

# Indigenous Peoples Communities of African Descent Extractive Industries





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# Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities

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# EXECUTIVE SUMMARY



## EXECUTIVE SUMMARY

1. The Inter-American Commission on Human Rights (hereinafter "Commission" or "IACHR") addresses in this report State obligations with regard to extraction, exploitation, and development activities concerning natural resources.
2. Through the implementation of its monitoring mechanisms, the Commission has consistently received information evidencing the human, social, health, cultural and environmental impacts of these projects on indigenous peoples and Afro-descendent communities. Many extractive and development activities in the hemisphere are implemented in lands and territories historically occupied by indigenous and Afro-descendent communities, which often coincide with areas hosting a great wealth of natural resources. Moreover, the Commission has received information indicating that these projects and activities are still not properly supervised by host states and states of origin, the scarcity of mechanisms to prevent human rights violations, and the formidable barriers faced by victims, peoples, and communities to access justice when these human rights violations take place. These challenges, as well as the widespread implementation of these projects in the Americas, promoted the preparation of this report by the Commission.<sup>1</sup>
3. The Commission underscores that it recognizes the importance of these initiatives to advance the prosperity of the peoples of the hemisphere, and may involve the freedom of every State to exploit its natural resources through the granting of concessions and investments of a private or public, national or international nature. But at the same time, the Commission notes that these activities should be implemented in conjunction with appropriate and effective measures to ensure they are not executed at the expense of the human rights of the individuals, communities or peoples who live in the areas where they take place.
4. Therefore, in this report the Commission affirms that although the rules of the inter-American system neither prevent nor discourage development projects, the Member States of the Organization of American States (hereinafter "OAS") have, under the inter-American human rights instruments, ineluctable obligations to respect and guarantee relevant rights in all settings, including in regard to extraction and development activities. There are a range of human rights which

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<sup>1</sup> The Commission has received information in the context of petitions, requests for precautionary measures, on-site visits, hearings and regional initiatives indicating that extraction, exploitation and development projects have been implemented in a significant number of countries throughout the Americas, including Belize, Brazil, Colombia, Chile, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Suriname, among others.

are frequently impacted by the implementation of extractive and development projects, including the rights to life, to physical integrity, to health, to non-discrimination, to consultation, consent and to cultural identity, information and participation, among others, as will be discussed throughout this report. On this basis, the IACHR refers to the general duties of States in the various scenarios in which these activities take place. It takes into account that the States have different levels of involvement in extractive, exploitation and development activities, insofar as they are of a private, public, or mixed nature. The Commission also addresses in specific sections, the special obligations of the States regarding activities of this nature affecting the rights of indigenous peoples and Afro-descendent communities.

5. The Commission refers in the first chapter of this report to the content of the obligations that States must comply with in regard to extraction, exploitation, and development activities from the perspective of the Inter-American system. The starting point of the legal analysis presented by the Inter-American Commission in this report is the duty to respect and ensure all human rights with due diligence, and to bring domestic legislation in line with the provisions of the Inter-American human rights instruments. Taking into account an evolutionary and systematic interpretation of the American Declaration of the Rights and Duties of Man (hereinafter “American Declaration” or “ADRDM”) and the American Convention on Human Rights (hereinafter “American Convention” or “Convention”), the Commission considers that the States’ obligations in these contexts, revolve around six main components: (i) the duty to adopt an appropriate and effective regulatory framework, (ii) the obligation to prevent violations of human rights, (iii) the mandate to monitor and supervise extraction, exploitation, and development activities, (iv) the duty to guarantee mechanisms of effective participation and access to information, (v) the obligation to prevent illegal activities and forms of violence, and (vi) the duty to guarantee access to justice through investigation, punishment and access to adequate reparations for violations of human rights committed in these contexts. In each of these scenarios, the Commission places special emphasis on compliance with these obligations in relation to indigenous peoples and communities of African descent.
6. A first essential obligation is the duty to adopt an appropriate regulatory framework for the protection of human rights in the context of extraction and development activities. The general obligation to guarantee human rights encompasses the duty to prevent human rights violations, which requires prior identification and proper monitoring of the impact that a specific plan or project could generate on the human rights of the population affected by it, both before granting the authorization or permit, and during project implementation. Closely linked to this issue, and as a component to the obligation of prevention, is the duty to supervise and oversee the activities that may affect human rights. The Commission also refers to the duty to prevent illegal activities and forms of violence against the population in areas affected by extraction and development activities. Likewise, the Commission believes that in the decision-making process for authorizing extractive activities, the rights of access to information and public participation are especially important for the protection and defense of human rights which may be affected. In addition to the States’ obligations already referred

to, other obligations should be taken into account, such as those related to the right to access adequate and effective mechanisms when rights have been affected, in line with the guarantees of judicial protection and due process.

7. As it has been consistently expressed by the various organs of the inter-American system, States have specific obligations with respect to indigenous peoples and Afro-descendent communities. For this reason, in the second chapter of this report the Commission clarifies the scope of the Inter-American standards in this respect. It also discusses some of its main concerns regarding compliance by States with these standards based on the information it has received, and refers to specific situations to illustrate the situation. The Commission resorted to the concept of *tribal peoples* in order to describe Afro-descendent peoples and communities who have maintained their different social, cultural and economic traditions and who, as it follows, are entitled to special protection. The concept of *tribal peoples* refers to peoples who are not indigenous or native to the region they inhabit, but who, similarly to indigenous peoples, share certain features which distinguish them from other sectors of the national community.
8. Subsequently, the Inter-American Commission addresses some of the main impacts that the implementation of extractive and development projects has on the rights of indigenous and tribal peoples, and Afro-descendent communities. Based on the information received in recent years in hearings, visits, country reports and other monitoring activities, the Commission seeks to highlight the ways in which these activities affect the enjoyment of human rights. To this end, the Commission refers, in particular, to violations of the right to collective ownership of indigenous and tribal peoples, and Afro-descendent communities over their lands, territories and natural resources; the right to cultural identity and religious freedom; the right to life, health, personal integrity, and a healthy environment; economic and social rights such as food, access to water<sup>2</sup> and labor rights; the right to personal liberty and social protest; and protection from forced displacement. The Commission also notes some of the specific impacts on different groups and collectivities of special concern, such as indigenous authorities and leaders; human rights defenders; women; children; older persons; and persons with disabilities.
9. This Report also offers the opportunity to address an important issue in the region which has not been closely examined before. This relates to the prevalence of foreign companies in Member States with headquarters in another Member State and which are often accused of committing human rights violations in the host countries with impunity. The Report outlines the evolving jurisprudential arguments on this issue and the context which necessitates jurisprudential intervention.

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<sup>2</sup> The IACHR has established that, although the right to water is not expressly recognized in the inter-American system, its various instruments establish a series of rights that are linked to access to water and its various dimensions, such as those referring to the conditions of water availability, quality, and accessibility without any discrimination. See, IACHR, Annual Report 2015, Chapter 4.A – *Access to Water in the Americas: An Introduction to the Human Rights to Water in the Inter-American System*, para. 26.

10. Finally, the Inter-American Commission issues recommendations to the States on the obligations and lines of action they should follow under international human rights law to achieve the full protection of human rights in the context of activities of this nature, and more specifically, the States' duties with regard to the rights of indigenous peoples and Afro-descendent communities in these scenarios.

CHAPTER 1  
INTRODUCTION



## INTRODUCTION

11. Although the extraction and exploitation of natural resources has long been part of the history of the American continent, in more recent years there has been a marked increase in these activities in the region, associated with a cycle of high prices for raw materials and strong international demand. The significant expansion of extractive activities in the current regional context is reflected both in terms of its proliferation across the hemisphere, and in its diversification into new areas. This has made these activities occupy a central place in the current development strategies of many countries in the region.
  
12. Various figures show that the arrival of the XXI century brought a significant increase in mining and oil extraction in the continent, and more specifically in Latin America and the Caribbean.<sup>3</sup> Likewise, the presence of export monocultures which cover large areas permitting huge production volumes has also significantly increased, with the corollary deep environmental impacts. For example, soy monocultures are covering large areas of land in the Southern Cone countries, as is the case with the production of sugar cane or palm oil for biofuels in countries like Guatemala and Colombia. At the same time, large infrastructure projects, such as roads, canals, dams, hydroelectric plants, wind farms, ports, resorts or similar projects are being implemented. With the terms *extraction, exploitation and development* plans or projects, the Commission refers to any activity that can affect the lands, territory, or natural resources of any indigenous peoples or afro-descendent community, especially any proposal related to the exploration of natural resources.<sup>4</sup>
  
13. Member States in the region play various roles in regard to these plans or projects, which vary according to the type of activity, interests and state priorities, as well as the policy defined in each category by a given country. The IACHR notes, for example, that the exploitation of natural resources can be done either directly by the State itself through public enterprises or managed by it; in mixed form, through public-private capital; privately, pursuant to the granting of a license or authorization by the State; or it may be an illegal extractive activity that has no State authorization, as is the case of informal mining for example. Therefore, in the field of hydrocarbons, in countries like Bolivia, Ecuador and Venezuela there is a significant state presence, which includes the active participation of state

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<sup>3</sup> United Nations Economic Commission for Latin America and the Caribbean (ECLAC). [Statistical Yearbook for Latin America and the Caribbean](#). UN. Santiago de Chile: 2014.

<sup>4</sup> The Commission notes that, similarly, the Inter-American Court has explained that the term “extraction or investment plan or project” used in the judgment of the *Case of the Saramaka People v. Suriname* entails “any proposed activity that may affect the integrity of the lands and natural resources within the territory of the Saramaka people, particularly any proposal to grant logging or mining concessions”. I/A Court, *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits and Reparations. Judgment of November 28, 2007, Series C No. 172, para. 129, foot note 127.

companies in the resource exploitation. In other countries like Brazil, Colombia and Peru, extraction and exploitation occur under private or mixed investment, and at times through agreements with foreign or transnational corporations. In the mining sector, although authorization for private companies to operate is prevalent, in countries such as Chile and Suriname there are also state-owned enterprises operating.

14. The Commission also notes that an important feature of economic globalization is the foreign or transnational character of many of the companies that implement extractive and development projects in our region. In these scenarios there are different roles played by the State of origin of the company executing the project, and by the host State of the activities at issue. The nature and composition of these companies poses new and complex challenges, particularly with respect to supervision and legal redress. Therefore, the various levels of involvement of States make up a multidimensional scenario that has to be taken into consideration for the establishment of responsibilities and the effective enjoyment of human rights.
15. It is however important to note that these extractive activities, plans, and projects are located in precise physical spaces. The Commission has observed through its various mechanisms that the populations which inhabit these physical spaces are seriously impacted by the expansion and intensification of activities of this nature. The IACHR recognizes that extraction and development activities can contribute in various ways to the enjoyment of human rights, especially those linked to overcoming poverty and inequality, and promote economic development processes and the generation of jobs and productive investment in the countries where they operate. However, the Commission has consistently received alarming information concerning the negative environmental, social, cultural, and human impacts generated by these activities.
16. At the same time, the IACHR has noted that very often, extraction and development projects coincide with lands and territories historically occupied by indigenous peoples and Afro-descendent communities. This is linked to the fact that the lands and territories traditionally inhabited by these peoples and communities are often located in areas hosting significant natural resources. Many times these are also populations in conditions of exclusion, poverty, and marginalization. Indeed, multiple authorities and leaders of indigenous peoples and Afro-descendent communities, as well as human rights defenders, have informed the IACHR about the negative impacts resulting from the implementation of extractive or development projects; and violations of their human rights. This has been documented by different actors, such as the World Bank, which has observed that mining and energy projects risk and endanger the lives, assets, and livelihoods of indigenous peoples.<sup>5</sup> Moreover, modern technology allows interventions in the remote areas at issue, causing significant displacement and irreparable damage to the land and natural resources of indigenous and tribal peoples. In this context,

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<sup>5</sup> World Bank. *The World Bank Participation Sourcebook*. Banco Mundial: Washington D.C. 1996, para. 251.

peoples and communities living on remote areas are particularly vulnerable, because of their weaker bargaining capacity.<sup>6</sup>

17. The impacts are many and differ according to the type of activity. In the case of mining, the most frequently reported effects refer to the destruction of ecosystems where the quarries are located, the physical removal of rocks, the impact on the hydrological system, and water pollution, explosions, dust emissions, among other problems. Some types of mining tend to concentrate and release pollutants on the environment. Mercuric pollution is an important concern in small-scale mining; while the use of cyanide in the leaching process is a concern for large-scale gold mining. Further, problems exist in relation to the dismantling of mines and environmental remediation. Hydrocarbon exploitation involves opening trails, seismic assessments, and pollution by spills or leaks in the extraction. These projects, in addition to the works for the extraction of natural resources, require other associated works, such as trails or roads to ensure access. Monocultures also have acute environmental effects such as loss of biodiversity and food security, increased use of agrochemicals, and the advance of the agricultural frontier on natural areas, among others. Informal mining generates an intense pace in deforestation and pollution of soil and waters.
18. Similarly, the Commission has received reports regarding the serious social and cultural impacts generated by extractive or development activities in the peoples and communities in which they occur. The reality faced by indigenous peoples and Afro-descendent communities due to projects of this nature is characterized by effects on health, changes in community relations, quality of life, migration, displacement of communities, changes in traditional patterns of economy, among others. Of special concern is that, as it has been repeatedly warned by the organs of the Inter-American system, the impacts on lands, territories and natural resources of indigenous and tribal peoples are particularly profound, as they are communities that base their economic, social and cultural development in their relation to the land. The IACHR notes that women, children, or older persons, who are often the most vulnerable, face differentiated and more severe impacts.
19. The Commission has also been informed that these problems persevere without adequate mechanisms to monitor and prevent future violations of human rights. Further, when such complaints are brought to the justice system, the petitioners must go through a series of obstacles and barriers that create situations of impunity. The reported difficulties are related to judicial and administrative barriers which are almost impossible to overcome.
20. Where investment projects involve foreign or transnational corporations originating from outside of the host country, situations of impunity are exacerbated. In the spheres of supervision, control and legal redress, it is notable that indigenous representatives and human rights defenders from various countries of the region have been unanimous in reporting and documenting the

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<sup>6</sup> World Bank. *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Evaluation of Results*. OED Report No. 25754, 10 April 2003, World Bank: Washington DC, para. 26.

deficiencies in the current legal and political frameworks and emphasizing the need for foreign and transnational corporations to also be held accountable in their home countries for actions that violate the human rights of indigenous peoples and Afro-descendants in the Americas. In sum, there are barriers to access to justice across jurisdictions, which involve issues of extraterritorial jurisdiction, differences in legislative and judicial approaches, and the protection of human rights at the national level. This is accompanied by poor supervision and control of foreign companies in host countries from the outset, enabling violations of rights of indigenous and Afro-descendent peoples, who are often not prioritized in the regulatory mechanisms that exist for executing development projects.

21. In this context, the Commission has also received information of concern regarding incidents of violence perpetrated against the peoples and communities where these projects are being implemented. Pervasive problems associated with these projects have fueled efforts of social advocacy, protest, and human rights defense. Among the main issues reported and documented are the contamination of soil and water, and other negative effects on the health of indigenous and Afro-descendent communities. However, the Commission has been informed that these social protests and other advocacy activities are frequently arbitrarily restricted; and sometimes violently repressed and criminalized. The Commission has received information corroborating murders, assaults, threats, forms of harassment and criminalization of protests and protestors, mainly affecting authorities and leaders of indigenous and tribal peoples.
22. Several of the aforementioned impacts will be analyzed in subsequent chapters, but the IACHR would like to emphasize that the information received shows that we are confronting a multiplicity of profound impacts that reach many different areas such as the environmental, territorial, spiritual, and those pertaining to the health and life of the peoples and communities. Sometimes several projects are implemented in the lands or territories of the same community or peoples which may result in different kinds of negative impacts. The IACHR also notes that in addition to the impacts inherent to the specific activity, additional human rights violations take place linked to the defense of rights, such as persecution, criminalization and serious situations of violence. The different impacts and levels of interference with rights are intertwined in the daily reality experienced by numerous peoples, communities, and individuals in the region.
23. The vast information and complaints received by the IACHR, as well as the nature of the rights at stake and the seriousness of the impacts observed, makes this a priority issue in the region and evidence the need to prepare this report. While the IACHR does not directly involve itself in the economic policies of OAS Member States, where such policies involve or impact human rights, this invokes its mandate, which therefore legitimately encompasses the fostering, promotion and protection of human rights during the implementation of development activities. The Commission recognizes that although developmental activities can respond to legitimate public and national interests, it is not acceptable for any negative fallout to impact indigenous and tribal peoples, and Afro-descendent communities in such disproportionate ways. These are collectivities whose ethnic and cultural diversity must be protected by States.

24. The Commission has warned previously that economic activities should be accompanied by measures to ensure that they are not carried out at the expense of the fundamental rights of the persons adversely affected by them.<sup>7</sup> These activities cannot compromise or subordinate the fundamental values of democracy and rule of law, in which the human person and his or her rights are at the center.<sup>8</sup> The Commission is concerned that human rights are increasingly perceived as an obstacle to economic development when in fact they are its precondition. The Commission also notes that, even though it is common to refer to “development” as the basis for favoring the exploitation of natural resources, several countries with a wealth of natural resources and who favor their extraction have low levels of human development. It is also of concern to the Commission that the majority of the benefits derived from those projects tend to be enjoyed by others and not the indigenous peoples and Afro-descendent communities which are the most negatively affected. Additionally, the zones where extractive projects are implemented report low levels of socioeconomic development.<sup>9</sup>
25. Considering the above, as part of its role in promoting and protecting human rights, the Commission addresses as the first point of this regional report, the international obligations of States under the Inter-American system in regards to the implementation of extractive and development activities. The Commission refers as its starting point to the general obligations of the States that are part of the Inter-American system, consisting of respecting and guaranteeing human rights to all persons within their jurisdiction without discrimination of any kind; and the duty to adapt the domestic legal framework to the provisions of the Inter-American human rights instruments. It also uses as a baseline the precedents and decisions adopted by the Inter-American Commission under the system of petitions and cases, precautionary measures, country reports and thematic reports; as well as the jurisprudence of the Inter-American Court of Human Rights (hereinafter “Court” or “Inter-American Court”). The Commission analyses

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<sup>7</sup> IACHR. Indigenous Mayan communities in the Toledo District (Belize), Merits Report No. 40/04, Case 12.053, October 12, 2004. para. 150.

<sup>8</sup> Similarly, see United Nations, World Conference on Human Rights. *Vienna Declaration and Programme of Action*. June 25, 1993. UN Doc. A/CONF.157/23, 12 de julio de 1993, Section I, para. 10. (“While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights”).

<sup>9</sup> For example, this issue was raised during the *Extractive Industries Review* undertaken by the World Bank, where the following was highlighted: “It is generally acknowledged by economists that economic growth is a prerequisite in order for long-term income-poverty alleviation to occur in a country. If extractive industries are a source of economic growth, then they should at least have the potential to contribute to poverty alleviation. The historical record of extractive industries in contributing to economic growth has been mixed, however. While some resource-rich countries have outstanding records of growth and poverty alleviation, others have shown little economic growth or have even experienced negative growth. Most academic studies of what is known as the *resource curse* suggest that between 1970 and 2000, the number of states with disappointing outcomes was larger than the number with successful outcomes.” In light of this, the respect of human rights was recommended among the conditions that would allow extractive industries to contribute to the mitigation of poverty through sustainable development. See World Bank. *Striking a Better Balance – The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review*. Vol. I, December 2003. pp. 2-3, and 45.

different levels of state involvement that illustrate the reality in the continent and therefore require different levels of responsibility on the part of States. At the same time, the Commission will consider throughout the report that indigenous peoples and Afro-descendent communities are the most commonly affected in these scenarios. Therefore, the approach is based on the State's responsibility, in light of the precedents of the inter-American system, taking into account that States may have different degrees of involvement, and that these activities have a differentiated impact on indigenous peoples and Afro-descendent communities.

26. Moreover, an important part of the legal framework of State obligations presented in this report are concrete duties States have towards indigenous peoples and Afro-descendent communities, based on the mandate to respect and protect their ethnic and cultural diversity. The Commission will address this issue in a second chapter. The IACHR begins by recognizing that, as widely developed by the organs of the Inter-American system, States have specific obligations to indigenous peoples as societies preexisting colonization or establishment of present state boundaries, which have been subject to conditions of marginalization and discrimination. From this historical fact, the international community has recognized that these peoples are different from other groups and therefore have particular rights, whose basic premise is the right to self-determination.
27. In this regard, the Commission notes that there is no precise definition of "indigenous peoples" in international law, and the prevailing position indicates that a definition is not necessary in order to protect their rights. Given the immense diversity of indigenous peoples in the world, a strict definition runs the risk of being restrictive. At the same time, the Commission has endorsed the existing standards in international law which are useful for determining when a human group can be regarded as "indigenous peoples." The most important factors to consider have been codified in Article 1.1 of ILO Convention 169, which outlines objective elements relating to the historical continuity, territorial connection, and presence wholly or partially of distinctive policies and their own specific social, economic, and cultural institutions. As to the subjective element, this provision states that "[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply." Both the IACHR and the Inter-American Court have considered that self-identification is paramount to determining the status of an indigenous people or community<sup>10</sup>.
28. The vast cultural and ethnic diversity of our continent also includes ethnic groups made up of descendants of those who originated in Africa. In several countries of the hemisphere, some Afro-descendants remain as ethnically and culturally distinct collectivities that share an identity, a common origin, a common history and tradition, such as for example, the *Maroon* in Suriname, the *quilombos* in Brazil, or the Afro-descendant communities in Colombia and Ecuador. In some

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<sup>10</sup> IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, 30 December 2009. III. Definitions, A. Indigenous peoples; tribal peoples.

cases, they went through processes of syncretism with indigenous peoples in the region, leading to distinct ethnic groups like the Garifuna that inhabit the Atlantic coast of Honduras, Guatemala, and Belize, among others. Therefore, these are dynamic and evolving societies which have undergone processes of change over the years and that maintain in whole or in part their own social, cultural, or economic institutions.

29. Although not sufficiently visible at the international level, Afro-descendant communities in the region also suffer profound impacts resulting from extractive and development activities in the territories they historically occupy and in lands that they have historically claimed as theirs. In this report, the IACHR wishes to address the situation of Afro-descendant *peoples* and *communities* living as such, and therefore have particular characteristics that require special protection. To this end, the Commission considers it essential to resort to the concept of "tribal peoples" under the ILO Convention 169, which defines as such the peoples that are not indigenous or native to the region they inhabit, but that similarly to indigenous peoples, share conditions that distinguish them from other sectors of the national collectivity.<sup>11</sup>
  
30. Two relevant criteria exist to identify communities that could benefit from the international protection extended to tribal peoples. On one hand, there are *objective* criteria, which consists of them sharing "[...] social, cultural and economic conditions [that] distinguish them from other sections of the national community", as well as be "regulated wholly or partially by their own customs or traditions or by special laws or regulations".<sup>12</sup> Similarly, the Inter-American Court has understood a "tribal people" those who are "not indigenous to the region, but that share similar characteristics with indigenous peoples, such as having social, cultural, and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions".<sup>13</sup> Certain Afro-descendant communities maintain an especial and collective relationship with the territory that they inhabit, which indicates the existence of some sort of consuetudinary land tenure system. They also have their own forms of organization, livelihoods, language, among other elements, that account for the habitual exercise of their self-determination. Along with this, there is a *subjective* element related to the awareness of the respective community of its distinct and group identity that makes its members assume themselves as members of a collectivity. Therefore, the second of those fundamental criteria is the self-identification that should be examined together with the elements associated with their traditional ways of life, their culture and worldview differing from other sectors of the population.

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<sup>11</sup> See Constitutional Court of Colombia. Judgment T-576/14. August 4, 2014. 3.11.

<sup>12</sup> ILO Convention 169, article 1. a).

<sup>13</sup> I/A Court, *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits and Costs. Judgments of November 28, 2007. Series C No. 172, para. 79 and paras. 80-84. Similarly, see I/A Court. *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, para. 132-133.

31. The Commission considers that, as indicated by the bodies of the inter-American system, as long as an Afro-descendant community or other ethnic group meets both elements, it can be considered a "tribal people" in the terms of Convention 169, for purposes of protection under international law<sup>14</sup>. Regardless of the denomination received internally by the community or that its existence is formally recognized or not, the key element is that it maintains its own traditional cultural practices and its members self-identify as part of a group with a distinct identity. The IACHR notes that, as indicated by the Inter-American Court, "[t]he fact that some individual members of [a tribal] people may live outside of the traditional [...] territory and in a way that may differ from other [members] who live within the traditional territory and in accordance with [the people's] customs does not affect the distinctiveness of this tribal group nor its communal use and enjoyment of their property"<sup>15</sup>. In this vein, the Commission has affirmed that while "[a] key element in the determination of when a given group can be regarded as indigenous or tribal is the historical continuity of its presence in a given territory [t]his does not imply, however, that indigenous or tribal peoples are static societies that remain identical to their predecessors."<sup>16</sup> As human communities, indigenous and tribal peoples have their own social trajectory, which adapts to the change of times, maintaining all or part of the cultural legacy of their ancestors.<sup>17</sup>
32. The Commission also notes that, as stated above, the tribal peoples and their members have in this context the same rights as those held by indigenous peoples and their members.<sup>18</sup> For the IACHR, "international human rights law imposes an obligation on the State to adopt special measures to guarantee the recognition of tribal peoples' rights, including the right to collectively own property."<sup>19</sup> The Inter-American Court has ruled in a similar way in the cases of the Moiwana Community,<sup>20</sup> and the Saramaka people, in which the victims belonged to different

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<sup>14</sup> I/A Court, *Case of the Moiwana Community v. Suriname*. (Preliminary Objections, Merits, Reparations and Costs). Judgment of June 15, 2005, Series C No. 124; I/A Court, *Case of the Saramaka People v. Suriname*. (Preliminary Objections, Merits, Reparations and Costs). Judgment of November 28, 2007. Series C No. 172. I/A Court, *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. (Preliminary Objections, Merits, Reparations and Costs). Judgment of November 20, 2013. Series C No. 270, para. 346.

<sup>15</sup> I/A Court. *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs, Judgment of November 28, 2007. Series C No. 172, para. 164.

<sup>16</sup> IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, 30 December 2009, para. 35.

<sup>17</sup> IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, 30 December 2009, para. 35.

<sup>18</sup> IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, 30 December 2009. para. 34.

<sup>19</sup> IACHR, Arguments before the Inter-American Court of Human Rights in the case of the Saramaka v. Suriname. Cited in: IA Court. Case of the Saramaka People vs. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 78.

<sup>20</sup> IA Court, Case of Moiwana Community vs. Suriname. (Preliminary Objections, Merits, Reparations and Costs). Judgment of June 15, 2005, Series C No. 124 (2005).

communities or peoples that are part of the Maroon population of Suriname, descendants of slaves who encamped in their territory from the colonial period, and therefore are not considered in the strict sense, "indigenous". The Court considered that the Maroon peoples are "tribal" communities as they maintain their traditional ways of life based on a special bond with their lands and territories, and therefore require special measures under international human rights law to guarantee their physical and cultural survival. From this, it stated that the "Court's jurisprudence regarding indigenous peoples' right to property is also applicable to tribal peoples."<sup>21</sup>

33. Considering the above, in this report, the Commission emphasizes the scope of the most relevant standards of the Inter-American system regarding the collective property of indigenous and tribal peoples and in particular, it refers to the set of specific obligations that States must respect and guarantee in the context of extraction and development plans or projects affecting the lands, territories and natural resources of these peoples<sup>22</sup>. It also discusses in this chapter some of the main concerns regarding compliance with the rights of indigenous and tribal peoples from the States of the region, and illustrates the situation by referring to certain specific situations regarding which it has received information.
34. In a final section, the Commission addresses the impacts of extractive and development activities in the full enjoyment of the rights of indigenous peoples and Afro-descendent communities. Using different mechanisms before the Commission, several indigenous peoples and Afro-descendent communities have disclosed the infringement of their rights as a result of the implementation of projects of this nature, either through contentious cases, precautionary measures, public hearings, during visits by the Commission followed by country reports or press releases, among others. Based on this information, the IACHR seeks to identify regional patterns of the impacts on human rights, illustrated through specific cases.
35. Given the breadth and complexity of the problems in the region, this report seeks to provide a non-exhaustive initial review, aiming to facilitate the consolidation and development of Inter-American standards on the subject. At the same time, the Commission expects that this report will make visible the major human rights violations committed in these contexts, and identify the main challenges that require greater attention from the IACHR in the future. Along with this, the Commission issues a series of recommendations that reflect its main concerns and, ultimately, intend to contribute to the preservation of ethnic and cultural diversity in the continent.

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<sup>21</sup> IA Court. Case of the Saramaka People vs. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 86.

<sup>22</sup> A systematization of the various pronouncements of the Inter-American system on this subject was published by the Commission in its report on the *Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and Jurisprudence of the Inter-American Human Rights* of 2009, which will serve as a reference for analyzing the current situation of OAS Member States in this report. See IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser. L/V/II.Doc.56/09, 30 December 2009.

36. The present report is directed, ultimately, to guide State actions on the basis of a positive recognition of cultural diversity, promoting the consolidation of truly multicultural, pluralistic and democratic States. This implies demonstrating the fundamental role that cultural identity and integrity have for the full enjoyment of human rights, under equal conditions, as well as for the reduction of the inequality gaps, and the elimination of all forms of discrimination. It also requires that States appreciate and incorporate various representations of life, worldviews and conceptions of wellness as basic pillars in the construction of a development that respects, protects, and promotes ethnic-cultural diversity.

CHAPTER 2  
HUMAN RIGHTS OBLIGATIONS  
OF STATES IN THE CONTEXT OF  
EXTRACTIVE, EXPLOITATION,  
AND DEVELOPMENT ACTIVITIES



## HUMAN RIGHTS OBLIGATIONS OF STATES IN THE CONTEXT OF EXTRACTIVE, EXPLOITATION, AND DEVELOPMENT ACTIVITIES

### A. *General human rights obligations*

37. The duty of the OAS member states to promote and protect human rights stems, in the first place, from the human rights obligations contained in the Charter of the OAS. Additionally, the American Convention and the American Declaration establish a number of obligations on States to promote and guarantee the effective exercise of human rights.
38. In particular, Article 1.1 of the American Convention codifies the general obligations of States Parties, consisting of respecting and ensuring the human rights of all people within their jurisdiction without discrimination of any kind. As indicated by the Inter-American Court since its earliest judgments, Article 1.1 is essential to determine whether a violation of human rights recognized by the Convention can be attributed to a State Party.<sup>23</sup>
39. The first obligation assumed under the terms of that article, is to "respect the rights and freedoms" recognized in the American Convention.<sup>24</sup> The obligation to respect is defined by the State's duty not to interfere with, hinder or prevent access to the enjoyment of the object of the right. As the Inter-American Court has explained "[w]hensoever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect."<sup>25</sup> Therefore, in the words of the Inter-American Court, "the notion of limitations to the exercise of the power of the State is necessarily included in the protection of human rights."<sup>26</sup>
40. The second general obligation of States Parties is to "ensure" the free and full enjoyment of the rights recognized by the Convention to all individuals that are subject to their jurisdiction. In the words of the Inter-American Court, "[t]his obligation implies the duty of States Parties to organize the governmental

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<sup>23</sup> IA Court. Velásquez Rodríguez v Honduras. Merits. Judgment of July 29, 1988. Series C No. 4. para. 164.

<sup>24</sup> IA Court. Velásquez Rodríguez v Honduras. Merits. Judgment of July 29, 1988. Series C No. 4. para. 165.

<sup>25</sup> IA Court. Velásquez Rodríguez v Honduras. Merits. Judgment of July 29, 1988. Series C No. 4. para. 169. IA Court. Case of Pueblo Bello massacre v Colombia. Judgment of January 31, 2006. Series C No. 140. para.111.

<sup>26</sup> IA Court. Case Gonzalez and others ("Campo Algodonero") v Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205. para. 235. IA Court. The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 21.

apparatus and, in general, all the structures through which public power is exercised, so that they are capable of legally ensuring the free and full enjoyment of human rights."<sup>27</sup> As part of their duty to act with due diligence, States have a legal obligation to reasonably prevent human rights violations, and to seriously investigate with the means at their disposal any violations that have been committed within their jurisdiction in order to identify those responsible, to impose on them the appropriate punishment, and to ensure the victims adequate reparations.<sup>28</sup> Therefore, "[t]he obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation –it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights."<sup>29</sup>

41. Similarly, according to Article 1.1 of the American Convention, the principle of equality and non-discrimination is a protection that underlies the guarantee of all the other rights and freedoms. Every person is entitled to the rights established in these instruments, and all States are mandated to respect and guarantee the full and free enjoyment of all human rights contained therein, without any form of discrimination. In the words of the Inter-American Court, "Article 1(1) of the Convention is a general norm the content of which extends to all the provisions of the treaty, because it establishes the obligation of the States Parties to respect and ensure the full and free exercise of the rights and freedoms recognized therein "without any discrimination." In other words, whatever the origin or the form it takes, any conduct that could be considered discriminatory with regard to the exercise of any of the rights guaranteed in the Convention is per se incompatible with it."<sup>30</sup> The same principle is applicable to the second part of Article II of the American Declaration.<sup>31</sup>
42. On the other hand, Article 2 of the American Convention establishes the general obligation to adapt domestic legislation to the provisions of the American Convention. This duty implies that each State party has to bring its domestic laws in line with the provisions hereof to guarantee the rights recognized therein, which implies that the measures provided for in the domestic law must be effective (principle of *effet utile*).<sup>32</sup> This duty implies on the one hand, the suppression of

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<sup>27</sup> IA Court. Case Velásquez Rodríguez v Honduras. Merits. Judgment of July 29, 1988. Series C No. 4. para. 166.

<sup>28</sup> IA Court. Case Velásquez Rodríguez v Honduras. Merits. Judgment of July 29, 1988. Series C No. 4. para. 174.

<sup>29</sup> IA Court. Case of Velásquez Rodríguez v Honduras. Merits. Judgment of July 29, 1988. Series C No. 4. para. 167.

<sup>30</sup> I/A Court, *Case of Nadege Dorzema et al v. Dominican Republic*. Merits, Reparations and Costs, Judgment of October 24, 2012, Series C No. 251, para. 224; I/A Court, *Case of Atala Riffo and daughters v. Chile*, Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 78; and I/A Court. Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 53.

<sup>31</sup> American Declaration, Article II, where relevant: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor".

<sup>32</sup> IA Court. "The Last Temptation of Christ" (Olmedo Bustos et al) v Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, para. 87; and Case of Heliodoro Portugal v Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 179.

rules and practices of any kind that entail the violation of the guarantees established in the Convention and, secondly, the adoption of laws and the development of practices leading to the effective observance of those guarantees.<sup>33</sup> In sum, the obligations contained in Articles 1.1 and 2 of the Convention provide the basis for determining international responsibility of a State for violations of that instrument, and reflect not only negative obligations, but also clear positive obligations to ensure respect for human rights within its jurisdiction.

43. Similarly, the IACHR has noted that the obligation to respect and guarantee human rights is enshrined in specific provisions of the American Declaration.<sup>34</sup> The Commission reiterates that the American Declaration is a source of international obligations for all the member states of the OAS.<sup>35</sup> These obligations emanate from the commitments of the member States with regards to human rights pursuant to the OAS Charter.<sup>36</sup> Member States have agreed that the content of the general principles of the OAS Charter is contained in and defined by the American Declaration, as well as the customary legal status of the rights protected under many of this instrument's core provisions.<sup>37</sup>
44. The American Declaration is part of the human rights framework established by the OAS Member States, referring to the obligations and responsibilities of the States, and requires that they refrain from supporting, tolerating, or participating in acts or omissions that contravene their commitments in the area of human rights. As the Declaration is a source of legal obligations, the States must implement in practice, within their jurisdictions, the rights established in that Declaration.<sup>38</sup>

<sup>33</sup> IA Court. Castillo Petruzzi et al vs. Peru. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52, para. 207, and Case Mendoza et al v Argentina. Preliminary Objections, Merits and Reparations. Judgment of May 14, 2013 Series C No. 260. para. 293.

<sup>34</sup> See, for example, IACHR, Report N° 40/04, Case N° 12.053, Maya Indigenous Communities (Belize), Annual Report of the IACHR 2004, paras. 136-156; IACHR, Resolution N° 12/85, Case N° 7615, Brazil, March 5, 1985; IACHR, Report 80/11, Case 12.626, *Jessica Lenahan (Gonzales) and others* (United States), July 21, 2011, para. 117; and IACHR, *Murdered and Missing Indigenous Women in British Columbia, Canada*, OEA/Ser.L/V/II. Doc. 30/14, December 21, 2014, para. 107.

<sup>35</sup> See IA Court, Advisory Opinion OC-10/89, "Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights", July 14, 1989, Ser. A N° 10 (1989), para. 45 (La Corte sostuvo que, "para los Estados miembros de la Organización, la Declaración es el texto que define los derechos humanos referidos en la Carta").

<sup>36</sup> Charter of the Organization of American States (A-41), Arts. 3, 16, 51.

<sup>37</sup> IACHR, Report No. 80/11, Case 12.626, *Jessica Lenahan (Gonzales) and others* (United States), July 21, 2011, para. 115.

<sup>38</sup> See, as a reference, the Statute of the Inter-American Commission on Human Rights (1979), Article 1, which establishes that the Commission was created "to promote the observance and defense of human rights" and defines human rights as those set forth in the American Declaration and in the American Convention. See also, Articles 18 and 20 of the Statute and the American Convention on Human Rights, Article 29 (d), which provides that no provision of this Convention shall be interpreted in the sense of "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." See also, Rules of Procedure of the Inter-American Convention on Human Rights (2009), Articles 51 and 52, which empower the Commission to receive and examine petitions alleging the violation of rights enshrined in the American Declaration with respect to OAS Member States that are not

45. As it has previously been established, the American Convention is an expression of the principles contained in the American Declaration.<sup>39</sup> In this regard, although the Commission does not apply the American Convention to Member States that are not a party to said treaty, its provisions are relevant to inform the interpretation of the provisions of the Declaration<sup>40</sup>.

## 1. State obligations with regards to human rights violations committed by private actors

46. Similarly, the organs of the Inter-American system have repeatedly recognized that, in certain circumstances, the State can be held internationally responsible for human rights violations committed by persons, which clearly includes private corporations. Therefore, from the first contentious cases decided, the Inter-American Court has discussed the implications of the human rights obligations contained in the American Convention for third parties, and has highlighted in particular that:

... in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, or all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.<sup>41</sup>

47. In subsequent judgments, the Inter-American Court has explained that "[t]he States Party to the Convention have *erga omnes* obligations to respect protective provisions and to ensure the effectiveness of the rights set forth therein under any circumstances and regarding all persons."<sup>42</sup> In the words of the Court, "[t]he effect of these obligations of the State goes beyond the relationship between its agents

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parties to the American Convention. See also IACHR, *Universalization of the Inter-American System of Human Rights*, OAS/Ser.L/V/II.152, Doc. 21, August 14, 2014, para. 15.

<sup>39</sup> IACHR, *Murdered and Missing Indigenous Women in British Columbia, Canada*, OEA/Ser.L/V/II. Doc. 30/14, December 21, 2014, para. 110.

<sup>40</sup> CIDH, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L./V/II.106, Doc. 40, rev. February 28, 2000, párr. 38.

<sup>41</sup> IA Court. *Velásquez Rodríguez v Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4. para. 172; and *Case of Godínez Cruz v Honduras*. Merits. Judgment of January 20, 1989. Series C No. 5. paras. 181, 182 and 187.

<sup>42</sup> IA Court. *Case of the "Mapiripán Massacre" vs. Colombia*. Judgment of September 15, 2005, Series C No. 134. paras. 111 and 112.

and the persons under its jurisdiction, as it is also reflected in the positive obligation of the State to take such steps as may be necessary to ensure effective protection of human rights in relations amongst individuals."<sup>43</sup>

48. In this regard, the organs of the Inter-American system have noted that it is clear that a State cannot be responsible for every violation of human rights committed between persons within its jurisdiction. Indeed, "the nature *erga omnes* of the treaty-based guarantee obligations of the States does not imply their unlimited responsibility for all acts or deeds of individuals, because its obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger."<sup>44</sup> In other words, "even though an act, omission or deed of an individual, it is not automatically attributable to the State, because the particular circumstances of the case and the applicability of these guarantee obligations must be assessed through the particular circumstances of the case."<sup>45</sup>
49. This approach has been used by the IACHR and the Inter-American Court in the interpretation and application of the norms of the Inter-American system, when analyzing situations concerning the violation of human rights by third parties. For example, in its *Report on the Situation of Human Rights in Ecuador* of 1997, after noticing the serious impacts of oil exploitation activities in the health and life of a sector of the population, the Commission "encourage[d] the State to take steps to prevent harm to affected individuals through the conduct of its licensees and private actors."<sup>46</sup> The IACHR similarly has underscored that a State can incur international responsibility under the American Declaration in specific circumstances for its omission to act with the necessary due diligence to protect individuals from human rights violations committed by private actors.<sup>47</sup>

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<sup>43</sup> IA Court. Case of the "Mapiripán Massacre" vs. Colombia. Judgment of September 15, 2005, Series C No. 134. paras. 111 and 112.

<sup>44</sup> IA Court. Massacre case of Pueblo Bello v Colombia. Judgment of January 31, 2006. Series C No. 140. para. 123.

<sup>45</sup> IA Court. Case of the Pueblo Bello Massacre v Colombia. Judgment of January 31, 2006. Series C No. 140. para. 123.

<sup>46</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS /Series L/V/II.96, doc. 10 rev. 1 April 24, 1997.

<sup>47</sup> See, for example, IACHR, Report Nº 40/04, Case Nº 12.053, Maya Indigenous Communities (Belize), Annual Report of the IACHR 2004, paras. 136-156 (The Commission found the State of Belize responsible under the American Declaration for granting logging and oil drilling concessions to third parties on land occupied by the Maya indigenous peoples, without effective consultation or informed consent of the community, which led to substantial environmental degradation of their land); IACHR, Resolution Nº 12/85, Case Nº 7615, Brazil, March 5, 1985 (The Commission found the State of Brazil responsible under the American Declaration for omitting to take effective and appropriate measures to protect the Yanomani indigenous community from private actors who settled on their lands for the construction of a major highway, which gave rise to widespread epidemics and sicknesses); IACHR, Report 80/11, Case 12.626, *Jessica Lenahan (Gonzales) and others* (United States), July 21, 2011, para. 117; and IACHR, *Murdered and Missing Indigenous Women in British Columbia, Canada*, OEA/Ser.L/V/II. Doc. 30/14, December 21, 2014, para. 107.

50. Several situations known by the Inter-American system in this regard have referred to the violation of human rights of indigenous and tribal peoples resulting from extractive or development activities. This reflects the reality of the region, where most of the projects of this nature take place on lands and territories traditionally occupied by these peoples, and as a result of the natural resources present therein or their strategic location. Among the cases known by the IACHR, are for example the case of the Yanomami people in Brazil, decided in 1985, in which it was alleged that private mining extraction activities affected the rights of this people;<sup>48</sup> the case of sisters Mary and Carrie Dann, members of the Western Shoshone indigenous people in the State of Nevada, United States of America, referring to the authorization of private gold prospecting activities within the traditional territory of the Western Shoshone;<sup>49</sup> the case of Mercedes Julia Huenteao Beroiza and other Mapuche families, presented as a result of the development of a hydroelectric project carried out by a national company;<sup>50</sup> among others.<sup>51</sup> Similarly, the Commission has submitted for review to the Inter-American Court cases concerning indigenous and tribal peoples which highlight state obligations toward these groups during the implementation of private activities for natural resources exploitation, such as the matters concerning the *Saramaka People v. Suriname* and the *Kichwa Indigenous People of Sarayaku v. Ecuador*.<sup>52</sup>
51. Further, in the context of the UN, the Human Rights Committee, the body in charge of evaluating compliance with the International Covenant on Civil and Political Rights (hereinafter "ICCPR"), has indicated that "individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities."<sup>53</sup> This position has also been adopted by the Committee on Economic, Social and Cultural Rights in the framework of the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR").<sup>54</sup> Similarly, other regional human rights bodies and experts established under

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<sup>48</sup> IACHR. Case No. 7.615 - Yanomami People (Brazil), Resolution No. 12/85, March 5, 1985.

<sup>49</sup> IACHR. Merits Report No. 75/02, Case 11.140 - Mary and Carrie Dann (USA), December 27, 2002.

<sup>50</sup> IACHR. Friendly Settlement Report No. 30/04, Petition 4617/02 - Mercedes Julia Huenteao Beroiza and others (Chile), March 11, 2004.

<sup>51</sup> See also IACHR. Merits Report No. 40/04, Case 12.053 - indigenous Mayan communities in the Toledo District (Belize), October 12, 2004; Admissibility Report No. 69/04, Petition 504/03 - Community of San Mateo de Huanchor and its members (Peru), October 15, 2004.

<sup>52</sup> IA Court. Case of the Saramaka People. Vs. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172. IA Court. If Kichwa Indigenous People of Sarayaku Vs Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245.

<sup>53</sup> UN. Human Rights Committee. General Comment No. 31: The Nature of the General Legal Obligation Imposed on States parties to the Covenant. U.N. Doc. CCPR/C/21/Rev.1/Add.13 26 May 2004. para.8.

<sup>54</sup> For example, in its General Comment No. 12, the Committee on Economic, Social and Cultural Rights indicated that "[...] [t]he obligation to protect requires that the State party take measures to ensure that enterprises or individuals do not deprive people to access to adequate food ". See UN. Committee on Economic, Social and Cultural Rights. General Comment No. 12: Implementation of the International Covenant on Economic, Social and Cultural Rights, The right to adequate food (Article 11). U.N. Doc. E/C.12/1999/5 (1999). para. 15.

regional human rights instruments have consistently indicated that a State is responsible for regulating the behavior of non-State actors in certain circumstances.<sup>55</sup>

52. It is worth mentioning the framework of the United Nations to "Protect, Respect and Remedy," prepared in 2008 by the Special Representative of the Secretary-General for Business and Human Rights, John Ruggie, which was adopted by the Human Rights Council;<sup>56</sup> supplemented in 2011 with the "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" (hereinafter, "Guiding Principles").<sup>57</sup> In particular, the Commission notes that according to the Guiding Principles, the States' duty to "protect" entails "taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication".<sup>58</sup> In this sense, in respect to States under the Inter-American system, the Commission emphasizes that this duty to protect has a conventional basis in Inter-American instruments, and coincides with the aforementioned general obligation to guarantee human rights in the terms previously mentioned.<sup>59</sup>
53. Similarly, the European Court of Human Rights has addressed the impact of business activities of various kinds, especially through the right to private and family life, enshrined in Article 8 of the European Convention on Human Rights.<sup>60</sup> For example, in the case *López Ostra v. Spain*, regarding the pollution from a waste treatment plant, the European Court stated that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however,

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<sup>55</sup> See inter alia UN. Committee on the Rights of the Child. General Comment No. 16: The State's obligations in relation to the impact of business in the rights of children. U.N.Doc. CRC/C/GC/16 (2013); and UN. DESC Committee. Declaration on the obligations of States parties regarding the corporate sector and economic, social and cultural rights. E/C.12/2011/1. July 12, 2011.

