to their lost rights of property, use and access;
- The failure of the Government of Peru to recognise and respect the rights of the Nuevo Lamas community to self-determination, including determination of priorities for their social, economic and cultural development, and the continued full use and effective control of their customary territories.

II. Factual background to this case

9. The following paragraphs set out the key facts of the present case, as understood by the author of this brief.

10. The Nuevo Lamas Community is a Kichwa indigenous community whose ancestral territories, used and occupied by them since time immemorial, are located within the San Martin region. The Community has been attempting to gain formal recognition from the local authorities regarding its territory since approximately 1980, when one of the co-founders of the modern-day Community, Miguel Ishuiza, was designated "agente municipal". For many years, the community sought recognition as a "caserio" (without success) being unaware of their rights to recognition as an indigenous community. In 2008, the Community learnt of the possibility of gaining legal recognition as a "native community", in line with the provisions of Decreto-Ley No. 22175 (*Ley de Comunidades Nativas y de Desarrollo de la Selva y la Ceja de Selva*) (hereafter "**Ley de Comunidades Nativas**"). After obtaining this recognition the same year, in 2009 the Community made another request to the Regional Government of San Martín (**GORESAM**) for the titling of their territory. They subsequently sent a letter requesting the titling of their lands again on 29 August 2013.[10] Technicians from the GORESAM's Titling Agency and Regional Environmental Authority visited the Community between 20–24 May 2014 to demarcate their territory, according to the boundaries established by the Community. According to the georeferenced results of this demarcation, the Community's communal territory covers an area of 1,759.70 hectares of land, of which 1,351.37 hectares (76%) overlap with the ACR-CE.[11]

11. In response to the 2013 request for titling, on 12 February 2016,[12] GORESAM provided the Community with a legal property title, but covering only 31.3048 hectares of its territory. In respect of the remainder of the territory recognised – 1,620.0154 hectares, or 98% of the total territory recognised (which was less than the 1,759.70 hectares claimed by the Community) – GORESAM stated that it could not form part of a property title, but could be conceded only through a use agreement (*cesión en uso*). The reason given for

[10] Registro de Expediente Nº 544043.
[11] Informe Técnico Nº 013-2014-GRSM/DRASAM/DTRTyCR/ACN, Dirección de Titulación, Reversión de Tierras y Catastro Rural.
[12] Resolución Directoral Nº 017-2016-GRSM/DRASAM/DTRTyCR.

this was because these 1,620 hectares were classified by the State as forest lands (*tierras de aptitud forestal*), which under national law cannot be granted a property title.

12. Specifically, the basis for this denial can be found in article 11 of the Ley de Comunidades Nativas, which provides that "la parte del territorio de las Comunidades Nativas que corresponda a tierras con aptitud forestal, les será cedido en uso y su utilización se regirá por la legislación sobre la materia". This position is also reflected in other legislative instruments. For example, under article 32 of the same law, untitled indigenous territories fall within the definition of the "State dominion lands" (*dominio del Estado*) (in contrast, pre-existing property titles of individuals are, by definition, excluded from State dominion lands). By operation of article 37 of Ley No. 29673 (Ley Forestal y de Fauna Silvestre) (hereafter "**Ley forestal**"), it is prohibited to grant property titles in forested State dominion land. This means that in effect, article 37 prohibits the titling of forested indigenous territories.

13. As per article 11 of the Ley de Comunidades Nativas, forested areas of untitled indigenous territories may only be granted through a "cesión en uso" agreement (some of the relevant parameters of which are mentioned briefly below). Accordingly, on 5 July 2017, having no other option in order to maintain access to and use of the forested portions of their territory, the Nuevo Lamas Community entered into a *cesión en uso* agreement with GORESAM in relation to the remaining 1,620 hectares of their land. However, an additional complication arose in relation to this cesión en uso agreement because, in addition to being forested lands, 1,314.7914 of the 1,620 hectares belonging to the Nuevo Lamas Community were also located within the ACR-CE.

14. The existence of the ACR-CE creates yet another difficulty for the titling of the territory of the Nuevo Lamas Community. This is because, under article 4 of the Law No 26834 (*Ley de Áreas Naturales Protegidas*) (hereafter "**Ley ANP**"), the lands of protected areas (of which the ACR-CE is one) form part of the public domain, and cannot be adjudicated in favour of individuals. Article 4 also provides that, when a protected area is declared in an area which includes private lands, restrictions can be imposed on the use of the private property, in conjunction with corresponding compensation mechanisms. Further relevant provisions are mentioned briefly in the following section.

15. The ACR-CE was itself created by GORESAM in 2005, pursuant to its powers under articles 7 and 11 of the Ley ANP. Prior to the creation of the ACR-CE, GORESAM, aware that the ACR-CE comprised traditional lands used by indigenous communities, organised several "information meetings" in which some affected indigenous communities were informed in very broad terms of the proposals for the ACR-CE. Those meetings were intended primarily to advise communities of a decision already taken by GORESAM, and as such, although such meetings may have involved soliciting the views of the community to a minimal extent (for example in relation to consequent minor details of implementation of the ACR-CE), there was no genuine consultation or accommodation of the community's views in relation to the fundamental question of its creation and effects, nor any seeking of consent for the creation of the ACR-CE on the community's lands.[13] In addition, the communities were not provided with full information about the proposal, and in particular the implications it might have for the legal rights of those communities to use and access the area. Similar criticisms can be made of the processes of development of the master plan (*Plan Maestro*) of the ACR-CE, undertaken in 2005-2006[14] and 2011-12.[15] The objectives and detailed management guidelines contained in

[13] The fact that a process of consultation as currently understood was not carried out is effectively conceded in the response filed by the Jefatura del ACR-CE, pages 35-36 (paragraphs 33 and 34), in which it is argued that consultations were not required under law at the time that the ACR-CE came into force because the national consultation law was not yet enacted. Although it is acknowledged that other information meetings were held – as outlined in the same response – it is in dispute that these were sufficient to comply with the obligations of effective participation that are set out further below.

[14] See Response of the Jefatura del ACR-CE, para 36.

for the *Plan Maestro* – which have significant implications for the uses which are legally permitted uses by indigenous communities in the ACR-CE – were developed without any significant input from the affected indigenous communities. In addition, GORESAM and the management of ACR-CE have not provided to the Nuevo Lamas Community or CEPKA any evidence demonstrating or suggesting that the traditional practices of the Nuevo Lamas Community pose any significant threat to, or indeed any threat at all to, the conservation objectives of the ACR-CE.

16. The restrictions imposed by the ACR-CE prior to and since the entry into force of the cesión en uso agreement have had significant negative impacts on the Nuevo Lamas Community, as their rights of access and use of their traditional territory have been significantly restricted. As a result, over the course of the last decade, CEPKA, on behalf of various indigenous communities including the Nuevo Lamas Community, has sought on multiple occasions to negotiate with GORESAM and the ACR-CE management in order to find a solution. This has included proposals in 2011 for co-management of the area,[16] as well as further negotiations in 2015, leading to the "Acta de Tarapoto" of 5 June 2012, in which Government stakeholders agreed with CEPKA to work together on areas including, inter alia:

> *La Titulación de los territorios indígenas,* ***sin el establecimiento de los contratos de cesión en uso****, debido a que este procedimiento se centra en una norma que afecta los derechos territoriales contenidos en el Convenio 169 OIT y contradice los mandatos de la Corte Interamericana de Derechos Humanos.*[17]

17. However, despite offering commitments in discussions with affected indigenous communities [and CEPKA] on these issues, in practice GORESAM and the ACR-CE proceeded with cesión en uso agreements, and have made few or no changes to the mode of operations of the ACR-CE.

A. Legal parameters of cesión en uso agreements and protected areas

18. There are multiple provisions in the *Ley forestal* which specify the uses native communities can make of forest areas within their territories (under *cesión en uso* or other arrangements). Notably:

    - Under article 66, indigenous communities are required to request permission from the regional forest authority for any use of forest flora and fauna resources except that which is required for *"uso doméstico, autoconsumo o fines de subsistencia"*. Requests for permission must be accompanied by a community management plan, as well as the community resolution by which the plan has been adopted.
    - Under article 75, the use of forest resources (including forest fauna) by indigenous communities requires the community to obtain a permit from the regional forest authority, with the exception of the use of such forest resources (including fauna) for *"uso doméstico, autoconsumo o fines de subsistencia"*.[18] Article 75 also notes that "el manejo forestal de los bosques comunales que

[15] See Response of the Jefatura del ACR-CE, para 37. The process outlined for the "consultation" in paragraph 38 shows the marginal integration of communities in the decision-making around the master plan, being involved merely in "information meetings" at the outset and "validation meetings" at the end, but without having any real role in the drafing and negotiation of the terms of the plan.

[16] PAJARES, Erick. *Informe Técnico Jurídico que sustenta la Propuesta de Cogestión del Área de Conservación Regional (ACR) Cordillera Escalera – Región San Martín*: para el Consejo Étnico de los Pueblos Kichwa de la Amazonía. Biosfera – Investigación de Futuros. Documento Interno de CEPKA. 2011.

[17] Acta de Tarapoto del 5 de junio 2015, firmado por: el Director Regional de Agricultura; el Director Regional de Energía y Minas; el Gerente de la Autoridad Regional Ambiental, y varios representantes de las Comunidades Nativas.

[18] See also article 81, which defines domestic use, personal consumption or subsistence as the "use of forest flora and fauna resources necessary for the individual or familial survival of the members of an indigenous community".

realizan las comunidades nativas se efectúa con autonomía, conforme a su cosmovisión y con planes de manejo, de acuerdo con lineamientos aprobados por el Serfor[19] que incorporen sus valores culturales, espirituales, cosmovisión y otros usos tradicionales del bosque, así como el control de la actividad por la propia comunidad y por el sector correspondiente".

- Article 76 recognises that communities holding a cesión en uso agreement have a right to *exclusive* possession, access, use and enjoyment of forest lands (whether production forests or protection forests).
- Article 81 confirms that no use licence or plan of management is required for the use of flora or fauna resources from the forest for domestic use, personal consumption or subsistence, which is defined as the "use of forest flora and fauna resources necessary for the individual or familial survival of the members of an indigenous community".
- Under article 78, Serfor recognises and respects the traditional knowledge of indigenous communities with respect to management of the forest, which knowledge is incorporated in the technical rules governing the communal forest use.
- Under article 87, a fee is charged for any use of forest fauna resources (except in relation to the exceptions stated in the law, relevantly domestic use, personal consumption and subsistence use).
- Under article 102, the indigenous community's own authority regulates hunting for subsistence purposes, but must conform with government authorities' rules in respect of endangered species, and must provide a list of species that may be hunted by the community (with seasons and quotas) with the regional forest authorities. GJC and FPP understand that neither the law nor the relevant government agencies allocates any specific technical assistance or funding to communities in order to meet any of these requirements.

19. However, these parameters must be read in conjunction with the relevant parameters in respect of protected areas (which covers the vast majority of the land covered by the cesión en uso agreement). The *Ley ANP* and its implementing decree (*Reglamento de la Ley de Areas Naturales Protegidas*, adopted by Decreto Supremo No. 038-2001-AG, hereafter "**Reglamento ANP**"), further permit various restrictions on the use of lands within a protected area, while also granting some protections to indigenous communities. Relevant provisions include:
    - Under article 5 of the Ley ANP, the requirement that the right to property of pre-existing property holders must be exercised in accordance with the objectives of the protected area;
    - Article 31 of the Ley ANP requires that the protected area management must give priority attention to securing the traditional uses and systems of life of indigenous communities who live in protected areas, respecting their self-determination, *to the extent that such uses are compatible with the objectives of the protected areas* (emphasis added).
    - Article 9 of the Reglamento ANP states that in the application of the provisions of the Reglamento, "se reconoce, protege e promociona las valores y prácticas sociales, culturales, religiosas, espirituales y económicas propias de las comunidades … nativas, tal como lo estable el "Convenio No. 169 sobre Pueblos Indígenas y Tribales en Países Independientes" de la Organización Internacional del Trabajo – OIT, en particular según en su Parte IX y en armonía con los objetivos de creación de las Áreas Naturales Protegidas."
    - Article 43 of the Reglamento ANP states:

> *(1) El proceso para la categorización definitiva o el de establecimiento de un Área Natural Protegida,* ***se debe realizar en base a procesos transparentes de consulta a la población local interesada,***

[19] Servicio Forestal y de Fauna Silvestre – SERFOR.

donde se incluye a las comunidades campesinas o nativas de acuerdo a los procedimientos de consulta establecidos en el "Convenio Nº 169 sobre Pueblos Indígenas y Tribales en Países Independientes" de la Organización Internacional del Trabajo - OIT*. En estos últimos casos dicha participación se realiza en particular a través de sus organizaciones locales y utilizando en lo posible el idioma más relevante del lugar.*

(2) Se pueden establecer Áreas Naturales Protegidas o categorizarlas definitivamente sobre predios de propiedad comunal, ***si es que se cuenta con el consentimiento previo dado libremente y con pleno conocimiento de causa de los propietarios de los mismos, cuyos derechos fundamentales se reconocen explícitamente en el dispositivo de creación.*** *En todo caso es aplicable lo establecido en el Artículo II del Título Preliminar del Código del Medio Ambiente y los Recursos Naturales Decreto Legislativo Nº 613.*

- Article 89 of the Reglamento ANP states:

  (1) El Estado reconoce los derechos adquiridos, tales como propiedad y posesión entre otros, de las poblaciones locales incluidos los asentamientos de pescadores artesanales y las comunidades campesinas o nativas, que habitan en las Áreas Naturales Protegidas con anterioridad a su establecimiento. En el caso de las comunidades campesinas o nativas vinculadas a un Área Natural Protegida, se debe considerar esta situación en la evaluación del otorgamiento de derechos para el uso de los recursos naturales con base a la legislación de la materia y los Convenios Internacionales que al respecto haya suscrito el Estado, en particular reconociéndose los conocimientos colectivos de las mismas.

