

Amicus Curiae brief

before the African Commission on Human and Peoples' Rights

Communication No. 588/15: Minority Rights Group International & Environnement Ressources Naturelles et Developpement (on Behalf of the Batwa of Parc National de Kahuzi-Biega) v. Democratic Republic of Congo

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I. Interest of *Amici*

This *amicus curiae* brief is respectfully submitted by:

1. Asia Indigenous Peoples Pact – AIPP
2. Asociación Interamericana de Derechos Ambientales – AIDA
3. Comisión Colombiana de Juristas – CCJ
4. Due Process of Law Foundation – DPLF
5. Global Initiative for Economic, Social and Cultural Rights – GI-ESCR

with coordination by the secretariat of the ESCR-Net – International Network for Economic, Social and Cultural Rights.

The organizations listed are members of the Strategic Litigation Working Group and the Networkwide Project on Environment and Economic, Social, and Cultural Rights (ESCR) of the International Network for Economic, Social and Cultural Rights (ESCR-Net). The *amici* have substantial relevant experience in human rights analysis and litigation, including regarding the rights of Indigenous Peoples and economic, social, cultural and environmental rights (ESCER).

ESCR-Net has more than 280 organizational and individual members in more than 75 countries. The secretariat of the network contributed by coordinating the preparation of this document. The network secretariat has supported *amicus* filings, third-party interventions, and expert opinions from different members in several international, regional and national jurisdictions in recent years.

II. Summary

In line with the practices of the African Commission on Human and Peoples' Rights, and Articles 60 and 61 of the African Charter on Human and Peoples' Rights, international, regional, and comparative constitutional legal interpretations of Indigenous Peoples' human rights to their lands, ancestral territories, and resources can serve as complementary references in applying related standards in the African Human Rights System.

The rights of Indigenous Peoples to their ancestral lands, territories, and natural resources without interference to their free, prior, and informed consent are guaranteed by universal, as well as inter-American, standards. Convention 169 of the International Labour Organisation (ILO), while not ratified by the Democratic Republic of the Congo (DRC), provides a relevant further reference in discerning international obligations regarding the rights of Indigenous Peoples. At the same time, the full right of Indigenous Peoples to their ancestral lands, territories and natural resources has been recognized in several national constitutions across Latin America.

States have clear legal obligations under international human rights, environmental and labor law as well as comparative law to harmonize environmental protection measures with the human rights of Indigenous Peoples to the lands, territories and natural resources that they have traditionally owned, occupied or used. International legal instruments have recognised the relationship between indigenous knowledge and effective environmental protection, and States accordingly have a duty to respect, preserve and maintain traditional knowledge relevant for conservation and sustainable use of biological diversity. Moreover, States have a duty to abide by cultural rights and to incorporate sociocultural dimensions in relation to any conservation measures. States also have a duty to consult and cooperate in good faith with Indigenous Peoples in order to obtain their free, prior and informed consent before adopting and implementing environmental measures that may affect them. Indeed, one of the critically important legal standards underpinning the obligation of States to harmonize environmental protection measures with the human rights of Indigenous Peoples to the lands, territories and resources that they have traditionally owned, occupied or used is the right to participation. States must respect, protect and fulfil the rights of Indigenous Peoples to participate in the conservation of their environment in conformity with international standards.

Given the foregoing, *amici* urge the Commission to:

1. Draw upon complementary United Nations (UN), regional, and comparative standards in interpreting Indigenous Peoples' rights to their traditional lands, territories, and natural resources within the African Human Rights System, and
2. Recognize and apply the duty of States to harmonize environmental protection measures with Indigenous Peoples' rights to their traditional lands, territories, and resources, taking into due account:
 - a. the role of Indigenous Peoples and traditional knowledge in conservation and combating climate change;

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- b. the cultural rights framework and the sociocultural dimension of conservation;
- c. Indigenous Peoples' right to free, prior, and informed consent with respect to environmental protection measures; and
- d. Indigenous Peoples' right to participation in conservation efforts pertaining to their lands.

III. Complementary Interpretations of Indigenous Peoples' Rights to the Lands, Territories and Resources They Have Traditionally Owned, Occupied or Used

In line with the practices of the African Commission on Human and Peoples' Rights and Articles 60 and 61 of the African Charter on Human and Peoples' Rights, international, regional, and comparative constitutional legal interpretations of Indigenous Peoples' human rights to their ancestral lands, territories, and resources, can serve as complementary references in applying related standards in the African Human Rights System. This section details several of those valuable sources of interpretation below.

A. United Nations Human Rights System Standards

Indigenous Peoples' rights to the recognition, demarcation, titling and safeguarding of their possession of their territories are protected in several instruments of the international human rights system.

The UN Committee on Economic, Social and Cultural Rights (CESCR) has interpreted the right to culture—protected under Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which has been ratified by the DRC—as including the protection of the territorial rights of Indigenous Peoples, in the following terms:

The strong collective 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. Indigenous peoples's cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected in order to prevent the degradation of their distinctive way of life, including their means of subsistence, the loss of their natural resources, and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, to take measures to return these lands and territories.¹

The International Covenant on Civil and Political Rights (ICCPR), also ratified by the DRC, establishes, in Article 27, the obligation of States parties not to deprive ethnic minorities of the right, in community with other members of their group, to enjoy their own culture, profess and practise their own religion, or to use their own language.. In interpreting this provision, the UN Human Rights Committee (HRC) has indicated that the protection of culture “may consist in a way of life which is

¹ UN, CESCR, General Comment No. 21, Article 15, paragraph 1(a), UN Doc. E/C.12/GC/21, (2009) at para. 36.

closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.”²

The UN Committee on the Rights of the Child (CRC) has in turn stressed, in interpreting the protection of cultural traditions and values contained in the preamble to the International Convention on the Rights of the Child, also ratified by the DRC, that: “States parties should closely consider the cultural significance of traditional land and the quality of the natural environment while ensuring the children’s right to life, survival and development to the maximum extent possible.”³

The UN Committee on the Elimination of Racial Discrimination (CERD), applying the corresponding Convention that was ratified by the DRC, has also established the obligation of States to protect Indigenous Peoples’ rights to ownership of their territories and to guarantee the autonomous development of their communal lands. This includes the duty to return traditional lands and territories inhabited or used without their free, prior and informed consent.⁴

Moreover, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁵ enshrines the rights to land, territory and natural resources of Indigenous Peoples, including those traditionally

² UN, HRC, General Comment No. 23, Article 27, UN Doc. HRI/GEN/1/Rev.7, (1994) at para. 3(2).

³ UN, CRC, General Comment No. 11, U.N. Doc. CRC/C/GC/11, (2009) at para. 35.

⁴ UN, CERD, General Recommendation No. 23, UN. Doc. A/52/18, Annex V, (2003) at para. 5.

⁵ Former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, provided some observations on the matter of the legal authority of the UNDRIP in his report to the UN General Assembly 2013. In his observations, the Special Rapporteur clarified:

[u]nder prevailing international law doctrine, declarations adopted by resolution of the United Nations General Assembly, unlike treaties, are not themselves direct sources of law. But to say simply that the Declaration is non-binding is an incomplete and potentially misleading characterization of its normative weight. It has long been widely understood that standard-setting resolutions of the General Assembly can and usually do have legal implications, especially if called “declarations”, a denomination usually reserved for standard-setting resolutions of profound significance.

The General Assembly has a long history of adopting declarations on various human rights issues, including the first international human rights instrument of the United Nations, the Universal Declaration of Human Rights, adopted in 1948. These declarations, like other resolutions, are adopted by the General Assembly under the authority granted to it under Article 13 (1) (b) of the Charter of the United Nations to make recommendations for the purpose of assisting with the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Although technically a resolution, the Declaration has legal significance, because it reflects an important level of consensus at the global level about the content of indigenous peoples’ rights, and that consensus informs the general obligation that States have under the Charter — an undoubtedly binding multilateral treaty of the highest order — to respect and promote human rights, including under Articles 1 (2), 1 (3), 55 and 56 of the Charter. The Declaration was adopted by an overwhelming majority of Member States and with the support of indigenous peoples worldwide. When representing such a widespread consensus, General Assembly resolutions on matters of human rights, having been adopted under the authority of the Charter itself, can and do inform Member States’ obligations under the human rights clauses of the Charter.

UN, Report of the Special Rapporteur on the rights of indigenous peoples, A/68/317, (2013) at para. 61-63.

owned by them but now occupied by non-indigenous persons.⁶ Article 26(2) of UNDRIP states 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.” Article 26(3) adds that States “shall give legal recognition and protection to these lands, territories and resources.”⁷

As the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, explained, the fundamental objective of the land titling procedure for Indigenous and Tribal Peoples is to provide security for land and resource rights “in accordance with indigenous and tribal peoples’ own customary laws and traditional land and resource tenure.”⁸

In 2008, the United Nations Development Group presented its Guidelines on Indigenous Peoples’ Issues, which state that, “Indigenous peoples’ lands and territories should be legally recognized, demarcated and protected from outside pressures.”⁹ In 2018, the Permanent Forum on Indigenous Issues expressed its opinion on the problems associated with the demarcation of indigenous lands, and urged States to “take immediate steps for the implementation of those rights through programmes for mapping, titling or other actions and legislative reforms.”¹⁰

The UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, also affirmed the obligation of States to ensure that there is no outside interference in traditional territories. This implies removing any type of interference by means of clearing these territories of bona fide third parties or of persons who illegally occupy demarcated and titled territories.¹¹

CERD General Recommendation 23 on Indigenous Peoples (1997), as referenced earlier, calls on States to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.”¹² This General Recommendation has been raised multiple times by the CERD in the context of nature preservation. For example, in concluding observations on Sri Lanka (2001), CERD raised concerns about the establishment of a national park on the ancestral forestland of the Veddas people and called on the State to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.¹³ In concluding observations on Nepal (2004), CERD raised concerns about “allegations of forced relocation and violations of the right of the indigenous peoples to own, develop, control

⁶ UNDRIP, Articles 25-32.