<sup>56</sup> UN. Report of the Special Representative of the Secretary-General on Business and Human Rights, John Ruggie. Protect, Respect and Remedy: A Framework for Business activities and Human Rights. A/HRC/8/5. April 7, 2008.

<sup>57</sup> UN. Report of the Special Representative of the Secretary-General on Business and Human Rights, John Ruggie. Guiding Principles on Business and Human Rights: implementation of the framework of the United Nations "Protect, Respect and Remedy". A/HRC/17/31. March 21, 2011.

<sup>58</sup> UN. Report of the Special Representative of the Secretary-General on Business and Human Rights, John Ruggie. Protect, Respect and Remedy: a Framework for Business activities and Human Rights. A/HRC/8/5. April 7, 2008. Founding Principle 1. Under Principle 1, "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises."

<sup>59</sup> In this regard, the Commission notes that, as expressly provided by the Guiding Principles, "In no case must be interpreted that these Guiding Principles establish new obligations under international law or to restrict or reduce the legal obligations that a State has taken, or who is subject in accordance with the rules of international law on human rights." See UN. Report of the Special Representative of the Secretary-General on Business and Human Rights, John Ruggie. Protect, Respect and Remedy: A Framework for Business activities and Human Rights. A/HRC/8/5. April 7, 2008. General principles.

<sup>60</sup> In particular, the European Court has explained that "Article 8 applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health." ECHR. *Taşkın and Others v. Turkey*. Application no. 46117/99. 10 November 2004. § 113. See similarly, ECHR. *López Ostra v. Spain*, judgment of 9 December 1994, § 51.

seriously endangering their health."<sup>61</sup> It noted, moreover, that in these contexts "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole."<sup>62</sup> On this basis, the Court has established a framework of consistent analysis for evaluating, on the one hand, the substantive merits of the decision by national authorities to ensure it is compatible with Article 8; and on the other, the decision-making process to determine if the interests of the person have been granted their due importance.<sup>63</sup>

54. For its part, the African Commission on Human and Peoples' Rights has indicated that: "The Charter specifies in Article 1 that the States Parties recognize not only the duties of the rights and freedoms adopted by the Charter, but they must also 'take [...] measures to give effect to them'". In other words, "if a State refuses to guarantee the rights of the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation."<sup>64</sup> In a similar sense, it has stated that: "[T]he State is obliged to protect rights holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms."<sup>65</sup>

## ***B. State obligations in the context of extractive, exploitation and development projects***

55. For several years, the Inter-American Commission has remarked on the importance of economic development for the prosperity of the peoples of this hemisphere,<sup>66</sup> and has indicated that it "recognizes that the right to development implies that each state has the freedom to exploit its natural resources, including

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<sup>61</sup> ECHR. *Case of López Ostra v. Spain*. Application No. 16798/90. para. 51.

<sup>62</sup> ECHR. *Case of López Ostra v. Spain*. Application No. 16798/90. para. 51.

<sup>63</sup> See inter alia ECHR. *Taşkın and Others v. Turkey*. Application no. 46117/99. 10 November 2004. § 115; ECHR. *Hatton and Others v. the United Kingdom*. Application no. 36022/97. 8 July 2003. § 99.

<sup>64</sup> "The Charter specifies in Article 1 that the States Parties shall not only recognize the rights, duties, and freedoms adopted by the Charter, but they should also "undertake.....measures to give effect to them." In other words, if a State neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation. African Commission on Human and Peoples' Rights (ACHR). *Commission Nationale des Droits de l'Homme et des Libertés v Chad*. Communication No. 74/92 (1995). para. 20.

<sup>65</sup> CADH. *Social and Economic Rights Action Center (SERAC) & Center for Economic and Social Rights (CESR) v. Nigeria*. Communication No. 155/96 (2002). Para. 46.

<sup>66</sup> IACHR. *Indigenous Mayan communities in the Toledo District (Belize)*, Merits Report No. 40/04, Case 12.053, October 12, 2004. para. 150.

through the granting of concessions and acceptance of international investment."<sup>67</sup> The Commission has also warned that "development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the human rights of persons who may be particularly and negatively affected."<sup>68</sup> Similarly, the Commission has noted that "the absence of regulation, inappropriate regulation or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention."<sup>69</sup>

56. The rules of the Inter-American human rights system neither prevent nor discourage development, but mandate that it takes place under conditions where the rights of individuals are respected and guaranteed.<sup>70</sup> When it is the State itself that implements a project, it has direct obligations to respect and guarantee the human rights involved. In contexts where third parties execute the projects at issue, the State also has specific obligations to meet. In this second scenario, the Commission has already underscored in the preceding paragraphs that the international responsibility of the State for the acts of individuals has been addressed by the IACHR and the Inter-American Court, recognizing that States have a duty to ensure the effectiveness of the human rights protected by the Inter-American instruments in the relations between individuals, as well as a duty to prevent with due diligence the violations of those rights, and to investigate, punish and remedy their consequences. Therefore, while the Commission recognizes the complex and diverse relationships that the State and the private sector may have, it is clear that under the Inter-American system, the human rights norms impose obligations on States to respect and ensure these safeguards in all contexts. This clearly applies to all States when directly implementing extractive and development activities, when they opt for mixed forms, or when they allow third parties to execute these activities. This includes situations where these third parties are foreign companies headquartered outside of the jurisdiction, but operating within the state.
57. The Commission also notes that the human rights impacts differ greatly depending on the type of activity. However, the IACHR has observed that the reports and information received in this context most often refer to the violation of the right to life, personal integrity and health, property, privacy and family, access to information, public participation in decision making, and access to justice. These

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<sup>67</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/Series L/V/ II.96, doc. 10 rev. 1 April 24, 1997.

<sup>68</sup> IACHR. Indigenous Mayan communities in the Toledo District (Belize), Merits Report No. 40/04, Case 12.053, October 12, 2004. para. 150.

<sup>69</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/Series L/V/II.96, doc. 10 rev. 1 April 24, 1997.

<sup>70</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/ Series L/V/II.96, doc. 10 rev. 1, 24 April 1997. In a similar sense, the Declaration of Principles of the Summit of the Americas, indicates that "Social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources carefully and responsibly they used." See First Summit of the Americas. Declaration of Principles: Partnership for Development and Prosperity: Democracy, Free Trade and Sustainable Development in the Americas. Miami, Florida 9 - 11 December 1994.

rights are protected by the Inter-American human rights instruments, and its contents and correlative state obligations have been widely developed by the organs of the Inter-American system.<sup>71</sup> As has been noted, many of the reported cases are related to the extraction of natural resources from lands and territories historically occupied by indigenous and tribal peoples.

58. The link between the effective enjoyment of the human rights most affected by development and extractive activities and the preservation of the environment is very clear.<sup>72</sup> Although neither the American Declaration of the Rights and Duties of Man nor the American Convention on Human Rights include explicit references to the protection of the environment, several fundamental rights require, as a necessary precondition for their exercise, a minimum environmental quality, and they are deeply affected by the degradation of natural resources. Both the American Declaration and the American Convention reflect a priority concern for the preservation of the health and well-being of the individual, which is related to a healthy environment and the rights to life, personal security, physical, mental and moral integrity, and health.<sup>73</sup>
59. The crucial link between the survival of human beings and the environment has also been recognized in other international treaties and instruments, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; the Amazon Cooperation Treaty; the World Charter for Nature; the Convention for the Protection of Flora, Fauna and Natural Scenic Beauty of the Americas; the Rio Declaration on Environment and Development; and the Convention on Biological Diversity.<sup>74</sup> At the Inter-American level, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), which

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<sup>71</sup> The Commission notes that the right to life is recognized in Article I of the American Declaration and Article 4 of the American Convention; the right to personal integrity and indirectly, health, in Articles I and XI of the American Declaration, Article 5 of the American Convention, and Article 10 of the Protocol of San Salvador; the right to property in Article XXIII of the ADRDM and Article 21 of the American Convention; the right to private and family life in Article V of the ADRDM and Article 11 of the American Convention; access to information in Article IV of the American Declaration and Article 13 of the American Convention; public participation in decision making in Article XX of the American Declaration and Article 23 of the American Convention; and access to justice in Article XVIII of the American Declaration and Articles 8 and 25 of the American Convention.

<sup>72</sup> See similarly, UN. Declaration of the United Nations Conference on the Human Environment. June 16, 1972, U.N. Doc. A/CONF.48/14/Rev.1 No. 3, 1973. The OAS Member States have also stated that: “[T]he full enjoyment of all human rights [...] it could foster better environmental protection by creating conditions to change behavior patterns that lead to environmental degradation, reducing the environmental impact of poverty and patterns of unsustainable development, more effective dissemination of information on the problem, and the more active participation of the groups affected by the problem in the political process.” OAS. General Assembly. Resolution on Human Rights and the Environment. AG/RES 1819 June 5, 2001. Preamble paragraph 3.

<sup>73</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Doc. OAS/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

<sup>74</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Doc. OAS/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

has been signed or ratified by several countries in the region<sup>75</sup> and entered into force in November 1999, includes in Article 11, the right to a healthy environment by providing that: "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation and improvement of the environment."<sup>76</sup>

60. The IACHR has emphasized in the following terms that there is a direct relationship between the physical environment in which people live, and the rights to life, security and physical integrity: "The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated."<sup>77</sup> Similarly, the Commission has indicated that: "[r]espect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being."<sup>78</sup>
61. The IACHR has also stressed the direct link between preserving the environmental integrity and access to sources of livelihood. Citing the World Charter for Nature, the Commission has argued that "mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients."<sup>79</sup> The IACHR has also recognized the link between environmental protection and the right to health. In 1983, in its *Seventh Report on the situation of human rights in Cuba*, the IACHR recommended that the State adopt specific measures to protect the environment in order to meet its obligations pertaining to the right to health, explaining that a healthy environment is essential for a healthy population, and noting that factors such as water supply, hygiene and sanitation services and waste disposal have a major impact in this regard.<sup>80</sup>

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<sup>75</sup> By 2015, the Protocol has been ratified or acceded to by Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay; and it has been signed by Chile, Dominican Republic, Haiti, and Venezuela. See OAS. [Department of International Law](#).

<sup>76</sup> IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 192.

<sup>77</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Doc. OAS/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997. In a similar sense, see IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, December 30, 2009, par. 190.

<sup>78</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/Ser. L/V/II.96, doc. 10 rev. 1 April 24, 1997.

<sup>79</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/ Ser. L/V/II.96, doc. 10 rev. 1 April 24, 1997.

<sup>80</sup> IACHR. The Situation of Human Rights in Cuba, Seventh Report. Doc. OAS/Ser. L/V/II.61, Doc.29 rev. 1 October 4, 1983, paras. 1, 2, 41, 60, 61. This has been underscored by the Commission subsequently. See

62. For its part, the Commission also has considered the critical connection between the sustenance of human life and the environment.<sup>81</sup> In fact, the IACHR observes that the degradation of the environment can affect negatively the access to water and the enjoyment of various human rights, such as the right to life, to health and to food.<sup>82</sup> Concretely, in relation to the link between access to water for human consumption and the environment, it is important to mention that the United Nation's ESCR Committee has signaled that in order to safeguard the right to health, it is necessary "to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health".<sup>83</sup> For this purpose, States must adopt measures to address risks to health which are related to the environment by, among other steps, designing and applying policies "aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals [...]".<sup>84</sup>
63. Considering the above, in this chapter the IACHR refers to the obligations that States must fulfill in these contexts, based on the principles advanced by the Inter-American system. On the basis of the State obligations derived from the Inter-American instruments, the IACHR identifies in the present section, the obligations that States have in the specific context of extractive and development activities impacting human rights. In this analysis, it will discuss the scope of State responsibility over the acts of third parties engaged in these development activities, as well as obligations which apply when the State itself implements these projects. This is a preliminary and non-exhaustive overview of human rights considerations applicable to the execution of extractive and development activities.
64. The IACHR considers an important pillar of its analysis the need to interpret human rights instruments considering the evolution of social conditions; a principle consistently applied by various international human rights monitoring bodies to ensure a more expansive protection.<sup>85</sup> In this regard, the Inter-American

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inter alia IACHR, Case No.12.503, *Maya Indigenous Communities of the Toledo District* (Belize), October 12, 2004, para.150-156.

<sup>81</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/Ser. L/V/II.96, doc. 10 rev. 1 April 24, 1997.

<sup>82</sup> See IACHR, Annual Report 2015, Chapter 4.A – *Access to Water in the Americas: An Introduction to the Human Rights to Water in the Inter-American System*, para. 66.

<sup>83</sup> 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, John H. Knox, Compilation report (A/HRC/25/53), para. 23. See also UN Committee on Economic, Social and Cultural Rights, General Comment N° 14, para. 15.

<sup>84</sup> 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, John H. Knox, Compilation report (A/HRC/25/53), para. 49. See also UN Committee on Economic, Social and Cultural Rights, General Comment N° 14, para. 36.

<sup>85</sup> See inter alia IA Court. Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10; IA Court. Case *Yakye Axa Indigenous Community vs. Paraguay*. Reparations and Costs. Judgment on June 17, 2005. Series C No. 125; IA Court. *Artavia Murillo and others (IVF) v Costa Rica*. Preliminary Objections, Merits, Reparations and Costs Judgment of November 28, 2012 Series C No. 257. See

Court has consistently indicated that human rights treaties "are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions."<sup>86</sup> This evolutionary interpretation is consistent also with the general rules of treaty interpretation enshrined in the Vienna Convention; as well as the interpretation guidelines contained in Article 29 of the American Convention.<sup>87</sup> For similar reasons, it is essential to also take into account the growing body of international instruments which are linked to the protection of human rights regarding the actions of companies, as they offer content to the international obligations of States, and influence the protection of the rights of persons under their jurisdiction.<sup>88</sup>

65. The Inter-American Commission considers that based on the most applicable international and regional human rights standards, States are obligated to act with due diligence to prevent and respond to human rights violations committed in the context of extractive and development activities. The State obligation in this context to act with due diligence has six dimensions: (i) the duty to adopt an appropriate and effective regulatory framework, (ii) the duty to prevent human rights violations, (iii) the obligation to supervise and monitor the activities of companies and other non-state parties, (iv) the duty to ensure mechanisms for effective participation and access to information, (v) the duty to prevent illegal activities and forms of violence, and (vi) the duty to guarantee access to justice through the investigation, punishment, and adequate reparation of human rights violations in these contexts. The Commission will address each of these dimensions below.

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ECHR. *Tyrer v. United Kingdom*. Application No. 5856/72. 25 April 1978; *Marckx v. Belgium* Application no. 6833/74. 13 June 1979.

<sup>86</sup> IA Court. *Case of the Mayagna (Sumo) Awas Tingni vs. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 146. IA Court. *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114

<sup>87</sup> IA Court. *Case of the "Street Children" (Villagrán Morales et al) vs. Guatemala*. Judgment of November 19, 1999. Series C No. 63, para. 193; and IA Court. *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114.

<sup>88</sup> The Commission has consistently interpreted the scope of the inter-American human rights instruments in many areas taking into account the existence of a related corpus juris of international law. IA Court. *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16. para. 115. IA Court. *Case of the "Street Children" (Villagrán Morales et al) vs. Guatemala*. Background. Judgment of November 19, 1999. Series C No. 63, paragraph 194. IACourt. *Case Yakyé Axa Indigenous Community vs. Paraguay*. Reparations and Costs. Judgment on June 17, 2005. Series C No. 125. paras. 128-130. IA Court. *Case Forneron and daughter v. Argentina*. Merits, Reparations and Costs. Judgment of April 27, 2012, Series C No. 242, para. 144; IA Court. *Case Furlan and Family Vs. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 125.

## 1. Duty to design, implement and effectively enforce an adequate legal framework

66. A first essential obligation is the duty to implement an appropriate regulatory framework for the protection of human rights that may be affected by extractive and development activities. This stems from the general obligation contained in Article 2 of the American Convention, according to which States must "adopt [...] such legislative or other measures as may be necessary to give effect to those rights or freedoms." Article 2 of the American Convention imposes on the States a general obligation to adapt their domestic laws to the standards of the Convention, and to ensure the effective enjoyment of the rights it codifies. The obligation to adapt domestic legislation to the American Convention under Article 2 is, by its very nature, an obligation of result.<sup>89</sup>
67. This obligation includes the adoption of the appropriate domestic legislation to protect the most relevant human rights in the field of extractive and development activities, the repeal of legislation which is incompatible with the rights enshrined in the Inter-American instruments, and to refrain from adopting legislation contrary to these rights.<sup>90</sup> This obligation entails having a strong and effective legal framework, which requires respect for human rights by the various actors who perform extractive and development activities, including state entities in charge, in order to discourage any threat to the most vulnerable human rights in these contexts.
68. Given the aforementioned link between the effective enjoyment of human rights and the preservation of the environment, environmental legislation is of particular relevance in this area. The Commission takes note that several OAS Member States have adopted legal provisions concerning the protection of the environment and most often have enacted laws and policies to treat public and private actions that have a significant and negative impact on the environment.<sup>91</sup> In practice, States have employed various methods of regulation, including the requirement of environmental impact assessments; the establishment of quality, production or emissions standards; licensing or regulation of high-risk activities; the provision of economic incentives or disincentives; the sanction of particularly harmful activities through criminal law; and the creation of private liability regimes to discourage and compensate for environmental damage.<sup>92</sup> Regardless of the option chosen, the

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<sup>89</sup> IA Court. Case Yakye Axa Indigenous Community vs. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 100. IA Court. Caesar V. Trinidad and Tobago. Merits, Reparations and Costs. Judgment of March 11, 2005. C Series No. 123, para. 93.

<sup>90</sup> IA Court. Castillo Petruzzi et al vs. Peru. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52 para. 207.

<sup>91</sup> IACHR. Work of the Inter-American Commission on Human Rights in the Field of Human Rights and the Environment. Document prepared in relation to Paragraph 4 of the AG/RES. 1926 (XXXIII-0/03) Human Rights and the Environment in the Americas, OAS/Ser.G, CP/CAJP-2102/03. November 18, 2003.

<sup>92</sup> See in this regard, SHELTON, Dinah. "Brazil's Environmental Rights and Obligations in the Inter-American Human Rights System". *The George Washington International Law Review*, Volume 40 No. 3, 2008-2009 p. 736.

implementation of norms oriented to protect the environment is required to prevent that human rights violations are committed against peoples and communities in the realm of extractive and development activities.<sup>93</sup>

### **Construction of the transoceanic canal and its impact on human rights in Nicaragua**

During its 154th session, a public hearing was held before the Commission focused on the construction of the transoceanic canal on the strip of the Pacific and the Atlantic in Nicaragua, including the participation of eleven civil society organizations and social movements in the country, as well as representatives of the State of Nicaragua.

In that occasion, the organizations denounced the severe impacts and risks to human rights that the project has been causing to the detriment of the population, specifically Afro-descendants and the Rama and Kriol indigenous peoples. Among these, were specifically mentioned the multiple impacts of an economic, social, cultural and environmental nature that the project could have on the territories, population, and on the ecological balance. The IACHR is particularly concerned at reports that the canal seriously affects lands and territories of indigenous peoples and Afro-descendants, which would involve the displacement of communities, and would generate impacts as deep as the disappearance of the *Rama* language due to the displacement of the last speakers of this language. The Commission notes that the State indicated that the canal will use 6.46% of the Rama and Kriol territory, and noted that the number of people who would be in the area of influence of the canal amounts to 7,700 families.

However, according to the participating organizations, the approval of the canal concession took place within an unusually short legislative process.<sup>94</sup> They stressed the following questionable points regarding the concession: the general misinformation about the project; the lack of analysis and public discussion on it; the absence of a free, prior and informed consultation or consent process with affected indigenous peoples and Afro-descendants; the establishment of a regime of excessive legal privileges to the grantee; among others. They highlighted that the framework law of the channel integrates a concession agreement that lacked legislative approval and discussion, and that constitutes the main instrument for implementing the megaproject. According to what was informed, this instrument

<sup>93</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Doc. OAS/Ser.L/V/II.96, Doc 10 rev.1, April 24, 1997. See also: IACHR. Resolution No. 12/85, Case No. 7615, Yanomami People v. Brazil, March 5, 1985.

<sup>94</sup> The petitioners indicated that the approval of the canal concession had taken place within a legislative process of eight days and following a three hour discussion. See IACHR, Hearing on the “Construction of the transoceanic canal and its impact on human rights in Nicaragua”, 154<sup>th</sup> Period of sessions, March 16, 2015. Similarly, see El Herald, *Congreso de Nicaragua adjudica a firma china la construcción de canal interoceanico*, June 13, 2013; La Prensa, *Orteguismo aprueba construcción del Canal*, June 13, 2013.

is contrary to the Nicaraguan legal framework, including the political Constitution itself.<sup>95</sup>

The State, for its part, noted that the National Assembly had enacted many laws to ensure the lawfulness and legitimacy of the project. It emphasized that this legislation declared the construction of the canal to be of national interest, but also took into consideration respect for human rights, the environment, and the project's social and environmental impacts. In this sense, it expressed that the project is based on the premise of development which is found in the Nicaraguan Constitution, and which aims to improve the living standards of its population. Additionally, it referred to the expected results of the canal, following which it described the project as "a national project known and approved by the majority of the Nicaraguan population" and indicated that the consultation of each of the communities affected by the canal was currently being conducted. It also expressed that the canal would use 6.46% of the Rama and Kriol territories, and indicated that a census establishing the number of affected families had also been completed, which had indicated a total of 7,700 families.

69. The IACHR notes that the lack of regulation relevant to the environmental and human rights impact of these activities is contrary to the obligation of adapting domestic law contained in Article 2 of the American Convention. As explained by the IACHR, "the absence of regulation, inappropriate regulation or lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention".<sup>96</sup> In a similar way, the European Court of Human Rights has stated that "[...] the State's responsibility in environmental cases may also arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in [...] the Convention".<sup>97</sup>
70. The Commission considers as a central sphere in this analysis the legal dispositions which protect the property rights of indigenous and tribal peoples against extractive and development activities. These include the right to prior, free and informed consultation and consent, as an essential guarantee for safeguarding the rights of indigenous peoples that otherwise may be harmed by such activities. Indeed, by virtue of its duty to adapt domestic law, States have to review their laws, procedures, and practices to ensure that the land rights of indigenous and tribal peoples are safeguarded in this context, in accordance with the rights established in the Inter-American human rights instruments.<sup>98</sup> Additionally, States

<sup>95</sup> See IACHR. Hearing on the "Construction of transoceanic canal and its impact on human rights in Nicaragua", 154th Session, March 16, 2015.

<sup>96</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Doc. OAS/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

<sup>97</sup> "[T]he State's responsibility in environmental cases may also arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention." ECHR. *Hatton and Others v. the United Kingdom*. Application no. 36022/97. 8 July 2003. § 119.

<sup>98</sup> IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, 30 December 2009. III.

are required to refrain from adopting regressive legislative or administrative measures which may affect the enjoyment of land rights of indigenous peoples.<sup>99</sup>

71. In a similar sense, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, has warned that "[t]he area of land rights, for example, is often key," because "[t]he absence of legal frameworks that clearly spell out land rights creates opportunities for arbitrary expropriation or land grabbing, which in turn can lead to conflict. Opaque procedures for granting exploitation licenses and concessions aggravate the situation and often fuel social protests."<sup>100</sup> The IACHR has similarly underscored that legal uncertainty over the rights of indigenous and tribal peoples over their territories makes them "especially vulnerable and open to conflicts and violation of rights."<sup>101</sup>
72. The IACHR also notes that the Inter-American Court has determined that States Parties must adapt their domestic legislation to the provisions of the American Convention and ensure that those norms are "effective", and involve "tak[ing] all measures to ensure that the provisions of the Convention be effectively complied with in their domestic legal order."<sup>102</sup> As stated by the Court, "the State's obligation to adapt domestic legislation to the treaty provisions is not limited to constitutional or legislative text, but must radiate to all legal and regulatory provisions and translate into effective practical application of standards to protection of human rights."<sup>103</sup> Similarly, the European Court has emphasized that "since the [European] Convention [on Human Rights] has as its main purpose to protect effective rights, not illusory guarantees, a fair balance between the different interests at stake may be inappropriate, not only when the rules for the protection of those rights are absent, but also when they are not properly enforced."<sup>104</sup>
73. Therefore, an integral part of the effective implementation and compliance with the law in this context is that the State "take[s] the measures necessary to ensure

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Definitions, A. Indigenous peoples; tribal peoples. para. 43. IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (USA), December 27, 2002, par. 173, Recommendations 1 and 2.

<sup>99</sup> If adopting regressive provisions, States are obligated to leave without effect or refrain from applying them. IACHR, Third Report on the Situation of Human Rights in Paraguay. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, paras. 49, 50 - Recommendation 4.

<sup>100</sup> UN. Report of the Special Rapporteur on the rights of freedom of peaceful assembly and of association, Maina Kiai, April 28, 2015, A/HRC/29/25, par. 13.

<sup>101</sup> IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, para. 57; IACHR, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, December 30, 2009, para. 87.

<sup>102</sup> IA Court. Garrido and Baigorria Vs. Argentina. Reparations and Costs. Judgment of August 27, 1998. Series C No. 39 para. 69.

<sup>103</sup> See inter alia IA Court. Rights and interests of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21. para. 65.

<sup>104</sup> "As the Convention is intended to protect effective rights, not illusory ones, a fair balance between the various interests at stake may be upset not only where the regulations to protect the guaranteed rights are lacking, but also where they are not duly complied with". ECHR. *Case of Dubetska and others v. Ukraine*. Application no. 30499/03. 10 May 2011. § 144. In a similar sense, see ECHR. *Moreno Gómez v. Spain*, Application no. 4143/02, §§ 56 and 61.

that the acts of its agents [...] conform to its domestic and inter-American legal obligations.”<sup>105</sup> Therefore, along with the legal framework, it is necessary to have in place an institutional apparatus that facilitates the enforcement of the existing norms to ensure the full compliance with this duty.

74. It is also relevant that the State considers and enforces its domestic law in relation to its trade relations with third parties, whether these are States, companies or other non-state entities.<sup>106</sup> For those scenarios in which these activities are carried out by third parties, it is necessary to incorporate safeguards to ensure respect for the human rights at stake in those provisions governing the creation and activities of companies such as trade or commercial laws, as they have a direct bearing in their behavior. Likewise, States must not adopt commercial or investment legislation that can weaken, undermine or deny the existing protections and their international human rights obligations.<sup>107</sup> The Commission also believes that the States’ duty to effectively enforce environmental protection standards is especially important with regard to non-state parties whose conduct is harmful to natural resources.
75. Another element of great importance is the need for legislation and other regulations to clearly define the responsibility for potential human rights violations. The absence of provisions in domestic law ensuring accountability of state officials or private parties, or the existence of rules excluding such liability, can compromise the international responsibility of States.<sup>108</sup> Indeed, as part of the general obligation to implement and enforce laws, States must ensure compliance with environmental norms and criminal law in relation to the exploration and exploitation of natural resources and impose the sanctions provided by law in the event of breach.

## 2. The need for the legal framework to adequately address foreign companies

76. Reference must also be made to the need to design a regulatory framework that adequately contemplates the operation of foreign companies in a state’s jurisdiction, given that the preponderance of such companies is already a reality in the region and that they are impacting human rights. Such a framework must include efficient methods of supervision and accessible means of redress where violations occur. This may involve negotiations between host states and states of

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<sup>105</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Doc. OAS/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

<sup>106</sup> See, the Guiding Principles 9 and 10. UN. Report of the Special Representative of the Secretary-General on Business and Human Rights, John Ruggie. Guiding Principles on Business and Human Rights: Implementation of the framework of the United Nations "Protect, Respect and Remedy". A/HRC/17/31. March 21, 2011.

<sup>107</sup> See, *inter alia*, United Nations, *Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas*, A/HRC/30/44, 14 July 2015; and United Nations,

<sup>108</sup> RIDH. Considerations facing the Second Global Forum on Business and Human Rights. Document submitted to the Working Group of the United Nations on business and human rights. October 2013. p.3.

origin at the entry level, such as during bilateral or other agreements and before foreign companies are accepted for business.

77. As indicated previously, this Report allows the IACHR to examine for the first time the important emerging issue of the extraterritorial application of human rights within the context of extractive and development projects. The need for comment on this jurisdictional aspect of human rights is particularly important in this context given the typical business framework in the many countries of the region, whereby development projects are usually carried out by foreign companies headquartered in another country, often with the approval and indeed express encouragement of the host state. The pattern that has emerged in the region, as reported to the Commission in its hearings, country visits, petitions and other means, is of a situation where vulnerable populations, mainly indigenous peoples and Afro-descendent communities, become victims of human rights violations as a result of the actions or inaction of such companies and the inability or unwillingness of the host state to protect them, sometimes because of a perceived fear that regulation will cause capital flight. In fact, numerous complaints have been received indicating that in conflicts over land and natural resources, law enforcement personnel appear to protect foreign business and not alleged victims.
78. Such phenomena have led to increased calls by civil society organizations and others for the State's responsibility for the protection of human rights to be shared with States of origin, often more economically successful and powerful states, such as Canada and Brazil, who should also be made accountable for the human rights violations of their corporate citizens in such circumstances. This, by no means absolves the host state from the primary duties to institute and enforce adequate human rights mechanisms for such companies operating within their borders.
79. In hearings on this subject before the Commission, the current Rapporteur for Indigenous Peoples - also the Rapporteur for Persons of African Descent and against Racial Discrimination - has expressed the view that international human rights law, conceived of as a dynamic tool, should be able to take into account these new realities of extra-territorial jurisdiction. The Rapporteur has noted that the principle of extraterritorial jurisdiction has been applied by states in the region, notably the United States and Canada, in other spheres, such as in Revenue Law and certain categories of criminal law. Further, the IACHR, taking note of evolving principles in international law and the work of other human rights monitoring bodies, has set out certain fundamental principles concerning the use of extraterritorial jurisdiction.<sup>109</sup> It is therefore jurisprudentially sound to understand that a State may be accountable under international human rights law for conduct that takes place in another country when the first state's acts or omissions cause human rights violations and the State in which the conduct has taken place is unable to protect or enforce the human rights in question. It is notable, for example, that foreign investment into OAS states in these arenas often occurs with the direct involvement of the investing state. The Commission has

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<sup>109</sup> IACHR, Report 112/10, Interstate Petition IP-02, Franklin Guillermo Aisalla Molina et al. (Ecuador - Colombia), October 21, 2010, paras. 98-100.

been informed in hearings, for example, that Canadian Embassies are directly involved in procuring such investment, labeled *economic diplomacy*, thereby deepening the necessary state connections for a framework for foreign state accountability. In addition, large scale foreign investment has significant public law dimensions, often a basis for ascribing state jurisdiction as quasi- public entities.

80. While this is an emerging and evolving area, now the subject of deep discussion at the United Nations level, some definitive statements have already been expressed by certain UN bodies about the duty of states to protect human rights, specifically to prevent human rights violations, even in relation to alleged violations by its nationals in other countries.<sup>110</sup> The IACHR continues to urge foreign states of origin to put mechanisms in place voluntarily to secure better human rights practices of their corporate citizens abroad. Accordingly, the Rapporteur for Indigenous Peoples has also held talks with state representatives on this issue with a view to enabling appropriate Protocols for a more universal protection of human rights within the general context of Business and Human Rights. In response, the IACHR notes with appreciation that the state of Canada has given assurances at hearings, in discussions with the Commission and even publicly, that it intends to strengthen, voluntarily, its existing corporate social responsibility rules for its companies operating abroad.<sup>111</sup> The Commission had in fact noted in hearings that these rules do not establish specific monitoring mechanisms that could be used in corporation operations abroad.
81. The Commission reiterates its concern that while business and investment is a laudable objective to be encouraged, it must be carried out on a platform that enhances and does not undermine human rights, within or beyond national borders.

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<sup>110</sup> The Committee on Economic, Social and Cultural Rights affirms that States parties should “prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.” Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, Art. 12, ¶ 39, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); see also Committee on Economic, Social and Cultural Rights, General Comment No. 15: The right to water, Art. 11-12, ¶ 31, U.N. Doc. E/C.12/2002/11 (Nov. 26, 2002). Specifically in regard to businesses, the Committee on Economic, Social and Cultural Rights has further stated that: “States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host States under the Covenant.” Committee on Economic, Social and Cultural Rights, Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, ¶ 5, U.N. Doc. E/C.12/2011/1 (May 20, 2011).

<sup>111</sup> See public announcement by the Government of Canada shortly after the October 2014 IACHR hearing on this issue: ‘Ottawa vows to protect ‘Canada brand’ with social responsibility policy’, Shawn McCarthy, OTTAWA — The Globe and Mail, Published Friday, Nov. 14 2014, 12:00 AM EST.

### 3. Duty to prevent, mitigate and eradicate the negative impacts on human rights

82. The duty of prevention is a central part of the general obligation to guarantee human rights and it entails, in the words of the Inter-American Court "all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages."<sup>112</sup>
83. As part of the duty to prevent human rights violations, the Inter-American system has developed the concept of "due diligence". In this sense, the Inter-American Court stated in its judgment in the *case of Velásquez Rodríguez v Honduras*:
- [...] An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.<sup>113</sup>
84. According to the evolving jurisprudence of the Inter-American system, "[the State's] obligation to adopt measures of prevention and protection for private individuals in their relations with each other is conditional on its awareness of a situation of real and imminent danger for a specific individual or group of individuals and the reasonable possibility of preventing or avoiding that danger."<sup>114</sup> If faced with such circumstances, States are required to adopt reasonable steps to prevent human rights violations by non-state actors, or else they engage their responsibility.<sup>115</sup> Additionally, the Court has explained that, in

<sup>112</sup> IA Court. *Velásquez Rodríguez v Honduras*. Background. Judgment of July 29, 1988. Series C No. 4. para. 175.

<sup>113</sup> IA Court. *Velásquez Rodríguez v Honduras*. Background. Judgment of July 29, 1988. Series C No. 4, paragraph 172. See also *Case of Godínez Cruz v Honduras*. Background. Judgment of January 20, 1989. Series C No. 5 para. 172; *Bámaca Velásquez vs. Guatemala* case. Background. Judgment of November 25, 2000. Series C No. 70. Para. 210.

<sup>114</sup> IA Court. *Gonzalez and others case ("Cotton Field") v Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No.205. para. 280. IA Court., *Case of the Pueblo Bello Massacre, Colombia*. Judgment of January 2006, Series C No. 140, par 31. 123; IA Court, *Sawhoyamaya Indigenous Community vs. Paraguay*. Judgment of March 29, 2006, Series C No. 146, para. 155; and *Case of Valle Jaramillo et al v Colombia*. Merits, Reparations and Costs, Judgment of November 27, 2008, Series C No. 192, par. 78.

<sup>115</sup> IA Court, *Case of Velásquez Paiz et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 19, 2015. Series C No. 307. para. 107; IA Court, *Gonzalez and others case ("Cotton Field") v Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No.205. para. 280; IA Court, *Case of the Pueblo Bello Massacre v Colombia*. Judgment of January 31, 2006, Series C No. 140, par. 123; IA Court, *Sawhoyamaya Indigenous Community vs. Paraguay*. Judgment of March 29, 2006, Series C No. 146, para. 155; and *Case of Valle Jaramillo et al v Colombia*. Merits, Reparations and Costs, Judgment of November 27, 2008, Series C No. 192, par. 78.

order to establish the failure to comply with the obligation to prevent violations to the right to life and physical integrity, it must be ascertained whether:

i) State authorities knew, or should have known, of the existence of a real and immediate risk to life and/or physical integrity of an individual or specific group of individuals and that ii) said authorities did not take the necessary measures, within the realm of their powers and attributions, which, rationally, were expected to be taken to prevent or avoid the risk<sup>116</sup>.

85. In this regard, the Commission wishes to emphasize that this principle does not apply when the State itself is the one implementing the project. As it was mentioned previously, at times, extractive industries can benefit from State support. In these cases, States have direct obligations to respect and guarantee human rights with due diligence. When the State is directly involved in promoting and advancing an extractive or development plan or project, it finds itself bound to strict compliance with all of the obligations provided for in the Inter-American instruments, such as the right to property, to life, to physical integrity, among others, as well as with the standards and obligations developed in the present report.
86. Nevertheless, it should be noted that the various organs of the Inter-American system have distinguished between a *general duty of prevention*, involving the adoption of normative and institutional policy measures to prevent and punish crimes in problematic areas known to the State, and a *specific duty of prevention*, which is applicable from the moment the State becomes aware of a real and immediate risk to a person or a specific group of persons in a concrete situation.<sup>117</sup> The IACHR emphasizes that this obligation to prevent is enforceable prior to the authorization of the activity or the granting of the necessary permits, as well as during the implementation and the life-cycle of the project, via supervision and oversight methods. The Commission will address the obligation to prevent prior to the authorization of a project in this section, and will address the oversight and supervision obligations in the following section.

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<sup>116</sup> This has been the criteria of the Court since it released its ruling in the *Case of the Pueblo Bello Massacre [Pueblo Bello Massacre v Colombia]*, Judgment of January 31, 2006, Series C No. 140, par.123], and has been consistently reiterated in its jurisprudence. In this respect, see IA Court, *Gonzalez and others case ("Cotton Field") v Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No.205. para. 283 y 284; IA Court, *Sawhoyamaxa Indigenous Community vs. Paraguay*. Judgment of March 29, 2006, Series C No. 146, para. 155; IA Court, *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, para. 188; IA Court, *Case of Castillo González et al. v. Venezuela*. Merits. Judgment of November 27, 2012. Series C No. 256, para. 128; IA Court, *Case of Luna López v. Honduras*. Merits, Reparations and Costs. Judgment of October 10, 2013. Series C No. 269, para.124; *Case of Human Rights Defender et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 283, para.143, and IA Court, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 14, 2014. Series C No. 287, para. 527.

<sup>117</sup> IA Court. *Gonzalez and others case ("Cotton Field") v Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205. para. 281-284.

87. With regards to the general obligation to prevent, the Court has stressed the importance of an adequate legal framework of protection, its effective application, and the adoption of prevention policies and practices increasing effectiveness. The prevention strategy must be comprehensive, involving the adoption of prevention measures of risk factors and strong institutions which can provide an effective response.<sup>118</sup> As was recognized by the Inter-American Court, "[i]t is not possible to make a detailed list of all such measures [of prevention], since they vary with the law and the conditions of each State Party."<sup>119</sup> However, it is possible to identify some central guidelines on measures that can be expected from States to evidence that they have acted with due diligence to prevent, in a general manner, human rights violations which occur in the context of extractive or development activities.
88. In this regard, a crucial issue resides in the establishing of a clear legal and institutional framework to properly identify and assess the inherent impacts that extractive and development activities would generate on human rights prior to the authorization or the granting of the permit. The aforementioned is closely linked to the existence of a regulatory and institutional framework that establishes environmental protection against pollution and degradation and therefore, of the human rights involved. OAS Member States must prevent environmental degradation in order to comply with their human rights obligations under the Inter-American system.<sup>120</sup> Adequate protection of the environment is essential to human well-being and the enjoyment of fundamental rights, in particular the right to life. In this regard, the Commission notes that the internal legal systems of the countries of the continent contain certain provisions to allow individuals interested in applying for authorization to carry out projects that may affect the environment to conduct, as a precondition, environmental impact assessments, and provide specific information on the areas of influence of the particular project. The vast majority of States in the continent have turned to mechanisms that require the licensing of business activities which may be hazardous to the environment.
89. It is important to note however that the traditional environmental approach is not sufficient. The specific impacts of a said project should also be assessed in light of general international human rights standards, including an evaluation of the concrete rights which can be affected, injured or otherwise restricted. In other words, the central concern of the IACHR is that criteria and procedures to ensure a human rights-oriented analysis of the impact are included in the decision-making process. In cases where such activities may affect indigenous and tribal peoples and Afro-descendent communities, there is a special duty, as developed by the organs of the Inter-American system, to carry out previous studies of social and environmental impact, with the participation of the indigenous peoples and Afro-descendent communities affected.

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<sup>118</sup> IA Court. *Gonzalez and others case ("Cotton Field") v Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205. para. 256.

<sup>119</sup> IA Court. *Velásquez Rodríguez v Honduras*. Background. Judgment of July 29, 1988. Series C No. 4. para. 175.

<sup>120</sup> IACHR. *Rights of indigenous and tribal peoples to their ancestral lands and natural resources*. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, December 30, 2009, paras. 190-193.

90. As indicated by the Inter-American Court, such studies “must be made in conformity with the relevant international standards and best practices” by “independent and technically capable entities, under the supervision of the State.”<sup>121</sup> Additionally, it has established that “one of the factors the environmental and social impact assessment should address is the cumulative impact of existing and proposed projects.”<sup>122</sup> More generally, social and environmental impact studies “must respect the [concerned indigenous or tribal] people’s traditions and culture,”<sup>123</sup> and their results must be shared with the communities so that they can make an informed decision. It has also indicated that they should “preserve, protect and guarantee the special relationship” that indigenous and tribal peoples have with their territories and guarantee their survival as peoples.<sup>124</sup> This way, in case indigenous peoples and Afro-descendent communities are affected, States are obligated to adopt the necessary compliance measures with these duties.
91. Other issues of concern in this area refer to the application of environmental standards compatible with those required in the international field so that the right to a healthy environment is safeguarded. In addition, the information received by the Commission indicates that often these preliminary assessments are directly made, funded, or promoted by the same private company that will perform the activity, compromising the results. In other occasions, the impact assessments are carried out by third parties hired by the interested company, generating a relationship that could bias the results of the assessments.
92. Accordingly, the observance of this obligation fundamentally requires that States not breach their international human right obligations in the securing of multilateral or bilateral commercial agreements. The IACHR observes that such instruments —and especially bilateral agreements —actually facilitate significantly the expansion of extractive and agro-industrial operations. It notes, in addition, that these agreements frequently include exemptions to the fulfillment of environmental norms or of norms which relate to indigenous and tribal people’s rights. In this respect, the Commission recalls that, as it was held by the Inter-American Court, “the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention.”<sup>125</sup> In fact, it expressed that: “on the contrary, their enforcement should always be compatible with the American Convention, which is a

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<sup>121</sup> IA Court. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 129. IA Court. Case Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245. paras. 205-206.

<sup>122</sup> IA Court. Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008, Series C No. 185, para. 41.

<sup>123</sup> IA Court. Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008, Series C No. 185, para. 41.

<sup>124</sup> IA Court. Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008, Series C No. 185, para. 40. IACHR, Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 254.

<sup>125</sup> IA Court. Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 140.

multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.”<sup>126</sup> Likewise, in acting as members of an international organization, States must comply with their human rights obligations.<sup>127</sup> This is particularly relevant, for instance, when deciding on the financing by development banks of projects whose execution could result incompatible with human rights.

93. On the other side, the *specific duty of prevention* is relevant in cases where a concrete plan or project supposes a real and immediate risk for an individual or specific group to the right to life or physical integrity as a result, *inter alia*, of environmental degradation or displacement, among others. For such a duty to arise, it is necessary that the State know or that it should have known about said risks. The State can be made aware about a risk through reports or complaints presented directly by the affected population or through information the State has at its own disposal within the context of authorization or concession-granting which accompany such types of activities. In such a case, in order to comply with its duty of prevention, the State must adopt reasonable measures to avoid the materializing of the risk of violations of human rights.
94. Among the measures that may be relevant in order to meet this requirement is the establishment of mechanisms to deal with urgent communications about incidents, implement emergency alert systems in cases of hazardous activities, inform the local population about the potential risks related to the operation, as well as to take actions to achieve coordination and cooperation between the various administrative authorities to ensure that the risks brought to their attention do not reach such gravity as to endanger human lives.<sup>128</sup> It is clear that compliance with

<sup>126</sup> IA Court. Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 140.

<sup>127</sup> As it was established in the 15th principle of the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*: “As a member of an international organisation, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that transfers competences to, or participates in, an international organization must take all reasonable steps to ensure that the relevant organization acts consistently with the international human rights obligations of that State”. International Commission of Jurists/ Maastricht University. *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, Maastricht, September 28, 2011, principle 15.

<sup>128</sup> The close relationship between the obligation to evaluate risks and the duty to prevent in the face of specific incidents has been evidenced by the European Court in specific cases such as *Tatar v. Romania*, with regards to the dumping of cyanide-contaminated water by a mining company. In this case, the petitioners denounced the national authorities’ lack of investigation and lack of environmental studies to anticipate and prevent the effects of this mining company’s activity on their rights and the environment. In its judgement, the Court stated that the existence of a serious risk for the health and well-being of persons gives rise to a State responsibility to evaluate risks, from the moment of the concession or authorization up until after the contamination, as well as to take appropriate measures. Given that the company was authorized to continue its industrial operations following the contamination, and given the State’s omission to take efficient and proportional measures to remedy the situation, the Court concluded that the State authorities had breached their duty to evaluate, in a satisfactory way, the risks that this company’s actions could generate, as well as had breached their duty to take adequate measures to protect the right to respect for private and family life, and the right to enjoy a healthy environment. ECHR. *Tatar v. Romania*. Application no. 67021/01. January 27, 2009. Also, see ECHR. *Case of Öneriyıldız v. Turquia*. Application no. 48939/99. November 30, 2004. para. 109.

this obligation is linked to the adequate identification and evaluation of the concrete impacts these activities may have on the human rights of the populations where they take place. Once the potential impacts are identified, States must adopt or where appropriate, require the company to adopt preventative and corrective measures to guarantee the protection of rights which would otherwise be affected.