  (2) El acceso y uso de las comunidades campesinas o nativas de los recursos naturales ubicados en un Área Natural Protegida, implica la posibilidad de aprovechar las especies de flora y fauna silvestre permitidas, así como sus productos o sub-productos, con fines de subsistencia. Para tal efecto se determina en cada caso los alcances del concepto de subsistencia en coordinación con los beneficiarios. En ningún caso pueden ser comprendidas especies de flora y fauna en vías de extinción.

  (3) Las especies, productos o subproductos de los mismos, de ser destinados a dicho aprovechamiento, en ningún caso pueden ser extraídos de Zonas de Protección Estricta ni Zonas Silvestres, o si ponen en riesgo los fines y objetivos de creación del Área Natural Protegida.

B. Integration of these norms in the Nuevo Lamas cesión en uso agreement

20. In developing the specific cesión en uso agreement, it appears that these restrictions have been applied conjunctively, with the effect that the exceptions generally applying to indigenous peoples' use in relation to forest areas within a cesión en uso area, as provided in the Ley forestal, have been further restricted or eliminated by application of the Ley ANP. For example, Clause 3.3 of the cesión en uso agreement provides, inter alia:

    - That community members may only use timber resources for subsistence purposes *when the tree has fallen through natural causes, and with the express authorisation of the ACR-CE management* [emphasis added] – therefore restricting the right to use timber resources even where such use is for domestic use, personal consumption or subsistence*;*
    - Community members must be "informed" of research projects which the ACR-CE management will carry out (on its face inconsistent with the community's *exclusive* rights of access and use to their territories);
    - The community's use of the non-timber flora and fauna resources must be in conformity with management plans (with no explicit indication that this will not be the case for subsistence use);

- Traditional rotational agriculture is effectively prohibited, by the requirement that communities must "respect the boundaries of agricultural areas".

21. Clause 3.3(b) reiterates that the Community must seek permission from the regional environmental authorities to use **any** forest flora and fauna resources, again without explicitly stating that community members have the right to use such resources for domestic use, personal consumption and subsistence without any permission from the regional authorities. In addition, clause 6 creates numerous zones within the territory under the cesión en uso agreement – specifically, a *zona de recuperación* (845.35 ha), a *zona silvestre* (140.71 ha), *a zona de protección estricta* (328.35 ha) and a *zona de uso especial* (0.37 ha). This zoning corresponds with zoning of the ACR-CE (in conformity with the Ley ANP), and imposes greater limitations on significant areas of the territory (in particular within the 29% of the cesión en uso lands zoned for "strict protection" or "forest").

22. It should also be noted that the cesión en uso agreement explicitly (in paragraph 3.3(a)) states that property rights over the entire area of the cesión en uso continue to be held by the State, indicating therefore incontrovertibly that the property rights of the Nuevo Lamas Community in this area are not recognised.

23. This factual background forms the context for the following discussion of relevant international legal principles.

III. Right to property of the Kichwa people (and specifically the Nuevo Lamas Community)

24. It is well-established in international and regional human rights law that indigenous peoples have the right to property over their customary lands. Article 21 of the American Convention on Human Rights protects the right to property, which, the Inter-American Court has held, "protects the right to property in a sense which includes, among others, the rights of members of indigenous communities within the framework of communal property".[20] The Inter-American Court has held that indigenous peoples' communal notion of property, while it "does not necessarily conform to the classic concept of property … deserves equal protection under Article 21 of the Convention".[21] Article 14 of ILO 169 equally requires States to recognise "the rights of ownership and possession of the peoples concerned over the lands that they traditionally occupy".

25. In the decision of *Xucuru v Brazil*, handed down in February 2018, the Interamerican Court summarised its jurisprudence in relation to indigenous peoples' property rights as follows:

> *… el Tribunal recuerda su jurisprudencia respecto a la propiedad comunitaria de las tierras indígenas, según la cual se indica inter alia que: 1) la posesión tradicional de los indígenas sobre sus tierras tiene efectos equivalentes al título de pleno dominio que otorga el Estado; 2) la posesión tradicional otorga a los indígenas el derecho a exigir el reconocimiento oficial de propiedad y su registro; 3) los miembros de los pueblos indígenas que por causas ajenas a su voluntad han salido o perdido la posesión de sus tierras tradicionales mantienen el derecho de propiedad sobre las mismas, aún a falta de título legal, salvo cuando las tierras hayan sido legítimamente trasladadas a terceros de buena fe; 4) el Estado debe delimitar, demarcar y otorgar título colectivo de las tierras a los miembros de las comunidades indígenas; 5) los miembros de los pueblos indígenas que involuntariamente han perdido la posesión de*

[20] *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR, Judgment of 31 August 2001, Ser C No. 79 (hereafter "**Awas Tingni**"), para 148.

[21] *Case of the Sawhoyamaxa Indigenous Community v Paraguay*, IACtHR, Judgment of 29 March 2006. Ser C No. 146 (hereafter "**Sawhoyamaxa**"), para 120.

sus tierras, y éstas han sido trasladadas legítimamente a terceros de buena fe, tienen el derecho de recuperarlas o a obtener otras tierras de igual extensión y calidad; 6) el Estado debe garantizar la propiedad efectiva de los pueblos indígenas y abstenerse de realizar actos que puedan llevar a que los agentes del propio Estado, o terceros que actúen con su aquiescencia o su tolerancia, afecten la existencia, el valor, el uso o el goce de su territorio; 7) el Estado debe garantizar el derecho de los pueblos indígenas de controlar efectivamente y ser propietarios de su territorio sin ningún tipo de interferencia externa de terceros, y 8) el Estado debe garantizar el derecho de los pueblos indígenas al control y uso de su territorio y recursos naturales. Con respecto a lo señalado, la Corte ha sostenido que no se trata de un privilegio para usar la tierra, el cual puede ser despojado por el Estado u opacado por derechos a la propiedad de terceros, sino de un derecho de los integrantes de pueblos indígenas y tribales para obtener la titulación de su territorio a fin de garantizar el uso y goce permanente de dicha tierra.[22]

26. These principles are derived from extensive jurisprudence from the Inter-American Court of Human Rights affirming the right of indigenous peoples to ownership of their customary territories,[23] which is directly applicable to the situation of the Kichwa in this case. As we set out further below, there are numerous specific obligations associated with this right, as well as related rights such as the right to self-determination and the right to the practice of culture, which may be violated in conjunction with the right to property and need also to be taken into account.

27. In respect of the situation of the Kichwa in this case, as explained in the *amparo* claim filed by the Nuevo Lamas Community on 22 August 2017, the Appeal filed on 3 September 2018 and the supplementary information filed on 16 October 2018, the Nuevo Lamas Community is an indigenous community of the Kichwa people who claim ancestral lands of approximately 1760 hectares. In fact, the legitimacy of the claim to territorial ownership by the Nuevo Lamas Community has been recognised by GORESAM (and thereby the State of Peru), through its adjudication of the claim for land titling made by the community on various occasions, including most recently on 29 August 2013. As a result of that claim, 31 hectares of the Community's territory have been titled, with a further 1620 hectares (approximately) the subject of a cesión en uso agreement between GORESAM and the Community – jointly reflecting 93.8% in total of the lands originally claimed by the Community. [24]

28. The extent of the traditional territory of the Nuevo Lamas Community is therefore not in significant dispute. Rather, what the claimant community is calling into question is the (in)adequacy of the *cesión en uso* as a form of recognition of its communal property rights, the significant restrictions on use and access imposed on the community under that agreement, as well as (relatedly) the imposition of a protected area on the traditional territory of the Community without proper consultation and free, prior and informed consent, with no compensation, and when such measures were not necessary and proportionate to achieve a legitimate public purpose.

A. Obligation to delimit, demarcate and title indigenous peoples' lands and territories

29. One of the obligations which the right to property imposes upon States Parties to the American Convention or ILO 169 is the obligation to delimit, demarcate and officially title the customary lands and territories of indigenous peoples within its jurisdiction. The

[22] *Caso Pueblo Indígena Xucuru y sus miembros c Brasil*, Corte Interamericana de derechos humanos, Sentencia de 5 febrero de 2018,. Ser. C No. 346 (hereafter "**Xucuru**"), para. 117.

[23] Inter alia, *Awas Tingni* paras 148-9; *Saramaka* para 89-91; *Case of Yakye Axa Indigenous Community v Paraguay*, IACtHR, 17 June 2005. Ser C No. 125 (hereafter "**Yakya Axa**"), para 137;, Kaliña and Lokono, para 124.

[24] Note, however, that 108.3798 hectares of the lands claimed by the Nuevo Lamas Community have neither been included in the titled lands or within the cesión en uso agreement.

rationale for this obligation is straightforward and is evident in the case before the Court: without such delimitation, demarcation and titling, the lands and territory of the Nuevo Lamas Community are vulnerable to encroachment, and the members of the Nuevo Lamas Community remain in a state of permanent insecurity in relation to their lands. It is to be noted that the obligation on the Peruvian State to recognise and protect the property rights of its indigenous people is a whole-of-State obligation, and falls equally on GORESAM as on national authorities.

30. The obligation to delimit, demarcate and title customary lands has been elaborated by the Inter-American Court on a number of occasions.[25] In its landmark judgment in *Awas Tingni*, the Court observed that:

> *"…the limits of the territory on which that property right exists have not been effectively delimited and demarcated by the State. This situation has created a climate of constant uncertainty among the members of the Awas Tingni community, insofar as they do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property. Based on this understanding, the Court considers at the members of the Awas Tingni community have the right that the State:*
>
> *(a) carry out the delimitation, demarcation and titling of the territory belonging to the Community; and*
> *(b) abstain from carrying out, until that delimitation, demarcation and titling have been done, actions that might lead the agents of the State itself, or third parties with its acquiescence or tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the community live and carry out their activities."*[26]

31. In the *Saramaka* case, the Inter-American Court gave further guidance on the basis for delimitation, demarcation and titling, and how it should be carried out:

> *The Court has previously held that, rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty. In order to obtain such title, the territory traditionally used and occupied by the members of the Saramaka people* ***must first be delimited and demarcated****,* ***in consultation with such people and other neighbouring peoples****. In this regard, the Court has previously declared that "a strictly juridical or abstract recognition of indigenous lands, territories or resources lacks true meaning where the property has not been physically established or delimited.*[27]

32. In the *Kaliña and Lokono Peoples* case, the Court held that a mechanism for the delimitation, demarcation and titling of indigenous and tribal peoples' territories must be undertaken "with the effective participation of these peoples [and] in accordance with their customary law, values, practices and customs".[28] The specific requirements of the

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[25] In addition to the cases referred to in the text, see also *Sawhoyamaxa* at para. 143.

[26] *Awas Tingni* at para. 153.

[27] *Saramaka*, paragraph 115 [emphasis added]. The Court in *Case of Moiwana Village v Suriname*. IACtHR. Judgment of 15 June 2005. Ser C No. 124 (hereafter "**Moiwana**") also held that the State should adopt necessary legal and administrative measures to ensure the property rights of the community, including an effective mechanism to delimit, demarcate and grant title to the community. The Court stated that these measures must take place "with the participation and informed consent of the victims as expressed through their representatives, the members of the other Cottica N'djuka villages and the neighbouring indigenous communities" (*Moiwana*, paras 209-210).

[28] Paragraph 305.

legal obligation of "effective participation" are described in more detail in section IV (79 – 97) below.

33. The obligation to delimit, demarcate and title the land and territories of indigenous peoples is an obligation to delimit, demarcate and title *all* their lands and territories. International law does not make the distinction, as Peruvian national law does, between lands that are in use for agriculture or livestock and those areas that are forested. *Prima facie*, the failure to provide the Nuevo Lamas Community with a property title over the entirety of its territory – including those parts of its territory which are forested – is a violation of Peru's obligations under the American Convention and ILO 169 to recognise and title the lands and territories of its indigenous peoples.

34. The inadequacy of Peru's existing titling system for indigenous peoples, in terms both of territories and natural resources, was noted by the CERD Committee in its Concluding Observations on Peru in May 2018. The Committee noted with concern:

> "*… Preocupa al Comité la falta de mecanismos efectivos de protección de los derechos de los pueblos indígenas sobre sus tierras, territorios y recursos, en parte, debido a la falta de un procedimiento adecuado de reconocimiento y titulación de tierras, así como a la concentración generalizada de la tierra y la explotación de recursos naturales por entes privados, empresas o individuos, lo cual continúa generando graves conflictos sociales …*"[29]

35. As this brief will discuss below, there may on some occasions be circumstances where, for a legitimate purpose, it is both proportionate and necessary for the State *not* to title in full the lands and territories of an indigenous people. However, such instances must by law be considered on a case by case basis – and in relation to indigenous territories, will arise only in exceptional circumstances. The *systematic* prohibition on the titling of any forested indigenous territories is inconsistent with the requirements of international human rights law, which require as a general rule that indigenous territories are delimited, demarcated and titled in full.