⁷ See also the ILO Indigenous and Tribal Peoples Convention (No. 169), Arts. 14(2)-14(3) and 15.

⁸ UN, Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/18/35/Add. 7, (2011) at para. 36.

⁹ UN Development Group, Guidelines on Indigenous Peoples’ Issues, (2009) at p. 18.

¹⁰ UN Permanent Forum on Indigenous Issues, Report of the seventeenth session, E/2018/43, (2018) at para. 8.

¹¹ Expert statement by Special Rapporteur Victoria Tauli-Corpuz on 17 March 2017, submitted to the Inter-American Court of Human Rights in the case of *Xucuru v. Brazil*. Inter-American Court of Human Rights, *Case of the Xucuru Indigenous People and their Members v. Brazil*, Judgment, 5 February 2018, at para. 124.

¹² UN, CERD, General Recommendation No. 23, UN. Doc. A/52/18, Annex V, (2003) at para. 5.

¹³ UN, CERD, A/56/18 (2001) at para. 335.

and use their traditional homelands and resources in the name of wildlife preservation.”¹⁴ In concluding observations on Kenya (2017), CERD drew attention to the forced evictions of the Sengwer people from the Embobut Forest and the Ogiek people from the Mau Forest and called on the State to “ensure legal acknowledgement of the collective rights of the Sengwer, the Endorois, the Ogiek and other indigenous peoples to own, develop, control and use their lands, resources and communal territories according to customary laws and traditional land-tenure systems...”¹⁵

Additionally, in the report on his visit to Kenya (2006), the Special Rapporteur on the rights of indigenous peoples stated that “existing legislation should be amended to ensure the rights of local indigenous communities to access the natural resources in protected areas in their traditional territories.”¹⁶ In the report on her visit to Honduras (2016), the Special Rapporteur on the rights of indigenous peoples raised “concerns about the creation of protected areas that overlap with indigenous territories and the resulting restriction of access to their lands and natural resources.”¹⁷ She urged “that the necessary measures be taken to facilitate access to and use of their lands and natural resources by the indigenous peoples in areas that are currently protected, free of charge and without penalty.”¹⁸

UN standards—including CERD General Recommendation 23¹⁹—also oblige States to take steps to return lands and territories where Indigenous Peoples have been deprived of them without their free and informed consent. These duties have been articulated several times in the context of environmental protection. For example, in concluding observations on Namibia (2008), the CERD raised concerns that communities whose lands were taken before 1990 had not yet received redress for this dispossession. It called on Namibia to either take steps to return lands and territories to indigenous communities who have been deprived of them, or to provide adequate reparation measures in accordance with paragraph 5 of General Recommendation 23.²⁰ In concluding observations on Rwanda (2011), the CERD noted with concern that “no land was offered to the Batwa after their land was expropriated without prior consultation with them about the construction of parks.”²¹ The Committee called on the State to “take all necessary steps, in consultation with and with the agreement of the Batwa, to offer them adequate land, *inter alia*, under the land distribution plan established by the State party, so that they can retain their traditional lifestyle and engage in income-generating

¹⁴ UN, CERD, A/59/18 (2004) at para. 128.

¹⁵ UN, CERD/C/KEN/5-7 (2017) at para. 20. This observation was linked to Convention Arts. 2, 5 and 6.

¹⁶ UN, Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/4/32/Add.3 (2007) at para. 106.

¹⁷ UN, Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/33/42/Add.2, (2016) at para. 57.

¹⁸ UN, Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/33/42/Add.2, (2016) at para. 100.

¹⁹ The Recommendation states that “[o]nly when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.” UN, CERD, General Recommendation No. 23, UN. Doc. A/52/18, Annex V, (2003) at para. 5.

²⁰ UN, CERD/C/NAM/CO/12 (2008) at para. 19. This observation was linked to Arts. 5 (d)(v) and (e)(vi) of the Convention.

²¹ UN, CERD/C/RWA/CO/13-17 (2011) at para. 17. This observation was linked to Convention Article 5.

activities.”²² In concluding observations on Rwanda (2016), the CERD raised concerns that the “forced eviction of the Batwa from their traditional lands in order to create and develop national parks, which may have contributed to the decline in their population, has seriously disrupted their traditional way of life.”²³ Whilst it took note of Rwanda’s explanations of why Batwa have not been compensated and information on free housing programmes set up for the Batwa, the Committee highlighted “the absence of appropriate measures to ensure the full integration of the Batwa, such as the allocation of land to compensate them for the lands that they have lost.”²⁴ The CERD reiterated its recommendation that “the State party consider putting in place specific measures, in consultation and agreement with the Batwa, whereby those who so wish are provided with plots of land, so that they can engage in income-generating activities.”²⁵

Similarly, in concluding observations on Tanzania (2012), the CESCR raised concerns regarding forcible eviction of vulnerable communities for the purposes of the expansion of national parks, calling on the State to protect such communities from forced eviction, and also ensure that “past forced evictions and violations that have taken place during those evictions are properly investigated, the perpetrators brought to justice, the findings made public and those evicted offered adequate compensation.”²⁶ In concluding observations on Sri Lanka (2010), CESCR raised concerns about the conversion of the Veddahs land into a national park and urged the State to ensure that they “can return to and remain undisturbed on the lands from which they were evicted, in particular in the Maduru Oya reserve.”²⁷ In the concluding observations on Kenya (2016), the CRC also called on the State to provide redress to those evicted or displaced from their lands “under the pretext of national development and resource conservation.”²⁸

In the same vein, in his report on Nepal (2009), the Special Rapporteur on the rights of indigenous peoples called for the development of a mechanism to provide redress to Adivasi Janajati communities who were deprived of their land without their free, prior and informed consent (FPIC), “including when that loss has occurred by the establishment of protected areas,” stating that, where possible, redress should include a return to their land.²⁹ Similar recommendations were made in the reports of the Special Rapporteur on the rights of indigenous peoples in relation to the Basarwa and Bakgalagadi

²² UN, CERD/C/RWA/CO/13-17 (2011) at para. 17.

²³ UN, CERD/C/RWA/CO/18-20 (2016) at para. 18. This observation was linked to Convention Article 5.

²⁴ UN, CERD/C/RWA/CO/18-20 (2016) at para. 18.

²⁵ UN, CERD/C/RWA/CO/18-20 (2016) at para. 19.

²⁶ UN, E/C.12/TZA/CO/1-3 (2012) at para. 22. This observation was linked to ICESCR Article 11, the right of everyone to an adequate standard of living. It also referenced General comment No. 7 (1997) on forced evictions.

²⁷ UN, E/C.12/LKA/CO/2-4 (2010) at para. 11. This observation was linked to ICESCR Art. 1(2), which states: “In no case may a people be deprived of its own means of subsistence.”

²⁸ UN, CRC/C/KEN/CO/3-5 (2016) at paras. 67-68. This observation referred to General Comment No. 11 (2009) on indigenous children and their rights under the Convention.

²⁹ UN, Report of the Special Rapporteur on indigenous peoples, A/HRC/12/34/Add.3 (2009) at para.90.

in Botswana (2010),³⁰ the Ngati Tuhoe peoples in New Zealand (2011),³¹ and the San and other groups in Namibia (2013).³² And in a report on Botswana (2019), the Special Rapporteur on minority issues urged the government to “facilitate the return of all those who were removed from the Central Kalahari Game Reserve who wish to return, along with their descendants regardless of age.”³³

The Basic Principles and Guidelines on Development-Based Evictions and Displacement also include within their scope evictions that are planned or conducted under the pretext of serving the “public good”, including those linked to environmental purposes.³⁴ These Principles state that when return is possible “the competent authorities should establish conditions and provide the means, including financial, for voluntary return in safety and security, and with dignity, to homes or places of habitual residence.”³⁵

Finally, UNDRIP Article 28(1) states that “indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”³⁶

In sum, UN standards determine strong protections for Indigenous Peoples' rights to their traditional lands, territories, and natural resources free, with security of tenure and freedom from interference without their free, prior, and informed consent, barring which the first-line remedy is restitution, including in cases involving conservation aims.

B. Inter-American System of Human Rights Standards

The rights of Indigenous Peoples to their ancestral lands, territories, and natural resources without interference to their free, prior, and informed consent are also guaranteed by Inter-American standards.

Both the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man protect property rights, in Articles 21 and XXIII, respectively. Although these provisions do not mention Indigenous Peoples, the organs of the Inter-American Human Rights

³⁰ UN, Report of the Special Rapporteur on indigenous peoples, A/HRC/15/37/Add.2 (2010) at para. 97.