95. The identification of risks to human rights must naturally be followed by the adoption of measures to prevent them from materializing. Therefore, it is expected that once the potential impacts are identified, States adopt or where appropriate, require the company to adopt mitigation measures or similar ones. The measures that are expected to be adopted or required by States must be aimed at mitigating the impacts, that is, reducing the possible damage that has been identified, and if the violation has already taken place, it is expected that the State takes action to stop the identified impact. Similarly, States must remedy its consequences, if its direct responsibility is involved, or otherwise, ensure redress through adequate and effective mechanisms.
96. In a similar way, the European Court has also determined the international responsibility of a State for the lack of design and implementation of effective measures capable of reducing industrial pollution to acceptable levels and that are consistent with the right to private and family life of the local population affected.<sup>129</sup> In the case *Dubetska and others v. Ukraine*, for example, based on the effects on health and living conditions caused by a coal mine, the Court found that there had been a violation of the Convention, because the state authorities were aware of the adverse effects of the mine and yet did not adopt effective measures to remedy the situation.<sup>130</sup> Furthermore, in the case *Moreno Gomez v. Spain*, the Court highlighted the lack of government action to end violations by third parties of the right invoked by the petitioner against nocturnal disturbances. In particular, it considered that although the authorities had adopted certain measures which should in principle have been sufficient to ensure respect for the rights violated, they tolerated and thus contributed to the repeated breach of the rules which they themselves had established. In light of this, it emphasized that the rules for protecting the rights guaranteed by the Convention are of little use if they are not properly applied.<sup>131</sup>
97. As such, the Commission underscores that, as previously indicated, "[w]henver significant ecological or other harm is being caused to indigenous or tribal territories as a consequence of development projects or plans or extractive

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<sup>129</sup> ECHR. *Fadeyeva v. Russia*. Application no. 55723/00. 9 June 2005. §§132-134.

<sup>130</sup> In particular, the European Court considered that "Despite the efforts, of more than twelve years, the state authorities have not been able to put an effective solution to the personal situation of the petitioners, along this period has remained virtually unchanged. [...] The Court considers that, given the wide discretion available to States in the context of their environmental obligations under Article 8 of the Convention, would go far to establish in general terms the right of an applicant to get new housing at state expense. However, the allegations of the petitioners could also have been remedied properly addressing environmental hazards." ECHR. Case of *Dubetska and Others v. Ukraine*. Application no. 30499/03. 10 May 2011. § § 147-150.

<sup>131</sup> ECHR. *Moreno Gómez v. Spain*. Application no. 4143/02. 16 November 2004. para. 57-61.

concessions, these projects, plans or concessions become illegal and States have a duty to suspend them, repair the environmental damage, and investigate and sanction those responsible for the harm."<sup>132</sup> The IACHR has indicated that priority should be given to the rights to life and integrity of indigenous and tribal peoples in these cases.<sup>133</sup> Accordingly, such peoples have the right to obtain the immediate suspension of the execution of development or extractive plans concerning natural resources when they negatively impact those rights.<sup>134</sup>

#### 4. Obligation to supervise development and extractive activities

98. One component of the obligation of prevention, derived from the general duty to guarantee human rights, consists of monitoring and supervising extractive or development activities that might affect human rights. This is associated with the fact that many of these projects, by nature, tend to pose serious risks to human rights and require States to supervise and oversee their implementation. As the IACHR has previously explained, the "[...] lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention."<sup>135</sup> Therefore, in the opinion of the Commission, compliance with the duty of prevention is closely linked to the existence of a coherent system of supervision and control in host states to encourage the various actors involved to avoid infringement of the rights of the population in the area in which they operate. This duty of prevention and supervision is also applicable to the countries of origin for the actions of its companies and nationals abroad during the implementation of extractive activities.
99. The organs of the Inter-American system have referred to the States' duty of supervision and control of the actions of private parties. Therefore, for example, in regard to private institutions that provide public services, the Inter-American Court has referred to the European Court of Human Rights to indicate that the

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<sup>132</sup> IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, December 30, 2009, par. 216.

<sup>133</sup> IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, December 30, 2009, par. 217

<sup>134</sup> IACHR, Democracy and Human Rights in Venezuela. Doc. OAS/Ser.L/V/II, Doc. 54, December 30, 2009, par. 1137, Recommendation 6; IACHR, Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OAS/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297 Recommendation 6; See also: IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, 30 December 2009, para.217.

<sup>135</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Doc. OAS/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

State has a duty to grant licenses and to exercise supervision and control.<sup>136</sup> The Inter-American Court has been clear in indicating that the obligation of state supervision includes both services provided by the State, directly or indirectly, and those offered by private individuals.<sup>137</sup> The Commission and other international bodies have also referred to the duty of supervision and inspection in respect to labor rights.<sup>138</sup> For its part, the European Court has held that with regard to activities by private individuals which may be dangerous for human rights, special attention must be paid to the specific regulations dealing with the special features of the activity in question. It has explained that such regulations should govern –in addition to the concession of licenses and authorizations– the supervision of the activity, its performance and safety.<sup>139</sup> Similarly, the IACHR takes note that the Guiding Principles provide that "States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms."<sup>140</sup> A meaningful interpretation of this must include the ability to supervise foreign companies.

100. While States have a duty of supervision and monitoring of business activities in these contexts, the Commission considers that this duty is stricter in certain circumstances, depending on the type of activity and nature of the business. There is a reinforced duty of supervision regarding the actions of companies with close ties to the State, owned by the State, or are under its control. As indicated in the Guiding Principles, "[w]here States own or control business enterprises, they have

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<sup>136</sup> ECHR. *Storck v Germany*, No. 61603/00. Section Three. Judgment of June 16, 2005, par. 103. In that case, the European Court ruled that: "The State has an obligation to ensure to its citizens their right to physical integrity under Article 8 of the [European Human Rights] Convention. To that end, there are hospitals administered by the State that coexist with private hospitals. The State can not completely absolve itself of its responsibility by delegating its obligations in this area to individuals or private organizations. [...] [T]he State maintain[s] the duty to exercise supervision and control over institutions [...] private. Such institutions, [...] need not only a license, but also a competent and frequent monitoring to determine whether the confinement and medical treatment is justified."

<sup>137</sup> The Court defined the scope of the responsibility of States when these obligations against private entities are breached in the following terms: "When it comes to core competencies related to the supervision and monitoring of the provision of public interest such as health, be by public or private entities (as in the case of a private hospital), is responsible for the failure to fulfill the duty to supervise the service to protect the mentioned right." IA Court. *Case Suarez Peralta vs. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, para. 150. See also IACHR. *Albán Cornejo v Ecuador* case. Merits, reparations and costs. Judgment of November 22, 2007, series C, number 171; IA Court. *Ximenes Lopes Vs. Brazil*. Judgment of July 4, 2006. Series C No. 149; IA Court. *Case Suarez Peralta vs. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261.

<sup>138</sup> See inter alia IACHR. *Captive Communities: Situation of the Guarani Indigenous People and Contemporary Forms of Slavery in the Chaco of Bolivia*. OAS/Ser.L/V/II. Doc. 58. December 24, 2009.

<sup>139</sup> ECHR. *Oneryildiz v. Turkey*. Application no. 48939/99. 30 November 2004. §§ 89-90. ECHR. *Kolyadenko and Others v. Russia*. Applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05. 9 July 2012. § 158.

<sup>140</sup> UN. Report of the Special Representative of the Secretary-General on Business and Human Rights, John Ruggie. *Guiding Principles on Business and Human Rights: implementation of the framework of the United Nations "Protect, Respect and Remedy"*. A/HRC/17/31. March 21, 2011. Principle 5, Commentary.

greatest means within their powers to ensure that relevant policies, legislation, and regulations regarding respect for human rights are implemented [...]."<sup>141</sup>

101. The Commission also takes into account that, as noted by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, in some cases the State engages in lucrative ventures, either through State-owned companies or companies administered by it, "blurring non-profit and for-profit interests and the role of the State in ensuring a level playing ground for both sectors."<sup>142</sup> Therefore, in the opinion of the IACHR, when extractive and development projects are implemented by State-run companies, the State is required to implement measures of strict supervision. This control should be undertaken by entities which meet the minimum guarantees of independence and impartiality, and have the necessary powers to verify that human rights are fully respected in these contexts, and are equipped to respond when human rights violations take place.
102. To be compatible with the special obligations concerning indigenous peoples and Afro-Descendent communities, supervision and control mechanisms must incorporate guarantees to ensure their specific rights. Such mechanisms must verify whether, once the project is approved, violations of the right to collective property, under the terms developed by the inter-American system and other applicable international standards, are taking place. As noted by the IACHR, this implies referring not only to the impact on the natural habitat of the traditional territories of indigenous peoples, for example, but also to the special relationship that links these peoples to their territories, including their own forms of economic livelihood, their identities and cultures, and their forms of spirituality.<sup>143</sup> These mechanisms must also enable a determination as to whether the plans or projects being implemented are affecting the ability of indigenous peoples and Afro-descendent communities to use and enjoy their lands and natural resources in accordance with their customary law, values, customs and mores.
103. Moreover, the Commission considers that the obligation to do a prior impact assessment —to which it referred in the preceding section— may allow the competent authorities and officials to have information on specific concerns of potential human rights impacts which can guide the effective fulfillment of the duty of supervision and control. However, with respect to environmental concerns, as noted above, while many States in the region have a normative and institutional apparatus in place that requires compliance with certain environmental parameters for the approval or authorization of activities that may affect the environment, only a few contain adequate and effective mechanisms to

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<sup>141</sup> UN. Report of the Special Representative of the Secretary-General on Business and Human Rights, John Ruggie. Guiding Principles on Business and Human Rights: implementation of the framework of the United Nations "Protect, Respect and Remedy". A/HRC/17/31. March 21, 2011. Principle 4, Commentary.

<sup>142</sup> UN. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, April 28, 2015, A/HRC/29/25, par. 13.

<sup>143</sup> IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, December 30, 2009, par. 255.

continuously monitor these activities throughout the project implementation. The IACHR is concerned regarding information received about the lack of action by States to effectively implement the existing provisions and where appropriate, impose sanctions or corrective action against non-compliance; as well as the lack of mechanisms to conduct periodic assessments.

104. The Commission considers necessary the development and effective implementation of mechanisms to allow State's compliance with its duty to supervise and monitor the performance of any company or entity that performs extractive or development projects. Essential to this are the efforts by States to establish evaluation systems that ensure external control, for example by joining others already established, or by forming state inspectors specialized in this field.<sup>144</sup>
105. Monitoring systems should provide effective and culturally appropriate responses to negative consequences on the enjoyment of human rights, and must establish procedures allowing to take into account the technical aspects of the activity in question, identify shortcomings in the processes that are concerned, the mistakes made by those responsible at different levels, and the particular characteristics of the affected population, especially when it comes to indigenous peoples and Afro-descendent communities. The inclusion of contractual clauses which impede monitoring or evaluation measures or impose obstacles to accountability in cases of human rights violations in agreements with businesses are incompatible with this obligation. In this regard, following the information received, the Commission takes notice that once the concessions are granted, some countries afford companies the right to decide whether they allow state inspectors to enter in their facilities.<sup>145</sup>

## 5. Duty to guarantee effective participation and access to information

106. The Commission wishes to underscore that, in the specific case of indigenous and tribal peoples, the obligations referred to in this report are all closely linked to the right to free, prior and informed consultation and consent. In relation to these peoples, States have a specific duty to consult, and ensure their participation in decisions on any measures affecting their territories, taking into account the special relationship between indigenous and tribal peoples to their land and natural resources, as provided for in ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples.<sup>146</sup> The Commission refers to this right in detail in a specific section of this report (see Chapter IV *infra*).

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<sup>144</sup> [Business and human rights: considerations facing the Third World Forum](#). November 2014.

<sup>145</sup> See, in this respect CIDSE. [UN Business & Human Rights Framework: Developing an intergovernmental process towards a binding instrument](#) Briefing Note, April 2014. p. 2.

<sup>146</sup> IACHR, Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OAS/Ser.L/V/II, Doc. 34, June 28, 2007, par. 246. IACHR, Second Report on the Situation of Human Rights in

107. In this respect, the IACHR considers it important to recall that the right to free, prior and informed consultation and consent is a fundamental right protected by article 13 of the American Convention and by article IV of the American Declaration. It is a particularly important right for the consolidation, functioning, and preservation of democratic systems, for which it has received a great level of attention, both by the OAS Member States and by the international doctrine and jurisprudence. As such, the Commission has indicated that one of the central elements for the protection of the right to property of indigenous peoples is precisely that States establish effective *and previously notified* consultations with indigenous communities in relation to the acts and decisions which can affect their traditional lands. Member States have the obligation to guarantee that each determination is based on a process of previously informed consent provided by the entirety of the indigenous community.<sup>147</sup>
108. The information provided by the State in the consultation process must be clear and accessible. This supposes that the information which will be provided must be comprehensible, which means, among other things, that its divulgation must be realized in clear language and that, in such cases where it is necessary, it be communicated with the help of a translator or in a language or dialect which allows community members to understand them completely. The information provided must also be sufficient, appropriate and complete to allow for a consent which is not manipulated in favor of the project or activity. The condition of prior notification implies that information must be presented with sufficient time prior to the authorization or prior to the initiation of the negotiations, taking into consideration de consultation process and the delays required to adopt representative decisions within each indigenous community.<sup>148</sup>
109. The organs of the Inter-American system have referred to the exercise of this right in respect to information concerning the implementation of extractive or development projects, relevant to the protection of the human rights affected in these contexts. In its *Report on the Situation of Human Rights in Ecuador*, when analyzing the impact on human rights resulting from development activities, the Inter-American Commission stated that "[the] protection of the right to life and physical integrity may best be advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights." It added that "[t]he quest to guard against environmental conditions which threaten human health requires that individuals have access to: [relevant] information [...]."<sup>149</sup>

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Peru. Doc. OAS/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, par. 26. IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, December 30, 2009, par. 289.

<sup>147</sup> IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, para. 142; IACHR, Special Rapporteur on the right to freedom of expression, *The right to access to information in the Inter-American System*, OEA/Ser.L/V/II. CIDH/RELE/INF. 1/09. December 30, 2009. para. 69.

<sup>148</sup> IACHR, Special Rapporteur on the right to freedom of expression, *The right to access to information in the Inter-American System*, OEA/Ser.L/V/II. CIDH/RELE/INF. 1/09. December 30, 2009. para. 72.

<sup>149</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/Series L/V/II.96, doc. 10 rev. 1 April 24, 1997.

110. For its part, the Inter-American Court, referred to the implementation of the right to information in this field in the *Case of Claude Reyes et al v Chile*.<sup>150</sup> In that matter, the petitioners alleged that the Chilean State violated their right to free access to information, because the Foreign Investment Committee refused to provide information regarding a deforestation project that sought to be implemented by a forestry company. The State, among other arguments, maintained that the information was "confidential" because it referred to "private background information that, if made public, could harm legitimate business interests."<sup>151</sup> In this regard, the Court described the information requested as of "public interest," because it "related to the foreign investment contract signed originally between the State and two foreign companies and a Chilean company (which would receive the investment), in order to develop a forestry exploitation project that caused considerable public debate owing to its potential environmental impact."<sup>152</sup> The Court also indicated that the state authorities were governed by the principle of maximum disclosure, pursuant to which the requested information had to be accessible, except in exceptional circumstances governed by certain guarantees, that is, be previously established by law, respond to a legitimate aim, and be necessary in a democratic society.<sup>153</sup> Therefore, the Court found that, as the State had not complied with the aforementioned guarantees, it had violated the right of access to information.
111. The European Court has also referred to access to information in the context of private projects of a diverse nature. In the case *Guerra and others v. Italy*, for example, the Court found that the State breached its obligation to guarantee the rights to private and family life, because it did not provide the petitioners essential and timely information on the impact of a fertilizer plant. It emphasized that such information would have enabled them to assess the risks and determine whether they wished to continue living in a place exposed to the risk of accidents arising from the activities of the factory.<sup>154</sup> Likewise, in the case *Taşkın and Others v. Turkey*, the Court held that, when confronted with complex issues of environmental and economic policy –as in the specific case was the permission of the operations of a gold-mine– the decision-making process must involve first the relevant research and studies to predict, and evaluate in advance the consequences of those activities. In that instance, it added that "[t]he importance of public access to the conclusions of such studies and to information which would enable

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<sup>150</sup> IA Court. *Claude Reyes et al v Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151.

<sup>151</sup> IA Court. *Claude Reyes et al v Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151. para. 60.

<sup>152</sup> IA Court. *Claude Reyes et al v Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151. para. 73.

<sup>153</sup> IA Court. *Claude Reyes et al v Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151. paras. 88-92.

<sup>154</sup> "In the instant case, the applicants waited, right up until the production of fertilizers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might face if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory. The Court held, therefore, that the respondent State did not fulfill its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention." ECHR. *Guerra and Others v. Italy*. Application No. 116/1996/735/932. 19 February 1998. § 60.

members of the public to assess the danger to which they are exposed is beyond question."<sup>155</sup> On the other hand, when analyzing compliance with the duty of prevention regarding the right to life *vis-à-vis* dangerous activities —as in the specific case was the establishment of a water-reservoir— the Court found that among the preventive measures to be adopted, the right to access information regarding the project had to be emphasized, as set out in the Court's jurisprudence.<sup>156</sup>

112. The Commission also takes note of the *Rio Declaration on Environment and Development*, adopted by the United Nations Conference on Environment and Development in 1992, in order to advance the protection of the rights and responsibilities of States in relation to the environment. In particular, Principle 10 of the Declaration indicates:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>157</sup>

113. Similarly, at the European level, in 1998 the Convention on *Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* was adopted during the Ministerial Conference "Environment for Europe" held in Aarhus, Denmark. In its preamble, this instrument provides that "in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns." It also establishes the requirement that "within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible [...]."<sup>158</sup>

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<sup>155</sup> ECHR. *Taşkın and Others v. Turkey*. Application no. 46117/99. 10 November 2004. § 119. See similarly, ECHR. *Guerra and Others v. Italy*. Application No. 116/1996/735/932. 19 February 1998. § 60; ECHR. *Case of McGinley and Egan v. The United Kingdom*. Application No. 10/1997/794/995-996. 9 June 1998. § 97.

<sup>156</sup> ECHR. *Kolyadenko and Others v. Russia*. Applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05. 9 July 2012. § 158.

<sup>157</sup> Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development held from 3 to 14 June 1992. A/CONF.151/26 (Vol. 1)

<sup>158</sup> Convention on access to information, public participation in decision-making and Access to Justice in Environmental Matters, Article 4.1.

114. Considering the above, the Commission considers that the right to access to information includes within its scope of application, such information necessary for the exercise or protection of human rights in the context of extractive or development activities. As the IACHR has indicated, “when the exercise of the basic rights of the individual depends on whether that individual is able to know relevant public information, the State must provide that information promptly, fully and by accessible means.”<sup>159</sup> As has been noted, the organs of the Inter-American system and other statements and instruments at the international level, require broad access to information on projects of this nature, even if this involves providing information on activities of private companies.
115. The right of access to information also facilitates the exercise of other fundamental rights. In this regard, the IACHR has considered that “access to information is a prerequisite for public participation in decision-making and for individuals to monitor and respond to public and private sector action.”<sup>160</sup> Access to relevant information is a necessary element to access to judicial remedies. In this regard, the Commission notes that one of the major obstacles that individuals and communities face when trying to access justice for human rights violations related to companies is the lack of information on their activities, structure, and impact, as well as the options for redress. It is common for people living in affected areas to lack basic information about the business activities carried out locally, and the potential risks to their lives. The lack of information on corporate operations can make it very difficult for people or communities affected to gather the necessary evidence to take legal action. It can also make it challenging to establish the causal links between corporate operations, and the negative impacts on human rights that they suffer. Therefore, the failure to obtain or disclose information affects the right to an effective remedy, discussed later in this report.<sup>161</sup>
116. In addition to access to information, in these contexts the right to public participation in decision-making is particularly relevant, as it allows those who have their interests at stake to voice their opinion in the processes that affect them.<sup>162</sup> Public participation is linked to Article 23 of the American Convention, which establishes that all citizens must enjoy the right “to take part in the conduct of public affairs, directly or through freely chosen representatives”. In similar terms, Article XX of the American Declaration provides that “[e]very person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”

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<sup>159</sup> IACHR. Application to the Inter-American Court of Human Rights in the case of Kichwa People of Sarayaku (Case 12.465) against Ecuador. April 26, 2010. para. 136.

<sup>160</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/SeriesL/V/II.96, doc. 10 rev. 1 April 24, 1997.

<sup>161</sup> Amnesty International. *Injustice incorporated. Corporate abuse and the human right to remedy*. Amnesty International, 2014. p. 159.

<sup>162</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/SeriesL/V/II.96, doc. 10 rev. 1 April 24, 1997.

117. Regarding the content of this right, the Inter-American Court has indicated that "[p]olitical participation can include widespread and varied activities that people perform individually or within an organization in order to intervene in the appointment of those who will govern a State or who will be responsible for conducting public affairs, as well as to influence the development of State policy using direct participation mechanisms."<sup>163</sup> The Court has also stated that "[c]itizens have the right to play an active role in the conduct of public affairs directly through referenda, plebiscites or consultations or through freely elected representatives."<sup>164</sup> The Commission has recommended, in particular, to implement "measures to ensure that all persons have the right to participate, individually and jointly, in the formulation of decisions which directly concern their environment."<sup>165</sup>
118. Similarly, when confronted with measures authorizing business activities and that represent an interference with their rights recognized under the European Convention, the European Court has stated that "whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8."<sup>166</sup> Therefore, the Court has ruled that in determining whether the State complied with this requirement, "[i]t is therefore necessary to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available."<sup>167</sup> Similarly, in the *case Giacomelli v. Italy*, concerning the adverse effect of a plant for the treatment of toxic industrial waste, the European Court found that the State violated the right to effective enjoyment of private and family life, because the mechanisms provided for by the national legislation for the protection of individual rights were deprived of useful effect, specifically that "any citizens concerned to participate in the licensing procedure and to submit their own observations to the judicial authorities."<sup>168</sup>

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<sup>163</sup> IA Court. *Castañeda Gutman v Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184. para.146.

<sup>164</sup> IA Court. *Castañeda Gutman v Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184. para.147.

<sup>165</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/SeriesL/V/II.96, doc. 10 rev. 1 April 24, 1997.

<sup>166</sup> ECHR. *Taşkın and Others v. Turkey*. Application no. 46117/99. 10 November 2004. § 118. See also: *McMichael v. the United Kingdom*, Application no. 16424/90, 24 February 1995, § 87. ECHR. *Hatton and Others v. the United Kingdom*. Application no. 36022/97. 8 July 2003. § 104.

<sup>167</sup> ECHR. *Taşkın and Others v. Turkey*. Application no. 46117/99. 10 November 2004. § 118. See also: *McMichael v. the United Kingdom*, Application no. 16424/90, 24 February 1995, § 87. ECHR. *Hatton and Others v. the United Kingdom*. Application no. 36022/97. 8 July 2003. § 104.

<sup>168</sup> ECHR. *Giacomelli v. Italy*. Application no. 59909/00. 26 March 2007. §94-97.

## **6. Duty to prevent illegal activities and forms of violence against the population in areas affected by extractive or development activities**

119. The Inter-American Commission has received troubling information regarding other human rights violations or threats generated in the context of the implementation of extractive or development projects or plans. The monitoring conducted by the Commission has revealed that in contexts where these plans or projects are carried out with the opposition of the affected indigenous peoples and Afro-descendent communities, there have been acts of harassment, threats and attacks. As observed by the IACHR, these acts are mainly directed against their leaders or other persons involved in the process of defending their rights. For example, the IACHR has been informed of acts of physical violence, including sexual violence against indigenous women; the implementation of mechanisms of criminal prosecution against authorities, leaders and members of indigenous communities; as well as acts of stigmatization and disrepute. All of these take place in a context marked by the lack of effective access to justice for indigenous and tribal peoples.
120. The IACHR notes that the situations are characterized by being directed to the indigenous authorities, community leaders or other community members who play key roles in the process of claiming their rights. They may also be oriented towards community members who are most at risk, such as the case of boys or girls. The actions reported are performed by or at the request of persons linked to extractive companies, who usually have strong economic power and are able to exert strong local pressure. In addition, it is noted that situations often go through an escalation in violence –in most cases reported, it starts with pressures and harassment, followed by death threats and then finally kidnapping or murder. The Commission strongly condemns these acts and understands that this is part of a message of intimidation to instill fear in peoples and communities fighting for their land rights.
121. In this regard, the IACHR recalls that the right to life is fundamental to the exercise of any other right, and is protected by Article I of the Declaration<sup>169</sup> and 4 of the American Convention.<sup>170</sup> Both the rights to life and to personal integrity constitute the minimum necessary for the exercise of any activity.<sup>171</sup> Protecting the right to life, in accordance with the State's obligation to guarantee human rights, entails not only negative obligations, but also obligations of a positive character. In particular, States have the duty to adopt measures to prevent and protect against

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<sup>169</sup> Article I of the American Declaration established that "[e]very human being has the right to life, liberty and security of the person."

<sup>170</sup> Article 4 of the Convention states: "Everyone has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of life [...]"

<sup>171</sup> IACHR, Report on the Situation of Defenders of Human Rights in the Americas, para. 42. See also, IA Court, Myrna Mack Chang vs. Guatemala. Judgment of November 25, 2003. Series C No. 101, para. 152.

the knowledge of a situation of real and immediate risk for an individual or group of individuals, and must adopt reasonable steps to prevent or avoid that risk."<sup>172</sup>

122. Likewise, the European Court has found that the duty of prevention extends "in appropriate circumstances to a positive obligation of the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual".<sup>173</sup> Notwithstanding the foregoing, the European Court has recognized that such positive obligation cannot be imposed on the State as an impossible or disproportionate obligation.<sup>174</sup> Therefore, it is necessary that the State authorities "knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."<sup>175</sup> In this regard, the European Court has established that the State must verify "whether the authorities did all that could reasonably be expected of them to avoid the risk."<sup>176</sup>
123. The active protection of the right to life and other rights enshrined in the American Convention, is part of the State's duty to guarantee the free and full exercise of the rights of all persons within the jurisdiction of a State, and mandates that it takes steps to punish deprivation of life and other human rights violations, and to prevent that any of these rights are violated by its own security forces or third parties acting with its acquiescence.<sup>177</sup> In the specific case of those who are organized to defend and promote a human right, as can be the right to a healthy environment, the IACHR and the Inter-American Court have identified a close relationship between the right to life and the exercise of freedom of association.<sup>178</sup> Therefore, acts against the life of a human rights defender, motivated by their work, may also involve the violation of the right to freedom of association.
124. The Commission further observes that sometimes the violence has allegedly been committed by agents of companies that provide security services. In this regard, the IACHR recalls that in its *Report on Citizen Security and Human Rights* it provided some guidelines towards fulfilling the duty of prevention in respect to

<sup>172</sup> IA Court. Massacre case of Pueblo Bello v Colombia. Judgment of January 31, 2006. Series C No. 140. para. 123.

<sup>173</sup> ECHR. *Kiliç v. Turkey*. Application No. 22492/93. 28 March 2000, § 62; *Osman v. United Kingdom*. Application No. 87/1997/871/1083. 28 October 1998. § 115.

<sup>174</sup> ECHR. *Kiliç v. Turkey*. Application No. 22492/93. 28 March 2000, § 63; *Osman v. United Kingdom*. Application No. 87/1997/871/1083. 28 October 1998. § 116.

<sup>175</sup> ECHR. *Kiliç v. Turkey*. Application No. 22492/93. 28 March 2000, § 63; *Osman v. United Kingdom*. Application No. 87/1997/871/1083. 28 October 1998. § 116.

<sup>176</sup> ECHR. *Mahmut Kaya V. Turkey*. Application no. 22535/93. 28 March 2000. § 92.

<sup>177</sup> IA Court. Case of 19 Tradesmen v Colombia. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109. para. 183.

<sup>178</sup> IA Court, Manuel Cepeda Vargas v Colombia. Preliminary Objections, Merits and Reparations. Judgment of May 26, 2010. Series C No. 213, par. 172; IA Court., Case of Kawas Fernández V. Honduras. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 150; IACHR. No. 13/96, Case 10,948 (El Salvador), 1 March 1996, par report. 25. Commission. Second Report on the Situation of human rights defenders in the Americas. OAS/Ser.L/V/II. Doc. 66. 31 December 2011. para. 26.

private security companies. The Commission has noted in this respect that "[t]o be in compliance with their duty to ensure the human rights at stake in citizen security policies, the member states must undertake the mission of preventing, deterring and suppressing crime and violence, as theirs is a monopoly on the legitimate use of force."<sup>179</sup>

125. In specific terms, the Commission has highlighted the need for domestic law to regulate the functions that can be performed by private security companies, the type of weapons and materials that they are authorized to use, the appropriate mechanisms for monitoring their activities, and the implementation of a public, accessible record with sufficient information. Likewise, a system should be defined for these private companies to report regularly on contracts they are executing, specifying the type of activities they perform. Public authorities must enforce the selection and training requirements of the people hired by private security companies, specifying which public institutions are able to issue certifications authorizing their employees.<sup>180</sup> The IACHR also emphasizes that a fundamental duty of the State is to investigate and, where appropriate, punish the material and intellectual perpetrators of human rights violations of which it is aware. As indicated by the Commission and the Court in its evolving jurisprudence, this obligation requires that all perpetrators involved in the events be punished, as well as the intellectual authors thereof.<sup>181</sup>
126. Other situations that the Commission has learned about are related to illegal extractive activities, which occur more frequently in relation to logging, mining or fishing in certain areas, impacting the environment and rights of local communities. For example, informal mining, especially in the Amazon region, generates an intense pace of deforestation and pollution of soil and water, resulting from the use of substances such as mercury, which seriously affects the environment. The Commission observes that these activities are usually implemented in lands and territories historically inhabited by indigenous peoples and Afro-descendent communities.
127. In this regard, it should be recalled that States are obligated to monitor and prevent illegal extractive activities in territories inhabited by indigenous peoples and Afro-descendent communities, and to investigate and punish those responsible.<sup>182</sup> For example, the IACHR has referred on several occasions to instances of illegal activities of extraction of natural resources in indigenous territories, explaining that such activities constitute threats and encroachments of

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<sup>179</sup> IACHR. Report on Citizen Security and Human Rights, para. 72.

<sup>180</sup> IACHR. Report on Citizen Security and Human Rights, para. 72.

<sup>181</sup> IA Court. Case of the Gómez Paquiyauri Brothers v Peru. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, par. 146; Myrna Mack Chang vs. Guatemala. Merits, Reparations and Costs. Judgment of November 25, 2003.

<sup>182</sup> IACHR. Rights of indigenous and tribal peoples to their ancestral lands and natural resources. Rules and jurisprudence of the Inter-American Human Rights System. OAS/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 268.

effective ownership and possession of indigenous territories<sup>183</sup> and threaten the survival of those indigenous peoples, especially due to their impact on rivers, soil and other resources that constitute their main sources of livelihood.<sup>184</sup> The Commission also warns that soil degradation in the Amazonas is especially challenging to remedy, and leads to desertification and permanent loss in major areas.

## 7. Duty to guarantee access to justice: investigation, sanction, and reparations for human rights violations

128. The Commission also considers important to underscore in this report the State obligations to ensure the access to adequate and effective remedies for human rights violations, in line with due process guarantees. According to the consolidated jurisprudence of the inter-American system, based on the obligations contained in Articles 8 and 25 of the American Convention, "[...] everyone has the right to a simple and prompt recourse, or any other effective recourse, to a competent court or judge for protection against acts that violate his fundamental rights, which constitutes one of the basic pillars not only of the American Convention, but also of the very rule of law in a democratic society in the sense of the Convention."<sup>185</sup>
129. Moreover, the Inter-American Court has held that Article 25.1 of the Convention establishes, in general terms, the obligation of States to ensure an effective judicial remedy for acts violating fundamental rights. In other words, "the State has the obligation to design and embody in legislation an effective recourse, and also to ensure the due application of the said recourse by its judicial authorities."<sup>186</sup> The system of administration of justice is therefore the first line of defense for the protection of human rights at the national level, and its work is paramount for the individual rights referred to in this report.
130. The IACHR has referred to the importance of these fundamental guarantees for the protection of human rights commonly affected in the context of extractive and development activities. In particular, the Commission has indicated that, along with access to information, participation in relevant decision-making processes, "requires that individuals have access to [...] judicial recourse" "to guard against

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<sup>183</sup> IACHR. Report on the Situation of Human Rights in Brazil. Doc. OAS/Ser.L/V/II.97, Doc. 29 rev. 1 September 29, 1997, para. 33.

<sup>184</sup> IACHR. Democracy and Human Rights in Venezuela. Doc. OAS/Ser.L/V/II, Doc. 54, December 30, 2009.

<sup>185</sup> See inter alia IA Court. Case of the "Street Children" (Villagrán Morales et al) vs. Guatemala. Background. Judgment of November 19, 1999. Series C No. 63 para. 234; Cesti Hurtado case. Judgment of September 29, 1999. Series C No. 56, para. 121; Castillo Petruzzi and others. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52.párr. 184.

<sup>186</sup> IA Court. Case of the "Street Children" (Villagrán Morales et al) vs. Guatemala. Background. Judgment of November 19, 1999. Series C No. 63 para. 237.

environmental conditions which threaten human health."<sup>187</sup> The Commission has also noted that "[t]his means that individuals should have access to judicial recourse to vindicate the rights to life, physical integrity and to live in a safe environment, all of which are expressly protected in the Constitution."<sup>188</sup> The IACHR has also issued statements in this regard within the petitions and cases mechanism.<sup>189</sup>

131. In the framework of the United Nations, it is worth mentioning the *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, in which the CESCR has indicated that: "States Parties [must] effectively safeguard rights holders against infringements of their economic, social and cultural rights involving corporate actors, by establishing appropriate laws, regulations, as well as monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations."<sup>190</sup> The Committee also stressed the importance of this right in the following terms: "It is of utmost importance that States Parties ensure access to effective remedies to victims of corporate abuses of economic, social and cultural rights, through judicial, administrative, legislative or other appropriate means."<sup>191</sup> The Commission also takes note that access to redress mechanisms is one of the three pillars of the Guiding Principles on Business and Human Rights.<sup>192</sup>

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<sup>187</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/Series L/V/II.96, doc. 10 rev. 1 April 24, 1997.

<sup>188</sup> IACHR. Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/Series L/V/II.96, doc. 10 rev. 1 April 24, 1997.

<sup>189</sup> In this sense, it is worth mentioning Admissibility Report No. 69/04, which was adopted by the Commission in the case of the Community of San Mateo de Huanchor and its members in Peru, where the Peruvian State was found internationally responsible for the alleged effects of an adjacent tank of toxic waste tailings on the community members. In assessing the adequacy and effectiveness of the processes initiated in order to determine the exhaustion of domestic remedies, the Commission noted that there was an unwarranted delay in the processing of the criminal case against the general manager of the mining company for alleged crimes against the Environment and Natural Resources. Also, administrative decisions mandating the removal of toxic waste tailings were not complied with, resulting in damage to the health of the population of San Mateo de Huanchor. Based on these considerations, the Commission considered, for the purposes of admissibility, that proceedings before the administrative and judicial authorities in order to seek legal protection for the rights affected to the detriment of the inhabitants of San Mateo de Huanchor had been ineffective. See, IACHR. Admissibility Report No. 69/04, Petition 504/03, Community of San Mateo de Huanchor and its Members, Peru, October 15, 2004. para. 44-64. See, in a similar sense, IACHR. Admissibility Report No. 76/09, Petition 1473-06, Community of La Oroya, Peru, August 5, 2009, paras. 55-69.

<sup>190</sup> UN. CESCR Committee. Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights. E/C.12/2011/1. July 12, 2011. para. 5.

<sup>191</sup> UN. DESC Committee. Declaration on the obligations of States parties regarding the corporate sector and economic, social and cultural rights. E/C.12/2011/1. July 12, 2011. para. 5.

<sup>192</sup> In this regard, the principle 25 states that: "As part of its duty to protect against human rights violations related to business activities, States should take appropriate measures to ensure, by way of judicial, administrative, legislative or other appropriate measures, that when such abuses on their territory and/or jurisdiction those affected have access to effective redress mechanisms ". UN, Report of the Special Representative of the Secretary-General on Business and Human Rights, John Ruggie, Guiding Principles on Business and Human Rights: implementation of the framework of the United Nations "Protect, Respect and Remedy," A/HRC/17/31, March 21, 2011, Principle 25.

132. The European Court of Human Rights, after analyzing matters related to the infringement of rights due to the authorization of business projects, has established that "the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process."<sup>193</sup> Therefore, the Court has required the application of this safeguard in regard to rights affected as a result of business activities. For example, in the case *Öneryıldız v. Turkey*—related to the death of at least nine people after an explosion in a garbage dump—the Court found the State responsible for the violation of the right to life, in its procedural dimension. The Court considered that the criminal justice system had not ensured the full accountability of officials and state authorities, or the effective implementation of provisions of domestic law guaranteeing respect for the right to life, in particular those that allow the criminal law to fulfill its deterrent function.<sup>194</sup>
133. As evidenced by the mentioned international decisions and instruments, the right of access to an appropriate and effective remedy in this context can be exercised with respect to very different human rights violations. It includes, for example, access to mechanisms to challenge the authorization of the activity, the removal of the source of violation with the aim of halting the environmental pollution, and securing reparations when damage has already been caused. Depending on the alleged violation, it may require the application of criminal law, for example, against breaches to the rights to life and personal integrity. In these cases, it entails the investigation, prosecution and, if applicable, punishment of those responsible.
134. On this last point, the Commission recalls that, as indicated by the Inter-American Court, "[t]he execution of an effective investigation is a fundamental and conditioning element for the protection of certain rights that are affected or annulled by these situations, such as, in the instant case, the rights to personal liberty, humane treatment and life. This assessment is valid whatsoever the agent to which the violation may eventually be attributed, even individuals, because, if their acts are not investigated genuinely, they would be, to some extent, assisted by the public authorities, which would entail the State's international responsibility."<sup>195</sup> Therefore, as established by the Inter-American Court "the State's international responsibility is also at issue when it does not take the necessary steps under its domestic law to identify and, where appropriate, punish the authors of such violations."<sup>196</sup>
135. In the words of the Court, "[i]f the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure

<sup>193</sup> ECHR. *Taşkın and Others v. Turkey*. Application no. 46117/99. 10 November 2004. § 119. ECHR. *Hatton and Others v. the United Kingdom*. Application no. 36022/97. 8 July 2003. § 127. ECHR. Case of Giacomelli v. Italy. Application no. 59909/00. 26 March 2007 § 83.

<sup>194</sup> ECHR. *Öneryıldız v. Turquía*. Application no. 48939/99. 30 November 2004. para. 117.

<sup>195</sup> IA Court. Case of the Pueblo Bello Massacre vs. Colombia. Judgment of January 31, 2006. para 145.

<sup>196</sup> IA Court. Case of the "Panel Blanca" (Paniagua Morales et al) vs. Guatemala Judgment of March 8, 1998 (Merits). para. 91.

the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention."<sup>197</sup> As it has been repeatedly warned by the Inter-American system, the application of effective justice –that is, conducting investigation processes, punishment and reparation against companies that violate human rights– is a key deterrent to prevent future recurrence of human rights violations.

136. The Commission notes with concern that there is a serious situation of impunity in the hemisphere with regard to human rights violations committed in the context of extractive or development projects. This is linked to the existence of a number of legal or administrative obstacles that are almost impossible to overcome.<sup>198</sup> Such barriers exist at all jurisdictional levels, and extend beyond the differences in legislations, the perspectives of tribunals and the protection of human rights at the national level.<sup>199</sup>
137. For example, victims face obstacles related to the investigation and collection of evidence for the submission of claims, access to lawyers, lack of knowledge of their rights, among others. The barriers to justice are also related to the high threshold which may be required from the victims to prove the alleged violations and therefore, the costs involved. Evidence of human rights violations in cases of environmental damage, for example, can entail enormous costs as they require sophisticated technical testing or expert scientific opinions, as well as experts' fees and costs related to the transportation of the experts to the affected areas; costs which generally cannot be assumed by the affected individuals and require the intervention of specialized agencies.<sup>200</sup> This can create additional difficulties when access to the mechanisms is restricted to a deadline. The difficult task of obtaining, preserving and collecting evidence, and providing testimony is sometimes exacerbated by possible risks to the safety of alleged victims, which is not an uncommon situation.<sup>201</sup>
138. Additionally, it is important to bear in mind that certain companies or business groups are often influential economic agents in the countries where they operate,

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<sup>197</sup> IA Court. *Velásquez Rodríguez v Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4. para. 176.

<sup>198</sup> See in this regard Amnesty International. *Injustice incorporated. Corporate abuse and the human right to remedy*. Amnesty International 2014. Similarly, SKINNER, Gwynne; Robert McCorquodale and Olivier De Schutter. *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*. International Corporate Accountability Roundtable (ICAR), CORE & European Coalition for Corporate Justice (ECCJ). December 2013. IACHR. Companies hearing, human rights and consultation in America. 154th Session. March 17, 2015.

<sup>199</sup> SKINNER, Gwynne; Robert MCCORQUODALE y Olivier DE SCHUTTER. *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*. International Corporate Accountability Roundtable (ICAR), CORE & European Coalition for Corporate Justice (ECCJ). Diciembre 2013. p. 2.

<sup>200</sup> RIDH. *Considerations of the Second Global Forum on Business and Human Rights*. Document submitted to the Working Group of the United Nations on business and human rights. October 2013. p.1. RIDH. *Business and human rights: considerations facing the III World Forum*. November 2014.

<sup>201</sup> SKINNER, Gwynne; Robert MCCORQUODALE y Olivier DE SCHUTTER. *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*. International Corporate Accountability Roundtable (ICAR), CORE & European Coalition for Corporate Justice (ECCJ). December 2013.p.18.

especially in economies heavily dependent on the activities that these companies undertake and the political will to secure access to justice might be absent.<sup>202</sup>

139. The IACHR notes with concern that in several countries of the continent these barriers are intensified for indigenous peoples and Afro-descendent communities, given the persistence of a wide gap in access to justice between their members and the rest of the population. Indeed, although the courts have a duty to treat all citizens on an equally, the IACHR has been informed that, for example, there is a severe delay in processing complaints by indigenous peoples in comparison with non-indigenous, especially from the business sector. Authorities and indigenous representatives have expressed to the IACHR that such inequality is more serious with regard to rights violations arising from projects for which there was no consultation, scenarios in which appeals of various kinds, including of protection, unconstitutionality or criminal complaints, have been filed and which have been rejected. In the exceptional cases where these claims have been received, the decisions are not complied with nor implemented by the competent authorities.
140. In the words of an indigenous leader from Panama, "the complaints and reports we file do not matter, because our demands are always ignored and we are treated as inferior people who have no rights and if we claim too much, the police is sent to us as if we were criminals."<sup>203</sup> Another example of this is in relation to the construction of the transoceanic canal in Nicaragua, because according to the information received by the Commission, the Supreme Court of Justice has dismissed more than thirty legal actions of unconstitutionality submitted by 180 Nicaraguan citizens of broad social, political, and cultural sectors from the country. It was reported that this has happened, despite the serious incompatibilities of the legislation authorizing the project with Nicaraguan law and its international obligations, thus validating a project that puts at serious risk constitutional and treaty rights of indigenous and tribal peoples.<sup>204</sup>

### a. Specific Problems Attributable to Foreign Investment

141. Those whose rights have been affected as a result of the acts performed by foreign or transnational companies face even more serious challenges. Due to their nature and scope, it is difficult for traditional judicial mechanisms to be effective at holding foreign enterprises accountable. Legal redress by means of civil or criminal lawsuits may be complicated in the internal systems of the countries involved; the State of origin of the company and country of destination of their activities. Therefore, host States generally do not fulfill their obligation to ensure access to effective judicial remedies to victims of human rights violations committed by such

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<sup>202</sup> Amnesty International. *INJUSTICE INCORPORATED. The corporate abuses and the human right to a remedy*. Amnesty International, 2014. p. 1.

<sup>203</sup> IACHR. Hearing on the Situation of property rights and the healthy environment of indigenous peoples in Bocas del Toro, Panama. 154th Session. March 20, 2015.

<sup>204</sup> See IACHR. Hearing on the "Construction of the transoceanic canal and its impact on human rights in Nicaragua", 154th Session, March 16, 2015.

foreign companies. At the same time there are many obstacles to achieving justice for alleged violations of foreign companies in the States of origin.

142. Rules of jurisdiction may also complicate access to adequate and effective legal remedies where attempts are made to bring suits in the countries of origin for actions of companies that occurred in host states. It must be added that host States where businesses operate may not be able to offer effective judicial recourses and enforce judgments, when the claim includes assets outside their jurisdiction. These jurisdictional difficulties in attempting to obtain remedies for claims in civil or criminal law against businesses underscore the need for effective mechanisms to be located within the realm of international human rights law which can attribute State responsibility for human rights violations to States of origin in certain cases.

A case which exemplifies the weaknesses of the investigative and judicial systems of countries where multinationals invest is the one involving the multinational *Chiquita Brands*. According to information available to the IACHR, in March 2007, the multinational company pleaded guilty in a United States courtroom to financing and supporting paramilitary groups in Colombia which were responsible for committing massacres, extrajudicial executions and forced labor in the context of the Colombian armed conflict. Given its acknowledgment of guilt, the company was ordered to pay more than \$25 million dollars to the State Department. In March 2012, the Specialized Prosecutor #33 of Medellin, facing the same facts that were judged by the court in the United States, rather decided to close the case against the multinational. Then, in December of the same year, the Attorney General's Office reversed that decision and ordered the reopening of the case.<sup>205</sup>

143. Victims also often face practical difficulties in starting and sustaining litigation, due to the costs associated with obtaining evidence, the cost of legal and technical experts, and the fact that due to their complexity these processes may take several years. These difficulties also present themselves when the lawsuit is undertaken in the company's host country, although they are much worse when they are undertaken in countries other than their own. The Commission notes that for victims of human rights violations, that often have very limited financial resources, the cost of litigation is a serious obstacle to their access to the courts.<sup>206</sup> These barriers, in addition to those already mentioned, make access to justice exceptionally difficult and often impossible. Therefore, for the people and communities whose rights are affected by the activities of multinational

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<sup>205</sup> See, the RIDH. *Considerations for the Second Global Forum on Business and Human Rights*. Document submitted to the Working Group of the United Nations on business and human rights. October 2013. p.1. For further information, see Case Business & Human Rights Resource Centre. [Profile lawsuits against Chiquita for activities in Colombia](#).

<sup>206</sup> SKINNER, Gwynne; Robert MCCORQUODALE y Olivier DE SCHUTTER. *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*. International Corporate Accountability Roundtable (ICAR), CORE & European Coalition for Corporate Justice (ECCJ). December 2013. p.18.

companies, this is one of the areas of greatest concern for the Commission in the current context in the region.