36. Moreover, the fact that untitled indigenous territories are defined as the "dominio del Estado" under article 32 of Decreto-*Ley No 22175 de Comunidades Nativas* is clearly an unequal treatment of the property rights of indigenous peoples within Peru, in violation of Articles 1 and 21 of the American Convention on Human Rights.[30] Recalling that indigenous peoples' rights to property arise by virtue of their customary ownership – evidenced by their use and possession of the lands in question – and not by virtue of a property title granted by the State, it is clear that the Nuevo Lamas communities, as well as other Kichwa communities in San Martín, have property rights within the San Martín region which significantly predate the enactment of Decreto-*Ley No 22175 de Comunidades Nativas*, enacted in 1978. However, under article 32 of that decree, lands which (prior to its enactment) had been "legitimamente otorgadas a particulares" do not fall within the "*dominio del Estado*", whereas preexisting untitled indigenous lands do. As such, the pre-existing property rights of individuals and pre-existing property rights of indigenous communities are not treated equally, with the latter being considered as "State dominion lands" while the former are considered as private. There are significant discriminatory effects of such a classification – including the prohibition of the grant of title in forest areas under the *Ley forestal*, as well as the fact that, until titled, indigenous lands are vulnerable to allocation by the State for other purposes, and therefore do not receive equal protection.

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[29] Peru: CERD/C/PER/CO/22-23, 23 de mayo 2018, at para. 16.

[30] See also article 23 of the Ley General del Sistema Nacional de Bienes Estatales - 29151, which establishes: "Los predios que no se encuentren inscritos en el Registro de Predios y que no constituyan propiedad de particulares, ni de las Comunidades Campesinas y Nativas, son de dominio del Estado…".

37. The lack of protection of untitled indigenous lands is inconsistent with the requirements of the American Convention in relation to the right to property. The Inter-American Court's jurisprudence has made clear that until delimitation, demarcation and titling takes place, the Peruvian State is obliged to abstain from undertaking any activities, or permitting or acquiescing in the activities of third parties, except with the free, prior and informed consent of the Nuevo Lamas Community, and more broadly the Kichwa people (the requirements for FPIC, which GJC and FPP do not consider to have been met in this case, are discussed in section IV(B) below). This principle is set out in the extract from the *Awas Tingni* case referred to above; it has also been reiterated by the Inter-American Court in, inter alia, the *Moiwana* case[31] and the *Saramaka* case.[32] In its recent decision in the *Kaliña and Lokono Peoples* case, the Inter-American Court held that the State continuing to issue land titles without delimiting, demarcating and granting title to the Kaliña and Lokono peoples (and therefore denying them a domestic remedy to protect their rights) constituted a violation of Article 21.[33]

38. In the instant case, we consider that the obligation on the State to delimit, demarcate and grant title to the Kichwa people has not been fulfilled by the State. The existence of a *cesión en uso* agreement is insufficient to fulfil this obligation: it explicitly does *not* recognise the property rights to the Nuevo Lamas community, and moreover requires the access and use of the area in question to be the subject of significant limitations which are not justified under international human rights law (and therefore are also inconsistent with the Constitution of Peru). Specifically, the failure of the State to delimit and demarcate the territory, and to provide it with equal protection under law, have given rise to the situation where the ACR-CE was created overlapping the territory of the Nuevo Lamas community without their effective participation (which includes their free, prior and informed consent), and without any compensation, causing yet more restrictions on use and access to be imposed, as we will discuss below.

B. Rights of access to and use of forest lands and resources in the Kichwa territory

39. A further question which arises out of the *amparo* claim of the Nuevo Lamas Community relates to the restrictions imposed on the Community's access to and use of those parts of its territory within the cesión de uso and, more specifically, the ACR-CE.

40. As noted in paragraphs 10 - 23 above, the combined effects of the provision of access to their territory through a cesión en uso agreement, and the additional restrictions placed on use because of the existence of the ACR-CE, have meant that the access to and use by the Nuevo Lamas Community of its forest territory has been significantly restricted, including among other things:

    - Significant geographical restrictions on access and use, including 29% of the cesión en uso lands (and 35.67% of the lands within the ACR-CE) in which community use of forest resources (i.e. hunting, fishing, gathering) is completely prohibited (in those lands classified for "zona de protección estricta" or "zona silvestre"). There is also a possibility under the agreement that some of those lands that currently have lesser restrictions e.g. (within the "zona de recuperación", covering 52.81% of the cesión en uso lands) may be classified for stricter protection in the future (see clause 3.3);
    - The effective prohibition of traditional rotational agricultural activities (*purmeo*), by the requirement to respect existing agricultural boundaries;

[31] *Moiwana* at para 211.
[32] *Saramaka* at para 194.
[33] *Kaliña and Lokono Peoples* at para. 160.

- Requirements to obtain permits for community use of forest resources, and removal of use exceptions for personal use and subsistence that would normally apply to forest use in areas under *cesión en uso* agreements;[34]
- Restriction on cutting of any trees for timber – Community's being restricted to using fallen trees, and only with explicit permission – thereby in practice requiring the Community to maintain and construct household and community buildings from external sources (including through purchase).

41. However, the imposition of these restrictions is also prima facie in violation of the obligations of the Peruvian State under international law, under the American Convention of Human Rights and ILO Convention 169 among others, because it deprives the Nuevo Lamas community of ownership of its natural resources, places severe limitations on their capacity to practice their culture and undermines their right to self-determination. Concretely, the ownership of the land under Article 21 of the American Convention and Article 15 of ILO 169 includes and implies the right to ownership and use of natural resources within the territory. As noted by the Inter-American Court in *Saramaka*:

> "*... the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life.*"[35]

42. The American Convention is consistent in this respect with the position set out in Article 15(1) of ILO 169, which states that the "rights of the peoples concerned to the natural resources pertaining to their lands[36] shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources".

43. The IACtHR in *Saramaka* found that an indigenous or tribal people's right to the land also extended to the "right to own natural resources they have traditionally used within their territory".[37] CERD has also specifically commented on the right of property of indigenous peoples in both natural resources (including subsoil resources and water) within their traditional lands. In its 2006 Concluding Observations on Guyana, and referring to UNDRIP, the Committee "urged the State party to recognize and protect the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources".[38] Article 26 of UNDRIP provides that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used", and that "Indigenous peoples have the right to own, use, develop and control the lands, territories and

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[34] In this respect, the cesión en uso agreement is on its own terms potentially ambiguous, as it states that permits must be obtained "en concordancia con el articulo 75 de la Ley No. 29763" – which article refers to the exception for personal use, domestic consumption and subsistence (see clause 3.3(b)). It is unclear whether this is intended to apply since it is not explicitly stated in the agreement, and moreover the agreement subsequently notes that additional use restrictions are to be applied because of the existence of the ACR-CE (see clause 3.3(c)). In practice, the management of the ACR-CE has frequently required permits from indigenous communities in the area (although not frequently for the specific community of Nuevo Lamas, as the ACR-CE guards are not proximate to them) for activities within the ACR-CE, suggesting that the understanding of the authorities (and therefore the practical effect for the communities) is that all personal use exceptions are inapplicable within the cesión en uso. There has been no suggestion that the Nuevo Lamas Community is exempt from such requirements, rather it appears that this has been merely a question of their geographical proximity.

[35] *Saramaka* at para. 122.

[36] By virtue of Article 13(2), "lands" in Article 15 is taken also to include territories.

[37] *Saramaka* at para. 121.

[38] Guyana: CERD/C/GUY/CO/14, 4 April 2006.

resources that they possess by reason of traditional ownership or other traditional occupation or use".[39]

44. The right of indigenous peoples to own and control natural resources within their territories is equally associated with the right to self-determination, protected under common article 1 of International Covenant on Civil and Political Rights ("**ICCPR**") and the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**"). Article 1(2) provides that "All peoples may, for their own ends, freely dispose of their natural wealth and resources" and, additionally, that "In no case may a people be deprived of its own means of subsistence". Citing article 1, the Committee on Economic, Social and Cultural Rights ("**CESCR**") has noted concerns in relation to indigenous peoples' control of natural resources in a number of countries. In its 2015 Concluding Observations on Chile, the Committee commented that "despite the efforts made by the State party with regard to the demarcation of indigenous lands, the Committee is concerned at the limited protection of the right of indigenous peoples to dispose freely of their wealth and natural resources and of their ancestral lands (art 1)."[40] The 2015 Concluding Observations on Paraguay similarly noted that the State party "has not yet legally recognized the right of indigenous peoples to dispose freely of their natural wealth and resources or put in place an effective mechanism to enable them to claim their ancestral lands (art 1)."[41] In respect of Guyana, the Committee stated it was particularly concerned at the "lack of recognition and protection of indigenous peoples' customary systems of land tenure or customary laws pertaining to land and resource ownership", and the "limitation of indigenous communities with land titles to manage and control resources within their territories".[42]

45. Indigenous peoples' ownership and use of natural resources within their territories is also closely linked to their right to enjoyment of their culture, a right which is protected in article 27 of the ICCPR as well as Article 30 of the Convention on the Rights of the Child and Article 19 of the American Convention in relation to indigenous children. The Human Rights Committee has held that for indigenous peoples, culture "may manifest itself in many forms, including a particular way of life associated with the use of land resources" and "traditional activities", which may require "positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them".[43] Deprivation of lands or natural resources can in turn deprive indigenous peoples' enjoyment of their culture. In *Poma Poma v Peru*, the Human Rights Committee observed that:

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39 UNDRIP article 26(1) and (2).

40 Chile, E/C.12/CHL/CO/4, 7 July 2015, para. 8.

41 Paraguay, E/C.12/PRY/CO/4, 20 March 2015, para. 6.

42 Guyana, E/C.12/GUY/CO/2-4, 28 October 2015, para. 14. Similar comments were also made by the Committee in relation to Thailand: E/C.12/THA/CO/1-2, 19 June 2015 at para. 9 ("The Committee recommends that the State party in particular guarantee the right of indigenous peoples to own, use, control and develop the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired"); Uganda: E/C.12/UGA/CO/1, 8 July 2015, at para. 13 ("The Committee recommends that the State party recognise indigenous peoples' rights to their ancestral lands and natural resources"); Indonesia: E/C.12/IDN/CO/1, 19 June 2014, at para. 38 ("… the Committee urges the State party … to ensure that it … effectively guarantees their inalienable right to own, develop, control and use their customary lands and resources"); El Salvador: E/C.12/SLV/CO/3-5, 19 June 2014, at para. 27 ("The Committee recommends that the State party create mechanisms for recognizing the indigenous peoples' rights to their ancestral lands and natural resources"); Finland: E/C.12/FIN/CO/6, 28 November 2014, at para. 9 ("… the Committee urges the State party … to strengthen its efforts to adopt the necessary legislative and administrative measures to fully and effectively guarantee the Sámi people's rights to own their land and to freely dispose of their natural wealth and resources"). The Human Right Committee ("**HRC**") has also made comments on the obligations towards indigenous peoples to which article 1 gives rise: see e.g. Canada: CCPR/C/79/Add.105, 7 April 1999, at para.8 ("The Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasises that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.").

43 Human Rights Committee, General Comment No. 23(50) (art 27); UN Doc. CCPR/C/21/Rev.1/Add.5 26 April 1994, para. 7.

7.3 In previous cases, the Committee has recognized that the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. In the present case, it is undisputed that the author is a member of an ethnic minority and that raising llamas is an essential element of the culture of the Aymara community, since it is a form of subsistence and an ancestral tradition handed down from parent to child. The author herself is engaged in this activity.

7.4 The Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.[44]

46. Likewise, in *Sarayaku* (at para. 171), citing its judgments in *Saramaka People* and *Mayagna* (*Awas Tingni*), the Inter-American Court observed that "Under international law, indigenous people cannot be denied the right to enjoy their own culture, which consists of a lifestyle that is strongly associated with their territory and the use of its natural resources".[45] It is clear in the present case, bearing in mind in particular the efforts made by the Kichwa people to maintain their ancestral traditions (including purmeo as well as cultural and livelihood activities based on the use of flora and fauna from their forested territories), that the use of their natural resources is a critical element in the survival of their culture, and that depriving them of access to these resources will prevent their enjoyment of their culture, in violation of Article 27 of ICCPR and other international norms. As noted below, the protections under Article 27 and related norms are also linked to the right of the Kichwa to self-determination.

47. The restrictions imposed by the State – through GORESAM and the ACR-CE management plan – on the access to and use by the Nuevo Lamas community (and the Kichwa people more broadly) of the forest and its resources within their traditional lands clearly involve violations of the rights to property, to culture, to equal treatment/non-discrimination and to self-determination. As discussed further below, the rights of ownership, access and use of such resources can only legitimately be restricted if such restrictions are necessary and proportionate to a legitimate public purpose, and through a decision-making process that involves the effective participation of the Kichwa people. Moreover, if such restriction is ultimately determined to be legitimate, proportionate and necessary (which GJC and FPP do not believe is the case, as set out below), compensation for the losses incurred is still required. As set out below, these conditions have not been met in the current situation.