³¹ UN, Report of the Special Rapporteur on indigenous peoples, A/HRC/18/35/Add.4 (2011) at para. 76.

³² UN, Report of the Special Rapporteur on indigenous peoples, A/HRC/24/41/Add.1 (2013) at paras. 77-86.

³³ UN, Report of the Special Rapporteur on minority issues, A/HRC/40/64/Add.2 (2019) at para. 94.

³⁴ UN, Report of the Special Rapporteur on adequate housing (including the Basic Principles and Guidelines on Development-Based Evictions and Displacement), A/HRC/4/18 (2019) at para. 8.

³⁵ UN, Report of the Special Rapporteur on adequate housing (including the Basic Principles and Guidelines on Development-Based Evictions and Displacement), A/HRC/4/18 (2019) at para. 65.

³⁶ This is further supported by Article 10 of UNDRIP and Article 16 of ILO Convention 169.

System have stated that the private and communal property of these peoples is equally protected in the aforementioned articles of the American Convention³⁷ and American Declaration.³⁸

Furthermore, in 2016, the Organization of American States General Assembly adopted the American Declaration on the Rights of Indigenous Peoples,³⁹ which recognizes, in Article XXV, the collective right of Indigenous Peoples to remain in their ancestral territories and to use the natural resources found there. Article XXV further specifies: (i) the right to maintain and strengthen their spiritual, cultural and material relationship with the territory; (ii) the duty of States to recognize and protect lands, territories and resources, respecting the customs, traditions and land occupation systems of the Indigenous Peoples concerned; (iii) and the right to legal recognition of the various forms of occupation and use of the land, territories and resources, based on appropriate systems of effective demarcation and titling.

The Inter-American Court has developed a wealth of jurisprudence on the content and scope of Indigenous Peoples' right to collective property and the obligations of States towards them.⁴⁰

³⁷ Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, 17 June, 2005, at para. 143.

³⁸ Inter-American Commission on Human Rights, *Case of Mary and Carrie Dann v. United States*, Merits, 27 December 2002, at paras. 131, 171.

³⁹ Declaración Americana sobre los Derechos de los Pueblos Indígenas, AG/RES. 2888 (XLVI-O/16) (2016).

⁴⁰ The jurisprudential line of the Inter-American Court on the subject of the territorial rights of Indigenous Peoples begins with the landmark ruling in the *Case of Mayagna Sumo Awas Tingni v. Nicaragua* (Judgment, 31 January 2001), where a series of territorial infringements and the lack of protection by the State through the omission of titling of ancestral indigenous lands, which had been granted for lumber exploitation to a private company, were demanded. The second ruling corresponds to the *Case of the Yakye Axa Community v. Paraguay* (Judgment, 17 June 2005), where the rights to life, legal guarantees, legal protection and property were recognized as violated, based on the omission of recognition and demarcation of their ancestral territory, which made it possible for a third party to take over the area and expel the Indigenous Peoples. The Inter-American Court ruled in the same vein in the *Case of the Sanboyamaxa Indigenous Community v. Paraguay* (Judgment, 29 March 2006). The fourth ruling is the *Case of the Saramaka People v. Suriname* (Judgment, 28 November 2007), where the state violated the collective rights of this Tribal People by building a hydroelectric plant and granting logging and gold mining concessions in their territory without their consent. The fifth decision corresponds to the *Case of the Xámok Kásek Indigenous Community v. Paraguay* (Judgment, 24 August 2010), who for humanitarian crisis reasons had abandoned their ancestral territory, which had to be reconstructed through anthropological surveys. The sixth decision corresponds to the *Case of the Kichwa Community of Sarayaku v. Ecuador* (Judgement, 27 June 2012), where the discussion revolves around the right to prior consultation and the free and informed consent that the community must give in order for mining rights to be valid. Subsequently, there was the *Case of the Kuna Indigenous Peoples of Madungandí and Emberá de Bayano v. Panama* (Judgment, 14 October 2014) concerning the territorial dispossession suffered after the flooding of their territories for the construction of a hydroelectric plant. Then, there are two judgments issued on the same day in favour of the Garifuna Communities in Honduras: *Case of the Garifuna de Punta Piedra Community and Members v. Honduras*; and *Case of Garifuna Triunfo de la Cruz Community and Members v. Honduras* (Judgments, 8 October 2015) for usurpation of their collective lands, omission in titling and threats derived from territorial conflicts. In the *Case of the Kaliña and Lokono Peoples v. Suriname* (Judgment, 25 November 2015) the Court found the lack of recognition of the juridical personality of Indigenous and Tribal Peoples collectively, led to the violation of other rights of participation, use and effective enjoyment of traditional territory. Finally, the last judicial decision was in the *Case of the Xucuru Indigenous People v. Brazil*, where the safeguarding of indigenous possession of the territory was ordered, guaranteeing the right to collective property (Judgment, 5 February 2018).

The Inter-American Court recognizes that:

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.⁴¹

Protection of Indigenous Peoples' land rights has also been recently re-affirmed in the Inter-American Court of Human Rights' 2020 *Lhaka Honbat v. Argentina* decision, which expressly found a violation of the right to participate in cultural life in a case involving Argentina's denial of indigenous communities' rights to their traditional territories.⁴² The Court also emphasized the interconnection between Indigenous Peoples' right to participate in cultural life and other rights, including the right to a healthy environment.⁴³

The Inter-American Court of Human Rights recognizes that, given the intrinsic connection that Indigenous and Tribal Peoples have with their territory, the protection of these territories:

also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their way of living. This connection between the territory and the natural resources that indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival and the development and continuation of their worldview must be protected under Article 21 of the Convention to ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the States.⁴⁴

In fact, the Court has affirmed the American Convention protects the special relationship of Indigenous Peoples with their traditional lands, which is vital to their cultural survival.⁴⁵ This culture

⁴¹ Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, 31 August 2001, at para. 149.

⁴² Inter-American Court of Human Rights, *Indigenous Community Members of the Lhaka Honbat (Our Land) Association vs. Argentina*, Judgment, 6 February 2020, at para. 231-242.

⁴³ Inter-American Court of Human Rights, *Indigenous Community Members of the Lhaka Honbat (Our Land) Association vs. Argentina*, Judgment, 6 February 2020, at paras. 243-251.

⁴⁴ Inter-American Court of Human Rights, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, 27 June 2012, at para. 146. See also Inter-American Court of Human Rights, *Case of the Yakeye Axa Indigenous Community v. Paraguay*, Judgment, 17 June 2005, at paras. 124, 135 and 137; Inter-American Court of Human Rights, *Case of the Samboyamaxa Indigenous Community v. Paraguay*, Judgment, 29 Marzo 2006, at paras. 118, 121.

⁴⁵ Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, 31 August 2001, at para. 149.

of Indigenous Peoples reflects “a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because the [sic] form part of their worldview, of their religiousness, and consequently, of their cultural identity.”⁴⁶ The Court has drawn a clear line in jurisprudence regarding the concept of communal property of Indigenous and Tribal Peoples. This construction radiates to other fundamental rights, being a synergistic relationship between property, community, participation, environment, and cultural identity.

With regard to the obligation to delimit, demarcate and title indigenous territories, the IACtHR has emphasized that it is up to the State authorities to conduct this process, taking into account Indigenous Peoples' special relationship with their lands. In this process, Indigenous Peoples must have their land possession safeguarded, which “not only implies the eviction of bona fide third parties or persons who illegally occupy the demarcated and titled territories, but also guarantees their peaceful possession and ensures that the titled property is free of hidden defects, that is, free of obligations or encumbrances in favor of third parties.”⁴⁷ The Inter-American Court has also referred to the obligation of States to provide legislative and administrative mechanisms “required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores.”⁴⁸

In its 2018 decision in the case of the Xucuru Indigenous People's territory in Brazil, the Inter-American Court summarized its jurisprudence on indigenous land and natural resource rights as follows:

[T]he Court recalls its jurisprudence with respect to community ownership of indigenous lands, which states, inter alia, that 1) Indigenous Peoples' traditional possession of their lands shall be deemed equivalent to the title of full ownership granted by the State; 2) traditional possession gives Indigenous People the right to demand official recognition of ownership and registration; 3) Indigenous Peoples who, through no fault of their own, have left or lost possession of their traditional lands retain the right to own them, even in the absence of legal title, except when the lands have been legitimately transferred to bona fide third parties; 4) the State must delimit, demarcate and grant collective title to the lands to members of indigenous communities; 5) Indigenous Peoples who have involuntarily lost possession of their lands, and whose lands have been legitimately transferred to bona fide third parties, have the right to recover them or to obtain other lands of equal size and quality; 6) the State must guarantee effective ownership to Indigenous Peoples and refrain from acts

⁴⁶ Inter-American Court of Human Rights, *Case of the Sawboyamaxa Indigenous Community v. Paraguay*, Judgment, 29 March 2006, at para. 118.

⁴⁷ Inter-American Court of Human Rights, *Case of the Xucuru Indigenous People and their Members v. Brazil*, Judgment, 5 February 2018, at paras. 124-125.