144. Therefore, the adoption of measures to ensure the investigation and, where appropriate, the application of criminal and administrative sanctions to the people in the public or private sphere, and companies responsible for human rights violations is required. With regard to foreign or transnational corporations, the latter implies action by both the host State, and the State of origin. In some jurisdictions, this may include the adoption of measures to ensure that national jurisdiction counts with effective mechanisms and institutions that allow the filing of complaints and the reparations to victims, taking into account international standards derived from human rights instruments.<sup>207</sup>
145. To reduce impunity, it would be useful for the competent authorities to carry out diagnostic work to identify complaints and proceedings against representatives of companies in recent years and what have been their results. Likewise, in a more developed system of accountability for states of origin, such states can institute 'blacklists' of companies that violate human rights so as to compel compliance.
146. Likewise, a coherent legal system, respectful of human rights, requires criminal justice to be joined by the adoption of punitive administrative measures, such as the cancellation of operating licenses for companies that are being investigated or convicted for the violation of human rights, or the prohibition on companies linked to human rights violations to develop their activities directly or through business partners.<sup>208</sup>
147. The IACHR wishes to underscore, moreover, that an essential component of the right to an effective remedy is the reparation of the damage. Derived from the general duty to guarantee human rights, the State has the obligation to directly repair the damage or when it is committed by third parties, guarantee mechanisms to obtain redress for human rights violations committed; a duty that is certainly enforceable against abuses by companies. In this regard, the Commission considers it necessary to highlight that when it comes to indigenous peoples or Afro-descendent communities affected, the right to reparation requires taking into account the perspective of the victims. Ethnic groups, by their nature, can be disproportionately affected by the behavior or may be affected in different ways. This highlights the immense importance that the determination of reparations be guided by the principles of recognition of the ethnic group as a collectivity. This includes the need for measures to respect the particular cultural identity of the people or community; take into account the collective dimension of the violations

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<sup>207</sup> RIDH. [Considerations for the Second Global Forum on Business and Human Rights](#). Document submitted to the Working Group of the United Nations on business and human rights. October 2013. p.1.

<sup>208</sup> RIDH. [Considerations for the Second Global Forum on Business and Human Rights](#). Document submitted to the Working Group of the United Nations on business and human rights. October 2013. p.5.

and remedial measures; and for reparations to be effective, they must meet the specific needs of the ethnic group.<sup>209</sup>

148. In order to ensure an effective remedy for victims of human rights violations related to extractive or development projects, States must adopt measures of various kinds to reduce and eliminate the barriers identified herein. As previously noted by the Commission, ensuring access to justice and to reparations, and responding to violations of human rights committed, is a fundamental way to prevent future violations of these rights.

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<sup>209</sup> See RODRIGUEZ GARAVITO, Cesar and Yukyan LAM. [Ethno-Reparations: Ethnic collective justice and Reparations for Afro and Indigenous Communities in Colombia](#). Dejusticia. Bogota: 2011.

CHAPTER 3  
SPECIFIC OBLIGATIONS AND  
GUARANTEES IN RELATION TO  
INDIGENOUS AND TRIBAL  
PEOPLES AND AFRO-  
DESCENDENT COMMUNITIES



## SPECIFIC OBLIGATIONS AND GUARANTEES IN RELATION TO INDIGENOUS AND TRIBAL PEOPLES AND AFRO-DESCENDENT COMMUNITIES

149. The organs of the inter-American System have underscored repeatedly that States have specific obligations in relation to indigenous peoples, given that these are original and pre-existing societies to colonization, or the establishment of current State borders. The recognition of specific rights for these peoples is also linked to the respect and appreciation of different cultural views, understandings of well-being and development, and ultimately, of their right to exist as ethnic and culturally differentiated peoples. However, the cultural differences in the region have not always been understood in terms of recognition and protection, instead these peoples have historically been subjected to marginalized conditions and discrimination. The historical exclusion which they have and still suffer and the practices of assimilation and dispossession have solidified gaps of a social, economic and human rights nature between indigenous peoples and the rest of the population.<sup>210</sup>
150. The overcoming of this situation, as well as their recognition and protection as culturally different peoples requires wide political and institutional structures that allow them to participate in public life, and protect their cultural, social, economic and politic institutions in the decision-making process. This requires, among other aspects, the promotion of an intercultural citizenship based on dialogue, the generation of culturally appropriate services, and differentiated attention for indigenous and tribal peoples. Effective participation, through the right to consultation and, when applicable, to previous, free and informed consent, constitutes an institution that allows the exercise of their singularity as ethnic groups and the guarantee of their rights, essential in multicultural, pluralist, and democratic States.
151. Having the protection and promotion of their socio-cultural identity as a core standard, the bodies of the inter-American System have elucidated the specific content of the rights of indigenous and tribal peoples, on the basis of the

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<sup>210</sup> This is reflect, among other aspects, in the high rates of poverty and extreme poverty of indigenous population, the high rates of morbidity and maternal and child mortality; the high rate of indigenous children with malnutrition; and the reduced access to health and education services, without out them being culturally appropriate. See *inter alia* United Nations Economic Commission for Latin America and the Caribbean (ECLAC). *Guaranteeing indigenous people's rights in Latin America. Progress in the past decade and remaining challenges: Summary*. UN/ECLAC. Santiago, Chile: 2014 p. 80-84; and UN. *Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz*. A/HRC/27/52. August 11, 2014, para. 42. First session of the Regional Conference on Population and Development in Latin America and the Caribbean. *Montevideo Consensus on population and Development*. Montevideo: 2013. Preamble, para. 3.

obligations under the American Convention and the American Declaration. The issue that has required greater attention from the Commission is the right to collective property of indigenous and tribal peoples over their lands, traditional territories, and the natural resources that lie in or within. As recognized by the IACHR “its enjoyment involves not only protection of an economic unity but also protection of the human rights of a collectivity whose economic, social and cultural development is based on its relationship with the land.”<sup>211</sup> The Inter-American Court has highlighted that the territorial rights of indigenous peoples are related to “the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations.”<sup>212</sup>

152. In this way, States have the obligation to guarantee the effective participation of indigenous peoples when considering any measure that affects their territories,<sup>213</sup> taking into account their special relationship with the land and its natural resources.<sup>214</sup> This is a concrete expression of the general rule according to which the State shall ensure “that indigenous peoples be consulted on any matters that might affect them,”<sup>215</sup> noting that the purpose of such consultation “should be to obtain their free and informed consent,”<sup>216</sup> as prescribed in ILO Convention 169<sup>217</sup> and the United Nations Declaration on the Rights of Indigenous Peoples.<sup>218</sup> Consultation and consent are not limited to matters which affect the property rights of indigenous peoples. They are also applicable to other administrative or

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<sup>211</sup> IACHR, Allegations before the Inter-American Court of Human Rights on the case of *Yakye Axa v. Paraguay*. In: I/A Court H.R. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 120(c).

<sup>212</sup> I/A Court H.R. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 146.

<sup>213</sup> IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1058.

<sup>214</sup> IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1071.

<sup>215</sup> IACHR, *Follow-Up Report – Access to Justice and Social Inclusion: The road towards strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, para. 158.

<sup>216</sup> IACHR, *Follow-Up Report – Access to Justice and Social Inclusion: The road towards strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, para. 158.

<sup>217</sup> ILO Convention 169 requires the States to consult with indigenous peoples in good faith, with the objective of achieving their agreement or consent on the aspects of management schemes or projects that affect them, and calls upon States to carry out consultations with indigenous peoples in connection with a variety of contexts (arts. 6, paras. 1 and 2, 15, para. 2, 17, para. 2, 22, para. 3, 27, para. 3, and 28). A tripartite committee of the ILO Governing Body has in fact stated that “the spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all its provisions are based”. [Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), para. 31. Quoted by: UN – Human Rights Council - Report of the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Doc. ONU A/HRC/12/34, July 15, 2009, para. 39.]

<sup>218</sup> See, *inter alia*, arts. 10, 11, 15, 17, 19, 28, 29, 30, 32, 36, and 38 of the UN Declaration.

legislative actions of the States that may have an impact on the rights or interests of indigenous peoples.<sup>219</sup>

153. The fundamental importance of this right is contrasted by a reality whereby most of the extractive activities on the countries in the region —mainly mining and hydrocarbons/oil— are developed in the lands and territories historically occupied by indigenous and tribal peoples, that usually coincide with areas that harbor vast amounts of natural resources. In addition, according to the information available to the IACHR, with an alarming frequency the plans and projects of development of roads, canals, dams, hydroelectric dams, ports, tourist resorts, wind farms, or the like, take place and affect the lands and territories of indigenous and tribal peoples. In some areas of the continent, land grabbing for cattle, intensive crops or monocultures —such as sugarcane, soy, and oil palm— especially affect indigenous and tribal peoples and their lands and territories.
154. Certainly, during the past years and increasingly often, the above has become evident to the IACHR from the information received through its different mechanisms and monitoring activities, that accounts for the affectation of the rights of indigenous and tribal peoples in these contexts and non-compliance with the State's obligations in relation, mainly, to the right to consultation and free, prior and informed consent. In this regard and in the present chapter, the IACHR emphasizes and discusses the scope of the most relevant standards of the inter-American system. It also shares some of its main concerns in relation to compliance therewith by the States in the region and illustrates the issues through reference to some specific situations on which it has received information.

### ***A. Specific guarantees for indigenous and tribal peoples in the context of extractive and development activities***

155. The IACHR and the Inter-American Court have developed jurisprudence that safeguards the right to property of indigenous and tribal peoples in light of extractive or development plans and projects which are proposed for implementation within their territories. These organs have referred for this

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The United Nations Special Rapporteur has described the content of the general obligations as follows: "In accordance with the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169, States have a duty to consult with indigenous peoples through special, differentiated procedures in matters affecting them, with the objective of obtaining their free, prior and informed consent. Premised on an understanding of indigenous peoples' relative marginalization and disadvantaged conditions in regard to normal democratic processes, this duty derives from the overarching right of indigenous peoples to self-determination and from principles of popular sovereignty and government by consent; and it is a corollary of related human rights principles. The duty to consult applies whenever a legislative or administrative decision may affect indigenous peoples in ways not felt by the State's general population, and in such cases the duty applies in regard to those indigenous groups that are particularly affected and in regard to their particular interests. The duty to consult does not only apply when substantive rights that are already recognized under domestic law, such as legal entitlements to land, are implicated in the proposed measure." UN – Human Rights Council - Report of the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Doc. ONU A/HRC/12/34, July 15, 2009, paras. 62-63.

purpose to Article 21 of the American Convention and Article XXIII of the American Declaration, interpreted in a way that facilitates the enjoyment and exercise of the rights recognized by States in other international treaties and instruments.

156. For over a decade, the Commission has indicated that, in the case of activities undertaken by the State or under its authorization that have an impact in the use and enjoyment of the right to property of indigenous peoples, it is necessary that the State guarantees that the affected peoples have the possibility of participating in the different decision-making processes, have information of the activities that would affect them, and have access to protection and judicial guarantees in case their rights are not respect. In the *Report on the Situation of Human Rights in Ecuador*, regarding the visit of the IACHR to Ecuador in 1995, the Commission considered that it was essential “that individuals ha[d] access to: information, participation in relevant decision-making processes, and judicial recourse.”<sup>220</sup> Particularly in relation to indigenous peoples, the Commission recommended the State to “take the measures necessary to ensure the meaningful and effective participation of indigenous representatives in the decision-making processes about development and other issues which affect them and their cultural survival.”<sup>221</sup> Similar statements were made by the IACHR in its *Third Report on the Situation of Human Rights in Colombia*;<sup>222</sup> in the case *Mary and Carrie Dan*, decided by the IACHR in 2002;<sup>223</sup> in the case of the *Maya Indigenous Community of the Toledo District v. Belize*, decided in 2004;<sup>224</sup> among others.<sup>225</sup>

<sup>220</sup> IACHR, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96 Doc. 10 rev. 1, 24 April 1997, Chapter VIII, Conclusions.

<sup>221</sup> IACHR, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96 Doc. 10 rev. 1, 24 April 1997, Chapter IX. Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country.

<sup>222</sup> In that report, regarding the *in loco* visit of 1997, the IACHR referred to the oil activity in the indigenous traditional territories, taking into account the guarantees to the right to property of the U’wa indigenous people, and recommended the State to “ensure that the exploitation of natural resources found at indigenous lands should be preceded by appropriate consultations with and, to the extent legally required, consent from the affected indigenous communities.” IACHR, *Third Report on the Situation of Human Rights in Colombia*, Chapter X, Recommendation 4.

<sup>223</sup> In this case, brought before the IACHR on April 2, 1993, the Commission analyzed the gold activity performed with the authorization of the State in the ancestral territory of the members of the Western Shoshone people, without adequate consultation. The Commission considered that “any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.” IACHR, Merits Report N° 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, Annual Report of the IACHR, para. 140.

<sup>224</sup> In this case, the Commission referred, among others, to a concession granted by the State in 1993, to logging companies. The Commission concluded that: “the State, by granting [...] concessions to third parties to utilize the property and resources that could fall within the lands which must be delimited, demarcated and titled or otherwise clarified or protected, without effective consultations with and the informed consent of the Maya people and with resulting environmental damage, further violated the right to property [...] to the detriment of the Maya people.” In this sense, it highlighted that “that one of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their

157. The Inter-American Court has interpreted Article 21 of the American Convention, in light of the obligations under the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. In particular, in the case of the Saramaka people, the Court determined that Suriname –which is not a State party to the ILO Convention 169– had ratified both the ICCPR and the ICESCR. Consequently, the Court referred to the text of those instruments, as they have been interpreted by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, in order to determine the content of Article 21 of the American Convention in relation to its application to Suriname in this case, reiterating that “[p]ursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants.”<sup>226</sup> In sum, the Court affirmed that the safeguards related to “effective participation and sharing of benefits regarding development or extraction projects within traditional indigenous and tribal territories, are consistent with the observations of the Human Rights Committee, the text of several international instruments, and the practice in several States Parties to the Convention.”<sup>227</sup>
158. Moreover, the right to be consulted is established in ILO Convention No. 169 (Articles 6, 7 and 15, among other Articles), in the United Nations Declaration on the Rights of Indigenous Peoples (Articles 27 and 32, among other Articles), as well as in the Proposed American Declaration on the Rights of Indigenous Peoples (Article XXIV). Financial institutions such as the World Bank<sup>228</sup> and companies of different types have adopted similar requirements.<sup>229</sup> Additionally, as has been indicated by the Inter-American Court, “[s]everal Member States of the Organization of American States have incorporated [the obligation to consult] in their domestic laws and through their highest courts” and, similarly, “[o]ther courts of countries that have not ratified ILO Convention No. 169.”<sup>230</sup>
159. In sum, in the words of the Inter-American Court, “the obligation to consult, in addition to being a treaty-based provision, is also a general principle of

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traditional territories.” IACHR, Merits Report No. 40/04, Case 12.053. Maya Indigenous Community of the Toledo District (Belize), 12 October 2004, paras. 153 and 142. Belize ratified ILO Convention 169 in 1991.

<sup>225</sup> For example, see IACHR. *Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Chapter IV. Rights of indigenous peoples and peasant communities, para. 248. Bolivia ratified ILO Convention 169 in 1991.

<sup>226</sup> I/A Court. *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 93. See United Nations. Report of the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, A/HRC/9/9, 11 August 2008, paras. 20-30.

<sup>227</sup> I/A Court. *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 130.

<sup>228</sup> World Bank, *Indigenous Peoples*, OP/BP 4.10.

<sup>229</sup> See on this matter, OXFAM International, *Community Consent Index 2015. Oil, gas, and mining company public positions on Free, Prior, and Informed Consent*. 2015.

<sup>230</sup> I/A Court. *Case of Kichwa Indigenous Peoples of Sarayaku v. Ecuador*. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para. 164.

international law”.<sup>231</sup> Through said instruments and caselaw developments, international law has given a specific content to the obligation to guarantee the effective participation of indigenous and tribal peoples in situations which affect their territory. Given these advances, there now is a positive obligation of the State to dispose of adequate and effective mechanisms in order to obtain the free, prior and informed consent of indigenous peoples, in line with their customs and traditions, as a means to protect their human rights, before the launching of activities which might affect their interests and can affect their rights on their lands, territories and natural resources.<sup>232</sup> In addition, this Tribunal has indicated that “it is the obligation of the State – and not that of indigenous peoples – to prove that all aspects of the right to prior consultation were effectively guaranteed in this specific case.”<sup>233</sup>

160. For the purposes of granting extractive concessions or undertaking development and extraction plans and projects over natural resources in indigenous or tribal territories, the Inter-American Court has identified three mandatory conditions that apply when States are considering approval of such plans or projects: (a) compliance with the international law of expropriation, as reflected in Convention Article 21; (b) non-approval of any project that would threaten the physical or cultural survival of the group; and, (c) approval only after ensuring effective participation –and, where applicable, consent–, a prior environmental and social impact assessment conducted with indigenous participation, and reasonable benefit sharing.<sup>234</sup> These requirements “are consistent with the observations of the Human Rights Committee, the text of several international instruments, and the practice of several States Parties to the Convention.”<sup>235</sup> They are equally consistent with the United Nations Declaration on the Rights of Indigenous Peoples.<sup>236</sup>
161. The States’ approval of development or exploitation plans for natural resources frequently affects the capacity of indigenous peoples to use and enjoy their lands and other natural resources on or within their traditional territories. The organs of the system have been particularly careful when determining the balance between the right to indigenous communal property and the interest of the States in the

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<sup>231</sup> Corte IDH, *Caso Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*. Fondo y reparaciones. Sentencia de 27 de junio de 2012. Serie C No. 245, párr. 164.

<sup>232</sup> See *inter alia* IACHR, *Report on Ecuador 1997*, Conclusions of Chapter IX. Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country and Conclusions of Chapter VIII; IACHR, *Report on the situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102 Doc. 9 rev. 1, February 26, 1999, Chapter X. Recommendation No. 4.; IACHR, Merits Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), Annual Report of the IACHR 2002, para. 140; IACHR, Merits Report No. 40/04, Case 12.053. Maya Indigenous Communities of the District of Toledo (Belize), October 12, 2004, para. 142.

<sup>233</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para. 179.

<sup>234</sup> IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, para. 225.

<sup>235</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 130.

<sup>236</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 131.

sustainable exploitation of the natural resources.<sup>237</sup> Therefore, the specific guarantees mentioned above complement each other, and their objective is that decisions in relation to the territory are made by the indigenous and tribal peoples at issue, so that their physical and cultural survival is guaranteed, as well as their own conception of development and the continuity of their world view, traditional ways of living, cultural identities, social structures, and economic systems. The Commission will refer to each of these in the following paragraphs.

162. The right to consultation and the corresponding State obligation are interrelated to a myriad of human rights,<sup>238</sup> and particularly with the right to participation in decision-making enshrined in Article 23 of the American Convention, as interpreted by the Inter-American Court in *Yatama v. Nicaragua*.<sup>239</sup> Article 23 recognizes the right of “every citizen” to “take part in the conduct of public affairs, directly or through freely chosen representatives.” In the context of indigenous peoples, the right to political participation includes the right to “participate, in equal conditions, in decision-making on matters and policies that affect or could affect their rights [...] from within their own institutions and according to their values, practices, customs and forms of organization.”<sup>240</sup>
163. In this regard, Article 7(1) of ILO Convention 169 adds that the participation of indigenous peoples is not limited to consultation processes. It indicates that the States must guarantee that indigenous peoples “participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.” This implies that the participation of indigenous peoples must be constant and permanent, and not limited only to specific consultations which may be required periodically. In this line, Article 6(1)(b) of ILO Convention 169 indicates that the States shall “establish means” through which indigenous peoples “can freely participate to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.” In relation to Article 6 of ILO Convention 169, the Committee of Experts in the Application of Conventions and Recommendations (CEACR) of the ILO has stated that:

the extensive preparatory work on this provision suggests that the tripartite constituents sought to recognize: (a) that indigenous and tribal peoples have a right to participate in the decision-making process in the countries in which they live for all issues covered by the revised Convention and which affect them directly; (b) that this right of participation should be an effective one, offering them an opportunity to be heard and to have an impact on the decisions

<sup>237</sup> IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, para. 233.

<sup>238</sup> UN – Human Rights Council –Report of the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Doc. ONU A/HRC/12/34, July 15, 2009, para. 41.

<sup>239</sup> I/A Court H.R., *Case of Yatama v. Nicaragua*. Judgment of June 23, 2005. Series C No. 127.

<sup>240</sup> I/A Court H.R., *Case of Yatama v. Nicaragua*. Judgment of June 23, 2005. Series C No. 127, para. 225.

taken; (c) that in order for this right to be effective it must be backed up by appropriate procedural mechanisms to be established at the national level in accordance with national conditions; and (d) that the implementation of this right should be adapted to the situation of the indigenous and tribal peoples concerned in order to grant them as much control as is possible in each case over their own economic, social and cultural development.<sup>241</sup>

164. The right of indigenous peoples to be consulted on the decisions that may affect them is also related to the right to cultural identity, to the extent to which the culture may be affected by these decisions.<sup>242</sup> The IACHR has affirmed that the State must respect, protect and promote the customs, institutions and traditions of indigenous and tribal peoples, as these are an intrinsic component of the cultural identity of the persons that comprise these peoples.<sup>243</sup> In this regard, the duty of the State is to develop consultation processes with respect to the decisions that may affect their territory, which is directly related to the duty of the State to adopt special measures to protect the right to cultural identity, based in a way of life intrinsically related to the territory.<sup>244</sup> The Commission shall refer to some of its main concerns with regards to the compliance with specific guarantees for indigenous and tribal peoples in the context of extractive or development activities by the States of the region, and will elaborate on this situation through reference to concrete situations regarding which it has received information.

### **1. Duty to ensure that the restrictions on the use and enjoyment by indigenous and tribal peoples of their natural resources do not result in a denial of their physical and cultural survival**

165. One of the main concerns of the Commission is compliance with the standards requiring that the granting of a concession does not affect the survival of the indigenous or tribal people in accordance with their traditional ways of life.<sup>245</sup> It is

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<sup>241</sup> ILO. CEACR. General observation. Indigenous and Tribal Peoples Convention, 1989 (No. 169). Report of the Committee of Experts on the Application of Conventions and Recommendations. Reference ILC.100/III/1A, February 16, 2011.

<sup>242</sup> IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1050.

<sup>243</sup> IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1050.

<sup>244</sup> IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1050.

<sup>245</sup> As stated by the Inter-American Court “another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members.” I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 128 and I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para. 156.

important to emphasize, as stated by the Court in its interpretation judgment in the *Saramaka* case, that 'survival' entails much more than physical survival, rather it "must be understood as the ability of the Saramaka to 'preserve, protect and guarantee the special relationship that [they] have with their territory', so that 'they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected [...]'. That is, the term 'survival' in this context signifies much more than physical survival."<sup>246</sup> In a similar sense, for the IACHR, "the term 'survival' [...] does not refer only to the obligation of the State to ensure the right to life of the victims, but rather to take all the appropriate measures to ensure the continuance of the relationship of the Saramaka People with their land or their culture."<sup>247</sup>

166. Moreover, the Commission considers that the term "survival" should be understood in a coherent manner with the indigenous and tribal peoples set of rights, with the aim of not giving rise to a static conception of their ways of life. To the contrary, when determining its scope, their right to freely pursue their economic, social and cultural development must be considered, in accordance with their own needs, preferences and aspirations. In addition, since the requirement to ensure their "survival" has the purpose of guaranteeing the especial relationship between these peoples with their ancestral territories, reasonable deference should be given to the understanding that the indigenous and tribal peoples themselves have in regards to the scope of this relationship, as authorized interpreters of their cultures.
167. In the opinion of the IACHR, infrastructure and economic exploitation plans and projects imposed and implemented within indigenous and tribal peoples' territories constitute one of the greatest risks to their physical and cultural survival. It is a special concern that the reported cases indicate that the implementation of extractive or development projects endanger their physical and cultural existence as peoples, depriving them of the option to continue their life plans, rendering them impossible.
168. Therefore, consultation and consent of indigenous peoples are of vital importance, because from the information received, the lack of effective participation in the granting of concessions, authorizations or permits in various countries in the Americas, has caused profound impacts that endanger their physical and cultural survival, their ways of life, and ultimately, their existence as peoples. If consent is achieved in accordance to the standards on this matter, indigenous and tribal peoples would have knowledge on the impacts, including the scope of their rights, and would decide whether they accept or not, to what extent, and under which circumstances, will those activities or projects be carried out in their territories, in order to foresee and control the changes that may arise. Likewise, the IACHR

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<sup>246</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 37.

<sup>247</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 29.

emphasizes that, after undertaking the consultation process and where appropriate, obtaining consent, the States must ensure that these authorized activities, plans or projects do not result in a denial of the physical and cultural integrity of indigenous peoples at issue. The State has and maintains at all times a duty as guarantor of human rights in light of the activities, plans or projects that are carried out on indigenous territories.

169. The IACHR warns that, on occasion, the concessions or projects overlap almost entirely with the ancestral territory of indigenous peoples,<sup>248</sup> and are authorized in direct contravention of the conception of development of these peoples.<sup>249</sup> This situation compromises the existence of these peoples, and would additionally imply the loss of the culture and knowledge that these peoples have established and maintained since time immemorial. For example, the president of the Achuar Nation of Ecuador stated before the Commission that in 2013 the blocks of the XI Oil Round comprise 100 percent of the territory of his people and they had fully and publicly rejected oil exploitation, indicating that “The territory and the life are not for sale. They are defended.”<sup>250</sup> A similar situation was brought to the IACHR’s attention in the case of the *Campesino* Community of Kañaris in Peru, who indicated that approximately 90 percent of their territory was overlapped by mining concessions of various scales, and that they allegedly had not been consulted nor had they granted consent.<sup>251</sup>
170. The situation is particularly worrying when States authorize projects or grant concessions over territories of indigenous peoples in voluntary isolation and/or initial contact, who in the exercise of their right to self-determination, have decided to avoid all contact with the surrounding society. Following the information received about indigenous peoples in voluntary isolation and/or initial contact in the region, the Commission considers that the projects and concessions authorized over their territories create a situation of territorial pressure that limits the routes that these peoples can travel in their territories, leading to the reduction of natural resources, and generating the risk of contact, which has grave consequences for the existence of these peoples.
171. The transmission of diseases is one of the greatest threats against the physical survival of peoples in voluntary isolation which can result from contact. As the Commission warned in its report on *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas*, “[g]iven their situation of isolation with respect to

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<sup>248</sup> IACHR. *Hearing on the Rights of Indigenous Peoples to Legal Recognition and Property in Peru*, 153 Period of Sessions, October 31, 2014; *Hearing on Indigenous Peoples’ Right to Prior Consultation in Ecuador*, 149 Period of Sessions, October 28, 2013; and, *Hearing on Reports of Destruction of the Biocultural Heritage Due to the Construction of Mega Projects of Development in Mexico*, 153 Period of Sessions, October 30, 2014.

<sup>249</sup> IACHR. *Hearing on the Human Rights Situation of Indigenous Peoples in the Context of the Peace Process in Colombia*, 149 Period of Sessions, October 31, 2013; and *Hearing on the Human Rights Situation of the Ashaninka People in Peru*, 138 Period of Sessions, March 23, 2010.

<sup>250</sup> IACHR. *Hearing on Indigenous Peoples’ Right to Prior Consultation in Ecuador*, 149 Period of Sessions, October 28, 2013.

<sup>251</sup> IACHR. *Hearing on the Rights of Indigenous Peoples to Legal Recognition and Property in Peru*, 153 Period of Sessions, October 31, 2014.

the non-indigenous societies, they do not have the immunological defenses to relatively common diseases, and a contagion may have, and on several occasions has had, tragic consequences.<sup>252</sup> In regards to the obligation to prevent impacts on the health of indigenous peoples as a result of development, the IACHR has indicated that States have “the duty to prevent the occurrence of these comprehensive situations of human rights violations, so as to preserve the life and physical integrity of the members of indigenous and tribal peoples, through the adoption of the public health preventive measures which are pertinent in each case.”<sup>253</sup>

## 2. Effective participation, impact studies on human rights, and shared benefits

### a. Right to previous, free, and informed consultation and consent

172. The first requirement consists in the effective participation of indigenous and tribal peoples since the first stages “in the processes of design, implementation, and evaluation of development projects carried out on their lands and ancestral territories.”<sup>254</sup> For the Court, effective participation specifically refers to the right to prior consultation of indigenous peoples “in accordance with their customs and traditions, in relation to all development, investment, exploration or extraction plan [...] that is carried out within the territory [...]”<sup>255</sup> According to Article 6(1) of ILO Convention 169, said consultation must be undertaken “through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly [...]”. Article 6(2) of ILO Convention 169 also states that “[t]he consultations [...] shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”
173. In the region there has been important progress in the application and implementation of the right of indigenous and tribal peoples to consultation and consent. Nevertheless, the Commission considers that the effective implementation of indigenous and tribal peoples’ right to free, prior and informed consultation and

<sup>252</sup> IACHR. *Report on Indigenous Peoples in voluntary isolation and initial contact in the Americas*, OEA/Ser.L/V/II. Doc. 47/13, 30 December 2013, para. 116.

<sup>253</sup> IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, para. 272.

<sup>254</sup> IACHR, *Follow-Up Report – Access to Justice and Social Inclusion: The road towards strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, para. 157.

<sup>255</sup> I/A Court H. R., *Case of the Saramaka People v. Suriname. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of 28 November 2007. Series C No. 172, para. 127,128. I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para. 159-167.

consent remains incomplete in most of the States in the Americas. On one side, in relation to those countries that have adopted a specific *corpus iuris*, such as Peru, Chile or Bolivia –on issues related to hydrocarbons– the Commission has been informed regarding concerns related to substantive elements of these norms, as these are considered more restrictive than the international standards. Likewise, the IACHR has received information according to which, various elaboration and/or approval processes of said norms have been questioned by the organizations of indigenous and tribal peoples who consider that these were undertaken in a manner incompatible with their rights and interests, finding themselves underrepresented or lacking capacity to decide on fundamental aspects.<sup>256</sup> Many countries in the region currently do not have a normative framework to implement this right, be it because it is currently in the process to be approved, or because there are no initiatives aimed to comply with this state duty.<sup>257</sup> In addition, the existence and/or approval of norms that are openly incompatible with this right prevent its effective realization.

### **Setbacks in the normative framework on prior consultation in the area of hydrocarbons in Bolivia**

The oil and gas activity in Bolivia, developed mainly in the Bolivian Chaco, has a long-standing activity and has generated a series of negative effects, resulting in considerable environmental damage in the region. Since its beginning, indigenous territories and peoples were affected by the oil and gas activities. After a long struggle, they succeeded in claiming their rights and introduced these into the national normative framework. Bolivia has a Hydrocarbon Law (Law No. 3058 of 2005), which dedicates articles 114 to 117 to the protection of indigenous peoples’ rights.<sup>258</sup> This law was implemented through the Regulation on Consultation and Participation for Oil and Gas Activities (“Reglamento de Consulta y Participación para Actividades Hidrocarburíferas”) (Executive Decree No. 29033 of 2007) and the Regulation of Social and Environmental Monitoring of Oil and Gas Activities within the Territory of Indigenous Peoples and Peasant Communities (“Reglamento de monitoreo socio-ambiental en actividades hidrocarburíferas dentro del territorio de los Pueblos Indígenas Originarios y Comunidades Campesinas”) (Executive Decree No. 29103 of 2007). This legislation regulates in detail the right to consultation in this sector and was considered progressive.

The Regulation on Consultation has undergone three modifications –in 2007, 2008 and 2015. Various organizations have expressed preoccupation for the last modification which would represent a setback for indigenous peoples’ rights.

<sup>256</sup> Due Process of Law Foundation (DPLF). *The Right of Indigenous Peoples to Prior Consultation. The Situation in Bolivia, Brazil, Chile, Colombia, Guatemala and Peru*. DPLF/OXFAM. 2015.

<sup>257</sup> Due Process of Law Foundation (DPLF). *The Right of Indigenous Peoples to Prior Consultation. The Situation in Bolivia, Brazil, Chile, Colombia, Guatemala and Peru*. DPLF/OXFAM. 2015.

<sup>258</sup> Hydrocarbons Law (Law No. 3.058), May 17, 2005, Articles 114 to 127.

Following information received by the IACHR, the last modification was introduced through Executive 2298 of March 8, 2015, by virtue of which the period for prior consultation for the extraction of hydrocarbons is reduced to 45 days. It also allows that, if indigenous people do not respond to the consultation process in the defined period, they may dispense with it and continue the licensing process through an administrative resolution. Likewise, the IACHR notes the adoption of Executive Decree No. 2366 of May 20, 2015, which “permits the development of exploration activities for oil and gas in the different areas and categories of protected areas ...” (Article 2). The IACHR was informed that this norm enables the development of hydrocarbon activities in 11 of the 22 protected areas in Bolivia.

### **Concerns in relation to the normative framework on consultation in Chile**

On May 28, 2012, through the Minister Council for Sustainability, the new Regulation on the Environmental Impact Assessment System was approved. Likewise, on November 15, 2013, through Executive Decree No. 66, the Ministry of Social Development approved the *Regulation on the Procedure of indigenous consultation in virtue of Article 6(1)(A) and 6(2) of ILO Convention 169 and derogates the indicated norms (“Reglamento que regula el procedimiento de consulta indígena en virtud del artículo 6 N° 1 Letra A) y N° 2) del Convenio N° 169 de la OIT y deroga la normativa que indica”*), published on March 4, 2014.

The information received by the IACHR indicates that both regulations have been questioned by indigenous organizations and civil society, not only because of the absence of an adequate consultation process for its approval, but also because of substantive issues. The Commission warns that one of the central elements of concern in relation to Executive Decree No. 40, applicable to activities that require an environmental impact assessment, is the serious limitation to the relevance of the indigenous consultation through the incorporation of a prescribed list of exceptional assumptions/conditions under which this right can be demanded. The Commission notes that, according to Article 85 of said Decree, consultation only proceeds for projects or activities that may generate one of the defined characteristics in its Articles 7, 8 and 10, and “to the extent where one or more human groups belonging to indigenous peoples are directly affected.” These provisions refer to the relocation of human communities (Article 7), significant disturbance of the life systems and customs of human groups (Article 7), location in or close to indigenous territories and the environmental value of the territory (Article 8), and the disturbance of cultural patrimony (Article 10). These requirements disregard the provisions of Article 6 of ILO Convention 169, which provides for the mandatory character of consultation “whenever

consideration is being given to legislative or administrative measures which may affect [indigenous peoples] directly”, without regard to the scale or impact of the project.<sup>259</sup>

174. In addition to the normative elements, the region is plagued by a constant structural problem that relates to the granting of concessions, authorizations and permits of all kind without complying with indigenous peoples’ right to consultation and, where appropriate, free, prior and informed consent.<sup>260</sup> With an alarming frequency, the Commission receives information about plans or projects of various kinds that affect the rights of indigenous and tribal peoples, who, nonetheless, are neither consulted, nor has their consent been obtained in the cases where it is required. For example, the Commission was informed that the transoceanic canal in Nicaragua has omitted prior consultation with indigenous and tribal peoples, and the actions of the State have focused on visiting the communities and, through money transfers, trying to convince community members during meetings simulating a consultation.<sup>261</sup> The Commission has also been informed about the non-application of consultation in certain sectors. It notes that even though countries like Bolivia carry out consultation processes on hydrocarbon issues, in other sectors such as mining or infrastructure no consultations have been undertaken despite the growth in investment in these sectors.<sup>262</sup>
175. Likewise, the Commission has been repeatedly informed that when said consultation processes are undertaken, there has been a lack of observance for the guarantees established by the organs of the inter-American system on this matter.<sup>263</sup> The IACHR has received reports of consultations that are incompatible

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<sup>259</sup> Due Process of Law Foundation (DPLF). *The Right of Indigenous Peoples to Prior Consultation. The Situation in Bolivia, Brazil, Chile, Colombia, Guatemala and Peru*. DPLF/OXFAM. 2015.

<sup>260</sup> See *inter alia* IACHR. *Hearing on Right to Prior, Free, and Informed Consultation of Indigenous Peoples and Afro-descendants in the Andean Region*, 141 Period of Sessions, March 29, 2011; IACHR. *Hearing on the Human Rights Situation of Indigenous Peoples in Argentina*, 144 Period of Sessions, March 23, 2012; IACHR. *Hearing on the Human Rights Situation of the Indigenous Communities Affected by Activities of the Mining Industry in the Andean Region*, 140 Period of Sessions, October 29, 2010; and, *Hearing on the Legal Obstacles for the Recognition and Titling of Indigenous Lands in Guatemala*, 140 Period of Sessions, October 25, 2010.

<sup>261</sup> UN. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, April 28, 2015. A/HRC/29/25, para. 31.

<sup>262</sup> See *inter alia* DPLF. *Right to consultation and free, prior and informed consent in Latin America. Advances and challenges in the implementation in Bolivia, Brazil, Chile, Colombia, Guatemala and Peru*. DPLF/OXFAM, 2015, p. 78; IACHR. *Hearing on Corporations, Human Rights, and Prior Consultation in the Americas*. 154 Period of Sessions, March 17, 2015.

<sup>263</sup> IACHR. *Hearing on indigenous peoples right to prior consultation in Chile*. 150 Period of Sessions, March 27, 2014; IACHR. *Hearing on the Consultation Right of Indigenous Peoples in Peru*. 146 Period of Sessions, November 1, 2012; IACHR. *Hearing on the Right to Consultation of the Indigenous Peoples of Peru*. 137 Period of Sessions, November 3, 2009; IACHR. *Hearing on Indigenous Peoples’ Right to Prior Consultation in Ecuador*, 149 Period of Sessions, October 28, 2013; IACHR. *Hearing on the Situation of Human Rights of Indigenous Peoples in Colombia*, 147 Period of Sessions, March 14, 2013; IACHR. *Hearing on the Situation of Human Rights of the Indigenous Peoples Inhabiting Indigenous Territory in the National Park Isiboro Sécure*

with international standards, because these are not undertaken prior to the execution of the projects involved; the communities or peoples are not properly informed; and the absence of the conditions for a free or culturally appropriate consultation, among others. It is concerning that, according to the information received, in such cases where agreements are reached as a result of the consultation process, the consulted indigenous peoples and communities face serious difficulties getting the State to comply with, or to enforce compliance with the agreements made. The IACHR considers key to highlight that even though it is fundamental that the consultation is undertaken in good faith, in a culturally appropriate manner, and in a prior, free and informed way; compliance with this right must not be focused only on adherence to the guarantees that govern the process.

176. In fact, effective participation in decision-making is a mechanism to effectively guarantee the rights of indigenous and tribal peoples which may be affected by extraction or development plans and projects pursued within their lands and territories. These are the rights to, *inter alia*, life, integrity, health, participation, territory, and environment. These rights must guide the procedural guarantees that will be analyzed in the following sections. In case procedural and substantive guarantees are not complied with in the consultation process, it cannot be affirmed that the consultation was undertaken in compliance with the inter-American standards on the matter. Indigenous and tribal peoples have often expressed their concern before the Commission regarding the formalistic approach often employed in the enforcement of the right to consultation which does not facilitate the effective guarantee of all of the human rights affected.
177. The regional situation can be summarized in States that recognize the right to consultation in their normative framework, but do not apply it effectively in practice and in accordance with inter-American standards; States that recognize the right and regularly apply it, but do not guarantee other affected rights through the consultation processes; and those that do not recognize the right to consultation, and therefore do not apply or guarantee the rights of indigenous and tribal peoples before permitting extractive and development activities.

### **Assessment from indigenous peoples and Afro-descendent communities in Colombia of the implementation of the right to consultation**

Indigenous peoples and afro-descendant groups in Colombia have affirmed that even though progress has been made in the formal recognition of their rights – mainly through the jurisprudence of the Colombia’s Constitutional Court and some normative instruments– this progress is not reflected in the full and effective enjoyment of their rights. The State of Colombia has reported that in 2014, 690 agreements were reached between the proponents of plans, activities or projects, and ethnic communities. Likewise, they informed that, by July 2015,

(*TIPNIS*) in Bolivia, 147 Period of Sessions, March 15, 2013; IACHR. *Hearing on Corporations, Human Rights, and Prior Consultation in the Americas*. 154 Period of Sessions, March 17, 2015.

130 consultation processes were being undertaken with 1,300 ethnic communities.

Nevertheless, the affected peoples and groups have indicated that there are a series of obstacles in the exercise of the right to prior consultation to these works, activities, and projects in their territories. Among the difficulties, there are structural difficulties in the exercise of the right to consultation, such as structural racism, the vulnerability of the communities, and the State's historical abandonment; the existence of factors that complicate and hinder the exercise of the right to consultation, such as the armed conflict, which have resulted in disproportionate impacts on ethnic peoples in Colombia; and the limited access to necessities for their rights and the absence of State services in the ethnic territories, which result in communities requesting basic services and citizen rights in the framework of prior consultations.

Likewise, they warn regarding serious difficulties related to the multiple, negative impacts resulting from the implementation of extractive projects without guarantee of the right to consultation and free, prior and informed consent; the granting of environmental licenses, requests, and mining titling without consultation and over restricted areas; denial of access to the identity registration and recognition process of afro-descendant and indigenous communities; and the difficulties in the recognition of their existence to avoid consultation processes. They also refer to cases of prior consultations that have been undertaken in "clandestine, irregular, uninformed, and imbalanced negotiation scenarios, led by companies and without the presence of control organs, which results in non-compliance of the agreements and without any limits on projects that jeopardize the survival of the peoples." They emphasized that prior consultation is a mechanism that must preserve their ethnic and cultural integrity, their survival as peoples, and not solely a proceeding or procedure.<sup>264</sup>

178. The Commission recalls that, in the inter-American system, it is clear that the entire State structure is obligated to adopt all measures at their disposal to comply with the duty to consult. In this regard, the I/A Court has identified that the processes of "socialization" and "information sharing" that the interested companies or third parties undertake with indigenous peoples on determined projects must not be confused with the consultation processes that must be undertaken by the States. In this line, the inter-American Court has been clear in explaining that "that the obligation to consult is the responsibility of the State; therefore the planning and executing of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the very company that is interested in exploiting

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<sup>264</sup> Organización Nacional Indígena de Colombia (ONIC), Confederación de Organizaciones Afro colombianas (CNOA) y el Proceso de Comunidades Negras (PCN). Bogota, July 10, 2015. [National Indigenous Organization of Colombia (ONIC), Afro-Colombian Federation of Organizations (CNOA) and the Black Communities Process (PCN)]

the resources in the territory of the community that must be consulted.”<sup>265</sup> In this regard, the IACHR has received constant information indicating that among the most frequently denounced negative practices is the delegation of the duty to consult to interested private companies.<sup>266</sup> Some States also mistakenly consider that the interaction and participation processes that companies undertake fulfill the duty to consult indigenous peoples.<sup>267</sup>

## i. Objective to obtain consent

179. The Inter-American Court has indicated that the objective of all consultation processes is to reach an agreement or to obtain consent.<sup>268</sup> Therefore, indigenous and tribal peoples should be capable of having significant influence on the process and decisions taken within it, which includes accommodating their perspectives and concerns, for example, through demonstrable and verifiable changes regarding the objectives, parameters and design of the project, as well as any other concern that they could have regarding the acceptance of the project itself. The Inter-American Court has indicated the same in case of the *Kichwa People of Sarayaku v. Ecuador*.<sup>269</sup>
180. This is a basic requirement found in different international instruments. In various specific provisions of the United Nations Declaration on the Rights of Indigenous Peoples, the obligation to consult with the objective of obtaining consent is underscored.<sup>270</sup> Likewise, ILO Convention 169 provides in Article 6(2) that “[t]he consultations [must be] carried out [...] with the objective of achieving agreement

<sup>265</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para. 187. See also: I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007, paras. 102, 129 and 131; and, *Report of the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, A/HRC/12/34, July 15, 2009, paras. 53-55.

<sup>266</sup> IACHR. *Hearing on Right to Prior, Free, and Informed Consultation of Indigenous Peoples and Afro-descendants in the Andean Region*, 141 Period of Sessions, March 29, 2011. IACHR. *Hearing on Corporations, Human Rights, and Prior Consultation in the Americas*. 154 Period of Sessions, March 17, 2015.

<sup>267</sup> For example, this was informed in the case of the Asháninka People of Peru in regards to the Paquitzapango Hydroelectric Project, among other extraction and energy projects in Peru. In this case, the State suggested that the information or socialization workshops carried out by companies granting concessions would fulfill said obligation. See *Hearing on the Human Rights Situation of the Ashaninka People in Peru*, 138 Period of Sessions, March 23, 2010. IACHR. *Hearing on the Rights of Indigenous Peoples and Energy and Extractive Industry Policy in Peru*, 140 Period of Sessions, October 26, 2010. IACHR. *Hearing on Right to Prior, Free, and Informed Consultation of Indigenous Peoples and Afro-descendants in the Andean Region*, 141 Period of Sessions, March 29, 2011.

<sup>268</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs, para. 134.

<sup>269</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012, para. 186.

<sup>270</sup> United Declaration on the Rights of Indigenous Peoples, Articles 10, 11, 15, 17, 19, 28, 29, 30, 32, 36 and 38.

or consent to the proposed measures.”<sup>271</sup> According to the ILO, the consultation is not merely a formal requirement, but a “genuine instrument for participation.”<sup>272</sup> The consultation process should “respond to the ultimate purpose of establishing a dialogue between the parties based on principles of trust and mutual respect, and aimed at reaching a consensus between the parties.”<sup>273</sup> Nevertheless, it is deeply troubling to note that this fundamental requirement of the right to consultation is commonly breached. With an alarming frequency, cases have been denounced in which mere information workshops, or meetings held between indigenous peoples and companies, are considered sufficient to comply with the right to consultation.<sup>274</sup>

181. In order to ensure that consultation processes are a way to guarantee the rights that could be affected, there should be clear evidence indicating that plans and projects were modified taking into account the opinions, concerns, and contributions of the indigenous and tribal peoples at issue. The IACHR has previously referred to the *duty of accommodation*, considering that the duty to consult requires, from all parties involved, flexibility to accommodate the different rights and interests at stake, as extraction, exploitation, and extractive concessions substantially affect the right to indigenous property and other related rights. The Commission has also indicated that it is the duty of the States “to adjust or even cancel the plan or project based on the results of consultation with indigenous peoples, or failing such accommodation, to provide objective and reasonable motives for not doing so.”<sup>275</sup> Therefore, those decisions related to the approval of the plans that do not adequately reflect the reasons that justify the lack of accommodation of the results of the consultation process, could be considered contrary to the due process guarantees established by the standards of the Inter-American Human Rights System.<sup>276</sup>
182. In the same line, the Commission remembers that “[t]he fact that indigenous peoples’ consent is not required as an outcome of every consultation process does not imply that the State duty to consult is limited to compliance with formal procedures”<sup>277</sup>. As it has previously affirmed, “[f]rom a substantive standpoint, States have the duty to take into account the concerns, demands and proposals

<sup>271</sup> ILO. CEACR. General observation. Indigenous and Tribal Peoples Convention, 1989 (No. 169). Report of the Committee of Experts on the Application of Conventions and Recommendations. Reference ILC.100/III/1A, February 16, 2011.