IV. Legitimate restrictions on indigenous peoples' rights in the context of conservation

48. As a general principle, it is recognised that there are some circumstances in which a State may impose restrictions on the enjoyment of some human rights, under conditions

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44 Human Rights Committee, *Poma Poma v Peru*, Communication No. 1457/2006, 28 December 2004, paras. 7.3 and 7.4, footnotes omitted.

45 The Court further explains in *Sarayaku*, at para. 159 and 217, "that the close relationship between indigenous communities and their land is generally an essential component of their cultural identity …" and "the right to cultural identity is a fundamental right – and one of a collective nature – of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society."

included in the elaboration of the right itself and under general principles of law.[46] There is also a body of jurisprudence which has imposed additional specific conditions on limiting indigenous peoples' property rights (and/or on property rights more broadly). The conditions for such restrictions are strictly applied, and have been elaborated upon in international jurisprudence.

49. Broadly, the general law principles for the limitations of rights include that any restriction must be:
    - prescribed by (and carried out in accordance with) law;
    - non-discriminatory;
    - proportionate;
    - necessary;
    - for a legitimate purpose in a democratic society;

50. In the case of indigenous peoples' right to property,[47] restrictions:

    - may be imposed only after a process which has included (at least) the effective participation of indigenous peoples, an environmental and social impact study, and the creation of benefit sharing mechanisms (and may not in any circumstances be imposed if such restrictions threaten the physical or cultural survival of the indigenous people or community in question);
    - must be accompanied by compensation for the impairment of the rights which have been restricted.

51. In the following paragraphs, we will elaborate the application of these principles specifically in the context of conservation projects, since in the context of the Nuevo Lamas community that appears to be the dominant purpose behind the actions of GORESAM and the Peruvian State more broadly.

A. General principles applying to limitations of human rights

Prescribed by (and carried out in accordance with) law (the legality principle)

52. The legality principle requires that, where a State intends to impose limitations on the exercise of human rights, such limitations must be prescribed by law, and must be imposed in accordance with the law which so prescribes the limitations (see e.g. art 30, ACHR, art 4 ICESCR; arts 9(1) and 17, ICCPR). This principle derives from general international law principles and the rule of law (and relates to the requirement that actions by States must not be arbitrary). This requirement is also connected to State obligations to provide a remedy for violations of human rights (see e.g. art 25 ACHR; art 2(3) ICCPR; art 6, CERD) and to ensure equality before the law (see e.g. article 24 of the ACHR).

53. In the case of property rights under the American Convention on Human Rights, this is also an explicit requirement under article 21(2), which provides:

> *(2) Ninguna persona puede ser privada de sus bienes, excepto mediante el pago de indemnización justa, por razones de utilidad pública o de interés social* ***y en los casos y según las formas establecidas por la ley*** [emphasis added].

Non-discriminatory

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[46] For a broader discussion on the general principles regarding limitations to human rights, see UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4.

[47] Some of these additional conditions, including the requirement of compensation which is an explicit requirement in article 21(2), have or may have application more widely than merely indigenous peoples – without prejudice to those (explicit or potential) broader applications, this brief will only consider the application of these principles to indigenous peoples.

54. It is a general principle of international human rights law that all measures taken by the state must not discriminate on grounds of, inter alia, race, colour, sex, language, political or other opinion, national or social origin, property, economic position, birth or other status" (see e.g. article 2 ICCPR; art 1 ACHR; art 2(2) ICESCR, ILO 169 arts 3 and 4). Non-discrimination on the grounds of race (which includes on the basis of race, colour, descent or national or ethnic origin) is also a specific obligation of Peru under the Convention on the Elimination of All Forms of Racial Discrimination (see e.g. the general principle contained in art 2, as well as specifically in respect of this case art 5(d)(v) on equality before the law and non-discrimination in relation to the right to own property).

55. Although it is permissible in some circumstances to limit or to derogate from certain human rights (including e.g. under certain exceptional circumstances such as war or public emergency – see e.g. article 4 ICCPR, art 27 ACHR), the requirement of non-discrimination is absolute and is applicable in relation to all limitations of or derogations from rights.

Legitimate purpose

56. As a starting point, it is worth acknowledging that international human rights law has acknowledged that in principle conservation can be a legitimate objective permitting the restrictions of rights, including the rights to property under Article 21.[48] However, it is nevertheless also clear from the jurisprudence that the fact that conservation is a legitimate objective in principle does not mean that conservation objectives automatically take precedence over indigenous peoples' territorial rights, and indeed on multiple occasions international courts have ordered the restitution of lands allocated for conservation purposes to indigenous peoples who have thereby been dispossessed.[49] Furthermore, it should be noted that respect for the human rights of indigenous peoples' is *itself* a legitimate public interest objective and cannot therefore be disregarded.[50]

57. More broadly, there is an increasing recognition that "conservation" as an objective also has social and cultural dimensions as well as purely ecological dimensions – as recognised, for example, in articles 8(j) and 10(c) of the Convention on Biological Diversity, in the Aichi Biodiversity Targets[51]; in the developing jurisprudence on the right to a clean environment (and its integration with other human rights); in the development of the *Akwe:Kon Guidelines on the Conduct of Cultural, Environmental and Social Impact Assessments (***Akwe:Kon Guidelines***)*;[52] in the recognition of the role of

[48] See *Kaliña y Lokono Peoples v Suriname*, para 71.

[49] *Case of the Xákmok Kásek Indigenous Peoples v Paraguay*, IACtHR, Judgment of 24 August 2010. Series C No. 214; Kaliña y Lokono Peoples v Suriname; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Republic of Kenya*, African Commission on Human and Peoples' Rights, Case No. 276/2003, 25 November 2009; *African Commission on Human and Peoples' Rights, v Republic of Kenya*, African Court of Humand and Peoples' Rights, Application No. 006/2012, 26 May 2017.

[50] See Yakye Axa, para 148.

[51] The Aichi Biodiversity Targets comprise the targets included in the Strategic Plan 2011-2020 for the implementation of the Convention on Biological Diversity. Target 11 of the Aichi Biodiversity Targets calls for the protection of 17% of terrestrial and inland water areas and 10% of coastal and marine areas, through either protected areas or ***other effective area-based conservation measures***. It is widely understood and accepted that such "other effective area-based conservation measures includes sustainable management by indigenous communities (outside the protected area framework): see e.g. IUCN WCPA, 2017. Guidelines for Recognising and Reporting Other Effective Area-based Conservation Measures. IUCN, Switzerland. Version 1 (available at https://www.cbd.int/pa/doc/guidelines-reporting-oecms-en.pdf); N Dudley et al, (2018), *The essential role of other effective area-based conservation measures in achieving big bold conservation targets*, Global Ecology and Conservation vol 15, pp 1-7.

[52] Secretariat of the Convention on Biological Diversity (2004), *Akwe:Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous Peoples* (CBD Guideline Series).

indigenous peoples in managing intact forest landscapes;[53] in the inclusion of livelihood dependence and cultural values amongst "high conservation values" used to assess the conservation value of lands;[54] among multiple other examples.

58. This growing understanding of the interdependence of cultural and ecological elements of conservation has given rise to jurisprudence and guidance pointing to the need for States to recognise the contribution of indigenous peoples to conservation, and to integrate principles of ecological conservation and protection of indigenous territorial rights in national policies. In her 2016 report to the United Nations General Assembly, the Special Rapporteur on the Rights of Indigenous Peoples, Vicki Tauli-Corpuz, noted:

> *15. Los pueblos indígenas mantienen fuertes vínculos espirituales con las plantas, los árboles y los animales que viven en sus tierras, y para ellos, proteger sus territorios es un deber sagrado. Los pueblos indígenas, sin embargo, tal vez no se autodenominan ecologistas, y por esta razón la comunidad dedicada a la conservación desconoce en gran medida lo que aportan a la conservación. Por otra parte, se reconoce cada vez más que las tierras ancestrales de los pueblos indígenas contienen los ecosistemas más intactos y proporcionan la forma de conservación más eficaz y sostenible. Se han hecho estudios que demuestran que los territorios de pueblos indígenas que han obtenido derechos sobre la tierra están notablemente mejor preservados que las tierras adyacentes.*[55]

59. Similarly, in his 2017 report, the Special Rapporteur on Human Rights and the Environment, John Knox, noted:

> *59. La protección de los derechos de las personas que viven más cerca de la naturaleza no solo es una exigencia del derecho de los derechos humanos; a menudo es también la mejor o la única forma de asegurar la protección de la diversidad biológica. Los conocimientos y las prácticas de las personas que viven en ecosistemas ricos en biodiversidad son vitales para la conservación y el uso sostenible de esos ecosistemas. Se ha estimado que los territorios y áreas conservadas por las poblaciones indígenas y las comunidades locales (TICCA, así denominadas por razones históricas) abarcan cuando menos la misma superficie que las zonas protegidas administradas por los Gobiernos. Se ha demostrado que la protección de los derechos humanos de las poblaciones indígenas y las comunidades locales tiene como resultado una mejor protección de los ecosistemas y la diversidad biológica. Por el contrario, tratar de conservar la diversidad biológica excluyéndolas de una zona protegida suele traducirse en fracaso. En resumidas cuentas, el respeto de los derechos humanos debe considerarse complementario y no contrapuesto a la protección del medio ambiente.*[56]

60. This interdependence has also been recognised by the Interamerican Court which, in its decision in *Kaliña y Lokono peoples v Suriname*, noted that "en principio, existe una compatibilidad entre las áreas naturales protegidas y el derecho de los pueblos indígenas y tribales en la protección de los recursos naturales sobre sus territorios, destacando que

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[53] James Watson et al (2018), *Policy Brief : Supporting indigenous peoples who manage intact forests is crucial to achieving climate goals*, WCS and others (available at: https://c532f75abb9c1c021b8c-e46e473f8aadb72cf2a8ea564b4e6a76.ssl.cf5.rackcdn.com/2018/09/12/8vxkock8bw_Policy_Brief_WCS_CDU_UMD_Indigenous_Lands_and_Intact_Forest_Landscapes_v5.pdf)

[54] See https://www.hcvnetwork.org/about-hcvf/what-are-high-conservation-value-forests, HCVs 5 and 6. HCVs are a principle and criteria used as sustainability criteria of a number of global operators, financial institutions and certification schemes, among other users.

[55] Special Rapporteur on the Rights of Indigenous Peoples, *Informe de la Relatora Especial del Consejo de Derechos Humanos sobre los derechos de los pueblos indígenas, Vicki Tauli-Corpuz*, UN Doc. No. A/71/229, parr. 15 (footnotes omitted).

[56] John Knox, *Informe del Relator Especial sobre la cuestión de las obligaciones de derechos humanos relacionados con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible*, Doc ONU no. A/HRC/34/49, 19 de enero de 2017, parr. 59.

los pueblos indígenas y tribales, por su interrelación con la naturaleza y formas de vida, pueden contribuir de manera relevante en dicha conservación." [57] The Court also noted:

> *La Corte considera relevante hacer referencia a la necesidad de compatibilizar la protección de las áreas protegidas con el adecuado uso y goce de los territorios tradicionales de los pueblos indígenas. En este sentido, la Corte estima que un área protegida, consiste no solamente en la dimensión biológica, sino también en la sociocultural y que, por tanto, incorpora un enfoque interdisciplinario y participativo. En este sentido, los pueblos indígenas, por lo general, pueden desempeñar un rol relevante en la conservación de la naturaleza, dado que ciertos usos tradicionales conllevan prácticas de sustentabilidad y se consideran fundamentales para la eficacia de las estrategias de conservación. Por ello, el respeto de los derechos de los pueblos indígenas puede redundar positivamente en la conservación del medioambiente. Así, el derecho de los pueblos indígenas y las normas internacionales de medio ambiente deben comprenderse como derechos complementarios y no excluyentes.*[58]

61. This understanding of the interdependence between cultural and ecological elements of conservation – as well as the obligations for conservation to take into account human rights requirements – has implications for the understanding of the legitimacy of restrictions on indigenous peoples' rights to own, access and make use of the natural resources on and in their territories. Given the increasing evidence[59] that indigenous peoples' use and ownership of lands and forests including in Latin America and Peru does not harm, and indeed frequently benefits, conservation objectives, and given the concurrent obligation to ensure (and public interest in ensuring) compliance with human rights law, it is arguable that conservation projects which do not integrate respect for

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[57] Kaliña y Lokono Peoples v Suriname, parr. 181.

[58] Kaliña y Lokon Peoples v Suriname, parr. 173.