⁴⁸ Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, 31 August 2001, at para. 164.

that could lead to State agents, or third parties acting with their acquiescence or tolerance, to affect the existence, value, use, or enjoyment of their territory; 7) the State must guarantee the right of Indigenous Peoples to effectively control and own their territory without any external interference from third parties; and 8) the State must guarantee the right of Indigenous Peoples to control and use their territory and natural resources. In this regard, the Court has held that it is not a question of a privilege to use the land, which can be taken away by the State or overshadowed by the property rights of third parties, but rather a right of Indigenous and Tribal Peoples to obtain title to their territory in order to guarantee the permanent use and enjoyment of that land.⁴⁹

According to the Inter-American Court, “when States impose limitations or restrictions on the exercise of the rights of indigenous peoples to the ownership of their lands, territories and natural resources, certain guidelines must be respected”⁵⁰ Thus, “when indigenous communal property and individual private property are in real or apparent contradiction, the American Convention itself and the jurisprudence of the Court provide guidelines to establish admissible restrictions.”⁵¹ These must be established by law, and be necessary, proportionate and aimed at achieving a legitimate objective in a democratic society, without denying the people their right to subsist.⁵² Likewise, the Court has specified that in the case of natural resources found in an indigenous community's territory, in addition to the criteria mentioned, the State is required to verify that any restrictions do not imply a denial of subsistence for the Indigenous Peoples themselves.⁵³

In addition to the ample jurisprudence of the Inter-American Court, the Inter-American Commission has some specific pronouncements on the cultural adequacy of the process of delimitation, demarcation, and titling of indigenous territories. In its words, “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.”⁵⁴

In line with Inter-American case law, the importance of the recognition and defense of community properties not only implies the defense of the fundamental rights of today's Indigenous Peoples, but

⁴⁹ Inter-American Court of Human Rights, *Case of the Xucuru Indigenous People and their Members v. Brazil*, Judgment, 5 February 2018, at paras. 115, 117.

⁵⁰ Inter-American Court of Human Rights, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, 27 June 2012, at para. 156.

⁵¹ Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, 17 June 2005, at para. 144.

⁵² Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, 17 June 2005, paras 144 y 145; Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgment, 28 November 2007, at para. 128.

⁵³ Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgment, 28 November 2007, at para. 129.

⁵⁴ Inter-American Commission on Human Rights, *Case of Mary and Carrie Dann v. United States*, Merits, 27 December 2002, at para. 128.

it is also necessary to recognize and understand the importance of conserving indigenous worldviews for the full enjoyment of human rights by future generations.

C. UN International Labour Organisation Standards

ILO Convention 169, while not ratified by the DRC, provides a relevant further reference in discerning international obligations regarding the rights of Indigenous Peoples. Its broad citation, particularly in the Americas, indicates its role crystallizing certain customary international law standards. In a guide to Indigenous Peoples' rights within the ILO framework, the Forest Peoples Programme affirms that the "evolution of juridical thought and practice" in the field of Indigenous Peoples rights "has led many to conclude that some indigenous rights have attained the status of customary international law and are therefore generally binding on states."⁵⁵ As explained by the ILO, "[i]n non-ratifying States, the courts can rely on the Convention [ILO 169], e.g. in order to determine general principles of law or customary international law."⁵⁶

The right of Indigenous Peoples to own and possess the lands they have traditionally occupied is expressly protected in Articles 13 and 18 of ILO Convention 169.

This Convention's guarantees concerning consultation have also contributed toward the legal recognition of Indigenous Peoples' right to FPIC with respect to actions that would affect their ancestral lands. The right to FPIC, embedded within the human right to self-determination of Indigenous Peoples, governs the negotiation of "the conditions under which [any] project will be designed, implemented, monitored and evaluated."⁵⁷

In relation to the right to natural resources, Article 15 of ILO Convention 169 specifically states:

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

⁵⁵ F. McKay, *A Guide to Indigenous Peoples' Rights in the International Labour Organization, Forest Peoples Programme*, 2010, p. 4, available at: <http://www.forestpeoples.org/sites/fpp/files/publication/2010/09/iloguideiprightsjul02eng.pdf>, citing (see, among others, S.J. Anaya, *Indigenous Peoples in International Law*, (Oxford and New York: OUP, 1996), at p. 49-58, 107; S. Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *Harv. Human Rights J.* 57 (1999), at p. 128; R. Torres, *The Rights of Indigenous Peoples: The Emerging International Norm*, 16 *Yale Journal Int'l Law*, at p. 127; C. Iorns Magallanes, *International Human Rights and their Impact on Indigenous Peoples' Rights in Australia, Canada and New Zealand*. In P. Havemann (ed.), *Indigenous Peoples' Rights in Australia, Canada and New Zealand*. (Auckland: OUP, 1999), at p. 238, 242; S.J. Anaya & R. Williams, *The Protection of Indigenous Peoples' Rights over Land and Natural Resources under the Inter-American Human Rights System*, 14 *Harv. Hum. Rts. J.* 33 (2001)).

⁵⁶ UN, ILO, *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*, at p. 182 available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf.

⁵⁷ UN, Food and Agriculture Organization, *Prior and Informed Consent: An indigenous peoples' right and good practice for local communities* (2016), at p. 13, available at <http://www.fao.org/3/a-i6190e.pdf>.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.⁵⁸

Furthermore, Article 14(1) of ILO 169 states:

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.⁵⁹

Emphasizing the communal aspect of Indigenous Peoples' relationship with their ancestral lands, ILO supervisory bodies have expressed concern in cases where collective lands are converted into individual property, affirming, for instance:

The ILO's experience with indigenous and tribal peoples has shown that when communally owned indigenous lands are divided and assigned to individuals or third parties, the exercise of their rights by indigenous communities tends to be weakened and generally end up losing all or most of the lands, resulting in a general reduction of the resources that are available to indigenous peoples when they keep their lands in common.⁶⁰

As further explained by the ILO:

[i]n order to effectively protect indigenous peoples' land rights, governments must establish procedures for identifying the lands of indigenous peoples and establish ways to protect their rights to ownership and possession. These procedures can take a variety of forms; in some cases they will including [sic] demarcation and titling while

⁵⁸ ILO 169, Art. 15(1)-(2).

⁵⁹ ILO 169, Art. 14(1).

⁶⁰ UN, ILO, Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal People's Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP), at para. 26.

in other [sic] they may imply the recognition of self-governance arrangements or co-management regimes.⁶¹

In sum, the ILO standards strengthen the international corpus iuris by recognizing Indigenous Peoples' rights to their ancestral lands, territories and natural resources, and prohibiting interference with their free, prior and informed consent.

D. Comparative Constitutional Law Standards

At the same time, the full right of Indigenous Peoples to their ancestral lands, territories and natural resources has been recognized in several national constitutions across Latin America.

This is the case with the Political Constitution of the Plurinational State of Bolivia (2009), which recognizes the pre-colonial existence of indigenous and native peasant nations and peoples, as well as their ancestral domain over their territories, and guarantees their self-determination within the framework of the unity of the State.⁶² It establishes several other articles applicable to Indigenous Peoples and has a specific chapter on the Bolivian Amazon.⁶³

The Constitution of the Federative Republic of Brazil (1988) dedicates Chapter VIII of Title VIII to the protection of Indigenous Peoples' rights, recognizing their social organization, customs, languages, beliefs, traditions, and original rights to the lands they traditionally occupy. It recognizes the permanent possession of the lands traditionally occupied by Indigenous Peoples and their exclusive right to use the riches of the soil, rivers and lakes within them.⁶⁴ It considers their lands to be inalienable and nontransferable, and their rights to be imprescriptible.⁶⁵ It recognizes the Brazilian Amazon as part of the nationally owned lands⁶⁶ and prohibits the removal of indigenous groups from their lands, except "ad referendum" by the National Congress in exceptional situations.⁶⁷

The Constitution of the Republic of Ecuador (2008) recognizes the existence of diverse indigenous nationalities coexisting within its territory.⁶⁸ It recognizes a set of collective rights in their favor: the right to freely maintain, develop, and strengthen their identity, sense of belonging, ancestral traditions, and forms of social organization; the right to possess their ancestral lands and territories; and the right to prior consultation, among others.⁶⁹

⁶¹ UN, ILO, Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169, at p. 95 available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf.

⁶² Political Constitution of Bolivia, Chapter Eight, Amazonia, Art. 2.

⁶³ Political Constitution of Bolivia, Chapter Eight, Amazonia, Arts. 390-392.

⁶⁴ Constitution of the Federative Republic of Brazil, 1988, Art. 231, §2°.

⁶⁵ Constitution of the Federative Republic of Brazil, 1988, Art. 231, §4.

⁶⁶ Constitution of the Federative Republic of Brazil, 1988, Art. 225, §4.

⁶⁷ Constitution of the Federative Republic of Brazil, 1988, Art. 231, §5.

⁶⁸ Constitution of the Republic of Ecuador, Art. 6.

⁶⁹ Constitution of the Republic of Ecuador, Art. 57.

The Venezuelan constitution also dedicates several articles to respect the rights of Indigenous Peoples and environmental rights, requiring, among other obligations, that the State recognize “the existence of indigenous peoples and communities, their social, political and economic organization, their cultures, practices and customs, languages and religions, as well as their habitat and original rights to the lands they ancestrally and traditionally occupy, and which are necessary to develop and guarantee their way of life.”⁷⁰

The Colombian legal context deserves particular attention in view of the relevant standards developed in various cases and legislation.⁷¹ The Political Constitution of Colombia (1991) enshrines the right to self-determination as one of the fundamental aspects of Colombia's foreign relations,⁷² and establishes an additional two senators to be elected in special national constituencies for indigenous communities.⁷³ It provides jurisdictional functions for indigenous community authorities,⁷⁴ and in Title XI, Chapter 4, establishes a special regime for indigenous territories.