<sup>272</sup> ILO. *Report of the Committee set up to examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989* (No. 169), made under article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF), 2006, GB.295/17; GB.304/14/7, para. 42.

<sup>273</sup> ILO, CEACR, *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989* Bolivia, 2005.

<sup>274</sup> IACHR. Information received in Panama City, July 31, 2015.

<sup>275</sup> IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, para. 324.

<sup>276</sup> IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, paras. 323-325.

<sup>277</sup> IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, para. 326.

expressed by the affected peoples or communities, and to give due regard to such concerns, demands and proposals in the final design of the consulted plan or project.”<sup>278</sup> Thus, in those cases where “[w]henver accommodation is not possible for motives that are objective, reasonable and proportional to a legitimate interest in a democratic society, the administrative decision that approves the investment or development plan must argue, in a reasoned manner, which are those motives”.<sup>279</sup> Such a decision, as well as the reasons that justify the non-incorporation of the results of the consultation on the final plan, should be formally communicated to the respective indigenous peoples.<sup>280</sup>

## ii. Considerations related to mandatory consent

183. The Inter-American Court has considered that “regarding large-scale development or extraction projects that would have a major impact within [the indigenous] territory, the State has a duty, not only to consult with the [indigenous people], but also to obtain their free, prior, and informed consent, according to their customs and traditions.”<sup>281</sup> In the interpretation of the judgment of the case of the *Saramaka People v. Suriname*, the Court expressed that “depending upon the level of impact of the proposed activity, the State may additionally be required to obtain consent from the Saramaka people.” It explained that “when large-scale development or extraction projects could affect the integrity of the Saramaka people’s lands and natural resources, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent in accordance with their customs and traditions.”<sup>282</sup>
184. Several pronouncements issued by United Nations bodies are illustrative of the existing consensus in relation to the consent requirement. The CERD has indicated in its *General Recommendation No. 23* that “no decisions directly relating to their rights and interests are [to be] taken without their informed consent.”<sup>283</sup> This has been applied to a variety of projects, including those of an extractive nature, for

<sup>278</sup> IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, para. 326.

<sup>279</sup> CIDH. *Derechos de los pueblos indígenas y tribales sobre sus tierras ancestrales y recursos naturales. Normas y jurisprudencia del sistema Interamericano de derechos humanos*. OEA/Ser.L/V/II, 30 de diciembre de 2009. párr. 327.

<sup>280</sup> According to the Inter-American Court, “the decisions adopted by national bodies that could affect human rights must be duly justified, because, if not, they would be arbitrary decisions. In such sense, the reasons given for a judgment must show that the arguments by the parties have been duly weighed and that the body of evidence has been analyzed. Moreover, a reasoned decision demonstrates to the parties that they have been heard [...]” I/A Court, *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008, para. 78.

<sup>281</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Series C No. 172, para. 134.

<sup>282</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 17.

<sup>283</sup> Committee on the Elimination of Racial Discrimination. *General Recommendation No. 23: Indigenous Peoples*. August 18, 1997, para. 4.

instance: mining, oil-drilling and gas operations, forestry harvesting, the establishment of protected areas, dams, agroindustrial plantations, resettlement and other decisions that affect territorial rights.<sup>284</sup> Therefore, the Human Rights Committee, in the case of *Ángela Poma Poma* (Peru) of 2009 indicated that the acceptability of “measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.”<sup>285</sup> It also considered that “participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.”<sup>286</sup>

185. In order to determine the scope of the expression “large-scale development or investment plans,” the Inter-American Court has referred to the statement of the former UN Special Rapporteur on the Rights of Indigenous Peoples, Rodolfo Stavenhagen:

a process of investment of public and/or private, national or international capital for the purpose of building or improving the physical infrastructure of a specified region, the transformation over the long run of productive activities involving changes in the use of and property rights to land, the large-scale exploitation of natural resources including subsoil resources, the building of urban centres, manufacturing and/or mining and extraction plants, tourist developments, port facilities, military bases and similar undertakings.<sup>287</sup>

186. In this regard, the Commission emphasizes that this concept is not restricted or limited to a specific category. Rather, a myriad of activities such as mining, oil and gas, infrastructure, among others, can be considered a “large-scale project”. In addition, the Commission notes that the origin of the capital behind the project – which may be public, private or mixed, national or international– is not an element that enables or excludes the application of this category. In the opinion of the Commission, it is neither possible nor convenient to adopt a closed definition, given the large diversity of projects. On the contrary, this concept seeks to be sufficiently flexible to include diverse extraction or development activities which take place in the countries of the region. However, it is possible to identify certain scenarios in which the duty to obtain indigenous and tribal peoples’ consent is

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<sup>284</sup> Véase *inter alia*, ONU. CERD. Observaciones finales relativas a Guyana, 04 de abril de 2006, CERD/C/GUY/CO/14, párr. 19; Guatemala, 15 de mayo de 2006, CERD/C/GTM/CO/11, párr. 19; Surinam, 18 de Agosto de 2005, Decision 1(67), CERD/C/DEC/SUR/4, párr. 3; Estados Unidos de América, 14 de agosto de 2001, A/56/18, párr. 380-407.

<sup>285</sup> UN. Human Rights Committee. Case *Ángela Poma Poma v. Peru*, para. 7.6.

<sup>286</sup> UN. Human Rights Committee. Case *Ángela Poma Poma v. Peru*, para. 7.6.

<sup>287</sup> UN. *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2002/65, January 21, 2003, para. 6.

clearly applicable, without constituting a closed list. It is also feasible to determine certain criteria that should be taken into consideration in defining whether the requirement of consent is applicable.

187. In fact, in relation to the first aspect, the Commission considers that certain activities could be considered *prima facie* as large-scale, such as those related to large-scale mining, oil and gas exploitation. There are evident differences between small-scale mining activities and large pits of “mega mining,” which entail the removal of large quantities of material per year and affect a large surface area. Other examples are dams that involve the permanent, partial, or total flooding of their lands and territories; as well as those that imply significant impacts in their sacred places. It also notes that domestic laws tend to have definitions or levels in relation to the scope of the projects, and the licensing process can change accordingly. Such factor can be used as a reference for this purpose, but it should never be considered as decisive.
188. The Commission considers that certain criteria should be taken into account when defining the applicability of consent, with the aim of determining whether a plan or project can be considered “high-scale” due to the greater impact they have on the integrity of the lands and natural resources of the indigenous peoples or Afro-descendent communities at issue. The Commission considers that the characteristics of the project such as its *magnitude* or *dimension*, and the *human* and *social impact* of the activity given the particular circumstances of the indigenous peoples or Afro-descendent communities which are affected, should be assessed.
189. With regard to the first dimension, the Commission considers that the magnitude of the project may be determined by reference to elements such as volume and intensity, the measurement of which depends on the type of activity. For example, in cases of the extraction of natural resources, the volume of the project may be measured through physical indicators that vary according to the extracted resource. The IACHR deems relevant to emphasize that such indicators not only must account for the material produced or commercialized, but also for the totality of materials extracted or removed to obtain said product. The environmental intensity of the project is a key element to consider because there are activities that, even though they account for volumes which may be considered insignificant, may have a grave impact on the environment. Such intensity may be defined in terms of its ecotoxicity, the generation of contaminants, the use of toxic substances, the use of explosives, negative effects on endangered or endemic species, emission of greenhouse gases, among others.<sup>288</sup>
190. A second fundamental dimension to understand the concept of “large-scale projects” refers to, in the opinion of the Commission, the human and social impact of the activity taking into consideration the particular circumstances of the

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<sup>288</sup> GUDYNAS, Eduardo. *Extractivismos: Ecología, economía y política de un modo de entender el desarrollo y la naturaleza*. RedGE/CLAES/PDTG. Lima: 2015. p. 18. [Extractivism: Ecology, economy and politics of a way of understanding development and nature]

affected indigenous peoples or Afro-descendent community. In other words, it must not be understood in a way that only considers the quantitative dimensions of the project, but also its nature and the scale of the impacts it would produce on the population. In this regard, the IACHR considers that an interpretation in accordance with the *pro personae* principle demands taking into consideration the nature of the rights at stake and the seriousness of its multiple impacts. The effects that may be generated on the collective right to property of indigenous and tribal peoples must be central to this analysis and in line with inter-American standards. This implies that understanding this right comprises the protection of a series of elements related to their world view, cultural identity, spiritual life, means of subsistence and, in sum, their physical and cultural survival as distinct peoples. This is closely linked to the duty to undertake social-environmental assessments, according to the standards of the inter-American system.

191. In this assessment, the Commission considers it essential to take into account that certain plans and projects, that are not meaningful by themselves, have effects over the same people or community and consequently, the impacts are accumulated. These accumulated projects, even if when considered independently are not “high-scale”, as a whole can generate the requirement of consent, if they cause a greater impact on the indigenous or tribal territory.
192. Moreover, the IACHR, and the bodies of different human rights protection systems have highlighted the relevance of indigenous peoples’ consent in decision-making processes in light of extractive or development plans and projects. The IACHR has recognized that consent is a mandatory requirement for the displacement of indigenous peoples in accordance with the provision of Article 16 of ILO Convention 169 and Article 10 of the UN Declaration on the Rights of Indigenous Peoples.<sup>289</sup> The former Rapporteur on the Rights of Indigenous Peoples, James Anaya, has expressed a similar opinion.<sup>290</sup> Similarly, the Inter-American Development Bank, on its involuntary resettlement policy of 1998, requires that informed consent is obtained from the indigenous peoples before any resettlement.<sup>291</sup>
193. The IACHR has also indicated that consent is required in the case of storage or the disposal of hazardous materials in the lands or territories of indigenous peoples, in accordance with the provision of Article 29 of the United Nations Declaration on the Rights of Indigenous Peoples.<sup>292</sup> The Declaration also enshrines in Article 30 that military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed

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<sup>289</sup> IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources*. OEA/Ser.L/V/II.Doc 56/09, December 30, 2009, para. 334(1).

<sup>290</sup> UN. *Report of the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya. Doc. ONU A/HRC/12/34, July 15, 2009, para. 47.

<sup>291</sup> Inter-American Development Bank, *Involuntary Resettlement Operational Policy*, 1998, Section IV, para. 4.

<sup>292</sup> IACHR. *“Indigenous and tribal peoples’ rights over their ancestral lands and natural resources.”* OEA/Ser.L/V/II.Doc 56/09, December 30, 2009, para. 334(3).

with or requested by the indigenous peoples concerned.<sup>293</sup> The IACHR considers that the public interest does not justify military presence in indigenous territories to guarantee the feasibility of extraction or development plans and projects that have not been consulted with nor been consented to by indigenous peoples.

### **Examples of the domestic incorporation of the requirement of consent in the countries of the region**

With regard to Colombia, the IACHR recognizes that the Constitutional Court of Colombia has been fulfilling a role of great importance in the protection and promotion of the rights of indigenous peoples.<sup>294</sup> The IACHR observes that the Constitutional Court has developed rich and progressive jurisprudence on indigenous peoples' right to consultation. Particularly, it highlights the jurisprudential development of the right to free, prior and informed consent<sup>295</sup> and its compatibility with the decision of the I/A Court H.R. in the Case of *Saramaka People v. Suriname*.<sup>296</sup> The Constitutional Court of Colombia has indicated that "even though the general duty of the State in relation to prior consultation consists in ensuring an effective and active participation of the communities with the objective of obtaining their consent, when the proposed measures represent an intense effect of the right to the collective territory obtaining consent from the community is a requirement prior to the implementation of the political measure, plan or project."<sup>297</sup>

In relation to Peru, the IACHR notes with satisfaction the approval of the Law on the Right to Prior Consultation ("*Ley del Derecho a la Consulta Previa*") and its regulation.<sup>298</sup> Likewise, as the Commission has been informed, the Regulation of the Law on the Right to Prior Consultation provides for some of the criteria by which the State must obtain indigenous peoples' consent for adopting a decision. Among these criteria are the forced displacement and disposal of hazardous

<sup>293</sup> IACHR. *Truth, justice and Reparation: Fourth Report on the human rights situation in Colombia*, 2013, para. 785.

<sup>294</sup> CEACR. General Report and observations concerning particular countries. International Labour Conference, 83 session, 1996. International Labour Office: Geneva, pg. 431-431. STAVENHAGEN, Rodolfo. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. Addendum Mission to Colombia, Doc. E/CN.4/2005/88/Add.2, November 10, 2004, para. 18.

<sup>295</sup> Constitutional Court of Colombia. Judgment T-769 of 2009, Judgment T-129 of 2011 and Judgment T-376 of 2012.

<sup>296</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 134.

<sup>297</sup> Constitutional Court of Colombia. Judgment T-376 of 2012, para. 25.

<sup>298</sup> IACHR. *Hearing on the Consultation Right of Indigenous Peoples in Peru*. 146 Period of Sessions, November 1, 2012.

materials in indigenous territories. Nevertheless, not all criteria referred to are contemplated in Peruvian legislation.<sup>299</sup>

With regard to Chile, the IACHR has received information indicating that the regulation process on the right of consultation of indigenous peoples is tainted by a series of misgivings expressed by indigenous organizations. According to the information received, these misgivings are diverse. A specific one is the reduction of the consultation requirement to situations of displacement or grave effects on indigenous peoples, rendering largely useless the content of the right to consultation and lacking consideration for the duty to obtain indigenous peoples' consent under the conditions established by international law.<sup>300</sup>

### iii. Prior consultation

194. The organs of the system have been emphatic in stating that consultation processes must comply with specific requirements, such as to undertake it previously, which implies that it must be conducted “from the first stages of the planning or preparation of the proposed measure, so that the indigenous peoples can truly participate in and influence the decision-making process.”<sup>301</sup> Likewise, Article 15(2) of ILO Convention 169 states that the “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.” Likewise, both the organs of control on the application of ILO conventions and the former UN Special Rapporteur on the rights of indigenous peoples, James Anaya, have indicated that the requirement of prior consultation implies that it must be conducted before adopting the measure or implementing the project that may affect the communities, including legislative measures, and the affected communities should participate in the earliest stages of the process.<sup>302</sup>

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<sup>299</sup> IACHR. *Hearing on the Consultation Right of Indigenous Peoples in Peru*. 146 Period of Sessions, November 1, 2012.

<sup>300</sup> IACHR. *Hearing on indigenous peoples' right to prior consultation in Chile*. 150 Period of Sessions, March 27, 2014.

<sup>301</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para 167 and paras. 180-182. I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 33.

<sup>302</sup> ILO. Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), GB.276/17/1; GB.282/14/3 (1999), para. 90; Committee of Experts on the Application of Conventions and Recommendations (CEACR), Individual Observation on ILO Convention No. 169, Argentina, 2005, para. 8; and, UN. *Report of the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Annex A, paras. 18 and 19.

195. In this sense, the IACHR highlights that it is necessary that the consultation process has a mechanism or procedure elaborated with indigenous and tribal peoples' participation, collaboration and coordination. The IACHR has stated that "all issues related to the consultation process [...] must be determined and resolved by the [indigenous or tribal] people in accordance with their traditional customs and norms."<sup>303</sup> This includes defining how the consultation process will be conducted. The former UN Special Rapporteur on the rights of indigenous peoples, James Anaya, has defined said process as "consultations on consultations."<sup>304</sup> According to the former Rapporteur, this process is a key element in achieving "a climate of confidence and mutual respect for the consultations, which should ensure that the consultation procedure itself is the product of consensus."<sup>305</sup>
196. The implementation of consultation processes after the granting of a concession for a specific project is one of the most frequent acts reported by indigenous peoples.<sup>306</sup> In this regard, the IACHR has received information indicating that many plans or projects have been authorized without the prior consultation with indigenous and Afro-descendent communities. This occurs despite the constant requests of indigenous peoples to be consulted before their territories are, for example, subjected to allotments, licenses, and concessions.
197. In this regard, it is illustrative to highlight the cases where the Constitutional Court of Colombia has declared the violation of this right because the plans or projects have not been previously consulted with indigenous peoples. For example, the case of the Mandé Norte project in the departments of Antioquia and Chocó,<sup>307</sup> the Multi-purpose Port Project of Brisa de la Sierra Nevada,<sup>308</sup> the project "for the construction and improvement of the cross-cutting way of Barú" of the Vial Barú Consortium,<sup>309</sup> the construction of the road named Unguía- Acandí or Titumate-Balboa- San Miguel- Acandí,<sup>310</sup> among others.

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<sup>303</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008, para. 27.

<sup>304</sup> UN Human Rights Council. *Report of the Special Rapporteur on the rights of indigenous peoples. Addendum The situation of the indigenous peoples affected by the El Diquís hydroelectric project in Costa Rica*. Eighteenth session. Doc. A/HRC/18/35/Add. 8. July 11, 2011, para. 30.

<sup>305</sup> UN Human Rights Council. *Report of the Special Rapporteur on the rights of indigenous peoples. Addendum The situation of the indigenous peoples affected by the El Diquís hydroelectric project in Costa Rica*. Eighteenth session. Doc. A/HRC/18/35/Add. 8. July 11, 2011, para. 30.

<sup>306</sup> IACHR. *Hearing on Reports of Destruction of the Biocultural Heritage Due to the Construction of Mega Projects of Development in Mexico*, 153 Period of Sessions, October 30, 2014; and IACHR. *Hearing on the Right to Consultation of the Indigenous Peoples of the Amazon Region and Implementation of Projects of the Initiative for the Integration of Regional Infrastructure in South America (IIRSA)*, 138 Period of Sessions, March 19, 2010.

<sup>307</sup> Constitutional Court of Colombia. [Judgment T-769 of 2009](#).

<sup>308</sup> Constitutional Court of Colombia. [Judgment T-547 of 2010](#).

<sup>309</sup> Constitutional Court of Colombia. [Judgment T-745 of 2010](#).

<sup>310</sup> Constitutional Court of Colombia. [Judgment T-129 of 2011](#).

#### iv. Informed consultation

198. In addition, consultation must be informed, which requires the sharing of full and precise information on the nature and consequences of the process on the peoples and communities consulted.<sup>311</sup> This information must be sufficient, accessible and timely.<sup>312</sup> In this sense, the Inter-American Court has indicated that the States must ensure that indigenous peoples “are aware of possible risks, including environmental and health risks, in order that the proposed development or extraction plan is accepted knowingly and voluntarily.”<sup>313</sup>
199. In this regard, it is necessary for the “State to both accept and disseminate information, and entails constant communication between the parties.”<sup>314</sup> This also implies that the States shall adopt measures “to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation.”<sup>315</sup> The IACHR has identified that, according to the nature and complexity of the measure, plan or project to be implemented, it is necessary that the States provide technical and independent assistance to indigenous peoples.<sup>316</sup> In the same vein, it is paramount that impact assessments are carried out prior to the granting of the measure which may affect the indigenous and tribal peoples at issue. Otherwise, this guarantee will not be fulfilled since the impacts of the proposed project or plan are not known. In this regard, the United Nations Permanent Forum on Indigenous Issues has indicated that the information provided should address, at least, the following aspects:
- a. The nature, size, pace, reversibility and scope of any proposed project or activity;
  - b. The reason/s or purpose of the project and/or activity;

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<sup>311</sup> IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, para. 142. I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 133. IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 April, 1997. IACHR, *Report on the Situation of Human Rights in Ecuador*. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 April, 1997. IACHR, *Access to Justice and Social Inclusion: The road towards strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, para. 248.

<sup>312</sup> IACHR. *The Right to Access to Information in the Americas*. Inter-American Standards and Comparison of Legal Frameworks Second Edition. OEA/Ser.L/V/II. CIDH/RELE/INF. 9/12. March 7, 2011, para. 72. Application to the I/A Court H.R. in the case of Sarayaku and its members against Ecuador, April 26, 2010, para. 137 – 144; Annual Report of 2008. Volume II: Report of the Office of the Special Rapporteur for Freedom of Expression, paras. 140 and 142; and, Declaration of Principles of Freedom of Expression (2000), Article 4.

<sup>313</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 133.

<sup>314</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 133.

<sup>315</sup> ILO Convention 169, Article 12.

<sup>316</sup> IACHR. Report “Indigenous and tribal peoples’ rights over their ancestral lands and natural resources.” OEA/Ser.L/V/II. Doc 56/09, December 30, 2009, para. 312.

- c. The duration of the above;
  - d. The locality of areas that will be affected;
  - e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;
  - f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others); and,
  - g. Procedures that the project may entail.<sup>317</sup>
200. The IACHR considers that having this information is vital in order for the dialogue with the State to happen in an equal footing, and that decisions are made with full knowledge. In the Americas, the IACHR has identified that many extractive and development plans and projects are approved without indigenous peoples being fully informed of their impacts and, in some cases, lacking prior assessments to determine these. According to the information provided to the IACHR, the information that indigenous peoples receive is not, in all cases, in their language, which hinders or precludes them from fully understanding the information provided. Likewise, the IACHR has received information regarding cases on which indigenous peoples have not received the necessary support or technical advice. This is considering that these plans or projects usually entail a series of large assessments that require specialized technical knowledge. It has also been reported that, on occasions, the indigenous peoples will be considered informed by only sharing with them the impact assessment studies, which tend to be lengthy and are frequently in Spanish.

For example, the lack of information was reported in the case of the consultation for the Eleventh Petroleum Round of Ecuador ("*Décimo Primera Ronda Petrolera del Ecuador*"), which covers a series of indigenous territories in the country. According to the information presented to the IACHR, an alleged 'parents meeting' in a specific province, with a majority of Shuar population, was considered a consultation meeting of the petroleum round, without prior notice

<sup>317</sup> See: Excerpt from the Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, endorsed by the UNPFII at its Fourth Session in 2005. Quoted in: United Nations Development Group. *Guidelines on indigenous Peoples' issues*. February 2008, p. 28.

and no previous information sharing. According to the facts provided to the IACHR, the parents did not understand what was being discussed, and had no knowledge they were convened for a “consultation” meeting.<sup>318</sup>

## v. Good faith

201. Consultation must be conducted in good faith and with the objective of achieving an agreement.<sup>319</sup> As indicated by the Inter-American Court, “good faith requires the absence of any form of coercion by the State or by agents or third parties acting with its authority or acquiescence.”<sup>320</sup> Likewise, the Court has considered that consultation in good faith “is incompatible with practices such as attempts to undermine the social cohesion of the affected communities, either by bribing community leaders or by establishing parallel leaders, or by negotiating with individual members of the community, all of which are contrary to international standards.”<sup>321</sup>
202. The Commission also considers that not giving proper attention to the results of the consultations during the final design of the development or extraction plans, projects or concessions, is contrary to the good faith principle that rules the duty to consult, which should allow indigenous peoples the ability to modify the initial plan.<sup>322</sup> Among other objective elements which allow the assessment of this aspect are the commitments reached, the changes or modifications made to the project to address the concerns and objections, and the disposition to adopt measures that were not required as part of the process, etc.
203. This principle also relates to the requirement that the consultation is not regarded as a mere formality, but must be conceived as “a true instrument for participation,” “which should respond to the ultimate purpose of establishing a dialogue between the parties based on principles of trust and mutual respect, and be aimed at reaching consensus between the parties.”<sup>323</sup> Likewise, the IACHR, as well as the

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<sup>318</sup> IACHR. *Hearing on Indigenous Peoples’ Right to Prior Consultation in Ecuador*, 149 Period of Sessions, October 28, 2013.

<sup>319</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 133. I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, paras. 185-187.

<sup>320</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para. 186.

<sup>321</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para. 186.

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<sup>323</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para. 186. ILO, CEACR, *Individual Observation concerning Convention No. 169, Bolivia*, 2005. UN. Permanent Forum on Indigenous Issues. *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent*. E/C.19/2005/3, February 17, 2005, para. 46. See also, *Report of the former Special Rapporteur on the situation of human rights and*

former UN Special Rapporteur on the rights of indigenous peoples, James Anaya, considers there is no good faith involved if the State has a pre-determined decision prior to the consultation process. It is inherent to the principle of good faith that guides a consultation process that none of the parties involved takes for granted a predetermined outcome,<sup>324</sup> because this is subject to the result of the consultations.<sup>325</sup>

204. In consultation processes, good faith is a key element for the validity of these processes and their resulting outcomes and the legitimacy for all the parties and for the human rights standards on this matter. Nevertheless, the IACHR has been able to verify that the good faith of the parties has been absent from the majority of the processes denominated as “consultative.” It is common to observe that, when conducting consultation processes, it has already been decided that the activity, plan, or project will be developed, using these processes to validate the decision made. Likewise, the IACHR has received information that points to the existence of practices of dividing indigenous leaders with the objective of debilitating the representation of indigenous peoples and their influence in the cases they have been defending.<sup>326</sup>

## vi. Free consultation

205. In accordance with the dispositions of the ILO and the former UN Special Rapporteur on the rights of indigenous peoples, James Anaya, the IACHR considers it is inherent to all consultations with indigenous peoples, that “a climate of mutual trust be established.”<sup>327</sup> In this regard, both the Commission and the Inter-

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*fundamental freedoms of indigenous people*, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Annex A, paras. 21 and 23.

<sup>324</sup> UN. *Report of the former Special Rapporteur on the rights of indigenous peoples. Addendum The situation of the indigenous peoples affected by the El Diquís hydroelectric project in Costa Rica*. Eighteenth session. Doc. A/HRC/18/35/Add. 8. July 11, 2011, para. 16; and, *Report by the former Special Rapporteur on the rights of indigenous peoples*, Addendum. Communications sent, replies received and follow-up. Annex IV. Ethiopia: Situation of the Gilgel Gibe III hydroelectric Project on the Omo River. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including right to development. James Anaya. Eighteenth session. Doc. A/HRC/18/35 Add. 1. 22 August 22, 2011, para. 12.

<sup>325</sup> UN. *Report of the former Special Rapporteur on the rights of indigenous peoples. Addendum The situation of the indigenous peoples affected by the El Diquís hydroelectric project in Costa Rica*. Eighteenth session. Doc. A/HRC/18/35/Add. 8. July 11, 2011, para. 16; and, *Report by the former Special Rapporteur on the rights of indigenous peoples*, Addendum. Communications sent, replies received and follow-up. Annex IV. Ethiopia: Situation of the Gilgel Gibe III hydroelectric Project on the Omo River. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including right to development. James Anaya. Eighteenth session. Doc. A/HRC/18/35 Add. 1. August 22, 2011, para. 12.

<sup>326</sup> IACHR. *Hearing on the Situation of Human Rights of the Indigenous Peoples Inhabiting Indigenous Territory in the National Park Isiboro Sécore (TIPNIS) in Bolivia*, 147 Period of Sessions, March 15, 2013; *Hearing on the Situation of Indigenous Peoples in Voluntary Isolation in Peru—Precautionary Measures 102/07 (Kugpakori Nahua Nanti and others)*, 262/05 (*Mashco Piro, Yora and Arawuaca*) and 129/07 (*Tagaeri, Taromenane*), 130 Period of Sessions, October 12, 2007.

<sup>327</sup> ILO. *Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC), GB.294/17/1; GB.299/6/1 (2007), para. 53; and,

American Court have indicated that good faith requires the absence of any form of coercion by the State or by agents or third parties acting with its authority or acquiescence.<sup>328</sup> In this line, the Inter-American Court indicated in its judgment of *Kichwa Indigenous People of Sarayaku* that the signing of agreements between the States and extractive companies that provide private security by the armed forces or national police “did not promote a climate of trust and mutual respect in order to reach a consensus between the parties.”<sup>329</sup>

206. Additionally, the Commission considers that the guarantee of freedom in the context of the consultation should be understood in broad terms. It is directed to ensure that indigenous and tribal peoples can decide if they wish or not to initiate a consultation process. Once it has been initiated, it should rule all its areas, such as the establishment of their own representatives. This requirement also implies that there should be no coercion, deception, or any kind of force used to accept a specific plan or project.

## vii. Culturally appropriate

207. In addition, the consultation process must be culturally appropriate and take into account the traditional decision-making processes, and be undertaken considering indigenous and tribal peoples’ representative institutions.<sup>330</sup> For the IACHR, “[t]his requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.”<sup>331</sup> The Inter-American Court, the ILO, and the UN Special Rapporteur on the rights of indigenous peoples have indicated that consultation processes must respect the internal decision-making processes of indigenous peoples and their organizations.<sup>332</sup>

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*Report of the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Annex A, paras. 23-25, 49-50.

<sup>328</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para. 186; and IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources*, para. 319.

<sup>329</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para. 193.

<sup>330</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, paras. 27, 131, 133, 154; and, I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, paras. 201-202.

<sup>331</sup> IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 140; and, Maya Indigenous Communities of the Toledo District (Belize), Merits Report, October 12, 2004, para. 142.

<sup>332</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para. 202; Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Authentic Workers’ Front (FAT), GB.283/17/1 (2001), para. 109; and, *Report of the former Special Rapporteur on the situation of human rights and*

208. According to the Inter-American Court and the ILO, the appropriateness of the consultation process also implies that the consultation has a temporal dimension, which again depends on the specific circumstances of the proposed action, taking into account respect for indigenous forms of decision-making.<sup>333</sup> In this line, the former UN Special Rapporteur on the rights of indigenous peoples indicated that “the necessary time has to be anticipated for indigenous peoples to conduct their decision-making processes and to effectively participate in the decision-making in a manner that adapts to their cultural and social models [...] if these are not taken into consideration, it will be impossible to comply with the fundamental requirements of a prior consultation and participation.”<sup>334</sup>
209. In this regard, the IACHR highlights the role of indigenous peoples’ general and community assemblies in decision-making processes on matters which may affect them.<sup>335</sup> In fact, even though indigenous peoples have representatives or boards of directors, usually these are in place and respond to the mandate given in their general or community assemblies. Therefore, the participation of general or community assemblies in consultation processes, and the respect for the decisions made during these, are of utmost importance.
210. It should be noted that in the case of *Chitay Nech v. Guatemala*, the Inter-American Court considered that the harassment and subsequent disappearance of an indigenous leader deprived “the community of the representation of one of its leaders in the various forums of its social structure.”<sup>336</sup> Therefore, it prevented “the access to the full exercise of the direct participation of an indigenous leader in the structures of the State, where the representation of groups in situations of inequality becomes a necessary prerequisite for the self-determination and the development of the indigenous communities within a plural and democratic State.” The Court also indicated that, the indigenous representatives “exercise their charge by mandate or designation and in representation of a community.” In this sense, it highlighted that this “duality is both the right of the individual to exercise the mandate or designation (direct participation) as well as in the right of the community to be represented.”<sup>337</sup> The Court recognized that political participation

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*fundamental freedoms of indigenous people*, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Annex A, para. 31.

<sup>333</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012, para. 203. ILO. *Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989* (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), GB.276/17/1; GB.282/14/3 (1999), para. 79.

<sup>334</sup> *UN Report of the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Annex A, para. 33.

<sup>335</sup> Application to the I/A Court H.R. in the case of Sarayaku and its members against Ecuador, April 26, 2010, para. 157.

<sup>336</sup> I/A Court H. R., *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgement of May 25, 2010. Series C No. 212, paras. 113 and 115. See also, I/A Court H. R., *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*. Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279.

<sup>337</sup> I/A Court H. R., *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgement of May 25, 2010. Series C No. 212, paras. 113 and 115. See also, I/A Court H. R., *Case of*

and the rights to representation give both indigenous leaders and the community as a whole, the collective right to be represented by persons or institutions of their choice. Affecting the first one undermines the collective right of the peoples or community.

211. With regard to indigenous women, the UN Expert Mechanism on the Rights of Indigenous Peoples has underscored that “women have the right to equality in the exercise of the right of indigenous peoples to participate in both internal and external decision-making processes and institutions.”<sup>338</sup> The IACHR considers that the States must guarantee the participation of women in the internal decision-making processes. A way to pursue this, in the framework of their own decision-making systems, is to coordinate with indigenous and tribal peoples, through means that are respectful of their customary law, for these to guarantee the participation of indigenous women in said processes.
212. In the region, the IACHR has identified that States usually relate directly with members of boards of directors of indigenous peoples or their representatives, the majority of whom are men, despite the fact that these members of boards of directors or representatives may not have an express mandate from their general or community assemblies to adopt decisions of special importance. Along this line, it is necessary that the States know how the indigenous peoples they relate to conduct their internal decision-making. Likewise, it is fundamental that in such decision-making instances, the States and indigenous peoples, through coordination actions, foster the participation of women. In this regard, the IACHR has been able to identify the role of indigenous women in various processes of territorial defense of indigenous peoples. For example, in the case of the Kichwa People of Sarayaku in Ecuador, indigenous women, in various moments and under different circumstances, monitored the entry of any non-authorized third party to their indigenous territory, especially the armed forces.

## **b. Environmental and social impact assessments**

213. The second guarantee is the realization of an environmental and social impact assessment, undertaken by “independent and technically capable entities, with the State’s supervision.”<sup>339</sup> The environmental and social impact assessments are intended to “preserve, protect and guarantee the special relationship” that indigenous peoples have with their territories and ensure their survival as

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*Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile.* Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279.

<sup>338</sup> UN. Expert Mechanism on the rights of indigenous peoples. Final study on indigenous peoples and the right to participate in decision-making. (D) Indigenous women in decision-making, May 26, 2011, para. 36.

<sup>339</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 129. I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para 205.

peoples.<sup>340</sup> For the Inter-American Court, Article 21 of the American Convention is infringed when the State fails to carry out or supervise environmental and social impact assessments prior to the granting of concessions.<sup>341</sup> Likewise, it has established that the environmental and social impact assessments must be completed prior to the granting of the respective concession,<sup>342</sup> and demands that the States guarantees the participation of indigenous peoples in the environmental and social impact assessments.<sup>343</sup> In general, the environmental and social impact assessments “must respect [indigenous and tribal] people[s] traditions and culture,”<sup>344</sup> and its outcomes must be shared with the communities for their informed decision-making.

214. Regarding its content, the Inter-American Court has specified that these assessments should be of a “social and environmental” character. The Commission reiterates that the inclusion of these two elements reveals the type of assessments that are required “must go further than the strictly environmental impact studies normally required in order to evaluate and mitigate the possible negative impacts upon the natural environment.” Instead, it becomes necessary to incorporate the identification of “the direct or indirect impact upon the ways of life of the indigenous peoples who depend on those territories and the resources present therein for their subsistence.”<sup>345</sup> Additionally, as expressed by the Inter-American Court, “[i]n order to comply with the Court’s orders, the ESIA’s must conform to the relevant international standards and best practices.”<sup>346</sup>
215. Moreover, the Inter-American Court has determined that social–environmental impact assessments should be carried out prior to the approval of the respective plans,<sup>347</sup> and require States to allow the indigenous peoples to participate in the

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<sup>340</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 40. IACHR, *Access to Justice and Social Inclusion: The road towards strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II, Doc. 34, June 28, 2007, para. 254.

<sup>341</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 154.

<sup>342</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 41. I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, paras. 205-206.

<sup>343</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 133; I/A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 16.

<sup>344</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 41.

<sup>345</sup> IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and Jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc 56/09, December 30, 2009, para. 254.

<sup>346</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objects, Merits, Reparations and Costs, Judgment of August 12, 2008. Series C No. 185, para. 41.

<sup>347</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 41; I/A

realization of prior environmental and social impact assessments.<sup>348</sup> In general terms, the environmental and social impact assessments “must respect the [corresponding] people’s traditions and culture.”<sup>349</sup> Their results should be shared and consulted with the communities with the objective of them providing inputs, undertake an independent evaluation or verification if they so desire it, and ultimately, make an informed decision. Therefore, implementing prior social-environmental impact assessments ensures that the affected peoples “are aware of possible risks, including environmental and health risks, in order that the proposed development or extraction plan is accepted knowingly and voluntarily.”<sup>350</sup>

216. Article 7(3) of ILO Convention 169 provides that States “shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities.” Likewise, it provides that “[t]he results of these studies shall be considered as fundamental criteria for the implementation of these activities.” In this line, the ILO has been requesting that States assess the spiritual and cultural impacts, as well as those environmental and social.<sup>351</sup>
217. In some States in the Americas, the IACHR has verified that, in compliance with this guarantee, environmental and social impact assessments have been undertaken in the context of extraction or development plans or projects. Nevertheless, it notes with concern that frequently these studies are carried out after the granting of the concession or the approval of the development plan at issue, and these do not assess the spiritual or the cultural impacts, among other effects that indigenous peoples may face. This evidences that indigenous peoples would not have access to sufficient, adequate, and timely information when consulted on the granting of any concessions. Likewise, the IACHR observes with concern that indigenous peoples’ participation in these studies is usually minimal.
218. Likewise, the IACHR was informed that, in some States, the granting business decides which entity will carry out the impact assessments, or will be responsible of its financing, or directly contracts their services. This situation questions the impartiality and independence of these studies. With regards to the cultural adaptation, the IACHR has received information of cases where the impact assessments are not translated to the language of indigenous peoples, as well as

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Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, paras. 205-206.

<sup>348</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 16; I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objects, Merits, Reparations and Costs, Judgment of August 12, 2008. Series C No. 185, para. 133.

<sup>349</sup> /A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 41.

<sup>350</sup> *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, para. 133.

<sup>351</sup> ILO. Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution); Observation on Paraguay in relation to ILO 169. International Labour Conference, 102 session, 2012, pgs. 915-919.

“socialization” processes on these studies which are extremely short and technical and which do not allow indigenous peoples to be fully informed. In relation to this safeguard, the IACHR is concerned that plans or projects are approved without the realization of impact assessments in accordance with relevant international standards, since this can compromise the feasibility of the projects and the cultural and physical integrity of indigenous peoples. For example, according to recent complaints, the construction of the “Inter-Oceanic Canal in Nicaragua” allegedly has been authorized without a respective prior impact assessment and, therefore, without the participation or cooperation of indigenous peoples that may be affected by this project.

### c. Right to benefit sharing in a project

219. In addition to the above, the implementation of participatory mechanisms for benefit sharing is required for peoples or communities affected by the extraction of natural resources or development plans or projects.<sup>352</sup> It is the opinion of the Court that “[t]he concept of benefit-sharing [...] can be said to be inherent to the right of compensation recognized under Article 21(2) of the Convention” and it “extends not only to the total deprivation of property title by way of expropriation by the State, for example, but also to the deprivation of the regular use and enjoyment of such property.”<sup>353</sup> In this line, Article 15(2) of ILO Convention 169 states that “[t]he peoples concerned shall wherever possible participate in the benefits of such activities [of the exploitation of natural resources in their territories], and shall receive fair compensation for any damages which they may sustain as a result of such activities.”<sup>354</sup> Likewise, the Court has indicated that the determination of those beneficiaries must be made by the peoples themselves according to their customs and traditions, and not by the State.<sup>355</sup>

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<sup>352</sup> IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1137, Recommendations 5 and 6; IACHR, *Access to Justice and Social Inclusion: The road towards strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II, Doc. 34, June 28, 2007, paras. 248 and 297, Recommendations 5 and 6.

<sup>353</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, paras. 138-139. As indicated by the Inter-American Court in this judgment, various international human rights organs have ruled in the same vein. See *inter alia* UN, Committee on the Elimination of Racial Discrimination, *Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador, supra* note 136, para. 16. UN, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65 (Fifty ninth session)*, U.N. Doc. E/CN.4/2003/90, January 21, 2003, para. 66.

<sup>354</sup> See also: UN, Committee on the Elimination of Racial Discrimination, *Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador, supra* note 136, para. 16.

<sup>355</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs, para. 129 and I/A Court H.R., *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, paras. 25-27.

220. In this section, the IACHR deems it important to refer to the right to property of indigenous peoples over their natural resources or the existing genetic resources in their territories,<sup>356</sup> and the traditional knowledge that indigenous and tribal peoples have in relation to their territories.<sup>357</sup> Specifically, it is important that indigenous peoples benefit from, *inter alia*, the exploitation, industrialization and marketing of these resources, including the realms of knowledge, innovation and traditional practices.<sup>358</sup> Likewise, the Commission notes that the Convention on Biological Diversity establishes on its Article 8, j) the duty to 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”. It is also required to have “the approval and involvement of the holders of such knowledge, innovations and practices”, and encourage “the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”<sup>359</sup>
221. It is relevant that these processes have the effective participation of indigenous peoples. The IACHR recalls the duty of the State to ensure that all indigenous peoples benefit from their own culture, which is based on Articles 1(1), 21 and 26 of the American Convention, as well as Article 14 of the Protocol of San Salvador, among other instruments.<sup>360</sup>
222. The IACHR considers that one of the objectives of indigenous peoples’ benefit sharing from extraction or development plans or projects is for the conditions of these peoples to improve. Nevertheless, the IACHR has identified, from the information received, that generally these plans or projects do not provide collective benefits to indigenous peoples. From the complaints received, indigenous peoples have indicated that these plans and projects have instead brought a series of damages.
223. Likewise, the Commission observes that in the Americas many States confuse this guarantee with voluntary or charitable deeds within the realm of corporate social responsibility policies. Therefore, the IACHR considers important to differentiate between the benefits that could be received by virtue of corporate social responsibility programs, and the benefits defined in the inter-American system. Among the existing differences, corporate social responsibility programs are based

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<sup>356</sup> INHR. *Considerations for the Second Global Forum On Business and Human Rights*. Document submitted to the United Nations Working Group on Business and Human Rights, October 2013, p. 6.

<sup>357</sup> The IACHR recalls that in the Inter-American System “property” has been defined by the Court as “those material objects that may be appropriated, and also any right that may form part of a person’s patrimony; this concept includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value.” *I/A Court H.R. Case of Ivcher Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74, para. 122.

<sup>358</sup> UN. Resolution 69/2. *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*. A/RES/69/2, September 25, 2014, para. 22.

<sup>359</sup> The Convention on Biological Diversity, adopted on 5 June 1992 at the United Nations Conference on Environment and Development (Rio “Earth Summit”).

<sup>360</sup> See: UN. Human Rights Committee (Article 27, General Comment 23) and UN Committee on Economic, Social and Cultural Rights (Article 15, General Comment 17).

on the goodwill of the companies, and, therefore, the benefits they choose to grant to indigenous peoples are subject to and depend on good faith. On the contrary, the benefits that must be guaranteed by the States for each project are of a mandatory character and indigenous peoples must participate in determining these benefits.

224. In this regard, the former UN Special Rapporteur on the rights of indigenous peoples, James Anaya, has indicated, referring to the Hydroelectric Project Chan 75 that affects the Community of Charco La Pava and other communities in Panama, that the benefits that indigenous peoples must receive must not be confused with the donations that companies may provide based on their goodwill, or the extension of public services that the State is already obligated to equally provide to all its citizens.<sup>361</sup> Particularly, the former Special Rapporteur has indicated that “the participation in the benefits of the project, as a right for these communities, goes beyond compensation for the damages or detriment caused, or charity. This participation implies an equitable share of the benefits generated by the project, including economic benefits, with the objective of transforming these communities into stakeholders in the development of the project.”<sup>362</sup> The IACHR would like to specify that the benefits that indigenous peoples may receive must not be used as conditions or inducements for these peoples to accept projects in their territories.

## ***B. General considerations on the right to collective property of indigenous and tribal peoples in the inter-American system***

225. The organs of the inter-American system have offered special attention to indigenous and tribal peoples’ right to collective property over their lands, territories and natural resources, as a right in itself, and therefore as a guarantee for the effective enjoyment of other fundamental rights. In the inter-American system, the territorial rights of indigenous and tribal peoples are based on Article XXIII of the American Declaration,<sup>363</sup> and in Article 21 of the American Convention.<sup>364</sup> Even though none of these Articles expressly refers to the rights of indigenous or tribal peoples, the IACHR and the Inter-American Court have

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<sup>361</sup> UN. *Report of the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya. Addendum Observations on the situation of the Charco la Pava community and other communities affected by the Chan 75 hydroelectric project in Panama. September 7, 2009, para 40. (Non-official translation. Summary of the report available in English, full report available only in Spanish).

<sup>362</sup> UN. *Report of the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya. Addendum Observations on the situation of the Charco la Pava community and other communities affected by the Chan 75 hydroelectric project in Panama. September 7, 2009, para 40. (Non-official translation. Summary of the report available in English, full report available only in Spanish).

<sup>363</sup> Article XXIII: “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”

<sup>364</sup> Article 21. “Right to Property. 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”

interpreted both provisions in the sense that they protect the rights that said peoples and their members have over their lands and natural resources, and therefore over their territories.<sup>365</sup>

226. The jurisprudence of the inter-American system has contributed to the development of the content of the right of indigenous peoples to communal property over their lands, territories, and natural resources, based on the provisions of the American Convention and the American Declaration, interpreted in light of the norms of the International Labour Organization (ILO) Convention No. 169,<sup>366</sup> the United Nations Declaration of the Rights of Indigenous Peoples,<sup>367</sup> the Draft American Declaration of the Rights of Indigenous Peoples and other relevant sources; all of which compose a coherent *corpus iuris* that defines the obligations of OAS Member States with regard to the protection of indigenous property rights.<sup>368</sup>
227. The situation of indigenous peoples has been of concern for the Inter-American Commission for several decades. In 1972, for example, in its resolution on the problem of “Special Protection for Indigenous Populations. Action to combat racism and racial discrimination”, the Commission affirmed that “for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states.”<sup>369</sup> Similarly, in 1972, in the case of the Guahibos Communities vs. Colombia, the Inter-American Commission referred to the duty of the State to defend indigenous lands.<sup>370</sup> A few years later, the Commission further developed this in a resolution in the case of the Yanomami People of Northwest Brazil, in which it recommended that the Government of Brazil delimit and demarcate the boundaries of the

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<sup>365</sup> IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, para. 5.

<sup>366</sup> The Commission notes that the following countries in the region are party to ILO Convention 169: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, México, Nicaragua, Paraguay, Peru and Venezuela. Source: ILO. NORMLEX. [Ratifications of Convention 169 - Indigenous and Tribal Peoples in Independent Countries](#), 1989.

<sup>367</sup> The IACHR notes that the Declaration on the Rights of Indigenous Peoples was adopted by a majority of 143 States in favor, 4 votes against and 11 abstentions. All the States in the continent voted in favor, except the United States of America and Canada, which voted against, and Colombia, which abstained. The IACHR notes, with satisfaction, that after the adoption of the Declaration, these three countries have reconsidered their position, and have formally registered their endorsement of this international instrument which is fundamental to the rights of indigenous peoples. It also notes that in the resolution adopted in 2014, during the high-level plenary meeting of the United Nations General Assembly, known as the World Conference on Indigenous Peoples, the States reaffirmed their support for the Declaration and their commitment to comply with its dispositions. UN. *Resolution 69/2. Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*. A/RES/69/2, September 25, 2014, para. 3.