[59] Dos estudios publicados recientemente y examinados por expertos indican que las medidas estrictas de conservación son menos eficaces a la hora de reducir la deforestación que los bosques comunitarios que son gestionados y controlados por pueblos indígenas y comunidades que dependen de ellos, lo cual se ha podido apreciar en bosques sometidos a diferentes sistemas de utilización (p. ej. de las categorías V y VI de la UICN). Uno de esos estudios, realizado por Porter-Bolland et al. de CIFOR (sólo disponible en inglés), es un análisis estadístico de las tasas de deforestación anuales notificadas en estudios de 73 casos de los trópicos. El análisis revela que la deforestación es considerablemente inferior en bosques gestionados por comunidades que en bosques estrictamente protegidos. El otro es un estudio de la pérdida de bosques realizado por el Grupo Independiente de Evaluación del Banco Mundial (escrito por Nelson y Chomitz, sólo disponible en inglés) que revela que algunos bosques gestionados por comunidades están ubicados en zonas sometidas a mayores presiones de deforestación que las áreas estrictamente protegidas. Teniendo eso en cuenta, los autores concluyen que los bosques gestionados por comunidades son mucho más eficaces a la hora de reducir la deforestación que las áreas estrictamente protegidas (véase la tabla resumida, pág. 9). En los casos en que hay datos disponibles, los autores han descubierto que las zonas forestales gestionadas y controladas por pueblos indígenas son aún más eficaces. Para obtener más información, consulte: Nelson, Andrew y Chomitz, Kenneth M. *Effectiveness of Strict vs. Multiple Use Protected Areas in Reducing Tropical Forest Fires: A Global Analysis Using Matching Methods.* PLoS ONE 6, n.º 8 (2011): e22722. http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0022722Porter-Bolland, Luciana et al. Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics. Forest Ecology and Management (junio de 2011), http://www.cifor.org/nc/online-library/browse/view-publication/publication/3461.html; see also C Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation: the natural but often forgotten partners* (World Bank, Washington DC, 2008); S Stevens, *Indigenous Peoples, National Parks and Protected Areas: A New Paradigm* (University of Arizona Press, 2014); C Stevens et al, *Securing Rights, Combating Climate Change: How Strengthening Community Forest Rights Mitigates Climate Change* (WRI/RRI 2014); V Toledo, "Indigenous Peoples and Biodiversity", in S Levin et al (eds), *Encyclopedia of Biodiversity*, 2nd ed, Academic Press, 2007; J Springer and F Almeida, "Protected areas and land rights of indigenous peoples and local communities" (Washington, D.C., Rights and Resources Initiative, 2015).

indigenous peoples' territorial rights should not be considered as reflecting a "legitimate" public purpose.

62. Moreover, as the African Court of Human and Peoples' Rights (the **African Court**) has noted in its decision in *African Commission on Human and Peoples' Rights v Republic of Kenya* (the *Ogiek* case),[60] the State cannot merely assert that the action was taken for a legitimate public interest; it must be demonstrated. Although decisions of the African Court are not binding on Peru, they provide persuasive guidance on the understanding of human rights law principles, which are very similarly framed in both Africa and the Americas (and have been influenced in turn by the jurisprudence of the Interamerican court). In the Ogiek case, the African Court was asked to rule on whether the rights to property[61] and the right to culture[62] (inter alia) of the Ogiek indigenous peoples, protected under the African Charter of Human and Peoples' Rights (the "**African Charter**"), had been violated as a result of their eviction from and exclusion from their lands, which the State sought to justify on the grounds of a public purpose of conservation. The Court stated:

> *In the instant case, the restriction of the cultural rights of the Ogiek population to preserve the natural environment of the Mau Forest Complex may in principle be justified to safeguard the "common interest" in terms of Article 27 (2) of the Charter. However, the mere assertion by a State Party of the existence of a common interest warranting interference with the right to culture is not sufficient to allow the restriction of the right or sweep away the essence of the right in its entirety. Instead, in the circumstances of each case, the State Party should substantiate that its interference was indeed genuinely prompted by the need to protect such common interest. In addition, the Court has held that any interference with the rights and freedoms guaranteed in the Charter shall be necessary and proportional to the legitimate interest sought to be attained by such interference.*

Necessity

63. As the African Court rightly notes in this paragraph, it is important to look beyond the question of legitimacy and consider also whether the restrictions placed on indigenous peoples' ownership, access to and use of their territories for conservation objectives can be considered *necessary* and *proportionate*.

64. Under the principle of necessity, measures which restrict the enjoyment of indigenous peoples' rights (to property, to practice their culture, and to self-determination, among others) may only be adopted if there is no other practicable way to achieve the objective of conservation. If less restrictive measures are available, they must be adopted in preference to more restrictive measures.

65. In considering whether restrictions on indigenous peoples' property rights are *necessary* to achieve the conservation purpose, it is again relevant to consider the general body of evidence indicating that indigenous peoples' use and practices frequently contribute to, rather than harming, conservation.[63] As such, it cannot be presumed that indigenous peoples' activities are inconsistent with conservation objectives, and indeed the onus is

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[60] *African Commission on Human and Peoples' Rights, v Republic of Kenya*, African Court of Humand and Peoples' Rights, Application No. 006/2012, 26 May 2017.
[61] Under article 14 of the African Charter, which states: "*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*"
[62] Under article 17(2) of the African Charter, which states "Every individual may freely take part in the cultural life of his community",
[63] See footnote [57] above.

"on States to justify why non-consensual protected areas may be strictly necessary within indigenous territories".[64]

66. As such, for a restriction to be justified, the State must show that the activities or presence of the indigenous people in question is, as a matter of fact, a main cause of environmental degradation sought to be remedied by the conservation objective. If their activities are not a primary or main cause of the environmental damage which the conservation objective seeks to address, then restrictive measures against them are unnecessary and represent an unjustified interference with their human rights. This point was highlighted by the African Court in the *Ogiek* case, which observed:

> *130. In the instant case, the Respondent's public interest justification for evicting the Ogieks from the Mau Forest has been the preservation of the natural ecosystem. Nevertheless,* ***it has not provided any evidence to the effect that the Ogieks' continued presence in the area is the main cause for the depletion of natural environment in the area. Different reports prepared by or in collaboration with the Respondent on the situation of the Mau Forest also reveal that the main causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions.*** *In its pleadings, the Respondent also concedes that "the Mau Forest degradation cannot entirely be associated or is not associable to the Ogiek people". In this circumstance, the Court is of the view that the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest.*

67. As the Ogiek decision suggests, the State must consider the impacts of *other* activities – including for example forestry, agricultural expansion or mining – in causing environmental degradation, and should consider restrictions on those other activities before imposing restrictions on indigenous rightsholders. In the context of San Martín, during the latter half of the 20th century, the principal drivers of environmental degradation and deforestation have been migrant agriculture and road-building, itself promoted by the Peruvian government including the Proyecto Especial Alto Mayo (PEAM), while in recent years additional negative environmental impacts have been caused by commercial agriculture, oil palm expansion and, to a lesser extent, gold mining.[65] There is, in contrast, no suggestion that the activities of indigenous peoples have been or are causing significant environmental damage.

68. Moreover, even where there is a genuine environmental issue which could justify restrictive measures on indigenous peoples' access and use, the measures adopted must be the least restrictive measures which can achieve the objective sought. This means that where, for example, concerns relate to a specific endangered species hunted by indigenous peoples, it will generally be disproportionate to restrict all use and access, when other, less restrictive measures (such as species-specific conservation agreements) could achieve the same or similar results.

69. In the present case, it is to be noted that there is no evidence that the use by the Nuevo Lamas Community of its territory has caused any significant environmental damage. Indeed, the fact that the Community's lands have been identified by GORESAM for conservation *prima facie* suggests the opposite – that their access and use of their territory has been sustainable. GORESAM has at no time presented any scientific or other evidence justifying the access and use restrictions imposed on the Nuevo Lamas

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[64] Special Rapporteur on the Rights of Indigenous Peoples, quoted in Fergus Mackay, "Recent Developments", www.corneredbypas.com, https://www.corneredbypas.com/recent-developments, accessed 9/11/2018.

[65] Valqui, M., Feather, C. & R. Espinosa Llanos. 2014. *Haciendo Visible Lo Invisible: Perspectivas indígenas sobre la deforestación en la Amazonía peruana*. Lima: AIDESEP & FPP. pp. 101-108.

Community, nor is there any suggestion that GORESAM sought seriously to consider the necessity of (a) the creation of the ACR-CE on the Community's lands or (b) the necessity of restrictive access and use measures, on any considered or objective basis. Rather, it appears that restrictions have been imposed automatically, in keeping with outdated, colonial conceptions of protected areas as places unused and untouched by humans, rather than as places actively used and managed by forest communities over generations.[66]

Proportionality

70. The question of proportionality effectively relates to the balancing of the importance of two public interests – the public purpose for which conservation measures are enacted, and the public interest in the fulfilment of human rights obligations (and specifically the respect of indigenous peoples' rights). In essence, it acknowledges that the enjoyment of human rights should not be lightly restricted, and the gravity of restrictions adopted should therefore be proportionate to the importance of the public purpose sought to be achieved. As such, to give an extreme example, it would not be considered proportionate to evict thousands of indigenous peoples from their territories for the purpose of saving one individual tree – as the gain (one saved tree) would be disproportionately small when compared with the severe impacts of the restriction of territorial rights.

71. It is well recognised in the human rights jurisprudence that the impacts of negation of the territorial rights of indigenous peoples has a very significant negative impact on them, because of the centrality of their lands to their identity, their cultures, their self-determination, and their very survival as indigenous peoples. As the Interamerican Commission noted in its 2010 compilation of Interamerican jurisprudence in relation to indigenous peoples, *Tierras ancestrales*:

> *La relación única entre los pueblos indígenas y tribales y sus territorios ha sido ampliamente reconocida en el derecho internacional de los derechos humanos. El artículo 21 de la Convención Americana y el artículo XXIII de la Declaración Americana protegen esta vinculación estrecha que guardan con las tierras, así como con los recursos naturales de los territorios ancestrales, vinculación de importancia fundamental para el goce de otros derechos humanos de los pueblos indígenas y tribales. Según han reiterado la CIDH y la Corte Interamericana, la preservación de la conexión particular entre las comunidades indígenas y sus tierras y recursos se vincula con la existencia misma de estos pueblos, y por lo tanto "amerita medidas especiales de protección". La Corte Interamericana ha insistido en que "los Estados deben respetar la especial relación que los miembros de los pueblos indígenas y tribales tienen con su territorio a modo de garantizar su supervivencia social, cultural y económica". Para la CIDH, la relación especial entre los pueblos indígenas y tribales y sus territorios significa que "el uso y goce de la tierra y de sus recursos son componentes integrales de la supervivencia física y cultural de las comunidades indígenas y de la efectiva realización de sus derechos humanos en términos más generales".*[67]

72. It is for this reason that the relocation of indigenous peoples is considered to be measure that can be taken only in exceptional circumstances, and having given their free, prior and informed consent. This can be seen, for example, in article 16 of ILO Convention 169, which states that:

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[66] For a history of the development of thinking in relation to protected areas, see further Special Rapporteur on the Rights of Indigenous Peoples Vicki Tauli-Corpuz, *Informe de la Relatora Especial del Consejo de Derechos Humanos sobre los derechos de los pueblos indígenas, Vicki Tauli-Corpuz*, UN Doc. No. A/71/229.

[67] Comisión interamericana de derechos humanos, *Derechos de los pueblos indígenas y tribales sobre sus tierras ancestrales y recursos naturales: Normas y jurisprudencia del Sistema Interamericano de Derechos Humanos*, 2010, parr. 55 (footnotes omitted). (Disponible a http://cidh.org/countryrep/TierrasIndigenas2009/Tierras-Ancestrales.ESP.pdf

(1) A reserva de lo dispuesto en los párrafos siguientes de este artículo, los pueblos interesados no deberán ser trasladados de las tierras que ocupan.

(2) Cuando ***excepcionalmente*** *el traslado y la reubicación de esos pueblos se consideren necesarios,* ***sólo deberán efectuarse con su consentimiento, dado libremente y con pleno conocimiento de causa****. Cuando no pueda obtenerse su consentimiento, el traslado y la reubicación sólo deberá tener lugar al término de procedimientos adecuados establecidos por la legislación nacional, incluidas encuestas públicas, cuando haya lugar, en que los pueblos interesados tengan la posibilidad de estar efectivamente representados.*

73. This position is reiterated in UNDRIP, whose article 10 provides: "Los pueblos indígenas no deben ser sacados o trasladados por la fuerza de sus tierras. Si son trasladados, entonces debe ser sólo con su consentimiento libre, previo e informado, lo que significa que tienen el derecho a tomar decisiones sobre un traslado, libremente, sin presión, teniendo toda la información y antes de que cualquier cosa suceda."

74. While these provisions refer to relocation, significant restrictions on access to and use of lands have similarly serious effects for indigenous peoples, meaning that such restrictions are subject to a particularly stringent test of proportionality. This was the position adopted by the African Commission in *Minority Rights Group International v Kenya* (the *Endorois* case)[68], where the Commission stated that:

> *212. The 'public interest' test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property. In this sense, the test is much more stringent when applied to ancestral land rights of indigenous peoples. In 2005, this point was stressed by the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights who published the following statement:*
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> > *Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.*[69]

75. As the Commission further noted, "[a]t the point where [a property] right becomes illusory, the limitation cannot be considered proportionate – the limitation becomes a violation of the right."[70] For the Nuevo Lamas Community, the access and use rights provided by the cesión en uso and the ACR-CE management plan are so limited, and the restrictions on traditional access and use so severe, that it is clear that the Peruvian State has not treated their rights as rights at all. Their rights have indeed become illusory, and have been restricted out of all proportion.