In Colombia, it should be noted that Indigenous Peoples are not only subject to fundamental rights, with their own uniqueness and legal status, but are also subject to special constitutional protection, in response to various factors that threaten the subsistence of Indigenous Peoples, such as:

- (i) the existence of historical patterns of discrimination against Indigenous Peoples and individuals that affects their material, cultural and spiritual survival; (ii) the pressure exerted on their territories, as well as the legal insecurity that exists regarding them, which generates even greater risks; (iii) the lack of understanding of their ways of seeing the world, social organization, and perception of development by non-indigenous society; (iv) the economic and geostrategic interests imposed on ancestrally occupied territories; (v) the special impact that armed conflict has generated on their territories and their lives; and (vi) the economic, political, geographic, and social marginalization that characterizes their situation and that translates into serious and real threats to their survival.⁷⁵

⁷⁰ Constitution of the Bolivarian Republic of Venezuela, Art. 119. See also articles 120-129.

⁷¹ The general legal framework for the protection of ethnic territorial rights in Colombia has as its main milestone the constitutional recognition in 1991 of cultural diversity as an essential part of the social rule of law. Thus, in keeping with the development of the right to material equality, ethnic groups are considered to be subject to special constitutional protection. Over the course of 28 years, specific jurisprudence has been produced relating to these groups, developing both domestic and international instruments linking their rights to territories to their very survival as a people and to their human dignity, which comprise not only a physical dimension of the occupied land, but also spiritual and cosmogonic practices, as well as the natural and population resources that ultimately constitute their social identity, customs, traditions, and ways of life.

⁷² Political Constitution of Colombia, 1991, Art. 9.

⁷³ Political Constitution of Colombia, 1991, Art. 171.

⁷⁴ Political Constitution of Colombia, 1991, Art. 246.

⁷⁵ Constitutional Court of Colombia, Judgment, T-153 of 2019, at para. 56, available at: <https://www.corteconstitucional.gov.co/relatoria/2019/t-153-19.htm>.

Furthermore, due to the special relationship Indigenous Peoples have with the land and the occupation of their ancestral territories, such peoples have the following rights, among others, as recognized by Colombian constitutional jurisprudence:

(i) the right to establish, enlarge, and safeguard possession of reservations in territories that Indigenous Peoples have traditionally occupied; (ii) the right to protection of sacred areas or areas of special spiritual and cultural importance, even if they are located outside of their reservations; (iii) the right to use and administer their territories; (iv) the right to participate in the use, exploitation and conservation of renewable natural resources existing in the territory; (v) the right to protection of areas of environmental importance; (vi) the right to exercise self-determination and self-government; and (vii) the right to free, prior and informed consultation.⁷⁶

The Colombian Constitutional Court has upheld “the State's obligation to adopt within its national law the legislative, administrative and other measures necessary to create an effective mechanism for Indigenous Peoples’ claims to ancestral lands, in order to ensure their ownership rights and take into account their customary law, values, uses and customs.”⁷⁷

The reinforced territorial protection of formalized indigenous territories, contained in Article 63 of the Colombian Constitution, establishes that “public property, natural parks, communal lands belonging to ethnic groups, reservation lands, national archaeological sites, and other property determined by law, are inalienable, imprescriptible, and non-seizable...,” reinforcing the legal recognition that they are comprised not only of the land actually occupied ancestrally, but also of the social and cultural relations of the ethnic communities made possible in the broader space where their culture and worldview are preserved and ancestral subsistence practices are reproduced. In this sense, reference is made to territorial rights, which cover the hydrography, toponymy, sacred places, law of origin, communication methods with other communities, beings and cross-border territories, autonomy and self-determination of their government within the framework of their own rights, among others.

In relation to FPIC, contemplated by ILO 169, Colombian Constitutional Court Judgment T-769 of 2009 established the standards for the weighing that the State must carry out in order to harmonize competing interests: on the one hand, the exploitation of natural resources and “general interest” with regard to the country's economic development, and on the other, the safeguarding of ethnic integrity.⁷⁸ The risks involved in the very realization of these economic projects “demand a special State duty to

⁷⁶ Constitutional Court of Colombia, Judgment, T-153 of 2019, at para. 66, available at: <https://www.corteconstitucional.gov.co/relatoria/2019/t-153-19.htm>.

⁷⁷ Constitutional Court of Colombia, Judgment, T-153 of 2019, at para. 88, available at: <https://www.corteconstitucional.gov.co/relatoria/2019/t-153-19.htm>.

⁷⁸ Constitutional Court of Colombia, Judgment, T-769 of 2009, available at: <https://www.corteconstitucional.gov.co/relatoria/2009/t-769-09.htm>. Article 330 of the Political Constitution of Colombia expressly states that the exploitation of natural resources cannot be detrimental to the cultural, social, and economic integrity of the communities.

guarantee prior consultation with indigenous communities and peoples. Participation in these cases, with respect to measures related to the use of mining resources located in their territories, must be compatible with the conditions of their distinct identity".⁷⁹

In cases of displacement and confinement of Indigenous Peoples in Colombia, the restitution of territorial rights is the preferred form of reparation. As was widely stated in a report presented to the Inter-American Court of Human Rights regarding failure to provide reparations to the victims of land dispossession in Colombia (2019),⁸⁰ special measures in the area of care and comprehensive reparations for Indigenous Peoples, who are the victims of armed conflict, seek to provide collective redress, prioritizing the implementation of public policy for the restitution of territorial rights based on the historical recognition of the injustices and dispossessions in the territories affected by war.⁸¹

In sum, the constitutional legal frameworks of various countries, such as exemplified here by Latin America, establish and incorporate Indigenous Peoples' rights similar to the international standards articulated previously.

⁷⁹ Gloria Amparo Rodríguez. Los derechos de los pueblos indígenas de Colombia. Luchas, contenido y relaciones. Editorial Universidad del Rosario, 2015, at p. 74 (citing Constitutional Court of Colombia, Judgment, C-366 of 2011).

⁸⁰ Comisión Colombiana de Juristas, A Snapshot of Land Restitution in Colombia (2019), available at: https://www.coljuristas.org/documentos/tmp/Radiografia_de_la_restitucion_de_tierras_en_Colombia_2019.pdf.

⁸¹ For example, Decree-Law 4633 of 2011 recognizes Indigenous Peoples' territory as a victim, "taking into account [Indigenous Peoples'] worldview and the special and collective bond that unites them with Mother Earth;" and that the territory is a "living entity," and therefore susceptible to suffering damages related to internal conflict and its related and underlying factors. Food sovereignty is also tied to territorial rights in this framework and is susceptible to judicial redress. Decree-Law 4633 of 2011, Art. 3; Decree-Law 4633 of 2011, Art. 45.

IV. States Must Harmonize Environmental Protection Measures with Indigenous Peoples' Rights to Their Lands, Territories and Resources

States have clear legal obligations under international human rights, environmental and labor law as well as comparative law to harmonize environmental protection measures with the human rights of Indigenous Peoples to the lands, territories and natural resources that they have traditionally, owned, occupied or used, as shall be established in this section. In the report on his mission to Costa Rica, the Independent Expert on human rights and the environment (2014) raised concerns about the expulsion of minority communities from homes that they have occupied for generations resulting from strict interpretation of laws governing protected areas. He stressed that “[c]onservation should not impose an undue cost on communities that have deep historical roots in areas of environmental importance”⁸² and added that “[T]he right to a healthy environment need not conflict with other fundamental rights.”⁸³ He called for the state to resolve the situation in a manner that “[s]afeguards both the right to a healthy and ecologically balanced environment and the rights of those who have lived in and near the protected areas for many years...”⁸⁴

A. States Must Acknowledge and Respect the Role of Indigenous Peoples and Their Traditional Knowledge in Conserving Biodiversity and Combating Climate Change

In considering harmonizing environmental protection measures with the human rights of indigenous peoples, international and regional sources, as well as comparative law and jurisprudence, can inform the Commission's understanding of State duties to recognize the role of Indigenous Peoples and their traditional knowledge in conserving biodiversity and combating climate change.

International legal instruments have recognised the relationship between indigenous knowledge and effective environmental protection.

The Preamble of UNDRIP recognizes that “respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment...”⁸⁵

In addition, the Convention on Biological Diversity (CBD), ratified by the DRC, and one of the most important international instruments related to environmental protection, expressly recognizes “the

⁸² UN, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/25/53/Add.1, (2014), at para. 63.

⁸³ UN, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/25/53/Add.1, (2014) at para. 63.

⁸⁴ UN, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/25/53/Add.1, (2014) at para. 63.