<sup>368</sup> IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, para. 5.

<sup>369</sup> Resolution on “Special Protection for Indigenous Populations. Action to combat racism and racial discrimination”, mentioned in IACHR, Yanomami Case, Report 12/85, Annual Report 1984-1985, para. 8.

<sup>370</sup> IACHR. *Guahibo Communities v. Colombia*. Case 1690, 1972, Section II. e.

Yanomami Park.<sup>371</sup> In 1983, the Commission adopted its first thematic report on indigenous peoples, *Special Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*.<sup>372</sup> In the following years, the Commission processed various cases regarding territorial rights of indigenous communities.<sup>373</sup>

228. The Inter-American Commission submitted to the Court, in June 1998, the first case related to the property rights of an indigenous community, the Mayagna (Sumo) Awas Tigni Community of Nicaragua, which opened the path to the further development of this issue. Since then, the IACHR has presented before the Court various issues related to different aspects of indigenous and tribal peoples' property rights, resulting in the following judgments: *Yakye Axa Indigenous Community vs. Paraguay*,<sup>374</sup> *Moiwana Community vs. Suriname*,<sup>375</sup> *Sawhoyamaya Indigenous Community v. Paraguay*,<sup>376</sup> *Saramaka People vs. Suriname*,<sup>377</sup> *Xákmok Kásek Indigenous Community vs. Paraguay*,<sup>378</sup> *Kichwa Indigenous People of Sarayaku vs. Ecuador*<sup>379</sup> and *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v. Panama*,<sup>380</sup> *Case of the*

<sup>371</sup> IACHR. Annual Report of the IACHR 1985, p. 24 *et seq.* As the Commission acknowledged in its report on *The Human Rights Situation of Indigenous People in the Americas* of the year 2000: "The significance of this resolution was twofold, inasmuch as it confirmed that the system was capable of processing violations of collective rights, as in the case of the property, life, health, and well-being of the Yanomami people. It was the first time that an inter-governmental organization had issued a resolution recommending such demarcation. The resolution also addressed aspects of health, education, and social integration." IACHR. *The Human Rights Situation of Indigenous People in the Americas*. OEA/Ser.L/VII.108. Doc. 62. October 20, 2000.

<sup>372</sup> IACHR, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V.II.62 doc. 10 rev. 3, 29 November 1983.

<sup>373</sup> For example, through the use of the friendly settlement mechanism, the Commission exercised the duty of guidance to guarantee agreements which may provide a response to the affectation of the rights of indigenous peoples in the region. For example, on March 25, 1998, the Commission formalized the first friendly settlement agreement to restore legitimate property rights to an indigenous community of the hemisphere under the inter-American system for protection of human rights. Under the aforesaid agreement the Paraguayan State undertook to acquire almost 22,000 hectares of land and to transfer it to the Enxet-Lamenxay and Kayleyphapopyet (Riachito) communities, both of which belong to the Enxet-Sanapana people, thereby terminating the respective claim to recover ancestral lands over which third parties had been granted title. IACHR. *The Human Rights Situation of Indigenous People in the Americas*. OEA/Ser.L/VII.108. Doc. 62. October 20, 2000.

<sup>374</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125.

<sup>375</sup> I/A Court H.R., *Case of the Moiwana Community v. Surinam*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005, Series C No. 124.

<sup>376</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146.

<sup>377</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172.

<sup>378</sup> I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214.

<sup>379</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245.

<sup>380</sup> I/A Court H.R., *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v. Panama*. Preliminary objections, merits, reparations and costs. Judgment of October 14, 2014. Series C No. 284.

*Garifuna community of Punta Piedra and their members vs. Honduras*;<sup>381</sup> *Case of the Garifuna community of Triunfo de la Cruz y sus Miembros Vs. Honduras*;<sup>382</sup> and *Case of the Kaliña y Lokono people Vs. Surinam*.<sup>383</sup> In addition, it is important to highlight cases resolved by the IACHR in relation to States which have not ratified the American Convention, such as *Mary and Carrie Dann (United States)*<sup>384</sup> and the *Maya Indigenous Communities of the Toledo District (Belize)*.<sup>385</sup>

229. In this way, the Commission and the Court have developed the content of indigenous and tribal peoples' right to collective property, considering this right the most important means for the recognition and protection of the ancestral territory, and therefore also protecting a series of elements related to their world view, spiritual life, self-determination, and their means of subsistence. Considering as a premise the special relationship that indigenous peoples hold with their ancestral lands and territories, the organs of the system have adopted an evolutionary interpretation of these provisions that extend further than the traditional interpretation of the right to property. This consideration can be observed since the first judgment known by the Inter-American Court on this matter. In fact, the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, related to the collective right to property of an indigenous community, its recognition and protection by the State, was an opportunity for the Court to establish that:

Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention -which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.<sup>386</sup>

230. In this judgment, the Inter-American Court referred to the fundamental importance that the collective recognition of the right to property has for the physical and cultural survival of indigenous peoples, expressing that “[f]or indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must

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<sup>381</sup> Corte IDH. *Caso Comunidad Garifuna de Punta Piedra y sus Miembros Vs. Honduras*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 08 de octubre de 2015. Serie C No. 304.

<sup>382</sup> Corte IDH. *Caso Comunidad Garifuna Triunfo de la Cruz y sus Miembros Vs. Honduras*. Fondo, Reparaciones y Costas. Sentencia de 08 de octubre de 2015. Serie C No. 305.

<sup>383</sup> Corte IDH. *Caso Pueblos Kaliña y Lokono Vs. Surinam*. Fondo, Reparaciones y Costas. Sentencia de 25 de noviembre de 2015. Serie C No. 309.

<sup>384</sup> IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002.

<sup>385</sup> IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004.

<sup>386</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 148.

fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”<sup>387</sup> Similarly in *Sawhoyamaya Indigenous Community v. Paraguay*, the Inter-American Court affirmed that: “This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention.” It also warned that: “[d]isregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.”<sup>388</sup>

231. Following the interpretations issued by the Inter-American human rights instruments, the organs of the system have established that the inextricable connection indigenous peoples have with their traditional lands, as well as the natural resources that lie on or within them, is also protected.<sup>389</sup> As the Inter-American Court recognized in *Saramaka People v. Suriname*: “the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. [...] This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities’ right to the use and enjoyment of their property.”<sup>390</sup> Likewise, the Court explained that “[...] it follows that the natural resources found on and within indigenous and tribal people’s territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people’s way of life.”<sup>391</sup>
232. Considering these elements, the organs of the system have developed a specific content for the right to collective property and the reach of State obligations. Particularly, the duty to recognize, delimit, demarcate and effectively protect the territory; the right to restitution of ancestral lands; and the right to free, prior and informed consultation and, where appropriate, their consent in light of decisions

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<sup>387</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 149.

<sup>388</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 120.

<sup>389</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 137.

<sup>390</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 122.

<sup>391</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 122.

which may affect them, among other things.<sup>392</sup> It is important to recall some of the essential elements of these rights that are particularly relevant to this report.

233. With regard to the obligation to recognize, delimit, demarcate and title indigenous peoples' ancestral territories, the approach of the Court has focused on considering that the possession of the land should suffice for "indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration."<sup>393</sup> But along with the official recognition, the organs of the system have understood that the duty to delimit and demarcate indigenous territories, as expressly affirmed by the Court "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established."<sup>394</sup> Compliance with these duties constitutes a guarantee of respect, in practice, of indigenous territories by third parties, as well as the certainty granted in relation to the geographic extension of their rights.
234. Third parties often have vested interests in indigenous territories, for example non-indigenous settlers, small holders, large estates, illegal miners, private companies, armed groups or the public security forces. In light of this, the IACHR has stated that indigenous and tribal peoples have the right to be protected from land conflicts with third parties, by granting prompt title, delimitation and demarcation of their lands without delays, so as to prevent conflicts and attacks by others.<sup>395</sup> Likewise, the IACHR has indicated that, since indigenous and tribal peoples and their members have a right to have their territory reserved for them, this includes the right to be free from settlements or presence of third parties or non-indigenous colonizers within their territories. The State has a correlative obligation to prevent the invasion or colonization of indigenous or tribal territories by other persons, and to carry out the necessary actions to relocate non-indigenous inhabitants who have settled there.<sup>396</sup>
235. The jurisprudence of the inter-American system has considered, as an essential element of the right to property of indigenous peoples, the right to restitution of the ancestral lands and territories of which they have been unwillingly deprived. Indigenous or tribal peoples who lose total or partial possession of their territories preserve their property rights over such territories, and have a preferential right

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<sup>392</sup> A systematization of various judgments on this subject was published by the IACHR in its report *Indigenous and tribal peoples' rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009.

<sup>393</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 79, para. 151.

<sup>394</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 143.

<sup>395</sup> IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1137 – Recommendation 2. IACHR. *Indigenous and tribal peoples' rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, para. 113.

<sup>396</sup> IACHR. *Indigenous and tribal peoples' rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, para. 114.

to recover them, even when they are in hands of third parties. The IACHR has underscored the need for States to adopt measures aimed at restoring the rights of indigenous peoples over their ancestral territories,<sup>397</sup> and it has pointed out that restitution of lands is an essential right for cultural survival and to maintain community integrity.<sup>398</sup> According to the Inter-American Court, “the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith”<sup>399</sup> –in which case the indigenous peoples have the right to recover them, as a preferential option even in relation to innocent third parties.<sup>400</sup>

236. As affirmed on various occasions by the IACHR, indigenous and tribal peoples are collective rights holders, in addition to the individual rights of their members.<sup>401</sup> Likewise, the Court has understood following its judgment of the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, that “international law on indigenous or tribal communities and peoples recognizes rights to the peoples as collective subjects of international law and not only as members of such communities or peoples.”<sup>402</sup> In addition, the Court has affirmed that “in view of the fact that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise some rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or indicated in this Judgment should be understood from that collective perspective.”<sup>403</sup> The Commission highlights the importance of this recognition, consistent with the obligation of States to respect and guarantee the collective rights of indigenous and tribal peoples, and especially, the right to recognition of their legal personality. Similarly, it indicates that this has considerable implications for the exercise of other collective rights, such as the right to property, to effective

<sup>397</sup> IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, para. 115.

<sup>398</sup> IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, para. 16.

<sup>399</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 128.

<sup>400</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 128.

<sup>401</sup> See *inter alia* IACHR, Case submitted to the I/A Court H.R. in the Case Mayagna (Sumo) Community of Awás Tingni v. Nicaragua, June 4, 1998; IACHR, Case submitted to the I/A Court H.R. in the *Case of the Yakye Axa Indigenous Community v. Paraguay*, March 17, 2003; IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004; IACHR, Case submitted to the I/A Court H.R., on the *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, February 2005; IACHR, Petition presented before the I/A Court H.R. on the *Case of the Saramaka People v. Suriname*, June 23, 2006; IACHR, Case submitted to the I/A Court H.R. on the *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, July 3, 2009; IACHR, Case submitted to the I/A Court H.R. on the *Case of the the Kichwa Indigenous People of Sarayaku v. Ecuador*, April 26, 2010.

<sup>402</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para 231.

<sup>403</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C. No. 245, para 231.

participation in decision-making, access to justice, recognition and protection of indigenous institutions and legal systems, among others.<sup>404</sup>

237. The Commission deems important to highlight that, when addressing the rights of indigenous peoples, the fundamental premise is that they are rights holders of the collective right to self-determination.<sup>405</sup> Indigenous peoples are original, pre-existent societies to colonization and the establishment of current state borders, and for centuries have been subjected to forms of exclusion and discrimination. Based on this historic fact, the international community has recognized that indigenous peoples, in addition to the individual human rights recognized in international law, possess the right to freely determine their economic, social and cultural development in order to ensure their existence and well-being as distinct peoples. Furthermore, the Inter-American Court has addressed the right to self-determination in different cases regarding indigenous and tribal peoples and communities.<sup>406</sup>
238. Similarly, on the basis of Article 1 of ICCPR and ICESCR, the Committees in charge of their supervision and interpretation have underscored the right to self-determination of indigenous peoples. The ESCR Committee has indicated that due to the right to self-determination established in Article 1, the peoples can “pursue their economic, social and cultural development” and “freely dispose of their natural wealth and resources”, so “they are not deprived of their means of subsistence.”<sup>407</sup> Furthermore, the United Nations Declaration on the Rights of Indigenous Peoples expressly recognizes the right to self-determination of indigenous peoples,” by virtue of which “they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>408</sup> For its part, the ILO Convention 169 recognizes the aspirations of the indigenous and tribal peoples to control their own institutions, ways of life, and economic development, within the framework of the States in which they live.<sup>409</sup> Also important are the

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<sup>404</sup> I/A Court, *Case of the Saramaka People v. Surinam*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007, para. 159 and subseq.

<sup>405</sup> IACHR. *Indigenous and tribal peoples' rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, paras. 165-166. IACHR. *Report on Indigenous Peoples in voluntary isolation and initial contact in the Americas*. OEA/Ser.L/V/II.Doc. 47/13. December 30, 2013, paras. 21-23.

<sup>406</sup> I/A Court, *Case of the Saramaka People v. Surinam*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007, Series C No. 172, paras. 93-94. I/A Court, *Case of the Kichwa People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012, Series C No. 245, para. 217, footnote 288. I/A Court, *Case of the Rio Negro Massacres v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 4, 2012, Series C No 250, para. 160, footnote 250.

<sup>407</sup> United Nations. Committee on Economic, Social and Cultural Rights. *Consideration of Reports submitted by States Parties under Articles 16 and 17 of the Covenant. Concluding observation on the Committee on Economic, Social and Cultural Rights. Russian Federation*. E/C.12/1/Add.94, 12 December 2003, para. 39.

<sup>408</sup> See UN Declaration on the Rights of Indigenous Peoples, preamble, Articles 3 and 4.

<sup>409</sup> ILO Convention 169, preamble, paragraph 5, and Article 7.1. In the same line, the cornerstone of Convention 169 is composed of the dispositions that enshrine the right to consultation and the full and effective participation of indigenous peoples, as rights that allow them to exercise the right to self-determination. In particular, it must be mentioned that Articles 2 and 33 establish the obligation of States to institutionalize the participation processes, and Articles 6, 7 and 15 establish the general framework for consultation and participation of indigenous peoples.

statements of United Nations mechanisms on indigenous peoples,<sup>410</sup> and other declarations that have recognized this right.<sup>411</sup>

239. The full effectiveness of the right to self-determination is closely related to the exercise of other specific rights of indigenous peoples that guarantee their existence as peoples, among which the right to integrity and cultural identity has a central place. In this regard, the IACHR and the Inter-American Court have recognized that indigenous peoples have the right to their cultural identity and for the States to guarantee their right to live in their ancestral territories in order to preserve their identity.<sup>412</sup> Another essential element of the right to self-determination is constituted by the relations they have with their lands, territories and natural resources, which are for indigenous peoples a basis for cultural identity, knowledge and spirituality, and they are, in the words of the Inter-American Court “a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations.”<sup>413</sup>

## 1. The principle of non-discrimination in relation to the right to collective property

240. The Commission considers it important to highlight that a structural cause which often lies beneath violations of the rights of indigenous and tribal peoples, is the existence of a profound situation of discrimination that affects these groups, deeply-rooted over the course of centuries. The lack of consultation before constructing a hydroelectric plant irrespective of its potential harm to thousands of lives, the destruction of entire communities resulting from the execution of economic projects, and the sale of lands that have been historically occupied by indigenous peoples or afro-descendants communities, are all expressions of this discrimination.

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<sup>410</sup> The three United Nations mechanisms for indigenous peoples –Special Rapporteur on the rights of indigenous peoples, Permanent Forum on Indigenous Issues, and the Expert Mechanism on the Rights of Indigenous Peoples– have considered that the most important right for indigenous peoples is that of self-determination, “as without the enjoyment of that right, they could not enjoy the other fundamental human rights of indigenous peoples.” United Nations. Permanent Forum on Indigenous Issues. *Consolidated report on extractive industries and their impact on indigenous peoples*. E/C.19/2013/16. 20 February 2013, para. 19.

<sup>411</sup> See, *inter alia*, Regional Conference on Population and Development in Latin America and the Caribbean. *Montevideo Consensus on Population and Development*. Montevideo, 2013. Preamble, paragraph 1.

<sup>412</sup> IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, paras. 160-161. Also see Allegations before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Referred to in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, para. 157(c). I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, paras. 171-182. I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations*. Judgment of June 27, 2012. Series C. No. 245, para. 217.

<sup>413</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 146.

241. Given the human rights violations often involved in the execution of extractive and development activities, the Inter-American Commission draws the States' attention to their international obligations in relation to the principles of non-discrimination and equality before the law, when they assess, allow or grant concessions, and supervise the activities of private entities related to these projects. The IACHR has repeatedly established that the principle of non-discrimination is one of the pillars of any democratic system and one of the foundations of the human rights system established by the OAS.<sup>414</sup> In fact, both the American Declaration and Convention where inspired that the ideal of "[a]ll men are born free and equal, in dignity and in right."<sup>415</sup> Article II of the American Declaration, and Articles 1.1 and 24 of the American Convention advance the principles of non-discrimination and equality before the law.<sup>416</sup>
242. According to Article 1.1 of the American Convention, the principle of equality and non-discrimination is a protection that underlies the guarantee of all other rights and freedoms, as every person is entitled to the respect and guarantee of the human rights established in those instruments, without any form of discrimination and in conditions of equality. The same is applicable to the second part of Article II of the American Declaration.<sup>417</sup> In the words of the Inter-American Court, "Article 1(1) of the Convention is a general norm the content of which extends to all the provisions of the treaty, because it establishes the obligation of the States Parties to respect and ensure the full and free exercise of the rights and freedoms recognized therein 'without any discrimination.'" In other words, whatever the origin or the form it takes, any conduct that could be considered discriminatory

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<sup>414</sup> See, *inter alia*, IACHR. *The Situation of People of African Descent in the Americas*. OEA/Ser.L/V/II.Doc.62, 5 December 2011, para. 1; IACHR. "Considerations regarding the compatibility of affirmative action measures designed to promote the political participation of women with the principles of equality and non-discrimination", *Annual Report of the Inter-American Commission of Human Rights, 1999*. Chapter IV. In general, the same has been said by the United Nations Bodies. The Human Rights Committee has indicated: "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights". (UN. Human Rights Committee. General Comment No. 18. *Non-discrimination*. CCPR/C/37, 10 November 1989, para. 1).

<sup>415</sup> American Declaration, Preamble.

<sup>416</sup> American Declaration, Article II: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." American Convention, Article 1.1: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."; and Article 24: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." See, Inter-American Convention Against All Forms of Discrimination and Intolerance, Preamble (adopted by the OAS General Assembly in La Antigua, Guatemala, 5 June 2013); OAS Charter, Article 3.1; and Inter-American Democratic Charter, Article 9.

<sup>417</sup> American Declaration, Article II, where relevant: All persons: "have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor".

with regard to the exercise of any of the rights guaranteed in the Convention is *per se* incompatible with it.”<sup>418</sup>

243. For its part, Article 24 of the Convention enshrines the right to equality before the law and to receive legal protection, without discrimination, as well as the first part of Article II of the American Declaration.<sup>419</sup> This right implies the prohibition of any arbitrary difference in treatment; any distinction, restriction or exclusion that, even if provided by law, is not objective and reasonable, would violate the right to equality before the law. That is, Articles 24 of the American Convention and II of the American Declaration would be violated if “the discrimination refers to unequal protection by domestic law.”<sup>420</sup>
244. The Commission also recalls that the rights to equality before the law, to equal treatment and non-discrimination mandate that States establish the necessary legal mechanisms to clarify and protect the right to collective property of all indigenous and tribal peoples, just as they protect the rights to property in general under the domestic legal system.<sup>421</sup> States violate the rights to equality before the law, to equal protection of the law and non-discrimination when they fail to grant indigenous and tribal peoples, “the protections necessary to exercise their right to property fully and equally with other members of the population.”<sup>422</sup>
245. The lack of equal protection to indigenous and tribal property can be exemplified by the preferential treatment afforded to individual property, in contrast to the unprotected nature of the lands and territories historically occupied by indigenous and tribal peoples. Furthermore, to maintain and incorporate norms or policies even when the indigenous and tribal peoples at issue have opposed the implementation of an extractive or development project represents a serious violation of the principle of non-discrimination. It is also incompatible with the right of indigenous and tribal peoples to belong to a distinct ethnic group with its own social, economic and cultural characteristics. It can lead instead to their disintegration or assimilation.

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<sup>418</sup> I/A Court H.R., *Case of Nadege Dorzema et al v. Dominican Republic*. Merits, Reparations and Costs. Judgement of October 24, 2012, Series C No. 251, para. 224; I/A Court H.R., *Case of Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 78; and I/A Court H.R. *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 53.

<sup>419</sup> American Declaration, Article II, where relevant: “All persons are equal before the law”.

<sup>420</sup> See, in relation to the distinction of Articles 1.1. and 24 of the American Convention. I/A Court H.R. *Case of Nadege Dorzema et al v. Dominican Republic*. Merits, Reparations and Costs. Judgement of October 24, 2012, Series C No. 251, para. 226.

<sup>421</sup> IACHR, Report No. 40/04. Case 12.053. IACHR. Indigenous Mayan communities in the Toledo District (Belize), Merits Report No. 40/04, Case 12.053, October 12, 2004. para. 155. IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, para. 61.

<sup>422</sup> IACHR, Report No. 40/04. Case 12.053. IACHR. Indigenous Mayan communities in the Toledo District (Belize), Merits Report No. 40/04, Case 12.053, October 12, 2004. para. 171. IACHR. *Indigenous and tribal peoples’ rights over their ancestral lands and natural resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, December 30, 2009, para. 61.

246. The Commission also highlights with concern the situation of deeply entrenched structural discrimination that exists against Afro-descendent communities. It reiterates its alarm in the sense that “the principles of equality and non-discrimination are still not guaranteed for Afro-descendants in the Americas,”<sup>423</sup> even in the context of extractive or development activities that could affect their collective rights. The Commission emphasizes that these communities face important obstacles in the exercise of their civil, political, economic, social and cultural rights,<sup>424</sup> which perpetuates their situation of poverty, exclusion and violence.

### **Exclusion and inequality against indigenous peoples and Afro-descendants in Honduras**

During its *in loco* visit to Honduras in December 2014, the Inter-American Commission was informed that indigenous peoples and Afro-descendants suffer the highest levels of poverty in the country. Indigenous peoples and Afro-descendants have lower levels of alphabetization in comparison to the rest of the population, high levels of malnutrition, and a higher rate of contagious diseases and infections. These inequalities are accentuated in indigenous and Afro-descendent women. Furthermore, the IACHR was informed that the maternal mortality rate of indigenous women was considerably higher than that of non-indigenous women.

Civil society organizations informed that 837 potential mining projects exist, which means the 35% of the national territory. Civil society informed the IACHR of 98 mining concessions in the Departments of Lempira and Santa Barbara. It also informed of the existence of 76 hydroelectric projects with a finalized feasibility study and/or operation contract approved in 14 of the 18 departments of the country (Atlántida, Colón, Comayagua, Copán, Cortés Francisco Morazán, Intibuca, La Paz, Lempira, Ocotepeque, Olancho, Patuca, Santa Bárbara, y Yoro). In relation to the companies that develop these projects, a member of an indigenous people in La Ceiba indicated “They don’t want to respect our culture, they don’t want to respect our tradition. Not only that, they deceive us. They tell us there will be work, and that’s a farce.” The IACHR was informed that mega-projects are being developed in the lands of indigenous peoples and their natural resources are being exploited, without previous, free and informed consultation processes taking place.

The Commission was also informed of concession processes to companies that have resulted in great repression to peoples and communities, which haven forcibly evicted. “People are distressed because of the disposessions and evictions carried out against the Garifuna community,” a member of the Garifuna

<sup>423</sup> IACHR. The Situation of People of African Descent in the Americas. OEA/Ser.L/V/II.Doc.62, 5 December 2011, para. 101.

<sup>424</sup> IACHR. The Situation of People of African Descent in the Americas. OEA/Ser.L/V/II.Doc.62, 5 December 2011, para. 102.

people told to the IACHR. Moreover, the IACHR has been informed of the disproportionate impact against the Garifuna people generated by the extensive production of African palm in the northern territory of the country. The IACHR received worrying information regarding the impact that human activities have in the situation of poverty of these communities. For example, the Garifuna Community of Santa Rosa indicates that due to the actions of companies that cultivate the African palm in the Department of Colon, the course of the Aguan River has been changed, generating devastating consequences to their environment and access to water, due to its high salinization.

Civil society organizations indicated that there is no legislation or regulations that ensure the rights recognized in the ILO 169 Convention, ratified by the State since 1994. They alleged that the Employment and Economic Development Zones Act (ZEDES) “has placed the Garifuna people in imminent danger of being expelled from the northern coast of Honduras.” They also allege that this law contemplates the creation of “model cities,” and that five of these cities encompass Garifuna communities, which reportedly were not consulted about this.<sup>425</sup>

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<sup>425</sup> IACHR. *Preliminary Observations on the situation of Human Rights in Honduras*. Press Release 146A/2014, December 5, 2014.



CHAPTER 4  
IMPACT ON THE FULL EXERCISE  
OF THE RIGHTS OF INDIGENOUS  
AND AFRO-DESCENDENT  
COMMUNITIES



## IMPACT ON THE FULL EXERCISE OF THE RIGHTS OF INDIGENOUS AND AFRO-DESCENDENT COMMUNITIES

247. Through its various mechanisms, the IACHR has received over the years information by various means showing that extraction and development projects impact the full enjoyment of the rights of indigenous peoples and Afro-descendent communities. The Inter-American Commission has received information on such impacts in relation to different peoples and communities in several countries of the continent. For example, using the different mechanisms of the Commission, several indigenous and tribal peoples have made the impact on their rights, grounded in the implementation of said projects, known to the Commission by means of, *inter alia*, contentious cases,<sup>426</sup> precautionary measures,<sup>427</sup> public hearings, and IACHR visits followed by country reports or press releases.<sup>428</sup> This led the IACHR to sustain in its *Report on Indigenous and Tribal People's Rights over their ancestral Lands and Natural Resources* that:

Infrastructure or development mega-projects, such as roads, canals, dams, port or the like, as well as concessions for the exploration or exploitation of natural resources in ancestral territories, may affect indigenous populations with particularly serious consequences, given that they imperil their territories and the ecosystems within, for which reason they represent a mortal danger to their survival as peoples, especially in cases where the ecological fragility of their territories coincides with demographic weakness.<sup>429</sup>

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<sup>426</sup> See *inter alia* IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Community of the Toledo District v. Belize*, October 12, 2004; IACHR, *Application before the I/A Court in the Case of Saramaka People v. Surinam*, June 23, 2006; IACHR, *Application before the I/A Court in the Kichwa Indigenous People of Sarayaku v. Ecuador*, April 26, 2010.

<sup>427</sup> The IACHR has heard, under the precautionary measure mechanism, about the following situations, *inter alia*, referring to peoples and communities: Maya Indigenous Communities (Belize); San Mateo de Huanchor Community (Peru); Ngobe *et. al.* Indigenous Communities (Panama); Communities of Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacan Municipalities in the Department of San Marcos (Guatemala); and Indigenous Communities of the Xingu River Basin, Pará (Brazil).

<sup>428</sup> See, *inter alia*, IACHR. *Third Report on the Situation of Human Rights in Paraguay*. Chapter IX. OEA/Ser./L/VII.110 doc. 52. 9 March, 2001, paras. 38 and 42, and IACHR. *Report on the Situation of Human Rights in Brazil* Chapter 6-1, OEA/Ser.L/V/II.97 Doc. 29 rev.1, 29 September, 1997.

<sup>429</sup> IACHR. *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, 30 December, 2009, para. 205.

248. While the impact of these projects on the human rights of indigenous and Afro-descendent communities has been a constant through the years, the IACHR is concerned to note that recently, and ever more frequently, it receives information about the serious impacts of these activities on the human rights of these collectivities in the region. This chapter represents an effort by the IACHR to make visible some of the impacts that the implementation of extractive and development projects have on the rights of indigenous peoples and Afro-descendent communities. It has been drafted in general based on the information received in recent years by the Commission at its hearings, visits, country reports, and monitoring activities. Similarly, the IACHR notes that the adverse effects of activities of this nature on the rights of indigenous peoples and Afro-descendent communities have been addressed by various mechanisms of United Nations.<sup>430</sup>
249. The impacts are multiple, complex and intertwined with other situations of violation of rights, such as poverty and extreme poverty, in which many peoples and communities find themselves. In this way, human activities deepen these situations, generating new scenarios of infringement that overlap with existing and often long-standing situations. This section does not seek to make a thorough diagnosis nor a comprehensive and finished account of the impacts in these contexts, but to demonstrate the seriousness and complexity of the situation through identified, general patterns that are illustrated through examples. The IACHR is aware that there are hundreds of indigenous peoples and Afro-descendent communities, in addition to those listed here, who see their rights affected daily in the context of the implementation of projects of this nature. The references that are made in the following paragraphs should serve to emphasize the inescapable need to develop indicators that more specifically evaluate the impact on human rights caused by the implementation of extractive and development projects in the countries of the hemisphere, and address, as a priority, the adverse effects that some of these activities are generating on the human rights of these collectivities.

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<sup>430</sup> The treaty bodies are among the mechanisms that have referred to the matter [Committee on Economic, Social and Cultural Rights: General Comment No.7 (1997) on the Right to Adequate Housing (Article 11(1) of the Covenant): forced evictions, para. 10, and No. 15 (2002) on The Right to Water (Articles 11 and 12 of the Covenant), paras. 7 and 16; Committee on the Rights of the Child, General Comment No. 11 (2009) on Indigenous Children and their Rights under the Convention, para. 16, and No. 16 (2013) on the State obligations regarding the Impact of the Business Sector on Children's Rights]; the Expert Mechanism on the Rights of Indigenous Peoples [A/HRC/EMRIP/2012/CRP.1 and A/HRC/21/55] and the Special Rapporteur on the Rights of Indigenous Peoples [see A/HRC/24/41 and A/HRC/FBHR/2012/CRP.1]. Cited by: UN. Working Group on the issue of Human Rights and Transnational Corporations and other business enterprises. A/68/279. 7 August, 2013, para. 1.

## ***A. Right to the collective property of indigenous peoples and Afro-descendent communities over their territories and natural resources***

250. The impacts related to the imposition of mining, logging, oil extraction, among other activities, on the rights of indigenous peoples have been widely reported to the IACHR. Based on the information at its disposal, the Commission has noticed that the main impacts that the implementation of these projects bring, include the reduction of the quantity and quality of water sources; the impoverishment of agricultural soils; the alteration of their own production systems; the decline of fish, fauna, flora and biodiversity in general; and the impact on the balance that constitutes the basis of the ethnic and cultural reproduction of the indigenous peoples.
251. The IACHR notes that, on occasions, concessions overlap with almost the entirety of the ancestral lands of indigenous peoples<sup>431</sup> and are approved in direct contravention of these peoples' own concepts of development.<sup>432</sup> Of particular concern to the IACHR are the cases reported where the implementation of extraction and development projects creates risks to their physical and cultural existence as peoples, providing no option to continue with their life plans as it would be impossible to accomplish them.<sup>433</sup>

### **Perspective of Indigenous Peoples in Ecuador**

Leaders of the Shuar People in Ecuador reported to the IACHR that the extractive policy in Ecuador contradicts not only constitutional principles, which include good living [“buen vivir”] and plurinationality, but also the worldview of the peoples affected. They have explained that:

“We want to say that the Shuar are not opposed to development, as it is said by the Government, army and companies. We have an example of an oil company that has existed in Amazonia for more than 40 years where there are multiple nationalities. But the development that they refer to is incompatible with the way of thinking of the people. The development that businesses refer to is the accumulation of goods. To the contrary, we say that the person must develop

<sup>431</sup> IACHR, *Hearing on the Rights of Indigenous Peoples to Legal Recognition and Property in Peru*, 153<sup>o</sup> Period of Sessions, October 31, 2014; IACHR, *Hearing on the Rights of Indigenous Peoples to Prior Consultation in Ecuador*, 149<sup>o</sup> Period of Sessions, October 28, 2013; and IACHR, *Hearing on Reports of Destruction of the Biocultural Heritage Due to the Construction of Mega Projects of Development in Mexico*, 153<sup>o</sup> Period of Sessions, October 30, 2014.

<sup>432</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples in the Context of the Peace Process in Colombia*, 149<sup>o</sup> Period of Sessions, October 31, 2013; and IACHR, *Hearing on the Human Rights Situation of the Ashaninka People in Peru*, 138<sup>o</sup> Period of Sessions, March 23, 2010.

<sup>433</sup> IACHR, *Hearing on Indigenous People's Right to Prior Consultation in Ecuador*, 149<sup>o</sup> Period of Sessions, October 28, 2013.

according to its needs, not accumulating, not destroying, but this does not happen within the development as proposed by the businesses and State. This is what we do not agree with and we request that the State, in accordance with the Constitution, guarantees the existence of indigenous peoples, but, instead, it kills.”<sup>434</sup>

In addition, the Kichwa Indigenous Peoples of Sarayaku currently have a life plan, aimed at restoring the Sumak Kawsay, which entails "maintaining a healthy territory without pollution, a productive and abundant land of natural resources which ensures food sovereignty and, also, having their own sustainable and free organization, and living in harmony with the concepts of development of the Kichwa people of Sarayaku." The plan aims to preserve the continuity of the social, cultural, political, and organizational life of Sarayaku through the implementation and execution of actions and programs that maintain the *Sumak Kawsay* of the Amazonian indigenous peoples and the living rainforest.<sup>435</sup>

252. In addition, the IACHR has received constant complaints alleging that, for reasons linked to the interest of third parties in the lands inhabited by indigenous peoples and Afro-descendent communities, States are reportedly not complying with the obligation to recognize, delimit and demarcate and title these areas; duties that have been widely developed by the organs of the Inter-American system.<sup>436</sup> It has also been reported before the IACHR that, in those cases where there are titling processes pending, these were purportedly not processed in accordance with the reasonable time guarantee.<sup>437</sup> This is compounded by the fact that the States are allegedly failing to comply with the obligation to remove existing third parties in titled indigenous territories and protect them from additional incursions by third parties.<sup>438</sup>
253. According to the information received, there appears to be a favorable attitude towards granting concessions or permits for extractive or development projects that were not consulted or approved by the indigenous peoples and Afro-

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<sup>434</sup> See, for example: IACHR, *Hearing on the Situation of Leaders and Defenders of the Shuar People in Ecuador*, 154<sup>o</sup> Period of Sessions, March 17, 2015.

<sup>435</sup> Information received by the IACHR in the regional summit about “Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects.” Panama City, July 30, 2015.

<sup>436</sup> IACHR, *Hearing on Legal Obstacles for the Recognition and Titling of Indigenous Lands in Guatemala*, 140<sup>o</sup> Period of Sessions, October 25, 2010. IACHR, *Report on the Situation of Human Rights in Brazil*, Chapter 6, OEA/Ser.L/V/II.97 Doc. 29 rev.1, 29 September, 1997, para. 62; and IACHR, *Hearing on the Right to Private Property of Indigenous Peoples of Panama*, 133<sup>o</sup> Period of Sessions, October 28, 2008.

<sup>437</sup> IACHR, *Hearing on the Rights of Indigenous Peoples to Legal Recognition and Property in Peru*, 153<sup>o</sup> Period of Sessions, October 31, 2014; and IACHR, *Hearing on Complaints of Occupation of Territories of Indigenous Peoples in Costa Rica*, 147<sup>o</sup> Period of Sessions, March 16, 2013.

<sup>438</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples in Nicaragua*, 150<sup>o</sup> Period of Sessions, March 25, 2014; and IACHR, *Hearing on Case 12.548 – Garifuna Community of Triunfo de la Cruz, Honduras*, 127<sup>o</sup> Period of Sessions, March 2, 2007.

descendent communities affected.<sup>439</sup> Therefore, there is a presence of third parties, settlers or officials of companies or Government entities seeking to take over lands inhabited by indigenous peoples and Afro-descendent communities via different mechanisms. On this aspect, the IACHR has received information indicating that the mechanisms used include the obtaining of overlapping individual titles, the annulment of collective titles, the imposition of administrative rights of way, and even the use of violence with the acquiescence of the State.<sup>440</sup> For example, the Commission was informed in relation to the transoceanic canal in Nicaragua that the titling process of the Rama and Creoles was not only interrupted, but that serious regressions have occurred since its construction which will require the expropriation of ancestral lands and the displacement of communities.<sup>441</sup>

254. The Commission notes that there is a problem in the region in that States frequently restrict the obligations of protection of indigenous peoples, to the lands that have certain kinds of formal recognition. Nevertheless, these lands frequently are only a fraction of those that indigenous and tribal peoples have a right to, and in regards to which the right to consultation and consent would be applicable. It is important to recall that “[t]he protective safeguards of the right to property under the Inter-American human rights instruments can be invoked by indigenous peoples in relation to territories that belong to them, but have not yet been formally titled, delimited or demarcated by the State.”<sup>442</sup> The referred state obligations are enforceable in relation to the lands and territories that indigenous peoples have traditionally occupied, and not only those recognized under the domestic legislation. As expressed by the Commission, in line with the jurisprudence of the Court, “States cannot grant concessions for the exploration of exploitation of natural resources that are located in territories which have not been delimited, demarcated or titled, without effective consultations with and the informed consent of the people.”<sup>443</sup>

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<sup>439</sup> IACHR, *Hearing on Human Rights Situation of Indigenous Peoples in Colombia*, 140<sup>o</sup> Period of Sessions, October 28, 2010; IACHR, *Hearing on Case 12.094 – Association of Indigenous Communities Lhaka Honhat, Argentina*, 137<sup>o</sup> Period of Sessions, November 2009; IACHR, *Hearing on Precautionary Measures and Petition 592/07 – Hul’qumi’num Treaty Group, Canada*, 133<sup>o</sup> Period of Sessions, October 28, 2008; and IACHR, *Hearing on Petition 592/07 and Precautionary Measures 110/07 – Hul’qumi’num Treaty Group, Canada*, 134<sup>o</sup> Period of Sessions, March 23, 2009.

<sup>440</sup> IACHR, *Hearing on Legal Obstacles for the Recognition and Titling of Indigenous Lands in Guatemala*, 140<sup>o</sup> Period of Sessions, October 25, 2010. IACHR, *Hearing on the Human Rights Situation of Peasants and Persons of Afro-Caribbean and Indigenous Descent in Canton de Talamanca, Costa Rica*, 140<sup>o</sup> Period of Sessions, October 28, 2010. IACHR, *Hearing on the Situation of Indigenous Communal Property in Nicaragua*, 138<sup>o</sup> Period of Sessions, March 23, 2010. IACHR, *Hearing on the Reports of Violations of the Human Rights of Indigenous Peoples in Costa Rica*, 153<sup>o</sup> Period of Sessions, October 31, 2014.

<sup>441</sup> See, IACHR, *Hearing on the Construction of the Transoceanic Canal and its Impact on Human Rights in Nicaragua*, 154<sup>o</sup> Period of Sessions, March 16, 2015.

<sup>442</sup> IACHR. *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, 30 December, 2009, para. 103; IACHR. *Indigenous Mayan communities in the Toledo District (Belize)*, Merits Report No. 40/04, Case 12.053, October 12, 2004. para. 153.

<sup>443</sup> IACHR. *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, 30 December, 2009, para. 103;

255. The IACHR has also been informed about indigenous lands and territories that have been allegedly reduced arbitrarily during the titling process, in order to facilitate the granting of permits, concessions or authorizations for projects of different nature, as purportedly occurred in the titling process of indigenous peoples in the Amazon.<sup>444</sup> Also, misappropriation or illegal occupation by third parties, who do not respect the ways of life of indigenous peoples, and which generate great uncertainty and distress and prevent them from living with dignity in conditions of peace and security, have been reported in their lands and ancestral territories.<sup>445</sup>

### **The indigenous peoples in the Caribbean Coast of Nicaragua**

The IACHR has been informed of a situation of violence as a result of the lack of protection from the Nicaraguan State of the territorial integrity of the indigenous peoples. Indigenous organizations and civil society have indicated to the IACHR that there is a need to finish the process of demarcation and titling of lands, in particular its last stage, related to the legal clarification. This according to Law No. 445, “Law concerning the Communal Property Regime of the Indigenous and Ethnic Communities, of the Autonomous Regions of the Atlantic Coast and the Bocay, Coco, Indio and Maiz Rivers.” According to the information received, in the absence of legal clarification, natural or legal persons argue that they have acquired legally properties inside of the ancestral territories of the indigenous peoples and settle on them. It has been indicated that this has generated the deterioration of the situation of the Caribbean Coast since 2014, increasing the number of aggressions with firearms, murders, as well as the number of persons that have been forced to fled from their homes.<sup>446</sup>

256. The IACHR has indicated that, sometimes, illegal occupants in indigenous lands carry out acts of intimidation or violence against members of these peoples.<sup>447</sup> The IACHR notes with concern the constant reports regarding territorial conflicts between indigenous and tribal peoples and settlers or other persons interested in taking over their traditional lands. These reports state that there is no adequate response from the State aimed at protecting indigenous peoples from violent

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I/A Court H. R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 194 (a).

<sup>444</sup> IACHR, *Hearing on the Situation of the Rights to Territory and Self-Government of Indigenous Peoples in the Amazon Region*, 143<sup>o</sup> Period of Sessions, October 27, 2011 and IACHR, *Hearing on Right of Indigenous Peoples in Panama to Collective Ownership of Lands*. 144<sup>o</sup> Period of Sessions, March 23, 2012.

<sup>445</sup> IACHR, *Hearing on the Situation of Afro-Colombian, Indigenous and Campesino Communities of Northern Cauca, Colombia*, 137<sup>o</sup> Period of Sessions, November 5, 2009; and IACHR, *Hearing on the Complaints of Occupation of Territories of Indigenous Peoples in Costa Rica*, 147<sup>o</sup> Period of Sessions, March 16, 2013.

<sup>446</sup> IACHR, *Hearing on the Situation of the Human Rights of Indigenous Peoples and Afro-Descendants along Nicaragua’s Caribbean Coast*, 156th Period of Sessions, 20 October 2015.

<sup>447</sup> IACHR, *Hearing on the Complaints of Occupation of Territories of Indigenous Peoples in Costa Rica*, 147<sup>o</sup> Period of Sessions, March 16, 2013, and IACHR, *Hearing on Land Tenure and Human Rights of Indigenous Peoples in Mexico*, 141<sup>o</sup> Period of Sessions, March 28, 2011.

acts.<sup>448</sup> Also, with alarming frequency such acts remain unpunished. <sup>449</sup> For example, some indigenous peoples in Costa Rica reported to the IACHR in 2013 that there exists a serious situation of invasion of their lands and ancestral territories, and that the State offered to relocate the affected indigenous persons from their territory as a protection measure, instead of removing the illegal occupants.<sup>450</sup>

257. The Commission has been informed of the establishment of protected areas on indigenous lands and territories, with proper respect for the right to consultation, which are later administered by States. In general, this brings forth the establishment of limitations on the use and enjoyment of natural resources that do not take into account their appropriate uses, and can presuppose an arbitrary restriction on their right to the use and enjoyment of the natural resources that they have traditionally used and are found in their territories.
258. In this regard, the Commission reiterates that environmental conservation is an important public necessity, but it cannot be pursued at the expense of the human rights of indigenous peoples.<sup>451</sup> The Commission has explained that “in some cases the establishment of protected natural areas can be a form of limitation or deprivation of indigenous peoples’ right to the use and enjoyment of their lands and natural resources, derived from the State’s unilateral imposition of regulations, limitations, conditions and restrictions upon said use and enjoyment for reasons of public interest, in this case the conservation of nature.”<sup>452</sup>
259. Taking this into consideration, the IACHR underscores that when the establishment of protected areas affects indigenous territories, the previously mentioned special guarantees in relation to extraction and development projects are also applicable.<sup>453</sup> Similarly, the Inter-American Court has established that in the context of the creation of protected areas, in order to guarantee the right to property of indigenous peoples, the States have to ensure the effective participation of the affected members of indigenous communities in accordance to their customs and traditions, in any plan or decision that could affect their traditional lands and restrict the use and enjoyment of those lands, in order to

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<sup>448</sup> See *inter alia* IACHR. *Truth, Justice and Reparation – Fourth Report on the Situation of Human Rights in Colombia*. OEA/Ser.L/V/II. Doc. 49/13, December 31, 2013, para. 825; IACHR, *Hearing on the Complaints of Occupation of Territories of Indigenous Peoples in Costa Rica*, 147<sup>o</sup> Period of Sessions, March 16, 2013; IACHR, *Democracy and Human Rights in Venezuela*. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, VII. D. paras. 1062-1071; *Third Report on the Situation of Human Rights in Paraguay*. Chapter IX. OEA/Ser./L/VII.110 doc. 52. 9 March 2001, Chapter IX, para. 41; and IACHR. *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97 Doc. 29 rev.1, 29 September, 1997, Chapter VI.

<sup>449</sup> IACHR, *Hearing on the Complaints of Occupation of Territories of Indigenous Peoples in Costa Rica*, 147<sup>o</sup> Period of Sessions, March 16, 2013.

<sup>450</sup> IACHR, *Hearing on the Complaints of Occupation of Territories of Indigenous Peoples in Costa Rica*, 147<sup>o</sup> Period of Sessions, March 16, 2013.

<sup>451</sup> IACHR, *Kaliña and Lokono Peoples*, Suriname. Merits Report No. 79/13. Case 12.639. 18 July 2013. para. 134.

<sup>452</sup> IACHR. *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, 30 December, 2009, para. 222.

<sup>453</sup> IACHR. *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, 30 December, 2009, para. 222.

guarantee that the plans or decisions do not deny their survival as people.<sup>454</sup> The IACHR considers that it is precisely to harmonize the respect of the rights of indigenous peoples and with conservation purposes that the State is mandated to conduct free, prior and informed consultations where the effective participation of the affected indigenous peoples is guaranteed.<sup>455</sup> Available information of concern indicates that licenses and concessions are being granted for purposes incompatible with environmental protection and the rights of indigenous and tribal peoples.<sup>456</sup>

### **Creation of protected areas for purposes incompatible with environmental conservation in Central America countries**

The IACHR was informed that in the Bocas del Toro Region in Panama, lands and territories traditionally inhabited by the Ngobe, Naso and Bribri communities were declared protected areas. Following information received by the IACHR, soon thereafter, the State granted concessions to large power plants and road construction.<sup>457</sup> This was brought to light by the former Special Rapporteur of the United Nations, James Anaya, who noted that *inter alia* the “Bosque Protector de Palo Seco” (Dry Stick Protective Forest) was created in 1983 when many Ngobe communities were already established in the area and in 2007, a corporation was authorized to bring forward a hydroelectric project which supposed the flooding of approximately 250 hectares surrounding the Changuinola river.<sup>458</sup>

A similar situation occurred in Honduras. According to the information received by the IACHR, several communities from the Garifuna people have seen their rights to traditional lands and territories restricted because of the establishment of protected areas, all without prior consultation. According to the information presented to the Commission, 28 of the 42 Garifuna communities existing in Honduras are within the core of protected areas or in its buffer zone. At the same

<sup>454</sup> I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparation and Costs. Judgment of August 24, 2010, Series C No. 214, para. 157.