76. The Inter-American Court has also recognised the need for particular attention and care in any limitation of the territorial rights of indigenous peoples, noting in *Saramaka* that the right to property in article 21 of the American Convention may be restricted only "under very specific, exceptional circumstances, particularly when indigenous or tribal land rights are involved."[71] Accordingly, in the exercise of balancing the different public purposes, the respect for indigenous peoples' territorial rights must weigh heavily.

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[68] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Republic of Kenya*, African Commission on Human and Peoples' Rights, Case No. 276/2003, 25 November 2009.

[69] Nazila Ghanea and Alexandra Xanthaki (2005) (eds). 'Indigenous Peoples‟ Right to Land and Natural Resources' in Erica-Irene Daes „Minorities, Peoples and Self-Determination‟, Martinus Nijhoff Publishers.

[70] Parr. 215.

[71] *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12 August 2008. Series C No. 185, at para. 49.

B. Specific conditions on limiting the rights of indigenous peoples' right to property: 'Effective Participation', Environmental and Social Impact Studies, Benefit Sharing and Free, Prior and Informed Consent and Compensation

77. As noted above, it is an obligation of international human rights law, applicable under both the American Convention and ILO 169, that activities or projects affecting indigenous peoples may not be undertaken except with:

    1. the effective participation of the indigenous people involved;
    2. an environmental and social impact study being carried out; and
    3. equitable sharing of the benefits with the indigenous people involved.[72]

78. In some circumstances, as we detail below, and, in GJC and FPP's view, in the instant case, effective participation will include the requirement that activities only proceed with the free, prior and informed consent of the indigenous peoples in question, not only "consultation". In addition, it is prohibited to impose measures that will threaten the physical or cultural survival of an indigenous people or community. The following sections detail the scope and nature of each of these obligations, and considers its application in the current circumstances.

The Right to Effective Participation

79. In Peru, the normative framework makes reference to "prior consultation" ("*consulta previa*").[73] In fact, the appropriate standard to be applied under the American Convention and other international standards is not mere *consulta previa* but, instead, the right of effective participation, as elaborated by the Court in *Saramaka People* and as affirmed repeatedly by the Human Rights Committee and others.[74] The Court was clear in *Saramaka* that one of the elements necessary to ensure 'survival' as an indigenous or tribal people[75] is the right to "effective participation" in decision making in relation to any investment or project[76] that may affect indigenous peoples' territories, and that consultation is just one aspect of this right.[77] The Court reiterated this holding in the *Xákmok Kásek* case.[78] Adherence to this right must, inter alia, commence in the earliest stages of the project (see further below); it must be carried out in conformity with indigenous peoples' customs and traditions; be undertaken in good faith and with the objective of reaching an agreement; and must ensure that indigenous peoples are aware

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72 These three requirements are set out in the *Saramaka* case at para. 129.

73 Ley N.º 29785, Ley del derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo

74 For the jurisprudence of the Human Rights Committee, *see inter alia*, *I. Lansman et al. vs. Finland (Communication No. 511/1992),* CCPR/C/52/D/511/1992; *Jouni Lansman et al. vs. Finland (Communication No. 671/1995),* CCPR/C/58/D/671/1995; *Apirana Mahuika et al v. New Zealand*. (Communication No 547/1993) CCPR/C/70/D/547/1993, 15 November 2000; *Mrs. Anni Äärelä and Mr. Jouni Näkkäläjärvi v. Finland*. (Communication No 779/1997) CCPR/C/73/D/779/1997, 7 November 2001; and *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009.

75 'Survival as an indigenous people' 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'."

76 The Court explains that a 'development or investment project' means "any proposed activity that may affect the integrity of the lands and natural resources within the territory of the Saramaka people, particularly any proposal to grant logging or mining concessions."

77 *Saramaka People* at para. 129.

78 *Xákmok Kásek Indigenous Community*, Judgment of 24 August 2010, Ser C No. 214, at para. 157 (citing *Saramaka* and stating that "the State must ensure the effective participation of the members of the Community, in keeping with their customs and traditions, regarding any plans or decisions that might affect their traditional lands that can bring restrictions of use and enjoyment of said lands in order to prevent those plans or decisions from denying an indigenous people from their subsistence").

of possible risks, including environmental and health risks, so that the activity is accepted knowingly and voluntarily.[79]

80. The Court further elaborated on the content of the right of effective participation in its interpretation judgment in *Saramaka People*, particularly with respect to the right of indigenous and tribal peoples to choose their own representatives and the conformity of the process with the customs and traditions of the indigenous or tribal people in question.[80] It is also important to recall the *Yatama Case* in this respect, where the Court held that States Parties to the American Convention must guarantee that indigenous peoples "can participate, in conditions of equality, in decision-making on matters that affect or could affect their rights and the development of their communities … and that they are able to do so through their own institutions and in accordance with their values, uses, customs and forms of organization …".[81]

81. The right to effective participation is much more than a mere right to be notified or consulted; instead, it is a spectrum of rights to be involved in decision making which ranges from consultation and active involvement in decision making, both of which must always occur, to the right to (give or withhold) consent, which (as discussed below, and as held by the Court) is triggered under certain circumstances. In this respect, the Court explained in *Saramaka* that the nature and content of the right to effective participation in any given situation is based on the interests at stake in the proposed activity.[82] Additionally, to be 'effective', and considering that crucial decisions are made in the feasibility and impact assessment phases of projects, participation must include active involvement at all levels of decision making, including feasibility studies and impact assessments,[83] and the modification of plans or projects where necessary based on indigenous peoples' input.

82. The IACHR characterises the last point, correctly in GJC and FPP's view, as a 'duty to accommodate'.[84] It explains that the "States' duty is to adjust or even cancel the plan or project based on the results of consultation with indigenous peoples, or failing such accommodation, to provide objective and reasonable motives for not doing so."[85] It further explains that:

> *Failure to pay due regard to the consultation's results within the final design of the investment or development plans or projects or extractive concessions is contrary to the principle of good faith that governs the duty to consult, which must allow indigenous peoples the capacity to modify the initial plan. From another perspective, decisions related to the approval of such plans, that fail to express the reasons that justify failing to accommodate the results of the consultation procedure, could be considered contrary to the due process guarantees set by the standards of the Inter-American human rights system.*[86]

83. The duty to accommodate is also present in the jurisprudence of the Human Rights Committee pertaining to indigenous peoples[87] and the constitutional jurisprudence of

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79 *Saramaka People*, at para. 133.

80 *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12 August 2008. Series C No. 185, at para. 17-9.

81 *Yatama v. Nicaragua*, Judgment of the Inter-American Court of Human Rights, 23 June 2005. Series C No. 127, para. 225.

82 *Saramaka People*, at para. 137.

83 *See inter alia* IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 157.

84 *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, 30 December 2009, at para. 323-25.

85 *Id*. at para. 324.

86 *Id*. at para. 325.

87 *See Mrs. Anni Äärelä and Mr. Jouni Näkkäläjärvi v. Finland*. (Communication No 779/1997) CCPR/C/73/D/779/1997, 7 November 2001, at para. 7.6 (stating that "that the authors, and other key

several OAS member states.[88] GJC and FPP consider that this duty is a crucial component of the right to effective participation, and without strict adherence to this duty, participation cannot be considered effective. These principles are equally applicable under ILO 169 (detailed consideration of which was given by the IACtHR in the *Sarayaku* case,[89] which affirmed *Saramaka*).[90]

84. The Inter-American Court of Human Rights has also noted that consultation should take place "during the first stages of a proposed development or investment plan and not only when it becomes necessary to obtain the community's approval".[91]

85. It is particularly important to note that in some circumstances, the right to effective participation includes the right to give *or withhold* consent to a project or investment. In *Saramaka*, the Court held that effective participation with regard to (at least) certain activities – notably large-scale projects that may have a major or significant impact on indigenous territories[92] - requires that State parties not only to consult with indigenous peoples, but also to "obtain their free, prior, and informed consent, according to their customs and tradition."[93] The Court further explained that the cumulative impact of smaller existing and proposed projects or investments may also trigger the requirement that consent be obtained.[94]

86. In its 2008 interpretation judgment in *Saramaka* the Court clarified the applicable standard, stating that:

> *… depending on the level of impact of the proposed activity, the state may additionally be required to obtain consent from the Saramaka people. The tribunal has emphasized that when large-scale development or investment projects could affect the integrity of the Saramaka people's lands and natural resources, the state has a duty not only to consult with the Saramaka's, but also to obtain their free, prior and informed consent in accordance with their customs and traditions.*[95]

87. The Court's jurisprudence has been followed by the Human Rights Committee, which emphasised in 2009 that:

> *… the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these*

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stakeholder groups, were consulted in the evolution of the logging plans drawn up by the Forestry Service, and that the plans were partially altered in response to criticisms from those quarters"); and *Apirana Mahuika et al v. New Zealand*. (Communication No 547/1993) CCPR/C/70/D/547/1993, at para. 9.6 (observing that "Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement").

88 *See inter alia, Haida Nation v. British Columbia (Supreme Court of Canada),* [2004] 3 S.C.R. 511, (where Chief Justice McLachlin, writing for a unanimous court, held that Canada has a "duty to consult with aboriginal peoples and accommodate their interests").

89 *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR, Judgment of 27 June 2012, Ser C No. 245 (hereafter "**Sarayaku**").

90 *Sarayaku*, paras 177ff.

91 *See inter alia Sarayaku*, para 180. See also Kaliña y Lokono Peoples v Surinam, para 14.

92 *Id*.

93 *Saramaka People*, at para. 134. *See also* at para. 137 (explaining that consent is required for "major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory").

94 *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12 August 2008. Series C No. 185, at para. 41 (explaining that explains that environmental and social impact assessments need to address the "cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual or cumulative effects of existing or future activities could jeopardize the survival or indigenous or tribal people").

95 *Id*. at para 17.

measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.[96]

88. It is especially important to observe that the Committee stressed that indigenous peoples' consent in this context is fundamental to rendering participation "effective," and that this requirement is triggered both in connection with activities that 'substantially compromise' and/or 'interfere' with indigenous peoples' culturally significant economic activities. The Committee's jurisprudence has thus evolved in line with the Court's jurisprudence and the UNDRIP to recognise that effective participation in decision making requires indigenous peoples' informed consent when their territorial and related rights may be affected.

89. The African Commission on Human and Peoples' Rights also heavily relied on Saramaka People in its 2010 decision in the case of the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*. Its decision states that "[i]n terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded;"[97] and, "the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also ***to obtain their free, prior, and informed consent, according to their customs and traditions***."[98] Notably, the development in question in that case was also a conservation project.

90. Likewise, CERD emphasises indigenous peoples' right, effectuated through their own freely identified representatives or institutions,[99] to give their prior informed consent in general[100] and in connection with specific activities, including: mining and oil and gas operations;[101] logging;[102] the establishment of protected areas;[103] dams;[104] agro-industrial

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[96] *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009, at para. 7.6. See also *Concluding observations of the Human Rights Committee, Togo*: CCPR/C/TGO/CO/4, 11 March 2011, at para. 21; *Concluding observations of the Human Rights Committee, Colombia*: CCPR/C/COL/CO/6, 4 August 2010, at para. 25 (stating that the "Committee also regrets that no progress has been made on the adoption of legislation … for holding prior consultations and guaranteeing the free, prior and informed consent of the members of the relevant community (arts. 2, 26 and 27); and recommending that the State "should adopt … the pertinent legislation for holding prior consultations with a view to guaranteeing the free, prior and informed consent of community members").

[97] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (February 2010), para. 226 (emphasis in original). Available at http://www.minorityrights.org/9587/press-releases/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal.html.

[98] *Id.* para. 291 (emphasis added)

[99] *See e.g.*, 'Letter to the Permanent Mission of the Philippines, Urgent Action and Early Warning Procedure, 24 August 2007, p. 2. Available at http://www.ohchr.org/english/bodies/cerd/docs/philippines_letter.pdf (expressing concern about alleged manipulation of the right to consent related to a government agency's "creation of a body with no status in indigenous structure and not deemed representative" by the affected people).

[100] *See e.g.*, *General Recommendation XXIII on Indigenous Peoples*, adopted by the Committee on the Elimination of Racial Discrimination at its 51st session, 18 August 1997, para. 4(d) (explaining that "no decisions directly relating to their rights and interests are taken without their informed consent"); and Australia: CERD/C/AUS/CO/14, 14 April 2005, para. 11 (recommending that Australia "take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in its general recommendation XXIII").

[101] *See e.g.*, Guyana: CERD/C/GUY/CO/14, 4 April 2006, para. 19 (recommending that Guyana "seek the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities"); Guatemala: CERD/C/GTM/CO/11, 15 May 2006, para. 19; Suriname: Decision 1(67), CERD/C/DEC/SUR/4, 18 August 2005, para. 3.