⁸⁵ UNDRIP, Preamble.

importance of traditional knowledge and methods conducive to biodiversity conservation.”⁸⁶ It requires in its Article 8(j), that a Member State:

Subject to its national legislation, respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity, and encourage their wider application with the approval and involvement of the holders of such knowledge, innovations and practices, and foster the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices...⁸⁷

State Parties to the CBD further commit to “[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements...”⁸⁸

Furthermore, the Paris Agreement under the United Nations Framework Convention on Climate Change, also ratified by the DRC, states that State Parties acknowledge that adaptation action should “be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems...”⁸⁹ Also relevant is another agreement ratified by the DRC, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol), which recognises the “importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components...”⁹⁰

UN treaty bodies in their work have also elevated the importance of harmonizing environmental measures and indigenous knowledge systems. For example, CEDAW General Recommendation No. 37 states that “[A]ll stakeholders should ensure that climate change and disaster risk reduction measures are gender responsive, sensitive to indigenous knowledge systems and respect human rights.”⁹¹ Also, in its concluding observations on Australia (2009), CESCR recommended that, in the context of measures to mitigate the adverse consequences of climate change, the State “put in place effective mechanisms to guarantee consultation of affected Aboriginal and Torres Strait-Islander

⁸⁶ Cher Weixia Chen & Michael Gilmore, *Biocultural Rights: A New Paradigm for Protecting Natural and Cultural Resources of Indigenous Communities*. *The International Indigenous Policy Journal*, Volume 6, Issue 3, 2015. Retrieved from: <https://ojs.lib.uwo.ca/index.php/iipj/article/view/7466/6110>

⁸⁷ CBD, Art. 8(j).

⁸⁸ CBD, Art. 10(c).

⁸⁹ Paris Agreement, Art. 7(5).

⁹⁰ Nagoya Protocol, Preamble.

⁹¹ UN, CEDAW, General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, CEDAW/C/GC/37 (2018) at para. 8; See also, UN, CEDAW, 44th Session, August 2009, ‘Statement of the CEDAW Committee on disaster risk reduction, gender and climate change.’

peoples, so [as] to enable them to exercise their rights to an informed decision as well as to harness the potential of their traditional knowledge and culture (in land management and conservation)."⁹²

UN Special Procedures have also emphasized the importance of traditional knowledge in conserving biodiversity and combating climate change. The 2017 Report of the Special Rapporteur on the rights of indigenous persons emphasised the role of Indigenous Peoples as effective partners in combating climate change whilst also stressing that they “play a fundamental role in the conservation of biological diversity and the protection of forests and other natural resources...”⁹³ More recently, the 2020 Report of the Special Rapporteur on human rights and the environment has noted that States have obligations to, “[r]espect the rights of indigenous peoples and local communities and peasants in all actions to conserve, protect, restore, sustainably use and equitably share the benefits of healthy ecosystems and biodiversity, including respect for traditional knowledge, customary practices and indigenous peoples’ right to free, prior and informed consent...”⁹⁴ The report further affirms that:

States have particular obligations to indigenous peoples and local communities and peasants. The top priority involves recognizing their land titles, tenures and rights, acknowledging the existence of different customs and systems, including collective ownership and governance models...States must ensure the effective participation of indigenous peoples in the creation of protected areas, their continued access to and use of traditional territories, including those within the protected areas (for hunting, fishing, gathering, cultivation and cultural activities consistent with sustainable use)... States are obligated to prevent human rights abuses – evictions, displacement, beatings, torture and murder – arising from exclusionary and militarized conservation.⁹⁵

Meanwhile, the 2017 Report of the Special Rapporteur on human rights and the environment concluded that States “should support indigenous and local efforts to protect biodiversity, including through ICCAs, recognizing that the traditional knowledge and commitment of indigenous peoples and local communities often make them uniquely qualified to do so.”⁹⁶ In the Report on her visit to Botswana (2016), the Special Rapporteur in the field of cultural rights stressed, in the context of a hunting ban, that it was “important to emphasize the cultural dimension of hunting and tracking practices by which people learn about their traditional territories, animal ecology, biosystems and the

⁹² UN, CESCR, E/C.12/AUS/CO/4 (2009) at para. 27. This observation was linked to art. 1, para. 1 of the ICESCR, the right to self-determination.

⁹³ UN, Report of the Special Rapporteur on indigenous peoples, A/HRC/36/46 (2017) at para. 15.

⁹⁴ UN, Report of the Special Rapporteur on human rights and the environment, A/75/161 (2020) at para 69(g).

⁹⁵ UN, Report of the Special Rapporteur on human rights and the environment, A/75/161 (2020) at para 72.

⁹⁶ UN, Report of the Special Rapporteur on human rights and the environment, A/HRC/34/49 (2017) at para. 71. The full form of ICCA is Indigenous Peoples' and Local Community Conserved Areas and Territories.

relationship between existences, and develop medicinal knowledge, conservation techniques and the skills used to maintain the environment, the fauna and the flora.”⁹⁷

Also, of relevance is the United Nations Conference on Environment and Development, specifically, Chapter 26 of Agenda 21 of the Rio Declaration, which aimed to recognize and strengthen the role of Indigenous Peoples; Chapter 26 states that “[i]ndigenous people and their communities have a historical relationship with their lands...they have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment...” and emphasizes “the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people...”⁹⁸

B. States Must Recognize and Apply Cultural Rights, including relating to the Sociocultural Dimension of Conservation

States have a duty to abide by cultural rights and to incorporate sociocultural dimensions in relation to any conservation measures. For instance, the UN Special Rapporteur in the field of cultural rights has specified that in relation to climate-related measures, “[t]o comply with their international human rights obligations, States should apply a rights-based approach to all aspects of climate change and climate action. This approach must include consideration of cultural rights and cultural impacts.”⁹⁹

States must ensure that conservation measures are consistent with the right to culture, guaranteed, inter alia, in Article 27 of the ICCPR on minority rights.¹⁰⁰ In its concluding observations on Thailand (2005), the Human Rights Committee (HRC) raised concerns about forced evictions in the context of a 1992 Master Plan on Community Development, Environment and Narcotic Crop Control, which had gravely affected the livelihood and way of life of Highlanders. Inter alia, the Committee requested that the State party “guarantee the full enjoyment of the rights of persons belonging to minorities that are set out in the Covenant, in particular with respect to the use of land and natural resources, through effective consultations with local communities.”¹⁰¹ In concluding observations on Kenya (2012), the HRC raised concerns at reports of the forced eviction of minority communities whose economic livelihood and cultural practices depend on the land.¹⁰² The Committee recommended that “in planning its development and natural resource conservation projects, the State party respect the rights

⁹⁷ UN, Report of the Special Rapporteur in the field of cultural rights, A/HRC/31/59/Add.1 (2016) at para. 52.

⁹⁸ United Nations Conference on Environment and Development, Agenda 21, Chapter 26 (1) (1992), available at: <http://www.un-documents.net/agenda21.htm>.

⁹⁹ The report specifically highlights how, “mitigation and adaptation measures undertaken in response to climate change without the free, prior and informed consent of affected indigenous peoples or without their participation, may further undermine their cultural rights.” United Nations Special Rapporteur in the field of cultural rights, Report, Aug. 10, 2020, A/75/298, para. 55, 57.

¹⁰⁰ See also UN, HRC, General Comment No. 23, UN Doc. HRI/GEN/1/Rev.7, (1994), Art. 27.

¹⁰¹ UN, CCPR/CO/84/THA, (2005) at para. 24. This observation was linked to arts. 2, 7, 19, 21 and 27 of the ICCPR.

¹⁰² It also highlighted that Kenya had not implemented the decision of the African Commission on Human and Peoples' Rights in the case *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*.

of minority and indigenous groups to their ancestral land and ensure that their traditional livelihood that is inextricably linked to their land is fully respected.”¹⁰³ In concluding observations on Ethiopia (2007), the CERD recommended that the State “adopt all measures to guarantee that national parks established on ancestral lands of indigenous communities allow for sustainable economic and social development compatible with the cultural characteristics and living conditions of those indigenous communities.”¹⁰⁴ In their concluding observations on Uganda (2015), the CESCR raised concerns that “many indigenous peoples, including the Benet, Batwa and Pastoralist communities, are denied access to their ancestral lands and are prevented from preserving their traditional way of living.”¹⁰⁵ It further stated that it was “particularly concerned about the information that the Batwa culture is at risk of extinction.”¹⁰⁶ Accordingly, the Committee recommended that Uganda “recognize indigenous peoples’ rights to their ancestral lands and natural resources”¹⁰⁷ and “pay particular attention to the promotion and preservation of cultural rights of indigenous peoples and ethnic minorities, including the Batwa culture.”¹⁰⁸

Furthermore, UNDRIP recognizes the rights of indigenous people to cultural and natural resources that “indigenous peoples (...) have the right not to be subjected to forced assimilation or destruction of their culture.”¹⁰⁹

These protections are foundational to a set of rights, now increasingly recognized as “biocultural rights”, defined as the rights of ethnic communities to administer, dispose and exercise autonomous custody over their territories and the natural resources that integrate their habitat, where their customs, beliefs, cultural and ancestral traditions are practiced in accordance with their cosmovision of nature.¹¹⁰ The biocultural rights framework can be understood as “a set of substantive Indigenous resource rights that simultaneously protect both Indigenous natural and cultural resources, realizing that they are inextricably linked and interconnected.”¹¹¹ This framework is evident in the inter-American jurisprudence noted previously recognizing the inherent spiritual relationship between the Indigenous Peoples’ way of life, their natural resources and the lands they have historically occupied. Articles 25

¹⁰³ UN, CCPR/C/KEN/CO/3 (2012) at para. 24. This observation was linked to arts. 12, 17, 26 and 27 of the ICCPR.