<sup>455</sup> IACHR, *Kaliña and Lokono Peoples*, Suriname. Merits Report No. 79/13. Case 12.639. 18 July 2013.

<sup>456</sup> The UN Special Rapporteur on the rights of indigenous peoples has manifested that “[t]he establishment of protected areas such as national parks and nature reserves often involves eviction of indigenous people from large tracts of indigenous lands, the collapse of traditional forms of land tenure, and their impoverishment, which has led to many social conflicts”. The Rapporteur has also emphasized “the need for new paradigms for protected areas in order to ensure that violated indigenous rights are restored and are respected in future. The defense of human rights must be a priority in environmental campaigns [...]”. United Nations. Human Rights Council. *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, Rodolfo Stavenhagen, A/HRC/4/32, 27 February 2007, paras. 22-23.

<sup>457</sup> IACHR, *Hearing on the Right to Property and the Right to a Healthy Environment of Indigenous Peoples in Bocas del Toro, Panama*, 154<sup>o</sup> Period of Sessions, March 20, 2015.

<sup>458</sup> UN, Report of the former Special Rapporteur on indigenous people’s rights, James Anaya, *Observations on the situation of the Charco la Pava Community and other communities affected by the Chan 75 Hydroelectric Project (Panama)*, September 7, 2009, A/HRC/12/34/Add.5.

time, the Commission has been informed that after the area is declared as protected, access to it is restricted for members of the community, making it impossible to exercise traditional cultural practices, but third parties are allowed to occupy areas that are claimed to belong to Garifuna communities by virtue of ancestral occupation, and some areas have been authorized for large touristic constructions.<sup>459</sup>

260. The IACHR has also identified cases in which indigenous territories or parts of them have been expropriated arbitrarily to execute extractive or development projects. For example, the IACHR notes the constant claims grounded on the construction of the so-called “Transoceanic Canal” in Nicaragua, indicating that the concession for the project was granted without a public bidding, and without consultation or consent from the affected indigenous and tribal peoples. It has been claimed before the Commission that the indigenous peoples at issue are allegedly deprived of the exercise of their main subsistence activities that are essential for their food security. Reportedly, their lands would be expropriated, affecting 40% of the territory of the Rama and Creole peoples, under a legal framework that allegedly has been enacted in contravention to the Inter-American standards on indigenous peoples in order to ensure the viability of the project.<sup>460</sup> It has also been reported that, due to the tourism projects in Bocas del Toro Region, Panama or in the Bahía de Tela in Honduras, the indigenous and tribal communities have been affected through, *inter alia*, the sale or illegal dispossession of their lands, arbitrary evictions and burning of their houses, and destruction of their agricultural production.<sup>461</sup>
261. The IACHR considers that many of the impacts related to the imposition of extractive or development projects are closely related to the structural problem identified in the region, which involves the granting of concessions or permits or other authorizations without complying with the right to effective participation, including consultation and, where appropriate, the prior, free, and informed consent of indigenous and tribal peoples.<sup>462</sup> Also, the Commission has repeatedly received information indicating that, when such consultation processes take place, they have not been conducted in compliance with the relevant guarantees

<sup>459</sup> Information received by the IACHR in the regional summit about “Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects.” Panama City, July 30, 2015.

<sup>460</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples of Nicaragua*, 150<sup>o</sup> Period of Sessions, March 25, 2014; and IACHR, *Hearing on the Human Rights Situation of Indigenous Women in Nicaragua*, 153<sup>o</sup> Period of Sessions, October 28, 2014, and IACHR, *Hearing on the Construction of the Transoceanic Canal and its Impact on Human Rights in Nicaragua*, 154<sup>o</sup> Period of Sessions, March 16, 2015.

<sup>461</sup> Information received by the IACHR in the regional summit about “Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects.” Panama City, July 30, 2015.

<sup>462</sup> IACHR, *Hearing on the Right to Prior, Free, and Informed Consultation of Indigenous Peoples and Afro-descendants in the Andean Region*, 141<sup>o</sup> Period of Sessions, March 29, 2011; IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples in Argentina*, 144<sup>o</sup> Period of Sessions, March 23, 2012; IACHR, *Hearing on the Human Rights Situation of the Indigenous Communities Affected by Activities of the Mining Industry in the Andean Region*, 140<sup>o</sup> Period of Sessions, October 29, 2010; and IACHR, *Hearing on the Legal Obstacles for the Recognition and Titling of Indigenous Lands in Guatemala*, 140<sup>o</sup> Period of Sessions, October 25, 2010.

established by the bodies of the inter-American system, nor are they intended to guarantee the rights of these peoples and communities.<sup>463</sup>

262. One aspect of particular concern is the situation of indigenous peoples in voluntary isolation and initial contact *vis à vis* third parties that execute projects or activities in their ancestral territories in contravention of the ‘no-contact principle.’ As the IACHR has indicated, contact has brought devastating consequences to these peoples, while “many of the situations of risk to the life and integrity of these peoples are generated by contact, either direct or indirect.”<sup>464</sup> In particular, the IACHR has received information regarding serious threats to peoples in voluntary isolation in States in South America.<sup>465</sup> The peoples in voluntary isolation in Bolivia, for example, are allegedly legally unprotected and there is a lack of will to guarantee their rights. In Brazil, the peoples in voluntary isolation from the Madeira and Xingú Rivers are reportedly threatened by hydroelectric dams and the presence of loggers and *garimpeiros* (illegal miners) in their ancestral territories.<sup>466</sup> In Paraguay, there are complaints regarding lack of action on the situation of the Ayoreo, who are allegedly facing deforestation of their territories. Similarly, in Colombia, the Nukak Makuk are reportedly affected by the territorial pressure of the internal armed conflict and extractive or development projects.<sup>467</sup> In the case of the Tagaeri and Taromenani from Ecuador, the IACHR has received information regarding the overlap of oil concessions with their ancestral territories, among other serious acts against their lives.<sup>468</sup>
263. With regards to Peru, the IACHR has been informed of risks threatening the ancestral lands of the indigenous peoples in voluntary isolation in the Territorial Reserve of Kugapakori, Nahua, Nanti, *et al.*, (RTNKN) due to the partial inclusion of the reserve within the oil exploitation lot no. 88, and, *inter alia*, the inexistence of adequate checkpoints and the absence of an effective protection plan.<sup>469</sup> The

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<sup>463</sup> IACHR, *Hearing on Indigenous Peoples’ Right to Prior Consultation in Chile*, 150° Period of Sessions, March 27, 2014; IACHR, *Hearing on Consultation Rights of Indigenous Peoples in Peru*, 146° Period of Sessions, November 1, 2012; IACHR, *Hearing on the Right to Consultation of the Indigenous Peoples of Peru*, 137°, Period of Sessions, November 3, 2009; IACHR, *Hearing on the Indigenous Peoples’ Right to Prior Consultation in Ecuador*, 149° Period of Sessions, October 28, 2013; IACHR, *Hearing on the Situation of Human Rights of Indigenous Peoples in Colombia*, 147° Period of Sessions, March 14, 2013; and IACHR, *Hearing on the Situation of Human Rights of the Indigenous Peoples Inhabiting Indigenous Territory in the National Park Isiboro Sécure (TIPNIS) in Bolivia*, 147° Period of Sessions, March 15, 2013.

<sup>464</sup> IACHR, *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas*. OEA/Ser.L/V/II.Doc. 47/13, December 30, 2013, para. 88.

<sup>465</sup> IACHR, *Hearing on Indigenous Peoples in Voluntary Isolation in South America*, 146° Period of Sessions, November 4, 2012.

<sup>466</sup> IACHR, *Hearing on the Situation of Peoples in Voluntary Isolation in the Amazon Region and the Gran Chaco*, 141° Period of Sessions, March 25, 2011.

<sup>467</sup> IACHR, *Hearing on the Situation of Peoples in Voluntary Isolation in the Amazon Region and the Gran Chaco*, 141° Period of Sessions, March 25, 2011.

<sup>468</sup> IACHR, *Hearing on the Indigenous Peoples’ Right to Prior Consultation in Ecuador*, 149° Period of Sessions, October 28, 2013; IACHR, *Hearing on the Human Rights Situation of Indigenous People in Ecuador*, 153° Period of Sessions, October 27, 2014; and IACHR, *Hearing on Indigenous Peoples in Voluntary Isolation in South America*, 146° Period of Sessions, November 4, 2012.

<sup>469</sup> IACHR, *Hearing on the Human Rights Situation of the Indigenous Peoples in the Territorial Reserve of Kugapakori, Nahua, Nanti, et al. (RTNKN) in Peru*, 150° Period of Sessions, March 24, 2014; and IACHR,

IACHR notes, moreover, that according to the available information, said oil exploitation lot was allegedly extended in contravention with the special safeguards applying to the reserve. Similarly, in the Case of the Territorial Reserve of Madre de Dios, which the indigenous peoples in isolation Mashco Piro *et. al.* travel through, the IACHR was informed that the Peruvian State had granted forest concessions in areas outside the current geographical area of the Reserve, but which nonetheless are part of the ancestral lands of the Mashco Piro.<sup>470</sup> According to the information submitted, there is pressure on the territory that compels the peoples in voluntary isolation to leave the Reserve in search of food, or to avoid contact with third parties who allegedly illegally enter the Reserve, despite the fact that it is an intangible (or untouchable) zone.<sup>471</sup>

### **Impact on the ancestral territory of the Tsimane, Mositén and Tacana Peoples in Bolivia**

The IACHR was informed by representatives of the Regional Council Tsimane-Mositén that around the year 2006, implementation of the project to improve the Yucumo-Rurrenabaque Road began and it is expected to be completed in 2015. They reported that this road, which is over 100 km. long, is located at a short distance from the “Tierra Comunitaria de Origen Pilón Lajas,” an ancestral territory of the Tsimane, Mositén and Tacana Peoples, located between the provinces of Sud Yungas and Franz Tamayo, La Paz Department, and General José Ballivián Province in Beni Department. These three indigenous peoples inhabit a territory of 300,086 hectares, are distributed in 23 communities, and have a population of approximately 1,800 persons. According to the information received by the IACHR, the Bolivian State did not carry out any prior, free and informed consultation with the indigenous peoples affected by this project, which is part of a larger project named “Corredor Norte,” which, in turn, is part of the “IIRSA” project (Initiative Project for the Integration of Regional Infrastructure in South America).

They indicated that they fear the likely impacts, which include, *inter alia*: the expansion of the agricultural frontier; the subjugation or invasion of indigenous territory; changes in their lives; impacts on the biosphere; closing of natural drainage channels; causing flooding in the upper part of the territory; among others. They emphasized that their territory is not only affected by this project, but, in the Northern part, there are also two hydrocarbon areas, and additional

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*Hearing on Human Rights Situation of Indigenous Peoples in Voluntary Isolation in Peru*, 149° Period of Sessions, November 1, 2013.

<sup>470</sup> IACHR, *Hearing on Human Rights Situation of Indigenous Peoples in Voluntary Isolation in Peru—Precautionary Measures 262/05 (Mashco Piro, Yora and Arahuaaca) and Requests for Information 102/07 (Kugpakori Nahua Nanti and others), and 129/07 (Tagaeri, Taromenane)*, 130° Period of Sessions, October 12, 2007.

<sup>471</sup> IACHR, *Hearing on Human Rights Situation of Indigenous Peoples in Voluntary Isolation in Peru—Precautionary Measures 262/05 (Mashco Piro, Yora and Arahuaaca) and Requests for Information 102/07 (Kugpakori Nahua Nanti and others), and 129/07 (Tagaeri, Taromenane)*, 130° Period of Sessions, October 12, 2007.

roads are being built to allow access to the oil station. They pointed out that a hydroelectric project and sugar mill also affect the territory. “All these projects, which are linked to this road improvement project, have not been consulted with the indigenous peoples, either those now operating or those ones that are planned to begin operations. Then, the indigenous peoples wonder, what are they going to do from now on?”<sup>472</sup>

## **B. Right to Cultural Identity and Religious Freedom**

264. According to the information received, the Commission has been able to identify with alarming frequency that extractive and development projects —often authorized without observing the right to consultation and consent of indigenous peoples and Afro-descendent communities— have had profound effects on their cultural identity and religious freedom. The IACHR has been informed about several cases in which said projects or activities have caused a breakdown of the social fabric and community fragmentation.<sup>473</sup> The Commission notes with concern that in the most severe cases, impact can reach a total loss of their ethnic and cultural identity, as well as a serious deterioration of their institutions.
265. As noted, the implementation of projects of such a nature shakes vital institutions of the indigenous peoples and Afro-descendent communities, such as their own forms of organization and leadership, the alteration of their life plans or visions of development, and the creation or promotion of *intra* and *inter*-ethnic conflicts, among others. The IACHR is particularly concerned regarding allegations of “buying of wills” by means of gifts or inducements, or by deceiving the leaders to favor the implementation of projects or activities in their territories. Increasing levels of alcoholism, drug addiction, delinquency, prostitution, disturbance of peace, family violence, deterioration of citizen behavior, and the disruption of social and communal organization have also been recorded.<sup>474</sup> The IACHR has also received claims regarding the creation and promotion of parallel leadership structures that operate against the forms of institutional and political organization of indigenous peoples, as well as their customary laws.<sup>475</sup> The adverse effects on

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<sup>472</sup> Information received by the IACHR in the regional summit about “Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects.” Panama City, July 30, 2015.

<sup>473</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144<sup>o</sup> Period of Sessions, March 28, 2012.

<sup>474</sup> IACHR, *Hearing on the Human Rights Situation of People Affected by Mining in the Americas and Responsibilities of the Host and Home States of the Mining Companies*. 149<sup>o</sup> Period of Sessions, November 1, 2013.

<sup>475</sup> IACHR, *Hearing on Human Rights Situation of Indigenous Peoples in Voluntary Isolation in Peru—Precautionary Measures 262/05 (Mashco Piro, Yora and Arahua) and Requests for Information 102/07 (Kugpakori Nahua Nanti and others), and 129/07 (Tagaeri, Taromenane)*, 130<sup>o</sup> Period of Sessions, October 12, 2007; IACHR, *Hearing on the Situation of Human Rights of the Indigenous Peoples Inhabiting Indigenous Territory in the National Park Isiboro Sécure (TIPNIS) in Bolivia*, 147<sup>o</sup> Period of Sessions, March 15, 2013; and IACHR, *Report on the Situation of Human Rights in Brazil*, OEA/SerL/V/II.97 Doc. 29 rev.1, 29 September, 1997, Chapter VI, para. 62.

the cultural identity related to the weakening and fragmentation of the representative institutions of the indigenous peoples can create major difficulties for the accomplishment of the consultation processes and, under certain circumstances, could result in a false expression of the indigenous peoples' position.<sup>476</sup>

266. The IACHR also notes that the imposition of projects of said nature negatively affects the free exercise of practices and religious ceremonies that are part of the expression of the cultural identity of tribal peoples and Afro-descendent communities. The Commission has identified that the sacred or religious sites are affected because they are located in areas where extractive or development activities are planned.<sup>477</sup> This could also mean the destruction of the sites as, for example, was denounced by some indigenous peoples in Mexico.<sup>478</sup> Similarly, the IACHR has been informed that third parties impede access to sacred sites,<sup>479</sup> and interfere with the realization of religious ceremonies.<sup>480</sup> In this regard, it recalls that in cases where indigenous peoples have been deprived of or prevented from performing religious practices, the IACHR and the Inter-American Court have considered that a violation of the right to cultural identity occurs, and this is intimately linked to the religious and spiritual manifestations of such peoples and their members, a part of their cultural heritage.<sup>481</sup>

### **Impact on the Mapuche People and their ceremonial sites of hydroelectric projects in Chile**

The Commission has received disturbing information regarding the impact of hydroelectric projects in Chile on the Mapuche People, as well as the difficulties that they are allegedly facing to achieve the protection of their human rights through the existing consultation mechanism. In particular, the IACHR was informed about the 'Central Hidroeléctrica Neltumé' project that reportedly

<sup>476</sup> The IACHR received information related to challenges with the proper undertaking of consultation processes in a number of hearings during its last 156 period of sessions, including the following: *Human Rights Situation of Indigenous Peoples in the Context of the Activities of the Palm Oil Industry in Guatemala* (October 22, 2015); *Reports of Discrimination against the Afro-descendent population in Colombia* (October 22, 2015); and *Impact of extractive industries over the sacred sites of indigenous peoples in the United States* (October 23, 2015).

<sup>477</sup> IACHR, *Hearing on Precautionary Measures and Petition 592/07 - Hul'qumi'num Treaty Group, Canada*, 133<sup>o</sup> Period of Sessions, October 28, 2008; and *Hearing on Petition 592/07 and Precautionary Measures 110/07 - Hul'qumi'num Treaty Group, Canada*, 134<sup>o</sup> Period of Sessions, March 23, 2009.

<sup>478</sup> IACHR, *Hearing on Land Tenure and Human Rights of Indigenous Peoples in Mexico*, 141<sup>o</sup> Period of Sessions, March 28, 2011.

<sup>479</sup> IACHR, *Hearing on Land Tenure and Human Rights of Indigenous Peoples in Mexico*, 141<sup>o</sup> Period of Sessions, March 28, 2011.

<sup>480</sup> IACHR, *Hearing on the Human Rights Situation of the Indigenous Communities Affected by Activities of the Mining Industry in the Andean Region*, 140<sup>o</sup> Period of Sessions, October 29, 2010.

<sup>481</sup> I/A Court H.R., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. Judgment of June 27, 2012. Merits and Reparations, paras. 212-219; and IACHR, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, 30 December, 2009, paras. 160-162.

takes place in the Los Ríos Region and aims to generate 487 MW. According to the information available to the Commission, said project has a variety impacts on the Mapuche communities of the area. It was reported that the discharge of water from the station to the Neltume Lake will allegedly produce a variable increase in their level, which would increase the frequency and duration of floods in the Tranguil sector and affect, in turn, the road that connects the inhabitants of the area. It is extremely concerning that, as it has been informed, such a variation of the level of the Lake also will cause a temporary and partial flooding of the Nguillatun field, a sacred space, which is located on the banks of the Lake, at the time when they usually hold the ceremony of *Nguillatun*. It has been reported to the Commission that the affected communities took several steps in order to demonstrate the adverse effects of this project, and that this had an impact on the decision by the Environmental Assessment Service (SEA) to carry out a process of indigenous prior consultation. However, the Commission was informed that said process was seriously questioned by the communities, as being inconsistent with international standards, for which reason only two of the eight affected communities are reportedly participating in the process. The communities submitted a proposal for the consultation process to be carried out according to international standards, but it was purportedly rejected.<sup>482</sup>

Another situation of concern to the IACHR relates to the “Central Hidroeléctrica Añihuerraqui”, which is allegedly located in the “Comuna de Curarrehue,” La Araucanía Region, Chile. As it was reported to the IACHR, said project will reportedly have a series of impacts in the Mapuche communities of the area, among which the IACHR notes the adverse effects of the “Complejo Ceremonial Nguillatue Trancura,” composed by the Pichitrancura Estuary, the Ponuwemanque and Peñewe Hills and the Nguillatun Prairie. The Commission received information indicating that an indigenous consultation process was carried out, in which the consulted communities came to the conclusion that the project is incompatible with their way of life and would irreparably harm their religious and cultural rights. In addition, it was reported to the IACHR that the consulted communities indicated during the process that the proposed mitigation, compensation and reparation measures were not pertinent. Despite this, on June 14, 2015, the project was approved by the Environmental Assessment Commission from the Araucanía Region.<sup>483</sup>

267. Another identified impact concerns the inability of indigenous peoples to make their life plans, which can cause them to suffer, in certain circumstances, serious patterns of depression and anguish. An emblematic example is the Embera Katío peoples from Colombia, affected by the “Mande Norte” mining company.<sup>484</sup>

<sup>482</sup> Information received by the IACHR in the regional summit about “Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects.” Panama City, July 30, 2015.

<sup>483</sup> Information received by the IACHR in the regional summit about “Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects.” Panama City, July 30, 2015.

<sup>484</sup> IACHR, *Hearing on the Human Rights Situation of the Indigenous Communities Affected by Activities of the Mining Industry in the Andean Region*, 140<sup>o</sup> Period of Sessions, October 29, 2010. See also: National Institute

According to the information received by the Commission, there have been cases of suicides that allegedly have among their possible causes the inability to perform religious ceremonies.<sup>485</sup> The devastating impact on the ways of life of indigenous peoples caused by the internal armed conflict, forced displacement and development and extractive projects in their territories reportedly has resulted in members of indigenous peoples losing sense and value in their lives and seeking to end them.<sup>486</sup>

### **Impact of extractive and development activities in the sacred sites of the indigenous peoples of the United States of America**

The IACHR has received information regarding the impact that the activities of extraction and development projects are having on the sacred sites of the Navajo, San Carlos and Laguna Pueblo in the United States of America. The IACHR was informed regarding the lack of adequate protection to sacred sites, violations to the right to consultation and free, prior and informed consent, as well as the absence of effective judicial or administrative mechanisms for the protection of their rights. In particular, it was informed of the damages to the San Francisco Peaks due to the use of treated waste water to produce snow for the *Arizona Snowbowl Ski Resort* in Flagstaff, Arizona; the extraction of uranium in Mount Taylor, New Mexico; and the future extraction of copper in the area of Oak Flats, Arizona, through the establishment of the largest copper mine of North America.<sup>487</sup>

## **C. Right to Life**

268. The IACHR considers that one of the most serious effects of extractive or development projects is the adverse effects on the life of members of indigenous peoples and Afro-descendent communities, as well as those situations that jeopardize the right to life.<sup>488</sup> The IACHR notes with concern that there have been killings of leaders or members of these peoples and communities in the context of opposition to these projects.<sup>489</sup> The IACHR has identified that impunity prevails in

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for Legal Medicine and Forensic Sciences, *Boletín Epidemiológico. Suicidio de Indígenas en Colombia. 2010-2014.*

<sup>485</sup> IACHR, *Hearing on the Human Rights Situation of the Indigenous Communities Affected by Activities of the Mining Industry in the Andean Region*, 140<sup>o</sup> Period of Sessions, October 29, 2010.

<sup>486</sup> IACHR, *Hearing on the Situation of Human Rights of Indigenous Peoples in Colombia*, 147<sup>o</sup> Period of Sessions, March 14, 2013.

<sup>487</sup> IACHR, *Hearing on the Impact of Extractive Industries on the Sacred Sites of Indigenous Peoples in the United States*, 156<sup>th</sup> Period of Sessions, 23 October 2015.

<sup>488</sup> IACHR, *Truth, Justice and Reparation - Report on the Situation of Human Rights in Colombia*. OEA/Ser.L/V/II. Doc. 49/13, December 31, 2013, para. 827

relation to such killings as it generally has not been established who is responsible, even where investigations take place.

### **Violence against leaders and defenders from the Shuar people in Ecuador**

Leaders and defenders of the Shuar people in Ecuador denounced the increase in violence against those who lead the processes of defense of said people confronted by extractive activities. This violence consists of harassment, threats, and even the murder of indigenous leaders. They have emphasized that the deaths generated by their processes of resistance remain in impunity. In particular, they reported the killing of José Tendetza, leader of the Shuar de Yanúa community, who was an active defender of the rights of his people against extractive activities. According to the information received, in December 2014, the lifeless body of José Tendetza was found by a group of miners and was handed over to the police. They pointed out that the circumstances of his death are allegedly associated with his opposition to extractive projects, but has not yet been fully investigated by the authorities. They asked for “justice” in relation to these facts.<sup>490</sup>

269. The IACHR is concerned that with alarming frequency killings of authorities and other indigenous leaders as well as defenders of their rights, are considered to be common crimes, and are attributed to the violence and insecurity that exist in several countries. Despite denouncing the alleged links with their activities in defense of human rights that may be affected by extractive and development projects, these allegations are not diligently investigated nor is there sanction against the possible perpetrators and intellectual authors. The Commission recalls that, as part of the due diligence required in investigations on the violations of the rights of a defender, the authorities must take into account their activity to identify the interests that could have been affected by the exercise of those activities and to be able to establish investigation and crime hypotheses.<sup>491</sup>

### **Community leaders and Environmental Defenders in El Salvador**

The IACHR was informed that, between 2008 and 2011, at least four persons were killed in El Salvador for reasons allegedly connected to their activities in defense of the environment and opposition to mining activities. According to

<sup>489</sup> IACHR, *Hearing on the Impact of Canadian Mining Activities on Human Rights in Latin America*, 153<sup>o</sup> Period of Sessions, October 28, 2014; IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples in Argentina*, 144<sup>o</sup> Period of Sessions, March 23, 2012; and IACHR, *Hearing on the Human Rights Situation in the Peruvian Amazon*, 137<sup>o</sup> Period of Sessions, November 3, 2009.

<sup>490</sup> See, for example, IACHR, *Hearing on the Human Rights Situation of the Leaders and Defenders of the Shuar people in Ecuador*, 154<sup>o</sup> Period of Sessions, March 17, 2015.

<sup>491</sup> IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev. June 2, 2000, para. 236.

members of the National coalition against Mining (*Mesa Nacional frente a la Minería*), in July 2009, Gustavo Marcelo Rivera Moreno was killed; in December 2009, Ramiro Rivera Gómez and Dora Alicia Sorto Rodríguez –who was pregnant at the time— were killed; and in June, 2011, Juan Francisco Duran Ayala was killed. According to the information received, such facts were denounced and the respective processes before the Attorney General of the Republic began so that it could investigate the perpetrators and authors. They indicated that only in relation to the murder of Marcelo Rivera were five gang members prosecuted. They explained that, despite having reported that the murders were linked to their activities in defense of rights against a mining company, whose executives may be involved as authors, the Prosecutor’s Office and the National Police did not take any actions to properly investigate such allegations.<sup>492</sup>

270. Moreover, the IACHR notes with extreme concern that members of private security forces have been accused repeatedly of committing human rights violations against indigenous communities and their members in the context of defense of land and territory. Several indigenous representatives have informed the IACHR that a great fear and anxiety is felt by peoples and communities because of acts of intimidation and harassment by private security guards and the impunity in which their acts remain. They indicated that people often request the assistance of State authorities such as the National Police, the Prosecutor’s Office, and local government authorities, without receiving a response. The IACHR has also received information indicating that private security guards are involved in operations alongside the security forces, the arrest of citizens, and judicial and extrajudicial evictions.

### **Violence acts against members of the Xinka Peoples and Defenders of their Rights *vis à vis* mining activities in Guatemala**

The Commission wishes to emphasize the situation of the Communities of the Xinka Peoples in the Municipalities Casillas and San Rafael Las Flores, Santa Rosa Department and from the Mataquesuintla and Jalapa Municipalities, Jalapa Department. According to information of public knowledge, these communities have opposed for some years the mining by the Company *Mina San Rafael*, and have suffered several acts of intimidation of violence in that context.

In particular, according to the information available to the Commission, on March 17, 2013, four leaders of the Xinka peoples were reportedly kidnapped, two of them managed to escape while one was killed in the meantime. Such events allegedly occurred when they were returning from a “good faith consultation” in Mataquesuintla and, purportedly, personnel from the security

<sup>492</sup> Information received by the IACHR in the regional summit about “Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects.” Panama City, July 30, 2015.

company employed by the mining company were involved.<sup>493</sup> Available information suggests that on April 27, 2013, at least ten protesters were attacked with firearms by private security guards, resulting in six people being wounded.<sup>494</sup> According to the information received, the head of the company's security service had ordered this aggression, and is reportedly being processed and in pretrial detention, together with a soldier who had worked as advisor for the security company.<sup>495</sup>

Other reported events are related to the attack suffered by Edwin Alexander Reynoso and his 16 year-old daughter, Merilyn Topacio Reynoso Pacheco, leaders of the movement "Resistencia Pacifica en Defensa de los Recursos Naturales" (Pacific Resistance in Defense of Natural Resources) from Mataquescuintla, Jalapa, on April 13, 2014. The attack killed the girl Merilyn Topacio Reynoso and caused injuries to her father.<sup>496</sup> The IACHR was also informed that on May 11, 2015, the legal director of the *Centro de Acción Legal Ambiental y Social* (Center for Environmental, Legal and Social Action-CALAS) was threatened with death, and on July 29, 2015, an unknown person shot several times in front of the CALAS headquarters. As it was reported, this was an act of intimidation against the legal support that CALAS has been providing in the trial against the aforementioned head of security of the company.

271. It has also been reported that communities or human rights defenders usually report these acts to the authorities, like the Public Prosecutor, the police, the local courts or others. However, the information available to the Commission indicates that, in general, they do not receive the required protection in time. In the cases of kidnapping, the lack of an immediate and adequate action to avoid the death of the threatened person has been mentioned. Sometimes the indigenous or community leaders are unable to make a report to the police because they are in very isolated locations. Another element that the IACHR identifies is that these acts often remain in impunity. All of this causes affected indigenous peoples and Afro-descendent communities to live situations of fear and anguish.

272. In light of the foregoing, the IACHR recalls that the right to life is basic and fundamental to the exercise of all other rights, and is protected by Articles I of the Declaration<sup>497</sup> and 4 of the American Convention.<sup>498</sup> Both the right to life and the

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<sup>493</sup> *Coordinación y Convergencia Nacional Maya Waq'ib'Kej. Preliminary Report on Human Rights violations during the state of emergency in Jalapa and Santa Rosa.* 2013. pp. 3-4. Information received during the August 2013 visit.

<sup>494</sup> International Peace Brigades. Alert: Increase in the attacks against human rights defenders in Guatemala, May, 2013. Information received during the August 2013 visit.

<sup>495</sup> Information received by the IACHR in the regional summit about "Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects." Panama City, July 30, 2015.

<sup>496</sup> Information received by the IACHR in the regional summit about "Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects." Panama City, July 30, 2015.

<sup>497</sup> Article I of the American Declaration establishes that "[e]very human being has the right to life, liberty and the security of his person."

right to personal integrity constitute an indispensable minimum for the exercise of any activity.<sup>499</sup> The protection of the right to life, according to the States' duty to guarantee human rights, entails both negative and positive obligations. In this regard, in addition to an absolute prohibition on arbitrary executions and forced disappearances, States are obligated to carry out positive actions to eradicate environments which are incompatible with or dangerous to the protection of human rights. They should also generate the conditions to eliminate violations to the right to life and to personal integrity by state agents or particulars, in such a way that they can freely exercise their activities.<sup>500</sup> In the specific context at issue, the IACHR considers that one of the factors which have enabled events such as the ones above-described has been the practical absence of effective mechanisms to protect the territories inhabited by indigenous peoples and Afro-descendent communities, and the lack of realization of consultation and consent processes in line with the applicable international human rights standards.

#### ***D. Right to health, personal integrity and a healthy environment***

273. The IACHR has asserted that extraction and development projects generate a series of consequences to the personal integrity, health, and right to a healthy environment of indigenous peoples and Afro-descendent communities.
274. Particularly in the case of mining, the most frequently reported impacts refer to, *inter alia*, the destruction of ecosystems where quarries are located, the physical removal of rocks, adverse consequences to the hydrological system, water pollution, explosions, and emissions of dust. In addition, the IACHR has been informed about the adverse effects on the health of indigenous peoples due to chemical and toxic materials used for the extraction of minerals, without the necessary treatment measures.<sup>501</sup> The implementation of such projects could cause serious pollution related to the disposal of toxic substances —such as mercury— in environments, forests, and rivers traditionally used by indigenous and tribal peoples for their physical survival. These adverse effects can become

<sup>498</sup> Article 4(1) of the Convention establishes: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

<sup>499</sup> IACHR, *Report on the Situation of Human Rights of Human Rights Defenders in the Americas*, para. 42. See also, I/A Court H.R., *Myrna Mack Chang v. Guatemala Case*. Judgement of November 25, 2003. Series C No. 101, para. 152.

<sup>500</sup> IACHR, *Report on the Situation of Human Rights of Human Rights Defenders in the Americas*, para. 45. Similarly, the I/A Court H.R., *Kawas Fernández v. Honduras Case*. Merits, Reparations and Costs. Judgement of April 3, 2009. Series C No. 196, para. 74.

<sup>501</sup> IACHR, *Hearing on the Human Rights Situation of the Apetina Indigenous Community in Suriname*. 150<sup>o</sup> Period of Sessions, March 27, 2014.

devastating in cases of large-scale mining projects, or when several small-scale concessions are granted in indigenous territories.<sup>502</sup>

275. The Commission notes that medium and small-scale mining is also prejudicial in social and environmental terms. It generally is insufficiently regulated and free from certain legal requirements. The IACHR has been informed about countries where the small-scale mining sector not only causes vast impacts for the indigenous peoples due to their operations, but also that the strong pressure for the granting of mining concessions seriously hampers the delimitation and demarcation of indigenous lands. The Commission underscores that, when addressing small-scale mining, community based mining should be distinguished, as it is often an important source of income, and it is socially controlled by indigenous peoples and Afro-descendent communities.
276. It has also been reported that after the end of mineral extraction, mines often lack proper closure and environmental remedies to ensure the mitigation of the environmental damages generated. For example, information received by the Commission points to 8,616 instances of environmental damage caused by mining activities in Peru, distributed in 21 regions of the country, as a consequence of irresponsible mining devoid of appropriate closure and remediation activities. It is also alarming to note that of the 8,616 identified instances of environmental damages caused by mining, 2,546 are considered to be of ‘very high risk’ and 1,735 of ‘high risk’, together amounting to a total of 4,281 instances so classified. Therefore, about 50% of the instances of environmental damages caused by mining are classified as at least ‘high risk.’<sup>503</sup> Similarly, the IACHR notes that, according to the Peruvian Ombudsperson’s Office, only 861 instances of environmental damage caused by mining had prior environmental assessments, an instrument necessary for mitigation management; while environmental damage caused by projects with closure plans amount to 2,075, a number that does not even represent 50% of the damages qualified as ‘high’ or ‘very high risk.’<sup>504</sup> This situation resonates in the words of an indigenous leader: “in Peru, a *cocha* [lagoon, water source] disappears and nothing happens, there is no remedy, no compensation, and the Company is not adequately punished, there is no legal claim for environmental crimes and no suit for damages; this generates a great injustice, massive adverse effects on the rights of indigenous peoples.”<sup>505</sup>
277. The IACHR notes with concern that, as it was informed, the presence of such substances in the body can cause, *inter alia*, neurological diseases, bacteria in the body, malformations, skin diseases, and disabilities of various kinds. It notes that

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<sup>502</sup> IACHR, *Hearing on the Rights of Indigenous Peoples to Legal Recognition and Property in Peru*, 153<sup>o</sup> Period of Sessions, October 31, 2014; and IACHR, *Hearing on the Human Rights Situation of the Apetina Indigenous Community in Suriname*. 150<sup>o</sup> Period of Sessions, March 27, 2014.

<sup>503</sup> Peru. Office of the Ombudsperson *¡Un llamado a la remediación! Avances y pendientes en la gestión estatal frente a los pasivos ambientales mineros e hidrocarburíferos*. Report No. 171. Lima: 2015.

<sup>504</sup> Peru. Office of the Ombudsperson *¡Un llamado a la remediación! Avances y pendientes en la gestión estatal frente a los pasivos ambientales mineros e hidrocarburíferos*. Report No. 171. Lima: 2015.

<sup>505</sup> Information received by the IACHR in the regional summit about “Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects.” Panama City, July 30, 2015.

children and women of child bearing age are among the most at risk to the adverse effects.<sup>506</sup> For example, as indicated to the IACHR, mercury affects the fetus causing neurological damage to the child.<sup>507</sup> Mercury deposited in rivers and other water sources accumulates in animals such as fish that are part of the traditional diet of many indigenous peoples and Afro-descendent communities in the region. The consumption of foods contaminated with mercury can have a serious impact on human health and may require finding replacements for traditional dietary foods, which, in many cases, is extremely difficult for economic reasons and because of the lack of feasible alternatives that could be provided by the State.<sup>508</sup> For example, the Commission was informed that the Apetina indigenous community in Suriname has a nutritional diet primarily based on fish, and even though it is contaminated by mercury related to the extraction of natural resources, they have not been able to replace it with another protein to obtain similar nutrients.<sup>509</sup>

278. It is worth noting that the IACHR has had many precedents with regards to challenges in the accessibility to water and to the alleged irreparable harms with affect historically discriminated persons and groups. In these cases, the Commission has taken notice, among other elements, of alleged restrictions to the access to water, which could irreparably harm the rights of specific people.<sup>510</sup>

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<sup>506</sup> IACHR, *Hearing on the Rights of Indigenous Peoples to Legal Recognition and Property in Peru*, 153<sup>rd</sup> Period of Sessions, October 31, 2014.

<sup>507</sup> IACHR, *Hearing on the Rights of Indigenous Peoples to Legal Recognition and Property in Peru*, 153<sup>rd</sup> Period of Sessions, October 31, 2014.

<sup>508</sup> IACHR, *Hearing on the Human Rights Situation of the Apetina Indigenous Community in Suriname*. 150<sup>th</sup> Period of Sessions, March 27, 2014.

<sup>509</sup> IACHR, *Hearing on the Human Rights Situation of the Apetina Indigenous Community in Suriname*. 150<sup>th</sup> Period of Sessions, March 27, 2014.

<sup>510</sup> The IACHR has positioned itself on the matter recently. See, generally, IACHR, Annual Report 2015, Chapter 4.A – *Access to Water in the Americas: An Introduction to the Human Rights to Water in the Inter-American System*. See also, for example, the precautionary measure related to persons deprived of liberty in the “Presidio Central de Porto Alegre” in Brazil, in which the Commission focused on the insufficient supply of water. In light of these and other elements, on January 11, 2013, the Commission granted precautionary measures to protect the life and physical integrity of the inmates at the penitentiary [IACHR, [Persons Deprived of Liberty at the Porto Alegre Central Prison](#), Brazil (PM 8/13), December 30, 2013]. Is also noteworthy the situation of the displaced individuals who had set up camp in “Grace Village” in Haiti. The Commission had received information on the critical situation to which these people were confronted following the 2010 earthquake, which was characterized by the lack of access to adequate medical treatment, to food and to safe drinking water. In the monitoring of this matter, the petitioners alleged that, in an attempt to forcefully dislodge them from the camp, their only safe drinking water sources had been contaminated. In view of the critical and exceptional situation to which these individuals were confronted, on March 26, 2013, the IACHR requested that the life and physical integrity of the residents of the camp be protected, and requested of the State that all residents have access to safe drinking water. [IACHR, [567 Families Living in Grace Village](#), Haiti (PM 52/13), March 26, 2013]. In addition, the Commission received information on the topic during its hearing on “Human Rights and Water in the Americas”, which took place on October 23, 2015, during the 156th period of sessions.

### **Canaán de Cashiyacu Community, Loreto, Peru**

The IACHR has been informed about serious impacts related to hydrocarbon activities in Peru, as in the case of the “Nativa Canaán” community of the Shipibo-Konibo people, located in the Cashiyacu creek, on the banks of the Ucayali River in the Loreto Department, Peru. According to the information received, this community overlaps with the oil lot no. 31-B, operated until 1994 by PETROPERU and thereafter by MAPLE GAS, without repairing the existent environmental damages. It has been stated that, according to reports from public entities, such as the Agency of Assessment and Environmental Control (OEFA) and the general Direction for Environmental Health (DIGESA), the Cashiyacu stream has excessive levels of chlorides and lead; and water from artesian wells in the community have arsenic and manganese concentrations above the standard for human consumption. In the words of members of the community, “we eat the fish with fear because it smells of oil.” They noted that, however, in March 2014 the extension of the contract for oil exploitation was extended. In the words of Edinson Cupertino, community leader, “The contract has been extended for ten years, and the Company considered that it was not necessary to consult or meet with the community.”<sup>511</sup>

279. The impacts of the presence of heavy metals in the bodies of human beings may be irreparable if States do not take special and urgent measures to deal with each case. For this reason, the IACHR believes that it is necessary for States to take measures that will allow for the repair of territories degraded and contaminated by the realization of extractive activities, which should include the implementation of special programs that include as one of its core actions attention to the health of indigenous peoples and Afro-descendent communities.<sup>512</sup>
280. In the case of oil projects, the Commission notes that they include the opening of trails, seismic evaluations, and contamination caused by spills or leaks during extraction. These undertakings, as well as works for the extraction of natural resources, require other associated works, such as roads or highways to ensure access. The IACHR has received information about spills in the Amazon due to breakage of pipelines or pipelines generating, among other effects, the presence of cadmium in the water above allowable levels, which have not been adequately repaired by the States.<sup>513</sup> This was reported to the IACHR in a hearing concerning the case of the contamination of the Marañón River in Peru, which is allegedly having impacts in the health of the indigenous communities affected, resulting in

<sup>511</sup> Information received by the IACHR in the regional summit about “Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects.” Panama City, July 30, 2015.

<sup>512</sup> IACHR, *Hearing on the Rights of Indigenous Peoples to Legal Recognition and Property in Peru*, 153<sup>o</sup> Period of Sessions, October 31, 2014.

<sup>513</sup> IACHR, *Hearing on the Rights of Indigenous Peoples and Energy and Extractive Industry Policy in Peru*, 140<sup>o</sup> Period of Sessions, October 26, 2010.

that the fish in the river have an unpleasant smell and taste.<sup>514</sup> As the Commission has cautioned previously: “Human exposure to oil and oil-related chemicals, through the skin or ingested in food or water, or through fumes absorbed via the respiratory system, has been widely documented to cause adverse effects to human health and life.”<sup>515</sup> The Commission has also noted that:

Oil development and exploitation do, in fact, alter the physical environment and generate a substantial quantity of toxic byproducts and waste. Oil development activities include the cutting of trails through the jungle and seismic blasting. Substantial tracts of land must be deforested in order to construct roads and build landing facilities to bring in workers and equipment. Installations are built, and exploratory and production wells drilled. Oil exploitation then generates byproducts and toxic wastes through each stage of operations: exploratory drilling, production, transportation and refining.<sup>516</sup>

281. In relation to the construction of dams in lands and territories of indigenous and tribal peoples, the IACHR has received information stating that, interrupting the natural path of the rivers impacts the ways indigenous peoples use their waters, generally for agriculture and crops.<sup>517</sup> The Commission was also informed that the dams facilitate the disproportionate accumulation of minerals when mining activities of different scale are carried out around them.<sup>518</sup> Monocultures also have acute environmental effects such as loss of biodiversity, the increase in the use of agrochemicals, and the extension of the agricultural frontiers into natural areas, among others. Informal mining generates an intense pace of deforestation and pollution of soils and waters.
282. It is concerning to note that projects of different kinds and scales threaten the destruction of essential water sources. For example, the IACHR received information regarding the construction of the Trans-Oceanic canal in Nicaragua, which reportedly will affect Lake Cocibolca, the most important natural reservoir of fresh water in Central America. In this regard, there is scientific opinion that classifies the construction of the canal as “catastrophic” since there would be no substitute for this natural reserve of drinking water.<sup>519</sup>

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<sup>514</sup> IACHR, *Hearing on the Rights of Indigenous Peoples and Energy and Extractive Industry Policy in Peru*, 140° Period of Sessions, October 26, 2010.

<sup>515</sup> IACHR, *Report on the Situation of Human Rights in Ecuador*. Chapter VIII. OEA/Ser.L/V/II.96, doc. 10 rev. 1, April 24, 1997.

<sup>516</sup> IACHR, *Report on the Situation of Human Rights in Ecuador*. Chapter VIII. OEA/Ser.L/V/II.96, doc. 10 rev. 1, April 24, 1997.

<sup>517</sup> IACHR, *Hearing on the Situation of Persons Affected by “Mega Dams” in the Americas*, 137° Period of Sessions, November 2, 2009.

<sup>518</sup> IACHR, *Hearing on the Situation of Persons Affected by “Mega Dams” in the Americas*, 137° Period of Sessions, November 2, 2009.

<sup>519</sup> See IACHR, *Hearing on the Construction of the Transoceanic Canal and its Impact on Human Rights in Nicaragua*, 154° Period of Sessions, March 16, 2015.

283. The IACHR has received information indicating that extractive or development projects can bring an increase in unknown diseases and illnesses or epidemics among indigenous peoples and Afro-descendent communities. According to the information received, this reportedly happens as a result of the presence of third parties in their ancestral lands and territories, or contagion through members of the peoples and communities working for companies who bring them to the communities upon their return.<sup>520</sup> For example, in the case of the construction of dams in indigenous and Afro-descendent territories, increases in illnesses like dengue, malaria, diarrhea and skin problems have been recorded;<sup>521</sup> and in the case of oil activities, epidemics, influenza, and measles are reportedly recorded.<sup>522</sup>
284. In addition to the above, according to the available information, many of the indigenous peoples affected must travel for long hours, or even days, to reach the nearest health center, so the necessary treatments allegedly do not occur in a timely manner.<sup>523</sup> The IACHR notes that, besides inaccessibility, these health care facilities often do not have the materials necessary to properly treat the diseases that affect members of indigenous peoples and that are linked to extractive activities.<sup>524</sup>
285. Of particular concern are those cases in which indigenous peoples have not developed immunity or resistance to these new diseases or are not able to treat them with their own traditional medicines.<sup>525</sup> The impact on health can be devastating for some especially vulnerable groups, such as indigenous peoples in voluntary isolation or initial contact, who are affected by the invasion of settlers and workers of the companies or the State. These peoples, when avoiding contact with the majority society, do not have the immune defenses needed to fight common diseases. In this way, a simple cold can cause a large number of victims.<sup>526</sup>
286. The IACHR has also been informed about the alleged disproportionate impact that intensive large-scale agriculture, such as oil palm and sugar cane plantations, have in several countries in the region. In particular, during its *in loco visit* to Honduras

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<sup>520</sup> See *inter alia* IACHR. *Report on the Situation of Human Rights in Ecuador*. Chapter VIII. OEA/Ser.L/V/II.96, doc. 10 rev. 1, April 24, 1997, Chapter IX.

<sup>521</sup> IACHR, *Hearing on the Situation of Persons Affected by "Mega Dams" in the Americas*, 137<sup>o</sup> Period of Sessions, November 2, 2009; and IACHR. *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97 Doc. 29 rev.1, 29 September, 1997, Chapter VI, para. 74.