[102] *See e.g.*, Cambodia: CERD/C/304/Add.54, 31 March 1998, paras 13, 19 (observing that the "rights of indigenous peoples have been disregarded in many government decisions, in particular those relating to citizenship, logging concessions and concessions for industrial plantations" and recommending that Cambodia "ensure that no decisions directly relating to the rights and interests of indigenous peoples are

plantations;[105] resettlement;[106] compulsory takings;[107] and other decisions affecting the status of land rights.[108]

91. Indigenous peoples' right to consent is also part of the jurisprudence of the Committee on Economic, Social and Cultural Rights ("**CESCR**"). In 2009, the CESCR stated with regard to the exercise of the right to take part in cultural life that the "strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[109] It continues that State parties must recognise and respect indigenous peoples' rights "to own, develop, control and use their communal lands, territories and resources" and "respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights."[110]

92. The CESCR has emphatically upheld indigenous peoples' right to consent as part of the right to freely dispose of natural wealth and resources protected under Article 1(2) of the Covenant. In its 2015 Concluding Observations on Venezuela, the Committee recommended that the State party "take the necessary steps to ensure that free, prior and informed consent is obtained from indigenous peoples in relation to decisions that may affect the exercise of their economic, social and cultural rights, in particular in connection with the granting of concessions for the exploration and development of mining resources and hydrocarbons".[111] In relation to Guyana, the Committee expressed its concerns at "recent court ruling that support mining activities without obtaining the free, prior and informed consent of the affected communities".[112] In 2014, the Committee's noted its concerns in relation to Guatemala that "indigenous peoples are still not effectively consulted, nor is their free, prior and informed consent obtained in the decision-making process concerning the exploitation of the natural resources within their traditional lands." [113]

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taken without their informed consent").

[103] *See e.g.*, Botswana: UN Doc. A/57/18, 23 August 2002, paras 292-314, (para. 304 concerning the Central Kalahari Game Reserve); and Botswana: CERD/C/BWA/CO/16, 4 April 2006, para. 12.

[104] *See e.g.*, India: CERD/C/IND/CO/19, 5 May 2007, para. 19 (stating that India "should seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects and provide adequate compensation and alternative land and housing to those communities").

[105] *See e.g.*, 'Indonesia', CERD/C/IDN/CO/3, 15 August 2007, para. 17 (recommending that Indonesia "ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in the Plan"); and Cambodia, *supra*, paras 13, 19.

[106] *See e.g.*, 'India', *supra*, para. 20 (stating that the "State party should also ensure that tribal communities are not evicted from their lands without seeking their prior informed consent and provision of adequate alternative land and compensation"); Botswana, *supra*, para. 12 (recommending that the state "study all possible alternatives to relocation; and (d) seek the prior free and informed consent of the persons and groups concerned"). *See also* Laos: CERD/C/LAO/CO/15, 18 April 2005, para. 18.

[107] Guyana, *supra*, para. 17 (recommending that Guyana "confine the taking of indigenous property to cases where this is strictly necessary, following consultation with the communities concerned, with a view to securing their informed consent").

[108] Australia, para. 11 (recommending "that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land"); 'United States of America', A/56/18, 14 August 2001, paras 380-407, (para. 400 concerning "plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, placing their land up for auction for private sale, and other actions affecting the rights of indigenous peoples").

[109] Committee on Economic, Social and Cultural Rights, *General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, adopted at the Committee's Forty-third session, 2–20 November 2009. UN Doc. E/C.12/GC/21, 21 December 2009, at para. 36-7.

[110] *Id.*

[111] Venezuela: E/C.12/VEN/CO/3, 7 July 2015, at para. 9.

[112] Guyana: E/C.12/GUY/CO/2-4, 28 October 2015, at para 16.

[113] Guatemala: E/C.12/GTM/CO/3, 9 December 2014, para. 7. See also: Thailand: E/C.12/THA/CO/1-2, 19 June 2015, at para. 9 ("The Committee recommends the State party … adopt a human-rights based approach in its development projects, as well as establish participatory mechanisms in order to ensure that no decision is

93. The fundamental importance of effective participation by indigenous peoples and their right to free, prior and informed consent has also been recognised and highlighted by various Special Procedures of the UN Human Rights Council. The Special Rapporteur on Indigenous Peoples, for instance, devotes considerable attention to these issues in his reports and communications. Likewise, citing the Human Rights Committee, the Special Rapporteur on the Right to Food explains that "no people's land, including in particular indigenous peoples, can have its use changed without prior consultation."[114] He thus recommends that any changes in land use can only take place "with free, prior and informed consent" and emphasises that this "is particularly important for indigenous communities, in view of the discrimination and marginalization they have been historically subjected to."[115]

94. Last but not least, indigenous peoples' right to effectively participate in decision making is upheld in the mandatory and binding policies of international financial institutions, all of which are discussed and approved by the member-states of the respective institutions. The right to consent or to agree to activities is recognised in the policies of the International Finance Corporation, the private sector arm of the World Bank Group that finances corporate activities, the Inter-American Development Bank, the Asian Development Bank and the European Bank for Reconstruction and Development.[116] It is also a prominent feature of the UN Development Group's policy on indigenous peoples, which applies to the activities of UN specialised agencies, programmes and funds.[117]

95. While the preceding list could be expanded further, suffice it to say that the Inter-American Court's jurisprudence on effective participation and the right to free, prior and informed consent is well reflected in the jurisprudence of the vast majority of intergovernmental human rights bodies and mechanisms. It is also incorporated into binding intergovernmental development policy instruments that apply to the overwhelming majority of international development assistance, including in the private sector arena. This right has thus been recognised as crucially important in the broader framework on indigenous peoples and is viewed as inextricably connected to the exercise of a range of other rights. GJC and FPP therefore urge the Court of San Martín to re-affirm the applicability of this right under the Peruvian Constitution and further elaborate on the modalities of its implementation.

96. In the instant case, the violations of the right to property entail serious consequences for the cultural and physical survival of the Nuevo Lamas Community and the Kichwa people more broadly. As set out in the *amparo* claim and its accompanying documents, the territory of the Nuevo Lamas Community, and their natural resources, remain the cornerstone of the livelihoods and culture of the Kichwa, which are now threatened by

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made that may affect access to resources without consulting the individuals and communities concerned, with a view to seeking their free, prior and informed consent"); Uganda: E/C.12/UGA/CO/1, 8 July 2015, para. 13 ("The Committee urges the State party to engage in consultations with indigenous peoples to enable them to give their free, prior and informed consent regarding development activities that have an impact on access to their lands").

114 *See Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge*. Mr. Olivier De Schutter, Special Rapporteur on the right to food, 11 June 2009, at p. 12 (citing Human Rights Committee, *Concluding Observations: Sweden*, 7 May 2009 (CCPR/C/SWE/CO/6), para. 20).

115 *Id*. at p. 13-5 (the Special Rapporteur identifies the following as one of the main human rights principles that is applicable in this context: "Indigenous peoples have been granted specific forms of protection of their rights on land under international law. States shall consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources").

116 *See* EBRD, 'Environmental and Social Policy' (London, 12 May 2008); Inter-American Development Bank, 'Operational Policy 7-65 on Indigenous Peoples' (22 February 2006); Asian Development Bank, 'Safeguard Policy Statement' (Manila, June 2009); and International Finance Corporation, 'Performance Standard and Guidance Note 7: Indigenous Peoples' (12 May 2011).

117 *See UN Development Group Guidelines on Indigenous Peoples Issues*, May 2008.

the significant restrictions on access and use imposed by the ACR-CE and the *cesión en uso* agreement. As the Inter-American Court noted in the *Cacarica* case:

> *"The ties between the territory and the natural resources traditionally used by the indigenous and tribal peoples, and that are necessary for their physical and cultural survival as well as the development and continuity of their world vision, are protected by Article 21 of the Convention. This is to ensure that they are able to continue living their traditional way of life and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions will be respected, ensured and protected by the States. Lack of access to the territories may prevent indigenous communities from using and enjoying the natural resources required to provide their subsistence through their traditional activities, and to practice their traditional health care systems, and other socio-cultural functions. This may expose them to precarious and infrahuman living conditions, to greater vulnerability to diseases and epidemics, and subject them to situations of extreme lack of protection."*[118]

97. In these circumstances, there are strong grounds to support the position that the failure to title in full the traditional territory of the Nuevo Lamas Community, as well as the restrictions on use imposed by the cesión en uso agreement and the requirements of the ACR-CE – bearing in mind that the lack of title and restrictions on use cover more than 98% of the Community's traditional territory - threaten the cultural and physical survival of the Nuevo Lamas Community and, as a result, that the Community's free, prior and informed consent ought to have been sought before the ACR-CE was created.

The obligation to conduct an Environmental and Social Impact Assessment

98. In *Saramaka*, the Court also held that the conduct of prior environmental and social impact assessments ("**ESIA**") is part of the conditions necessary to ensure survival as an indigenous or tribal people.[119] The Court states that the "purpose of the ESIAs is not only to have some objective measure of such possible impact on the land and people, but also … 'to ensure that members of the Saramaka people are aware of the possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily'."[120] The Court therefore ties the prior ESIA to the States' duty to guarantee the effective participation of the indigenous and tribal peoples in decisions about activities that may affect their territories.[121] The Court also upholds indigenous peoples' right to effective participation in the ESIA process itself, from its inception through review and related stages.[122] Importantly, the Court also explains that ESIAs need to address the "cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual or cumulative effects of existing or future activities could jeopardize the survival of indigenous or tribal people."[123]

99. Further, to be consistent with the Court's approach in *Saramaka* (affirmed in the *Sarayaku*[124] and *Kaliña and Lokono Peoples*[125] cases), prior ESIAs "must conform to the

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[118] *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v Colombia*. IACtHR. Judgment of 20 November 2013. Ser C No. 270, at para. 354.

[119] *Saramaka People* at para. 129. The obligation under ILO 169 to involve indigenous peoples in environmental studies, which again must be conducted at an early stage, has also been noted by the ILO Governing Body: see Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Central Workers' Union ("CUT"), 2001, para 90.

[120] *Saramaka People* at para. 40.

[121] *Id.* at para. 41.

[122] *Kaliña and Lokono Peoples*, para. 213 See also para. 216 (finding that the impact assessment requirement had not been adhered to, in part because "the first assessment was made in 2005, eight years after the startup of exploitation, and the Kaliña and Lokono peoples did not participate in it before it was accepted…").

[123] *Id.*

[124] Para 206.

relevant international standards and best practices, and must respect the Saramaka people's traditions and culture."[126] The associated footnote states that "One of the most comprehensive and used standards for ESIAs in the context of indigenous and tribal peoples is known as the Akwe:kon Guidelines,[127] which were developed by the state parties to the Convention on Biological Diversity, a convention in force for Peru, to facilitate "the development and implementation of their impact-assessment regimes."[128] The guidelines apply "whenever developments are proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities."[129]

100. Pertinent to the present case, we note in particular the following provisions of the Akwe:Kon Guidelines:

- Under Article 11, notification of a development proposal and impact assessment, containing all details of the proposal, should be provided to organisations representing indigenous peoples in sufficient time to allow the affected indigenous community to prepare its response;
- Under Article 12, indigenous communities should be invited to participate in and are to be accorded full respect in all stages of the assessment and development process, including planning and implementation;
- Under Articles 28-34, development proposals should be assessed for possible impacts upon, *inter alia*, customary use of biological diversity, traditional knowledge, sacred sites and ritual or ceremonial activities; the need for cultural privacy, and the exercise of customary laws.
- Under Article 35, national ESIA legislation and processes should "respect existing inherent land and treaty rights as well as legally established rights of indigenous and local communities".
- Under Article 39, an ESIA should take into account, inter alia, traditional systems and means of production;
- Under Article 51, an ESIA should take into account effects on social cohesion;
- Under Article 53, where prior informed consent is required by national law, the assessment process should consider whether such consent has been obtained.

101. The Court has also made clear that such an assessment must occur *prior* to the grant of any concession (or, in the present case, before the creation of a protected area). [130] Moreover, the requirement that indigenous peoples directly participate in impact assessments is expressly contained in ILO 169, Article 7(3),[131] as well as highlighted by various UN treaty bodies.[132] As noted above, the ESIA is integrally linked to the effective

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[125] Para 215. In *Kaliña and Lokono Peoples*, the mining concession had been granted prior to the acceptance by Suriname of the Court's jurisdiction, but mining exploitation activities commenced only after this jurisdiction had been accepted. Accordingly, the Court did not consider it competent to review the actions taken prior to the grant of the mining concession, and in the particular case considered only whether an obligation arose in relation to an ESIA prior to exploitation activities (see paragraph 215), while reiterating the principle that an ESIA should be carried out prior to the grant of any concession (paragraph 214).

[126] *Id*. (footnote omitted).

[127] *See* http://www.cbd.int/doc/publications/akwe-brochure-en.pdf.

[128] *Id*. at p. 5.

[129] *Id*.

[130] Kaliña and Lokono, para 214. See also *Saramaka*, para 129; *Sarayaku*, para 205.

[131] ILO 169 Article 7(3) provides that: "*Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.*"

[132] *See e.g*., Suriname, CERD/C/SUR/CO/13-15, 25 September 2015, para. 26 ("*The Committee urges the State party to obtain the free and prior informed consent of indigenous and tribal peoples prior to the approval of any project affecting their lands. In addition, the Committee recommends that the State party ensure that an adequate cultural, environmental and social impact assessment is conducted in collaboration with those peoples concerned prior to the granting of concessions or the planning of activities …*"); and Niger, CERD/C/NER/CO/15-21, 25 September 2015, at para. 18 (recommending that Niger "*declare a moratorium*

participation process, in part because it provides critical information permitting the Kichwa people to understand the scope and nature of the activities proposed, and their benefits and risks, including the possible environmental and health risks. Without any ESIA having been carried out, it was impossible for a legitimate consultation process to take place.