¹⁰⁴ UN, CERD/C/ETH/CO/15, (2007) at para. 22. This observation was linked to Article 5 (c), (d) and (e) CERD.

¹⁰⁵ UN, E/C.12/UGA/CO/1, (2015) at para. 13. This observation was linked to Article 1 of the ICESCR, the right to self-determination.

¹⁰⁶ UN, E/C.12/UGA/CO/1, (2015) at para. 37. This observation was linked to Article 15 of the ICESCR, which includes the right to take part in cultural life.

¹⁰⁷ UN, E/C.12/UGA/CO/1, (2015) at para. 13.

¹⁰⁸ UN, E/C.12/UGA/CO/1, (2015) at para. 37.

¹⁰⁹ UNDRIP, Art. 8(1).

¹¹⁰ Constitutional Court of Colombia, Judgment T-622 of 2016, available at: <http://www.corteconstitucional.gov.co/relatoria/2016/T-622-16.htm>.

¹¹¹ Cher Weixia Chen & Michael Gilmore, Biocultural Rights: A New Paradigm for Protecting Natural and Cultural Resources of Indigenous Communities. *The International Indigenous Policy Journal*, Volume 6, Issue 3, 2015, p.8, available at: <https://ojs.lib.uwo.ca/index.php/iipi/article/view/7466/6110>.

and 26 of UNDRIP articulate similar principles. The framework can help inform the disposition of comparable legal issues in the African Human Rights System.

In consonance with this framework, the Inter-American Court of Human Rights declared:

it important to refer to the need to ensure the compatibility of the safeguard of protected areas with the adequate use and enjoyment of the traditional territories of indigenous peoples. In this regard, the Court finds that a protected area consists not only of its biological dimension, but also of its socio-cultural dimension, and that, therefore, it requires an interdisciplinary and participatory approach.¹¹² Thus, indigenous peoples can generally play a relevant role in nature conservation,¹¹³ given that certain traditional uses entail sustainable practices and are considered fundamental for the effectiveness of conservation strategies.¹¹⁴ Therefore, respect for the rights of indigenous peoples can have a positive impact on environmental conservation. Thus, indigenous peoples' rights and international environmental standards should be understood as complementary and non-exclusive rights.¹¹⁵

The conception of conservation envisioned in the Declaration of Indigenous Peoples of Africa on Sustainable Development and Rio +20 (2012) also emphasizes the importance of conservation of ecosystems through suitable access and management of Indigenous peoples' land and resources.

¹¹² Inter-American Court of Human Rights, *Case of the Kaliña and Lokono Peoples v. Suriname*. Judgment, 25 November 2015, at para. 173 (citing See Secretariat of the Convention on Biological Diversity (2004), Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (CBD Guidelines) Montreal: Secretariat of the Convention on Biological Diversity, Practical Principle 9, at p. 16, available at: <https://www.cbd.int/doc/publications/addis-gdl-en.pdf>; Durban Accord: Action Plan, adopted at the Vth World Parks Congress, Durban, South Africa, 2003, at p. 25, available at: https://rmportal.net/library/content/nric/1001.pdf/at_download/file. At this congress, convened by the International Union for Conservation of Nature (IUCN) and the World Commission on Protected Areas, a new paradigm of protected area is adopted that leaves behind the consideration of reserves as mere national conservation spaces, and takes on scientific, economic and cultural claims and implements management and funding policies led by various partners. This new paradigm has subsequently been incorporated by numerous international organizations and entities.)

¹¹³ Inter-American Court of Human Rights, *Case of the Kaliña and Lokono Peoples v. Suriname*. Judgment, 25 November 2015, at para. 173 (citing See Rio Declaration on Environment and Development, Principle 22, adopted at the United Nations Conference on Environment and Development, held in Rio de Janeiro, 3-14 June 1992...available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.15_1_26_Vol.I_Declaration.pdf;

World Conference on Indigenous Peoples, High-level Plenary Meeting of the UN General Assembly..., Resolution adopted by the General Assembly on 22 September 2014, at paras. 22, 26, 34-35, available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/2).

¹¹⁴ Inter-American Court of Human Rights, *Case of the Kaliña and Lokono Peoples v. Suriname*. Judgment, 25 November 2015, at para. 173 (citing See World Wide Fund for Nature (WWF) International, *Indigenous Peoples and Conservation: WWF Statement of Principles*. Gland, Switzerland: WWF International, at p. 5, 9, available at: <https://c402277.ssl.cf1.rackcdn.com/publications/3/files/original/WWFBinaryitem8943.pdf?1342687913>).

¹¹⁵ Inter-American Court of Human Rights, *Case of the Kaliña and Lokono Peoples v. Suriname*. Judgment, 25 November 2015, at para. 173 (See World Conservation Union and WWF-International, *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies*. IUCN, Gland, Switzerland and Cambridge, UK and WWF International, Gland, Switzerland, Principle 1. The principles, guidelines and case studies presented in this study respond to Resolution 1.53 of the World Conservation Congress (WCC) on Indigenous Peoples and Protected Areas adopted at the WCC in Montreal in October 1996.)

Therefore, this declaration too should be interpreted as including a sociocultural dimension within conservation.¹¹⁶

In conclusion, Indigenous Peoples' cultural rights engender limits on conservation measures and provide bases for the biocultural rights framework. The biocultural rights framework illuminates the interdependent and mutually reinforcing relationship between Indigenous Peoples' cultural rights and the right to a healthy environment. And conservation measures, as clarified in Inter-American standards, must include sociocultural dimensions.

States Must Respect, Protect and Fulfil the Right to Free, Prior, and Informed Consent of Indigenous Peoples when Adopting Environmental Protection Measures

States have a duty to consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing environmental measures that may affect them. Indeed, one of the critically important legal standards underpinning States obligations to harmonize environmental protection measures with the human rights of Indigenous Peoples to the lands, territories and resources that they have traditionally owned, occupied or used is the right to participation.

Article 19 of UNDRIP requires that states “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”¹¹⁷ This has been recognised by the UN Special Rapporteur on human rights and the environment as applying to the establishment of protected areas in the lands and territories of Indigenous Peoples.¹¹⁸

This duty has also been recognized by numerous treaty bodies and special procedures in the context of environmental protection. CERD, in its concluding observations on Botswana (2002), raised concerns about the resettlement of the Basarwa/San people to outside the Central Kalahari Game Reserve and recommended that no decisions that directly related to the rights and interest of indigenous peoples be taken without their informed consent.¹¹⁹ Moreover, in its concluding observations on Ethiopia (2007), CERD raised concerns “about the consequences for indigenous groups of the establishment of national parks in the State party and their ability to pursue their

¹¹⁶ Declaration, Rio+20 International Conference of Indigenous Peoples on Self-Determination and Sustainable Development, 19 June, 2012, Rio De Janeiro, available at: <https://www.forestpeoples.org/sites/default/files/publication/2012/06/final-political-declaration-adopted-rio20-international-conference-indigenous-peoples-self-determina.pdf> (signatories available at: <https://www.forestpeoples.org/sites/default/files/publication/2012/06/list-indigenous-peoples-organizations-networks-and-federations-who-are-signatories-rio-20-indigenous.pdf>).

¹¹⁷ On free, prior and informed consent in the context of relocation, see also ILO 169, Art. 16; UNDRIP, Art. 10.

¹¹⁸ UN, Report of the Special Rapporteur on human rights and the environment (including the Framework Principles on Human Rights and the Environment), A/HRC/37/59 (2018), Framework Principle 15.

¹¹⁹ UN, A/57/18(SUPP) (2002), at paras. 301-305.

traditional way of life in such parks.”¹²⁰ It recommended that Ethiopia provide information “on the effective participation of indigenous communities in the decisions directly relating to their rights and interests, including their informed consent in the establishment of national parks, and as to how the effective management of those parks is carried out.”¹²¹ Furthermore, in its concluding observations on Thailand (2012), CERD raised concerns related to the effects of environmental protection laws on ethnic groups living in forests. It urged Thailand to “review the relevant forestry laws in order to ensure respect for ethnic groups’ way of living, livelihood and culture, and their right to free and prior informed consent in decisions affecting them, while protecting the environment.”¹²² Similar comments were also made in the CERD’s aforementioned concluding observations on Kenya (2017).¹²³ CESCR, in its concluding observations on Sri Lanka (2010), raised concerns that the “conversion of the Veddahs’s traditional land into a national park has led to their socio-economic marginalization and impoverishment, Veddahs having been prohibited access to their traditional hunting grounds and honey sites.”¹²⁴ Inter alia, CESCR recommended that the State establish “a state authority for the representation of Veddahs which should be consulted and should give consent prior to the implementation of any project or public policy affecting their lives.”¹²⁵ The importance of consultation with indigenous peoples, in the context of measures to mitigate climate change was also stressed in the CESCR’s concluding observations on Australia (2009).¹²⁶ In its concluding observations on Tanzania (2012), CESCR raised concerns about the forced eviction of vulnerable communities from their traditional lands for the purposes of expanding national parks; the Committee recommended that the “establishment of game reserves, the granting of licences for hunting and other projects on ancestral lands are preceded by free, prior and informed consent of the people affected.”¹²⁷ CRC, in its concluding observations on Kenya (2016), raised concerns about “evictions of indigenous peoples from their lands under the pretext of national development and resource conservation.”¹²⁸ The Committee called on Kenya to “consult and cooperate in good faith with the indigenous peoples concerned, including indigenous children, in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”¹²⁹ In its concluding observations on Gabon (2016), the CRC called on the State to “ensure a transparent and human rights due diligence process, with the full participation of pygmy communities, including

¹²⁰ UN, CERD/C/ETH/CO/15 (2007), at para. 22. This observation was linked to Article 5 (c), (d) and (e) CERD.