102. In the present case, it is our understanding that no environmental and social impact assessment was carried out, and certainly not one which complied with international guidance in relation to the assessment of cultural impacts.

Equitable benefit sharing and compensation

103. There is a specific requirement under the terms of Article 21 of the ACHR that compensation be provided for any lands expropriated from a property holder. Notably, Article 21(2) provides:

> *2. Ninguna persona puede ser privada de sus bienes*, **excepto mediante el pago de indemnización justa**, *por razones de utilidad pública o de interés social y en los casos y según las formas establecidas por la ley*. [emphasis added]

104. Despite this requirement, and despite the State failing to title more than 98% of the territory claimed by the Nuevo Lamas Community, and imposing severe restrictions on its use of non-titled areas, no compensation has been offered to the Nuevo Lamas Community.

105. More broadly, a further requirement which derives from the right to property, is linked to the right of effective participation, is the obligation of States to ensure that indigenous peoples share equitably in the benefits of any activity undertaken on their customary territories. This requirement was set out in *Saramaka*, but has been affirmed in several other cases, including the recent case of *Kaliña and Lokono Peoples*. In that case, the Court noted that:

> *When considering developing plans within the territories of indigenous and tribal peoples, the State should, within reason, share the benefits of the project in question, as appropriate. This concept is inherent in the right to compensation recognized in Article 21(2) of the [American] Convention, which refers not only to total deprivation of a property title by means of expropriation by the State, but also includes the deprivation of the normal use and enjoyment of the property*.[133]

106. Participation in the benefits of exploration and exploitation activities is explicitly anticipated by ILO 169 Article 15(2), and the ILO Governing Body has recognised, in response to a representation of non-observance by Colombia of the provisions of that Convention, that consultations must take place to determine the appropriate sharing of benefits.[134] Furthermore, this right to participate in benefits may be found in the tenth closing provision of the Ley de Consulta Previa.[135] This requirement has also been highlighted by other treaty bodies, including CERD, which in a recommendation to Ecuador concerning oil operations affecting indigenous peoples, which states that

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on projects for which independent studies on the human rights impact have not yet been commissioned or completed").

[133] *Kalina and Lokono* para 227.

[134] ILO Governing Body, Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Central Workers' Union ("CUT"), 2001, para 91.

[135] The tenth closing disposition of Law Nº 29785 establishes that: "Conforme a lo señalado en el artículo 15 del Convenio 169 de la OIT, los pueblos indígenas deberán participar siempre que sea posible en los beneficios que reporte el uso o aprovechamiento de los recursos naturales de su ámbito geográfico, y percibir una indemnización equitativa por cualquier daño que puedan sufrir como resultado de las mismas, de acuerdo a los mecanismos establecidos por ley."

"merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought, *and that the equitable sharing of benefits to be derived from such exploitation be ensured.*"[136]

V. Self-Determination and the Right to Effectively Control Traditional Territory

107. An issue which both underlies and derives from the violations of the rights of the Kichwa people to their customary lands is the severe negative effect of the lack of recognition of their customary territories, and the grant of concessions to third parties on these territories, on the right to self-determination of the Kichwa, their capacity to effectively control their territories, and their cultural integrity. As noted above, the CESCR has stressed the interconnectedness of these rights, including through repeatedly affirming the obligations of State to obtain indigenous peoples' free, prior and informed consent in relation to Article 1(2) of the Covenant guaranteeing the right to freely dispose of natural wealth and resources. As discussed below at para 69, the Inter-American Court also stresses that this is interdependent with the right of indigenous peoples to "freely pursue their economic, social and cultural development".

108. The relationship between indigenous peoples and their territories, and the centrality of land to their cultural survival, and the obligations this gives rise to, has been recognised by the Inter-American Court. In *Awas Tingni*, the Court stated:

> *Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic 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.*[137]

109. The Inter-American Court in *Saramaka* highlighted the right of indigenous and tribal peoples' to self-determination, by virtue of which they may "freely pursue their economic, social and cultural development," and may "freely dispose of their natural wealth and resources," and how this right interacts with and relates to their property and other rights guaranteed under the American Convention.[138] This was reiterated by the Court in the *Kaliña and Lokono Peoples* case, in which the Court noted that the CESCR had interpreted common article 1 as applicable to indigenous peoples. The Court stated:

> > *In this regard, based on the right to self-determination of the indigenous peoples pursuant to said Article 1, such peoples may "freely pursue their economic, social and cultural development" and may "freely dispose of their natural wealth and resources" to ensure that they are not "deprived of [their] own means of subsistence. According to Article 29(b) of the American Convention, this Court is unable to interpret the provisions of Article 21 of this*

[136] Ecuador: 21/03/2003, CERD/C/62/CO/2, at para. 16.
[137] *Awas Tigni*, at para. 149.
[138] *Saramaka People v. Suriname*, at para. 93. See also *Sarayaku*, para. 171 and 305 (where the Court discusses measures to "repair the damage caused to the Sarayaku People, particularly through the violation of their rights to self-determination, cultural identity and prior consultation …"); *Xákmok Kásek*, at para. 255 (ruling that *"… said facts constitute obstacles to conveying title to the land, as well as having an a negative impact on the Xákmok Kásek Community's abilities of self-determination …"*; *Case of Chitay Nech et al v Guatemala* IACtHR. Judgment of 25 May 2010, Ser C No. 212, para. 113 (finding that the direct representation of indigenous peoples, through their mandated representatives and/or institutions, is "a necessary prerequisite" for the exercise of their right to self-determination and, by extension, their right to freely pursue their economic, social and cultural development "within a plural and democratic State"); and *Case of the Río Negro Massacres v Guatemala*. IACtHR. Judgment of 4 September 2012, Ser C No. 250, para. 160 (citing the right to self-determination and other international standards).

instrument in a sense that would limit the enjoyment and exercise of the rights recognized by Suriname in these covenants.[139]

110. The Court similarly referred to Article 27 of ICCPR, and the special protection it gave to the enjoyment by indigenous peoples of their culture, consisting of their way of life associated with territory and use of resources,[140] and observed that it supported an interpretation of Article 21 of the American Convention that "requires recognition of the right of the members of indigenous and tribal peoples to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied".[141]

111. Rights to self-determination and to the free pursuit of social, economic and cultural development are also guaranteed under ILO 169, in particular through: Article 5 (which states that the social, cultural, religious and spiritual values of indigenous and tribal peoples will be recognised and protected, and that the integrity of their values, practices and institutions shall be respected); Article 6(c) (which requires States to establish means for indigenous and tribal peoples' own institutions and initiatives); Article 7 (which states that peoples have the right to determine their own priorities for the process of development and exercise control, to the extent possible, over their own economic, social and cultural development); and Article 8(2) (which provides that indigenous and tribal peoples' have the right to retain their own customs and institutions). They are also reflected inter alia in UNDRIP Articles 3, 4, 5, 11, 20, 23 and 26. The interconnectedness of these rights has been emphasized by the UN Expert Mechanism on the Rights of Indigenous Peoples, which explains that "participation in decision-making also has a clear relationship with indigenous peoples' right to self-determination, including the right to autonomy or self-government, and the State's obligation to consult indigenous peoples in matters that may affect them based on the principle of free, prior and informed consent."[142] These obligations equally arise under the International Convention on the Elimination of all forms of Racial Discrimination; and in its Concluding Observations on Costa Rica, CERD recommended that "in light of its general recommendation No. 21 (1996) on the right to self-determination and ILO Convention No. 169, that indigenous peoples' authorities and representative institutions be recognized in a manner consistent with their right to self-determination in matters relating to their internal and local affairs".[143]

112. In *Saramaka*, the Court observed that Suriname's legal framework was incompatible with Article 21 of the Convention because it "does not guarantee [the Saramaka] the right to effectively control their territory without outside interference."[144] It follows that States have an obligation pursuant to Article 21 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. Consistent with its conjunctive reading of Article 21 and the right to self-determination, the Court in the *Saramaka* case explicitly ordered that legislative recognition of the Saramaka people's territorial rights must include recognition of "their right to manage, distribute, and effectively control such

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[139] *Kaliña and Lokono Peoples*, at para. 122. The FPP notes that Article 35 of ILO 169 also states that the application of that Convention should not adversely affect rights and benefits of the peoples concerned in relation to other international instruments, with the corollary that ILO 169 should be interpreted in a manner which is consistent with Colombia's obligations under other international instruments.

[140] See further paras 26ff. above.

[141] *Kaliña and Lokono peoples*, para 124.

[142] Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the right to participate in decision-making*. UN Doc. A/HRC/EMRIP/2010/2, 17 May 2010, at para. 5.

[143] Costa Rica: CERD/C/CRI/CO/19-22, 25 September 2015, para. 26.

[144] *Saramaka People* at para. 115.

territory, in accordance with their customary laws and traditional collective land tenure system."[145]

113. The Court's judgment in *Yakye Axa* is also relevant and supports the Court's jurisprudence in *Saramaka*. Therein the Court unequivocally equates control over territory with indigenous peoples' survival, development and the pursuit of their aspirations.[146] In that case, the Court observes that "indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations."[147]

114. In the instant case, the imposition on the Nuevo Lamas Community territory of a conservation area entailing significant restrictions on their access and use is having significant and detrimental impacts not only on the property rights as such, but also on the right of the Kichwa people to self-determination. The Kichwa people, and the Nuevo Lamas Community, have their own traditions. The failure to recognise and respect their ownership of and effective control of their territory deprives the Nuevo Lamas Community of a real territory and thereby devastates its internal governance structures, thereby significantly violating the Kichwa's right to self-determination.

VI. Conclusion

115. GJC and FPP consider that the case before this Court raises a number of issues of principle in relation to indigenous peoples' fundamental rights in Peru, which are protected by the Constitution, national law and international instruments. This amicus brief has identified several significant gaps and inconsistences in Peru in between national laws and State practice, on the one hand, and internationally and Constitutionally-protected rights of indigenous peoples on the other. This case presents an opportunity for the Court to pronounce on several critical points which remain ambiguous, and are currently being applied in a manner detrimental to indigenous peoples, including in particular:

- The obligation on the State to delimit, demarcate and grant formal titles to indigenous peoples over the full extent of their customary lands and territories, including lands which are classified as "forest areas", and the recognition that such ownership inherently includes full rights of access and use of natural resources within the territory;
- The obligation on the State to align and harmonise its conservation activities with the respect for human rights in general, and the territorial rights of indigenous peoples in particular, including the need to ensure that any impairment of indigenous peoples' rights are necessary, proportionate and legitimate, and do not threaten their physical and cultural survival;
- The obligation to ensure the effective participation of indigenous peoples in relation to any activities or projects proposed to take place on, or affect, their rights to own, access or use natural resources on their customary lands and territories, prior to any such activities taking place - and, where the activities (including cumulatively) are large-scale or threaten the physical or cultural

[145] *Id.* at para. 194 and 214(7). *See also* UNDRIP, Art. 26(2) (providing that "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired").

[146] *See also* I-A. Com. H.R., *Report 75/02, Case 11.140. Mary and Carrie Dann. United States*, December 27, 2002, para. 128 (observing that "continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples").

[147] *Indigenous Community Yakye Axa v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005 Series C No. 125, at para. 146.

integrity of the affected indigenous peoples, to carry out such activities only with their free, prior and informed consent;

- The obligation to carry out an environmental and social impact assessment, with the full participation of affected peoples in accordance with the principles set out in the Akwe:Kon Guidelines, prior to the commencement of any project on indigenous peoples' lands or territories (including conservation projects);
- The obligation on the State to provide compensation in the case of expropriating indigenous peoples' property, including where that property has not previously been titled by the State.

116. GJC and FPP also believe that in this specific case, it would be appropriate for the Court to order that:
    (a) the State should undertake the delimitation, demarcation and titling of the full extent of the customary territory of the Nuevo Lamas Community;
    (b) the cesión en uso and other restrictions on access and use imposed by the ACR-CE management plan (and any future plan which does not receive the free, prior and informed consent of the Nuevo Lamas Community) are unlawful, and should be unenforceable in relation to any member of the Nuevo Lamas Community;
    (c) GORESAM and the ACR-CE management should engage in consultations with the Nuevo Lamas Community (and with other affected indigenous communities), with the objective of reaching agreement, over the future of the ACR-CE on its territories, such consultations to include inter alia whether the ACR-CE should continue to exist on its territory and, if the Community agrees to its continuation: the terms of such continuation (including financial terms); the terms of its future management including possibilities of co-management or exclusive management by the Nuevo Lamas Community (and other affected indigenous communities); and any access or use restrictions that may be agreed to third parties and to the Nuevo Lamas Community within the territory.
    (d) No further projects should be undertaken in the territory of the Nuevo Lamas Community without their effective participation, without a participatory environmental and social impact study being carried out, without them obtaining a reasonable benefit from any such projects, and without the free, prior and informed consent of the Nuevo Lamas Community.

117. We wish to thank the Court for the opportunity to submit this amicus brief, and are hopeful the Court will take this opportunity not only to uphold the internationally-protected human rights of the Kichwa and other indigenous peoples of Peru, but to ensure the protection of Peru's natural and cultural heritage for its future generations.