¹²¹ UN, CERD/C/ETH/CO/15 (2007), at para. 22.

¹²² UN, CERD/C/THA/CO/1-3 (2012), at para. 16. This observation was linked to arts. 1, 2 and 5 CERD.

¹²³ UN, CERD/C/KEN/5-7 (2017), at para. 20.

¹²⁴ UN, E/C.12/LKA/CO/2-4 (2010) at para. 11. This observation was linked to art. 1, para. 2 of the ICESCR, which states: “In no case may a people be deprived of its own means of subsistence.”

¹²⁵ UN, E/C.12/LKA/CO/2-4 (2010) at para. 11.

¹²⁶ UN, E/C.12/AUS/CO/4 (2009), at para. 27. This observation referred to art. 1, para. 1 of the ICESCR, the right to self-determination.

¹²⁷ UN, E/C.12/TZA/CO/1-3 (2012), at para. 22. This observation was linked to Article 11 ICESCR, the right of everyone to an adequate standard of living. It also referenced General Comment No. 7 (1997) on forced evictions.

¹²⁸ UN, CRC/C/KEN/CO/3-5 (2016) at paras. 67-68. This observation was linked to general comment No. 11 (2009) on indigenous children and their rights under the Convention.

¹²⁹ UN, CRC/C/KEN/CO/3-5 (2016) at paras. 67-68.

children, before demarcating lands for commercial purposes or turning them into national parks.”¹³⁰ CEDAW, in its concluding observations on Thailand (2017), called on the state to “ensure effective consultations with women from affected communities with regard to the zoning of national parks and the economic exploitation of lands and territories traditionally occupied or used by them and that it secures the free, prior and informed consent of the women affected and provide adequate compensation as necessary.”¹³¹ In its concluding observations on Costa Rica (2017), CEDAW raised concerns about forced eviction and the “lack of implementation of the principle of free, prior and informed consent and the lack of consultations with indigenous and Afro-descendant women in connection with development projects affecting their collective rights to land ownership.”¹³² Accordingly, the Committee recommended that Costa Rica take action against forced eviction and implement effective consultation mechanisms and “assess and mitigate the impact of the establishment of protected areas and the adoption of environmental public policies on the rights of indigenous women and women of African descent.”¹³³

Similarly, the Special Rapporteur on indigenous peoples, in a report on Argentina (2012), recommended that the government “guarantee suitable processes for consultation with indigenous peoples when a proposal is made to establish a national park or protected area that might adversely affect them.”¹³⁴ Similarly, in a report on Paraguay (2015) the Special Rapporteur stated that the “indigenous peoples concerned should be consulted with a view to obtaining their consent” prior to the establishment and management of protected areas that affect their lands, territories or natural resources.¹³⁵ And in the report on her visit to Honduras (2016), the Special Rapporteur stated that “the creation of protected areas also requires prior consultation, the consent of the indigenous peoples directly or indirectly affected and due regard for their rights under national and international law.”¹³⁶ In his report on Botswana (2019), the Special Rapporteur on minority issues recommended that the State engage in consultation so as to “allow the San communities to continue traditional hunting, grazing or foraging activities consistent with wildlife conservation.”¹³⁷

States Must Ensure Indigenous Participation in Conservation Efforts Pertaining to Their Lands

States must respect, protect and fulfil the rights of Indigenous Peoples to participate in the conservation of the environment pertaining to their lands, in conformity with international standards.

¹³⁰ UN, CRC/C/GAB/CO/2 (2016), at para. 52.

¹³¹ UN CEDAW/C/THA/CO/6-7 (2017), at paras. 42 - 43.

¹³² UN, CEDAW/C/CRI/CO/7 (2017), at para. 36.

¹³³ UN, CEDAW/C/CRI/CO/7 (2017), at para. 37.

¹³⁴ UN, Report of the Special Rapporteur on indigenous peoples, A/HRC/21/47/Add.2 (2012) at paras. 95-96.

¹³⁵ UN, Report of the Special Rapporteur on indigenous peoples, A/HRC/30/41/Add.1 (2015) at para. 83.

¹³⁶ UN, Report of the Special Rapporteur on indigenous peoples, A/HRC/33/42/Add.2 (2016), at para. 100

¹³⁷ UN, Report of the Special Rapporteur on minority issues, A/HRC/40/64/Add.2 (2019) at para. 94.

As noted above, UNDRIP states that “indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”¹³⁸ ILO 169 also establishes a right of Indigenous Peoples to “participate in the use, management and conservation” of the natural resources pertaining to their lands.¹³⁹

UN treaty bodies and special procedures mandate holders have also emphasized the importance of participation rights of Indigenous Peoples in conservation. CERD in its concluding observations on Suriname (2012), stressed the right of indigenous and tribal peoples—known locally as Maroons and Bush Negroes—to participate in the exploitation, management and conservation of natural resources.¹⁴⁰ The Committee reiterated its concerns in its following concluding observations on Suriname (2015).¹⁴¹ In its concluding observations on Kenya (2017), CERD’s comments on forced eviction from traditional forest lands was followed by a recommendation that Kenya legally recognise the collective rights of Indigenous Peoples “to participate in the exploitation, management and conservation of the associated natural resources.”¹⁴² CESCR in its concluding observations on Canada (2016) called on the State to “address the impact of climate change on indigenous peoples more effectively while fully engaging indigenous peoples in related policy and programme design and implementation.”¹⁴³ In the report on his visit to Nepal (2009), the Special Rapporteur on the rights of indigenous people called for the National Parks and Wildlife Conservation Act to be “amended to include enhanced participation of Adivasi Janajati in the management of the parks.”¹⁴⁴ And in the report on her visit to Honduras (2016), the Special Rapporteur on the rights of indigenous peoples stated that the “management of existing or proposed protected areas should be conducted with the full and effective participation of the indigenous peoples affected, respecting their own forms of use and management of natural resources in their ancestral territories.”¹⁴⁵

¹³⁸ UNDRIP, Art. 29(1). It further states that, “States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination”

¹³⁹ ILO 169, Art. 15(1).

¹⁴⁰ UN, CERD/C/SUR/CO/12 (2012), at para. 12. These observations were linked to arts. 2 and 5 CERD.

¹⁴¹ UN, CERD/C/SUR/CO/13-15 (2015), at para. 24. These observations were linked to arts. 2 and 5 CERD.

¹⁴² UN, CERD/C/KEN/5-7 (2017), at para. 20. This observation was linked to arts. 2, 5 and 6 CERD.

¹⁴³ UN, E/C.12/CAN/6 (2016), at paras. 53-54. This observation was linked to art. 12 ICESCR, the right to health.

¹⁴⁴ UN, Report of the Special Rapporteur on indigenous peoples, A/HRC/12/34/Add.3 (2009), at para.90.

¹⁴⁵ UN, Report of the Special Rapporteur on indigenous peoples, A/HRC/33/42/Add.2 (2016), at para. 100.

V. Conclusion

Given the foregoing, *amici* urge the Commission to:

1. Draw upon complementary UN, regional, and comparative standards in interpreting Indigenous Peoples' rights to their ancestral lands, territories, and natural resources within the African Human Rights System, and
2. Recognize and apply the duty of States to harmonize environmental protection measures with Indigenous Peoples' rights to their traditional lands, territories, and resources, taking into due account:
 - a. the role of Indigenous Peoples and traditional knowledge in conservation and combating climate change;
 - b. the cultural rights framework and the sociocultural dimension of conservation;
 - c. Indigenous Peoples' right to free, prior, and informed consent with respect to environmental protection measures; and
 - d. Indigenous Peoples' right to participation in conservation efforts pertaining to their lands.

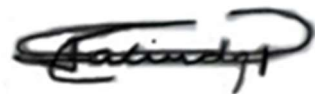
Sincerely,



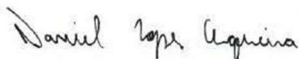
Binota Moy Dhamai
Asia Indigenous Peoples Pact - AIPP



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Asociación Interamericana de Derechos Ambientales - AIDA



Javier Galindo
Comisión Colombiana de Juristas – CCJ



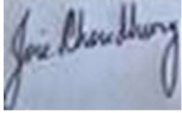
Daniel Cerqueira
Due Process of Law Foundation – DPLF

Amicus Curiae brief before the African Commission on Human and Peoples' Rights, Communication No. 588/15:
Minority Rights Group International & Environnement Ressources Naturelles et Developpement (on Behalf of the
Batwa of Parc National de Kahuzi-Biega) v. Democratic Republic of Congo



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