<sup>522</sup> IACHR. *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96, doc. 10 rev. 1, April 24, 1997, Chapter IX.

<sup>523</sup> IACHR, *Hearing on the Situation of Human Rights of the Rarámuri and Tepehuán Indigenous Peoples in the Sierra Tarahumara of Chihuahua, Mexico*, 147<sup>o</sup> Period of Sessions, March 14, 2013.

<sup>524</sup> See *inter alia* IACHR. *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96, doc. 10 rev. 1, April 24, 1997, Chapter IX.

<sup>525</sup> IACHR, *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96, doc. 10 rev. 1, April 24, 1997, Chapter IX; IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144<sup>o</sup> Period of Sessions, March 28, 2012; and IACHR, *Situation of Indigenous Communities Affected by the Initiative Project for the Integration of Regional Infrastructure in South America (IIRSA)*, 137<sup>o</sup> Period of Sessions, November 2, 2009.

<sup>526</sup> IACHR. *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96, doc. 10 rev. 1, April 24, 1997, Chapter IX.

in December 2014, information was received about the impact of African (oil) palm in the northern territory of the country occupied by the Garifuna people. For example, according to the information received, the Garifuna Community of Santa Rosa reports that, due to the work of the businessmen who cultivate oil palm in the Colon Department, the course of the Aguan River was changed, which reportedly has had devastating consequences on their environment, and on their access to water, given the high salinization thereof.<sup>527</sup> According to the information received, the expansion of tree monocultures occurs in the Amazon region. For example, it was indicated that the community Shipibo Konibo Santa Clara de Uchunya, in Ucayali, Peru, is allegedly affected by deforestation caused by African Palm plantations carried out by a Malaysian Company.<sup>528</sup>

## ***E. Economic and Social Rights***

287. The situation of economic and social rights of indigenous peoples and Afro-descendent communities has garnered the attention of the IACHR, especially in contexts in which extraction and development projects are implemented. The Commission has identified that the adverse effects on the territory and the natural resources of indigenous peoples and Afro-descendent communities have a direct consequence on their economic and social rights, linked to the loss of effective control over their lands and ancestral territories, and therefore to their main sources of livelihood. In the most serious cases, it deepens poverty or immerses them in a situation of extreme poverty where they are not able to get the necessary resources for their physical survival.<sup>529</sup>
288. A component of the right to food that is extremely relevant to indigenous peoples, for example, is access to food sources derived from their own subsistence activities, such as hunting, fishing, agriculture, among others. Restrictions on the subsistence activities of indigenous peoples are commonly inherent to the implementation of various projects, and they have an impact on the right to food of such peoples whose very existence can be threatened if they cannot find new livelihood alternatives.<sup>530</sup> The implementation of projects also affects the production of food, therefore increasing the costs of living in the country and threatening the sovereignty and food security of affected communities.<sup>531</sup>

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<sup>527</sup> IACHR, *Preliminary Observations concerning the Human Rights Situation in Honduras*. Press Release 146A/2014. December 5, 2014.

<sup>528</sup> Information received by the IACHR in the regional summit about “Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects.” Panama City, July 30, 2015.

<sup>529</sup> IACHR, *Hearing on the Situation of Human Rights of the Rarámuri and Tepehuán Indigenous Peoples in the Sierra Tarahumara of Chihuahua, Mexico*, 147° Period of Sessions, March 14, 2013.

<sup>530</sup> IACHR, *Hearing on the Rights to the use and exploitation of natural resources and prior consultation with respect to the Cucapá indigenous people of Mexico*, 133° Period of Sessions, October 22, 2008.

<sup>531</sup> See IACHR, *Hearing on the Construction of the Transoceanic Canal and its Impact on Human Rights in Nicaragua*, 154° Period of Sessions, March 16, 2015.

289. The IACHR has been informed about State actions in the nutrition field, which disregard the ways of management and administration of the lands and territories of indigenous and tribal peoples, and their natural resources, such as the authorization of the use of transgenic seeds, without consultation with indigenous peoples. For example, the IACHR has been informed about the granting of permits for the cultivation of transgenic seeds —such as soy, corn, cotton— on indigenous territories, despite the clearly expressed decision of the indigenous peoples to have a transgenic-free territory.<sup>532</sup> This situation is purportedly affecting the development priorities of indigenous peoples around the use of native seeds and jeopardizing their food security. Among the main consequences, the IACHR notes the meagre financial support to indigenous or peasant agriculture; denial of food sovereignty; the dismantling of practices and institutions of communal cooperation and forms of management of common resources; promotion of intra-community conflicts; cases of land grabbing and dispossession of lands; migration; flora, fauna, soil and water pollution; interruption of the geochemical cycles; and the impossibility of reproducing the rural agro-food systems.<sup>533</sup>
290. Another aspect to note is related to the industrial agriculture of transgenic seeds. The IACHR has received information that indicates that this kind of agriculture promotes monocultures through transgenic seeds that require high amounts of agro-toxics, which are scattered by aircrafts or other machinery.<sup>534</sup> In this way, the spraying of toxic substances in communities adjacent to crops is allegedly affecting their health and polluting the environment. In regards to the legal regulation of other seeds, the IACHR has identified two main effects on the basis of the information received. The first is the possibility that third parties can patent the seeds and collect royalties for them, without any benefit to the indigenous peoples who have traditionally used them.<sup>535</sup> The IACHR considers that, as long as the seeds of their territories are vital resources for their subsistence, these peoples must see benefit in both their use and exploitation, which could be restricted by the State's actions. The second is the prohibition of the use of the seeds and the restriction of free flow in the States.<sup>536</sup> The IACHR must emphasize that according to the information received, these adverse effects are allegedly happening in the context of a food crisis, labor over-exploitation, and land grabbing that involves the destruction of the local systems of food of indigenous peoples and Afro-descendent communities.<sup>537</sup>

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<sup>532</sup> IACHR, *Hearing on Reports of Destruction of the Biocultural Heritage Due to the Construction of Mega Projects of Development in Mexico*, 153<sup>o</sup> Period of Sessions, October 30, 2014.

<sup>533</sup> IACHR, *Hearing on Reports of Destruction of the Biocultural Heritage Due to the Construction of Mega Projects of Development in Mexico*, 153<sup>o</sup> Period of Sessions, October 30, 2014.

<sup>534</sup> IACHR, *Hearing on the Situation of Economic, Social, and Cultural Rights of Campesinos in Latin America*, 149<sup>o</sup> Period of Sessions, October 29, 2013.

<sup>535</sup> IACHR, *Hearing on the Situation of Economic, Social, and Cultural Rights of Campesinos in Latin America*, 149<sup>o</sup> Period of Sessions, October 29, 2013.

<sup>536</sup> IACHR, *Hearing on the Situation of Economic, Social, and Cultural Rights of Campesinos in Latin America*, 149<sup>o</sup> Period of Sessions, October 29, 2013.

<sup>537</sup> IACHR, *Hearing on the Situation of Economic, Social, and Cultural Rights of Campesinos in Latin America*, 149<sup>o</sup> Period of Sessions, October 29, 2013.

291. The IACHR documented in its 2015 Annual Report that the main impediments to access to water in the Americas derived from the negative effects resulting from the implementation of extractive projects and the use of agricultural chemicals in the region, from the pollution and contamination of water sources, from the lack of access to water for persons and communities who live in poverty and extreme poverty, especially in rural zones, and from the cutbacks in safe water provision service. These are all problems which cause disproportionate impacts on the human rights of persons, groups and communities which have suffered historical discrimination.<sup>538</sup>
292. In addition, the Commission received information during its hearing on “Human Rights and Water in the Americas” celebrated October 23, 2015 during its 156th period of sessions, which indicated that the region relies on a development model focused on the exploitation of natural resources, which is leading to an intensification of its exploitation of its water sources.<sup>539</sup> It was also indicated that this situation has become more alarming due to the increasing pressure to use natural resources in the implementation of extractive activities, as for the construction of dams and for mining activities,<sup>540</sup> which is impacting negatively on persons, groups and historically discriminated communities, and specifically on people who find themselves in the areas of influence of the projects.<sup>541</sup> During the hearing, the Commission received information from numerous organizations from the Americas indicating that at least 20% of the 580 million persons living in Latin America and the Caribbean do not have proper access to drinking water by means of an aqueduct.<sup>542</sup> The petitioner organizations also informed that at least 30% of the water served receives treatment, many times deficient, resulting in that 34 of 1,000 children die every year in Latin America and the Caribbean due to illnesses associated with water.<sup>543</sup>
293. The Commission has also received information in the context of hearings and on-site visits concerning the link between the implementation of extractive projects and the scarcity and contamination of water. The Commission, for example, during its on-site visit to Chile on November of 2014, received information indicating that indigenous peoples have not been consulted in a free, prior, and informed manner concerning the implementation of a number of development projects and extractive industries, and the impact of these initiatives on their access to water

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<sup>538</sup> IACHR, Annual Report 2015, Chapter IV.A – *Access to Water in the Americas: An Introduction to the Human Right to Water in the Inter-American System*. Similar information was presented during the regional thematic hearing focused on human rights and water in the Americas, celebrated during the 156<sup>th</sup> period of sessions of the IACHR, October 23, 2015.

<sup>539</sup> Information received during the thematic regional hearing on Human Rights and Water in the Americas which was held during the 156th period of sessions. October 23, 2015. See also, [Diagnosis of Water in the Americas](#), p. 22.

<sup>540</sup> Information provided by representatives of civil society during the thematic regional hearing on Human Rights and Water in the Americas which was held during the 156th period of sessions. October 23, 2015.

<sup>541</sup> Information received during the thematic regional hearing on Human Rights and Water in the Americas which was held during the 156th period of sessions. October 23, 2015.

<sup>542</sup> IACHR, Hearing, *Human Rights and Water in the Americas*, 156th Period of sessions, October 23, 2015.

<sup>543</sup> IACHR, Hearing, *Human Rights and Water in the Americas*, 156th Period of sessions, October 23, 2015.

and natural resources such as seeds.<sup>544</sup> Even though there is an ongoing process of reform of the water code in Chile, the participation of indigenous peoples in that process has been limited. These problems are aggravated by the low level of representation of indigenous peoples in public institutions and their situation of poverty and marginalization.

294. With regards to the right to water, the IACHR has received information about the monopolization and overexploitation of water resources for extractive projects, for the most part mining ones.<sup>545</sup> According to the information received, this situation compromises the productive bases of the indigenous peoples and endangers ecosystems through habitat degradation and contamination of the water by the dumping of industrial chemical waste.<sup>546</sup> The monopolization and overexploitation of water leads to ignoring the traditional practices of sustainable use of water and soil –such as agriculture– vital for the survival of indigenous peoples and for the conservation of biodiversity.<sup>547</sup> The IACHR has documented that in many cases this situation has resulted in displacement of indigenous peoples out of their ancestral territories to cities or urban areas, which has plunged them into further poverty as they lack the resources for their subsistence.<sup>548</sup>
295. On the other hand, the IACHR has received alarming information regarding indigenous workers in companies that perform extractive or development projects in inappropriate working conditions or in violation of their rights. The IACHR has received complaints about labor abuses towards indigenous workers by companies carrying out activities in indigenous territories.<sup>549</sup> It has also received information on measures that weaken labor controls and which have resulted in job insecurity for indigenous workers.<sup>550</sup> In this context, the Commission has identified a deficient or absent oversight by States to prevent or punish the actions of the companies.<sup>551</sup>
296. A situation of special concern of the IACHR is the situation of the Miskito divers in Honduras and Nicaragua, because, according to the information received, they are often victims of labor abuse by the fishing companies for whom they work.

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<sup>544</sup> See, IACHR, Press Release, *IACHR Concludes Visit to Chile*, December 11, 2014.

<sup>545</sup> IACHR, *Hearing on the Right to Water and Indigenous Peoples in the Andean Region*, 129° Period of Sessions, September 6, 2007.

<sup>546</sup> IACHR, *Hearing on the Right to Water and Indigenous Peoples in the Andean Region*, 129° Period of Sessions, September 6, 2007.

<sup>547</sup> IACHR, *Hearing on Reports of Destruction of the Biocultural Heritage Due to the Construction of Mega Projects of Development in Mexico*, 153° Period of Sessions, October 30, 2014.

<sup>548</sup> IACHR, *IACHR, Hearing on the Right to Water and Indigenous Peoples in the Andean Region*, 129° Period of Sessions, September 6, 2007.

<sup>549</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples of Nicaragua*, 150° Period of Sessions, March 25, 2014.

<sup>550</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144° Period of Sessions, March 28, 2012.

<sup>551</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples of Nicaragua*, 150° Period of Sessions, March 25, 2014; IACHR, *Hearing on the Case 12.738 – Opario Lemoth Morris et al (Miskito Divers), Honduras*, 143° period of Sessions, October 24, 2011.

According to the information received, these companies allegedly force the Miskito divers to venture deeper than allowed, in overcrowded conditions, without compressors and other control devices in good condition, and for more than 12 hours of diving.<sup>552</sup> This situation has led to many of the Miskito workers acquiring physical disabilities or even dying, all without receiving adequate medical attention.<sup>553</sup>

## ***F. Right to Personal Liberty and Social Protest***

297. At a regional level, the IACHR has identified a pattern of criminalization of demonstrations or social protest by leaders of various indigenous and tribal peoples, linked to the defense of their rights against extractive or development projects.<sup>554</sup> In particular, the IACHR has been informed about cases of criminalization of social protest in countries such as Argentina,<sup>555</sup> Chile,<sup>556</sup> Colombia,<sup>557</sup> Costa Rica,<sup>558</sup> Ecuador,<sup>559</sup> Guatemala,<sup>560</sup> Mexico,<sup>561</sup> Peru,<sup>562</sup> and

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<sup>552</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples of Nicaragua*, 150° Period of Sessions, March 25, 2014; and IACHR, *Hearing on the Case 12.738 – Opario Lemoth Morris et.al (Miskito Divers)*, Honduras, 143° period of Sessions, October 24, 2011.

<sup>553</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples of Nicaragua*, 150° Period of Sessions, March 25, 2014; and IACHR, *Hearing on the Case 12.738 – Opario Lemoth Morris et.al (Miskito Divers)*, Honduras, 143° period of Sessions, October 24, 2011.

<sup>554</sup> IACHR, *Hearing on the Impact of Canadian Mining Activities on Human Rights in Latin America*, 153° Period of Sessions, October 28, 2014; IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144° Period of Sessions, March 28, 2012; IACHR, *Hearing on the Situation of the Rights to Territory and Self-Government of Indigenous Peoples in the Amazon*, 143° Period of Sessions, October 27, 2011; IACHR, *Hearing on the Human Rights Situation of the Indigenous Communities Affected by Activities of the Mining Industry in the Andean Region*, 140° Period of Sessions, October 29, 2010; and IACHR, *Hearing on Corporations, Human Rights and Prior Consultation in the Americas*, 154° Period of Sessions, March 17, 2015.

<sup>555</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples in Argentina*, 144° Period of Sessions, March 23, 2012.

<sup>556</sup> IACHR, *Hearing on the Situation of human rights defenders of the Mapuche People in Chile*, 131° Period of Sessions, March 10, 2008.

<sup>557</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples in the Context of the Peace Process in Colombia*, 149° Period of Sessions, October 31, 2013.

<sup>558</sup> IACHR, *Hearing on the Reports of Violations of the Human Rights of Indigenous Peoples in Costa Rica*, 153° Period of Sessions, October 31, 2014.

<sup>559</sup> Leaders and defenders of the Shuar people in Ecuador have denounced to the IACHR a pattern of criminalization of social protest which reportedly involves the justice administration system. They have informed the IACHR that in a report drafted by the *Universidad Andina [Simón Bolívar]* of Ecuador, there are around 200 open cases against leaders. IACHR, *Hearing on the Human Rights Situation of the Leaders and Defenders of the Shuar people in Ecuador*, 154° Period of Sessions, March 17, 2015; and IACHR, *Hearing on the Human Rights Situation of Indigenous People in Ecuador*, 153° Period of Sessions, October 27, 2014.

<sup>560</sup> IACHR, *Hearing on Human Rights Situation of Indigenous Peoples in Guatemala*, 143° Period of Sessions, October 24, 2011.

<sup>561</sup> IACHR, *Hearing on Reports of Destruction of the Biocultural Heritage Due to the Construction of Mega Projects of Development in Mexico*, 153° Period of Sessions, October 30, 2014; and IACHR, *Hearing on Land Tenure and Human Rights of Indigenous Peoples in Mexico*, 141° Period of Sessions, March 28, 2011.

Venezuela,<sup>563</sup> among others. The IACHR has identified that these resistance actions by indigenous and tribal peoples are often in relation to the granting of concessions, permits or authorization for activities of various kinds without consultation. It is concerning to note that the criminalization of social protest against such projects, adds additional difficulties to these peoples and their leaders in the defense of their rights. It is paradoxical to note that often these peoples and the defenders of their rights try to use several legal or political actions with the aim that the States meet their demands, which often do not succeed and then lead to actions of social protest, which are themselves criminalized.

298. Furthermore, the IACHR notes the misuse of criminal law to criminalize demonstrations and social protests by indigenous and tribal peoples. In particular, the IACHR has identified that justice operators have resorted to various criminal classifications, such as theft, contempt for authority, incitement, offences related to terrorism, rebellion, crimes against the security of the State, invasion of private property, kidnapping, conspiracy to commit crime, etc.<sup>564</sup> In most of these cases, the criminal charges are joined by arrests, imprisonment and the use of pre-trial detention for periods exceeding any reasonable time and without appropriate safeguards.<sup>565</sup>
299. Other international human rights bodies have also noticed this pattern of criminalization. In particular, the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association, Maina Kiai, stated with concern that “the number of arrests and prosecutions for alleged offences committed in the course of the legitimate exercise of the rights to freedom of peaceful assembly and of association continues to rise.”<sup>566</sup> In addition, he warned that the most widely used legal mechanisms are “injunctions, civil damages and trespass and defamation suits, are often used to curtail the work of civil society organizations and individuals engaged in defending rights in the context of natural resource exploitation.”<sup>567</sup>
300. The IACHR notes that criminalization favors stigmatization of the processes of defense of these peoples, who are branded as “criminal enterprises” or “destabilizing agents,” when they seek to defend their territories from the impacts

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<sup>562</sup> IACHR, *Hearing on the Rights of Indigenous Peoples to Legal Recognition and Property in Peru*, 153<sup>rd</sup> Period of Sessions, October 31, 2014.

<sup>563</sup> IACHR, *Hearing on Indigenous Jurisdiction and Human Rights*, 141<sup>st</sup> Period of Sessions, March 25, 2011.

<sup>564</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples in Argentina*, 144<sup>th</sup> Period of Sessions, March 23, 2012; IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144<sup>th</sup> Period of Sessions, March 28, 2012; and IACHR, *Hearing on the Criminal Processes against Defenders of Indigenous Peoples in Countries in the Region*, 134<sup>th</sup> Period of Sessions, March 20, 2009.

<sup>565</sup> IACHR, *Hearing on Human Rights Situation of Indigenous Peoples in Guatemala*, 143<sup>rd</sup> Period of Sessions, October 24, 2011; and IACHR, *Hearing on the Situation of human rights defenders of the Mapuche People in Chile*, 131<sup>st</sup> Period of Sessions, March 10, 2008.

<sup>566</sup> UN. Report from Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association, Maina Kiai, April 28, 2015, A/HRC/29/25, para. 33.

<sup>567</sup> UN. Report from Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association, Maina Kiai, April 28, 2015, A/HRC/29/25, para. 34.

of extractive or development.<sup>568</sup> The IACHR has been informed of some cases in which media has had a role in the stigmatization of indigenous and tribal peoples, including their leaders, and advocates.<sup>569</sup>

301. On the other hand, in the context of the exercise of the right of social protest, the IACHR has received complaints regarding the improper use of force by the law enforcement officers in operations aimed at controlling demonstrations or protests by indigenous and tribal peoples, as well as civil society members that support them. According to the information received, the IACHR has identified violent acts attributable to security agents or to third parties acting under the acquiescence of the State, which remain in total impunity.<sup>570</sup> For example, in cases of demonstrations regarding territorial issues by the Mapuche people in Chile, the IACHR was informed of cases of physical violence on the part of the police against defenders of Mapuche rights; a situation, which in some cases, reportedly had ended in the death of such defenders in connection with violations of the rules for the use of force and without any proportionality in the response of the police.<sup>571</sup> Such events allegedly remain in impunity as they have been referred to the military jurisdiction in violation of the established jurisprudence of the Inter-American System about this jurisdiction.<sup>572</sup> Another situation of concern arises in Peru where, according to the information received by the IACHR, from August 2011 to May 2015, reportedly 63 deaths and 1,935 injuries resulted in the context of social conflicts, mostly over social and environmental affairs.<sup>573</sup>
302. The IACHR has also identified that the implementation of projects has involved, in some cases, the increase of the presence of police or military forces in lands and territories of indigenous and tribal peoples,<sup>574</sup> or in the areas where protests take place.<sup>575</sup> The IACHR was even informed that primary schools nearby to areas

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<sup>568</sup> IACHR, *Hearing on the Situation of Economic, Social, and Cultural Rights of Campesinos in Latin America*, 149° Period of Sessions, October 29, 2013; and IACHR, *Hearing on Situation of the Rights to Territory and Self-Government of Indigenous Peoples in the Amazon Region*, 143° Period of Sessions, October 27, 2011.

<sup>569</sup> IACHR, *Hearing on the Criminal Processes against Defenders of Indigenous Peoples in Countries in the Region*, 134° Period of Sessions, March 20, 2009.

<sup>570</sup> IACHR, *Hearing on the Reports of Violations of the Human Rights of Indigenous Peoples in Costa Rica*, 153° Period of Sessions, October 31, 2014; IACHR, *Hearing on the Human Rights Situation of the Indigenous Communities Affected by Activities of the Mining Industry in the Andean Region*, 140° Period of Sessions, October 29, 2010; and IACHR, *Hearing on Corporations, Human Rights, and Prior Consultation in the Americas*, 154° Period of Sessions, March 17, 2015.

<sup>571</sup> IACHR, *Hearing on the Situation of human rights defenders of the Mapuche People in Chile*, 131° Period of Sessions, March 10, 2008.

<sup>572</sup> IACHR, *Hearing on the Situation of human rights defenders of the Mapuche People in Chile*, 131° Period of Sessions, March 10, 2008.

<sup>573</sup> Information received by the IACHR in the regional summit about “Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects.” Panama City, July 30, 2015.

<sup>574</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144° Period of Sessions, March 28, 2012; and IACHR, *Hearing on Situation of the Rights to Territory and Self-Government of Indigenous Peoples in the Amazon Region*, 143° Period of Sessions, October 27, 2011.

<sup>575</sup> IACHR, *Hearing on the Criminal Processes against Defenders of Indigenous Peoples in Countries in the Region*, 134° Period of Sessions, March 20, 2009.

where these projects are implemented have been occupied as barracks.<sup>576</sup> Such a presence seeks to ensure the unhindered execution of extractive activities or in some cases, to pressure or intimidate indigenous peoples to accept these activities.<sup>577</sup> It concerns the IACHR to note that, in several countries of the region, public security forces are engaged in the protection of persons linked to extractive projects, instead of providing protection to the population.<sup>578</sup>

303. In this respect, the IACHR recalls that the right to assembly is protected by articles XXI of the American Declaration and 15 of the American Convention. As was signaled previously, the political and social participation which happens through the exercise of the right to assembly is an essential element for the consolidation of democratic life and, for this reason it amounts to an imperative social interest.<sup>579</sup> The IACHR reiterates that peaceful social protest, as a manifestation of freedom of assembly, is a fundamental tool in the defense of human rights, is essential for engaging in political and social criticism of authorities' activities, as well as for establishing positions and plans of action with regards to human rights.<sup>580</sup> The right to public protest is protected by the Convention so long as it is exercised peacefully and without arms.<sup>581</sup> To comply with this obligation to respect and guarantee the right to assembly, States must not only avoid obstructing it, but also take positive measures to guarantee its exercise before, during and after a protest. These measures must guarantee the exercise of this right from the moment authorities are informed of the intent to carry out a protest, during the protest protecting the rights of participants and involved third parties, and afterwards, to investigate and sanction any person, including state agents, who committed acts of violence against the right to life and physical integrity participants and involved third parties.

### **Intimidation of human rights defenders through police and/or military intervention in countries of Central America**

The information received by the IACHR points to the existence of situations where military detachments have been placed in the ancestral lands or territories of indigenous communities or peoples, who have been defending their rights in the context of development or extraction projects. With regards to Panama, representatives of the Ngobe, Naso and Wounaan peoples informed the IACHR that they felt “surrounded” by the increase of police and military forces in

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<sup>576</sup> See IACHR, *Hearing on the Construction of the Transoceanic Canal and its Impact on Human Rights in Nicaragua*, 154<sup>o</sup> Period of Sessions, March 16, 2015.

<sup>577</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144<sup>o</sup> Period of Sessions, March 28, 2012; and IACHR, *Hearing on Situation of the Rights to Territory and Self-Government of Indigenous Peoples in the Amazon Region*, 143<sup>o</sup> Period of Sessions, October 27, 2011.

<sup>578</sup> See for example, IACHR, *Hearing on the Human Rights Situation of the Leaders and Defenders of the Shuar people in Ecuador*, 154<sup>o</sup> Period of Sessions, March 17, 2015.

<sup>579</sup> IACHR, *Report on the Situation of Human Rights Defenders in the Americas* (2006), para.60; IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas* (2012), para.128.

<sup>580</sup> IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas* (2012), para.129.

<sup>581</sup> Article 15 of the American Convention on Human Rights.

their indigenous territories.<sup>582</sup> They alleged that the police are there to defend the interests of companies and the State rather than their rights. They specified that in the case of the Ngobe Community from Charco La Pava, the AES Company keeps community members “trapped” with big checkpoints guarded by the police.<sup>583</sup> These agents are reportedly limiting the free movement of indigenous peoples every time they enter or exit their territories. According to the information given, the agents are allegedly requesting the Ngobe to render statements on the reasons why they come or go from their territories.<sup>584</sup>

In relation to Guatemala, the information received indicates that there are several cases in which military bases have been installed in indigenous communities and municipalities’ ancestral lands and territories. The affected indigenous peoples have been carrying out processes in defense of their rights *vis à vis* the implementation of processes without adequate respect for the right to consultation. According to the information received, the militarization of the indigenous lands and territories has happened mainly in areas where there are strong processes seeking to defend the rights of the indigenous communities and peoples, presumably as a strategy to allow the installation of projects.<sup>585</sup> The alleged increase in the military presence in the Ixil Region, one of the most affected by the armed conflict, is particularly troubling. In this region the number of military personnel has purportedly increased in the Chajul Militar Base and the Nebaj military detachment. Also, a detachment was installed in Cotzal, and it is alleged that there is constant patrolling by the military personnel based in the military base of Ixcán to Chajul and Izpatán, locations in the Northern Area. In the view of the leaders, shared with the IACHR, “[the military personnel] comes to control the peoples instead of the companies that want to come in, if the members protest they control the demonstrations [and] intimidate the population, especially those who are victims or survivors of the conflict. The wounds have not healed and they are open again.”<sup>586</sup>

With regard to Nicaragua, the IACHR was informed that peaceful marches have taken place against the Trans-Oceanic canal, demanding the suspension of the project. According to the information submitted to the IACHR, the participants

<sup>582</sup> IACHR, *Hearing on Right to private property of indigenous peoples of Panama*, 133<sup>o</sup> Period of Sessions, October 28, 2008; and IACHR, *Hearing on the Situation of Human Rights of the Indigenous Peoples Inhabiting Indigenous Territory in the National Park Isiboro Sécura (TIPNIS) in Bolivia*, 147<sup>o</sup> Period of Sessions, March 15, 2013.

<sup>583</sup> IACHR, *Hearing on Right to private property of indigenous peoples of Panama*, 133<sup>o</sup> Period of Sessions, October 28, 2008.

<sup>584</sup> IACHR, *Hearing on Right to private property of indigenous peoples of Panama*, 133<sup>o</sup> Period of Sessions, October 28, 2008.

<sup>585</sup> For example, the following areas were mentioned: Chisec, Cobán, Fray Bartolomé de las Casas, Raxruha, among others. Complaint from the Q’eqchi’, Poqomchi’ and Achi’ peoples. *Analysis of the situation of racism and discrimination in Alta Verapaz*. Information received on August 23, 2013, in Cobán, Alta Verapaz. Similar information was received in the meeting with the PDH on August 29, 2013 in Guatemala City.

<sup>586</sup> Witness statement rendered in a meeting with leaders of indigenous organizations on August 25, 2013 in Nebaj, Quiché.

have been threatened by military and police personnel who have violently dissolved said protests. The Commission was informed, specifically, of the repression suffered by the participants of four marches in December 2014, where persons were illegally detained and transferred to a cell in Chipote, where torture has been historically practiced. According to witness statements received by the IACHR, these persons were attacked, arbitrarily deprived of liberty, and subjected to ill treatment by police as a consequence of their participation in the marches. The witnesses added that when relatives went to visit them, they were not allowed any type of communication.<sup>587</sup>

## G. Protection from forced displacement

304. The Inter-American Commission and the Court have referred in various occasions to protection from displacement, especially while analyzing the freedom of movement and residence, recognized at article 22.1 of the American Convention.<sup>588</sup> The organs of the Inter-American system have found in their case law that this right creates an obligation upon the States to abstain from actions that will lead to the displacement of persons and from aiding third parties in perpetuating events that trigger internal.<sup>589</sup>
305. In this regard, both the Commission and the Court have considered that the United Nation's *Guiding Principles on Internal Displacement*, which are based on international human rights standards, are particularly relevant to determine the scope and content of article 22.1 of the Convention in the content of internal displacement. Following these Guiding Principles, States have four main obligations in a context of internal displacement: (i) the obligation to prevent displacement; (ii) the obligation to protect the displaced persons during the displacement; (iii) the obligation to provide and enable humanitarian relief; and (iv) the obligation to enable the return, resettlement and relocation of the displaced persons.<sup>590</sup>

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<sup>587</sup> See IACHR, *Hearing on the Construction of the Transoceanic Canal and its Impact on Human Rights in Nicaragua*, 154<sup>o</sup> Period of Sessions, March 16, 2015.

<sup>588</sup> Article 22.1 states that: "Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law".

<sup>589</sup> See, *inter alia*, IA Court, *Case of the Santo Domingo Massacre v. Colombia*. Preliminary Objections, Merits and Reparations. Judgment of November 30, 2012. Series No. 259, para. 255; *Case of Vélez Restrepo and family v. Colombia*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 3, 2012. Series C No. 248, para. 220; *Case of Valle Jaramillo et al. v. Colombia*. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, para. 138; *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148, para. 206; and *Case of the "Mapiripán Massacre" v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, para. 168.

<sup>590</sup> IACHR, *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*. OEA/Ser.L/V/II. Doc. 49/13. December 31, 2013, para. 537.

306. The forced displacement of indigenous and tribal peoples from their lands and territories is one of the most serious consequences of the imposition of projects that the Commission has observed.<sup>591</sup> It observes with special concern that indigenous peoples continue reporting cases of forced displacement.<sup>592</sup> For example, the IACHR was informed that, as a consequence of the implementation of the Trans-Oceanic Canal in Nicaragua, the Rama and Creole people are reportedly facing displacement from their territories.<sup>593</sup> It was also reported that the *Cóndor Mirador* Project for copper and gold exploitation over Shuar territory of Ecuador includes the displacement of members of these people from their traditional territories.<sup>594</sup>
307. The forced displacement of indigenous and tribal peoples in the Americas is also linked to the grabbing of lands and territories traditionally occupied by them by third parties to execute projects or activities of different kinds.<sup>595</sup> Indeed, the implementation of projects for development or extraction commonly requires extensive geographic areas and often requires serious alterations to large extents of land for the construction of different types of buildings, plants, facilities, the expansion of access roads and communications routes, among others. These alterations are openly incompatible with the uses to which peoples traditionally put their lands and territories and, therefore, result in the modification or negation of their life plans. The Commission, for example, received information during its on-site visit to Colombia on August of 2015, indicating that Afro-descendent communities continue to be disproportionately affected by the problem of displacement, not only as the result of the armed conflict in their ancestral territories, but also the execution of extractive industry projects, which fuel forms of violence and killings, including sexual violence against Afro-descendent women, and acts of harassment against human rights defenders.<sup>596</sup>
308. In addition, the IACHR has received information that allegedly indicates that there is a close relationship between extractive interests and displacement. According to the information received, there have been cases in which displacement is promoted through various means as a strategy for territorial dispossession and uprooting communities to secure access to the necessary land for the

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<sup>591</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144° Period of Sessions, March 28, 2012.

<sup>592</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144° Period of Sessions, March 28, 2012; IACHR, *Hearing on the Right to Prior, Free, and Informed Consultation of Indigenous Peoples and Afro-descendants in the Andean Region*, 141° Period of Sessions, March 29, 2011; and IACHR, *Hearing on Situation of the Rights to Territory and Self-Government of Indigenous Peoples in the Amazon Region*, 143° Period of Sessions, October 27, 2011.

<sup>593</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous Women in Nicaragua*, 153° Period of Sessions, October 28, 2014.

<sup>594</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous People in Ecuador*, 153° Period of Sessions, October 27, 2014; and IACHR, *Hearing on the Human Rights Situation of the Leaders and Defenders of the Shuar people in Ecuador*, 154° Period of Sessions, March 17, 2015.

<sup>595</sup> IACHR, *Hearing on the Situation of Economic, Social, and Cultural Rights of Campesinos in Latin America*, 149° Period of Sessions, October 29, 2013.

<sup>596</sup> IACHR, Press Release, *IACHR Visits Colombia to Receive Information on the Situation of Persons of African Descent*, August 27, 2015.

implementation of projects.<sup>597</sup> In this regard, the IACHR was informed in public hearings about the situation of indigenous peoples in Colombia. According to the information submitted, in Colombia, the impacts of extractive activities in indigenous territories are increased by the presence of military actions that are commonly present during the internal armed conflict, generating a strong armed and extractive pressure in the territories of indigenous peoples, such as the Nasa, Kankuamo, Emberá Chamí, and Awá, forcing their displacement.<sup>598</sup>

309. The IACHR has identified that hydroelectric dams are a type of infrastructure project that make it impossible for affected people to return to their ancestral territories.<sup>599</sup> Projects that have been implemented for several years and some more recent projects exemplify this. For example, the Kuna de Madungandi and Embera de Bayano indigenous peoples in Panama were forcibly displaced for the construction of the Bayano hydroelectric dam between the years 1972-1976.<sup>600</sup> Members of these peoples described the profound impact that seeing their territory flooded had caused and described the feeling of helplessness of knowing that they could never return. Displacement meant for such peoples, according to one testimony, “to take away the right to live and coexist with [their] nature.”<sup>601</sup>
310. A more recent example is the case of the Paquitzapango Hydroelectric Project in the Peruvian Amazon, which allegedly entails the displacement of Asháninkas indigenous communities from their lands without the possibility to return.<sup>602</sup> Also, during its *in loco* visit to Honduras in December, 2014, the Commission received information according to which concessions issued to companies have been accompanied by massive repression of the peoples, who also have been forcibly evicted. “There is anxiety in the lands about the dispossession and evictions of the Garifuna Community,” stated a member of the Garifuna people to the IACHR.<sup>603</sup> In relation to Nicaragua, the Inter-American Commission was informed that the construction of the Trans-Oceanic canal will result in the displacement of indigenous peoples and people of African descent. Several families will be subjected to the process of expropriation contemplated in the Trans-Oceanic Canal Act and that will result in the dispossession of their properties for derisory

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<sup>597</sup> IACHR, *Hearing on the Situation of Human Rights of Indigenous Peoples in Colombia*, 147° Period of Sessions, March 14, 2013; IACHR, *Hearing on the Human Rights Situation of Indigenous Peoples in Colombia*, 140° Period of Sessions, October 28, 2010; and IACHR, *Human Rights Situation of Indigenous Peoples in Colombia*, 134° Period of Sessions, March 23, 2009.

<sup>598</sup> IACHR, *Human Rights Situation of Indigenous Peoples in Colombia*, 134° Period of Sessions, March 23, 2009.

<sup>599</sup> IACHR, *Hearing on the Situation of Persons Affected by “Mega Dams” in the Americas*, 137° Period of Sessions, November 2, 2009.

<sup>600</sup> IACHR, *Hearing on the Case 12.354 – Kuna de Mandungandi and Embera de Bayano, Panama*, 144° Period of Sessions, March 23, 2012.

<sup>601</sup> IACHR, *Hearing on the Case 12.354 – Kuna de Mandungandi and Embera de Bayano, Panama*, 144° Period of Sessions, March 23, 2012.

<sup>602</sup> IACHR, *Hearing on the Rights of Indigenous Peoples and Energy and Extractive Industry Policy in Peru*, 140° Period of Sessions, October 26, 2010; and IACHR, *Hearing on the Human Rights Situation of the Ashaninka People in Peru*, 138° Period of Sessions, March 23, 2010.

<sup>603</sup> IACHR. *Preliminary Observations concerning the Human Rights Situation in Honduras*. Press Release 146A/2014. December 5, 2014.

payment, in addition to not providing guarantees for their relocation to adequate alternative lands.<sup>604</sup>

311. It is concerning to note that sometimes arbitrary and violent eviction procedures are applied. For example, it was reported that in the region of Bocas del Toro in Panama during several years indigenous communities have been subjected to violent evictions to make way for extractive or development initiatives. In particular, they reported that in October 2008, a contingent of national police escorted private workers to “chop with a chainsaw” 17 houses that were in the center of the Cayo del Agua Community, events in which police officers allegedly physically assaulted people, including a pregnant woman to force her to vacate her home.<sup>605</sup> Another situation of grave concern refers to the forced evictions of indigenous communities in various parts of Guatemala. According to the information available, between 2004 and 2007, 72 violent evictions of peasants were recorded, 44 of them in 2007 alone.<sup>606</sup> In the following years, the evictions have continued to be a primary concern for organizations and indigenous communities in several areas of the country. Although there is no quantitative information of the total number of evictions carried out, it is known that it is a practice that has continued to affect hundreds of people and communities in Guatemala.<sup>607</sup> The information received by the IACHR suggests that in many cases these evictions are related to the expansion of monoculture crops, taking control of large areas for cattle grazing, and the implementation of projects of extraction and infrastructure, such as dams or other power generation projects.
312. The Commission considers that indigenous and tribal peoples have an especial protection under international law in relation to forced displacement, derived from the reinforced obligations that the State has towards collective property. Forced displacement directly runs contrary to the very existence of indigenous and tribal peoples, because it breaks the fundamental relationship that they have with their territories, both in terms of physical survival, since they obtain sustenance from the territory, and cultural survival, as their culture is directly linked to their territory.
313. In the words of the Inter-American Court, “the forced displacement of the indigenous peoples out of their community or from their members can place them

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<sup>604</sup> See IACHR, *Hearing on the Construction of the Transoceanic Canal and its Impact on Human Rights in Nicaragua*, 154<sup>o</sup> Period of Sessions, March 16, 2015.

<sup>605</sup> IACHR, *Hearing on the Right to Property and the Right to a Healthy Environment of Indigenous Peoples in Bocas del Toro, Panama*, 154<sup>o</sup> Period of Sessions, March 20, 2015.

<sup>606</sup> International Displacement Monitoring Centre. *Guatemala: Violence and inequality still blocking solutions for IDPs*. 2009. Citing Amnesty International. 2009 Report: Guatemala.

<sup>607</sup> According to available information, in 2011, the UNOHCHR in Guatemala noted evictions carried out in: Valle del Polochic (Alta Verapaz), which had effects in 732 Q’eqchi’s families (March 15); in Retalhuleu, which had effects on 139 peasants (July 28); and in Parque Sierra “El Lacandón”, in Petén, which affected 69 families (August 24) [UNOHCHR. Annual Report of the United Nations High Commissioner for Human Rights about the activities performed by her office in Guatemala. 2011, para. 76]. In 2012, the UNOHCHR noted the violent eviction of 325 persons in Cahabón, Alta Verapaz [UNOHCHR. Annual Report of the United Nations High Commissioner for Human Rights about the activities performed by her office in Guatemala. 2012, para. 80.]

in a special situation of vulnerability, that for its destructive consequences regarding their ethnic and cultural fabric, generates a clear risk of extinction and cultural or physical rootlessness of the indigenous groups.”<sup>608</sup> Therefore, it had indicated that “it is indispensable that the States adopt specific measures of protection considering the particularities of the indigenous peoples, as well as their customary law, values, uses, and customs, in order to prevent and revert the effects of said situation.”<sup>609</sup> Furthermore, the IACHR recalls that “relocation” is a circumstance for which international instruments, such as de UN Declaration on the Rights of Indigenous Peoples<sup>610</sup> and the 169 ILO Convention<sup>611</sup>, requires the obtainment of the consent of the indigenous and tribal peoples.

314. It also recalls that the jurisprudence of the inter-American system has recognized, as an essential part of the right to property of indigenous peoples, the right to restitution of the ancestral lands and territories, from which they have been deprived for reasons beyond their control. This supposes that indigenous peoples that lost the total or partial possession of their territories, retain their rights to property over them, as long as the fundamental relationship with the ancestral territory exists.<sup>612</sup> As it has been recognized by the bodies of the system, in those exceptional cases where due to objective and justified reasons it is impossible for the State to restore the territorial rights of the indigenous or tribal peoples, “it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures.”<sup>613</sup> The Commission has previously indicated that this alternative “only constitutes a legally acceptable hypothesis when all possible means to obtain the restitution of each people’s specific ancestral territory have been exhausted, and such restitution has not been possible because of objective and justified reasons, in the terms established by the Inter-American jurisprudence.”<sup>614</sup>
315. When the option to return to their territories is materially impossible, it is also impossible that indigenous and tribal peoples can exercise their special relationship with these territories. In the cases where indigenous peoples or communities are relocated to alternative lands, they are not equal or better in size or quality than their ancestral territories in which they used to live, thus affecting

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<sup>608</sup> I/A Court H.R., *Case of Chitay Nech et al v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 25, 2010. Series C No. 212, para. 147.

<sup>609</sup> I/A Court H.R., *Case of Chitay Nech et al v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 25, 2010. Series C No. 212, para. 147.

<sup>610</sup> United Nations. Declaration on the Rights of Indigenous Peoples. Article 10.

<sup>611</sup> ILO. Indigenous and Tribal Peoples Convention, No. 169 (1989), Article 16.

<sup>612</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 128.

<sup>613</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 135.

<sup>614</sup> IACHR. *Indigenous and tribal people’s rights over their ancestral lands and natural resources: Norms and jurisprudence of the Inter-American human rights system*. OEA/Ser.L/V/II. Doc.56/09, 30 December 2009, para. 142.

their ability to recreate and maintain their culture.<sup>615</sup> This uprooting results in great anxiety and uncertainty as their ways of life and development models are impacted in a significant and irreparable way.<sup>616</sup> Additionally, the displacement of indigenous and tribal peoples and persons of African descent can result in a rural exodus towards the cities or other areas. When members of indigenous peoples and Afro-descendent communities are forced to relocate to urban areas, they tend to suffer great difficulties to access vital necessities for their livelihoods and are placed in a situation of poverty or extreme poverty.<sup>617</sup>

## ***H. Differentiated impact in groups and sectors of special concern***

### **1. Authorities, leaders from indigenous and tribal peoples, as well as Afro-descendent communities, and human rights defenders**

316. The information received by the IACHR attests to the special, adverse effects on the rights of leaders and indigenous authorities in some countries of the region,<sup>618</sup> for reasons linked to their activities in defense of the rights of their peoples or communities from extractive or development projects. Such impact is expressed concretely in information regarding murders, assaults, threats, harassment and criminalization. In this respect, the IACHR notes that, according to a recent report from Amnesty International, the largest number of actions it has adopted in the past two years were on behalf of those who defend human rights related to land, territory and natural resources.<sup>619</sup> During the 156<sup>th</sup> Period of Sessions, the IACHR was informed of the elevated and differentiated risk to which these human rights defenders are exposed, as they generally are in isolated and marginalized places,

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<sup>615</sup> IACHR, *Hearing on the Case 12.354 – Kuna de Mandungandi and Embera de Bayano, Panama*, 144<sup>o</sup> Period of Sessions, March 23, 2012; and IACHR, *Hearing on Case 12.717/Precautionary Measure PM 56/08 – Indigenous Communities Ngobe and Others, Panama*, 137<sup>o</sup> Period of Sessions, November 2, 2009.

<sup>616</sup> IACHR, *Hearing on the Case 12.354 – Kuna de Mandungandi and Embera de Bayano, Panama*, 144<sup>o</sup> Period of Sessions, March 23, 2012; and IACHR, *Hearing on Case 12.717/Precautionary Measure PM 56/08 – Indigenous Communities Ngobe and Others, Panama*, 137<sup>o</sup> Period of Sessions, November 2, 2009.

<sup>617</sup> IACHR, *Hearing on the Human Rights Situation of the Apetina Indigenous Community in Suriname*. 150<sup>o</sup> Period of Sessions, March 27, 2014.

<sup>618</sup> See, for example, IACHR, *Hearing on the Human Rights Situation of the Leaders and Defenders of the Shuar people in Ecuador*, 154<sup>o</sup> Period of Sessions, March 17, 2015. IACHR. *Hearing on the Human Rights Situation of Defenders of the Environment in the Context of Extractive Industries in America*, 156<sup>th</sup> Period of Sessions. October 19, 2015.

<sup>619</sup> Amnesty International. *Defending Human Rights in the Americas: Necessary, Legitimate and Dangerous*. London, 9 December 2014.

and highlighting that they suffer aggressions from both public and private security forces, and from the organized crime.<sup>620</sup>

317. In its recent *in loco* visit to Honduras, for example, the IACHR received alarming information about killings, acts of violence and death threats against indigenous and Garifuna leaders, in particular against those who defend their territories and natural resources in a context of megaproject development without a prior informed consultation. “So they tell me they are going to kill me. I am not afraid. I am exposed, waiting to die,” a female defender of the indigenous peoples in La Ceiba informed the IACHR. As the Commission has established, many of the attacks against the life and personal integrity of indigenous leaders and defenders have the intention of reducing their defense of their territories and natural resources, as well as the defense of their right to autonomy and cultural identity.<sup>621</sup>

### **Murder of the Lenca leader Tomas García, in Honduras**

The information received by the IACHR states that, in July 2013, Lenca indigenous leader, Tomas García, was murdered and his son of 17 years of age, Allan García Domínguez, was injured as a result of events allegedly committed by members of the Honduran Army when repressing a protest against the execution of a hydro-electric project in their ancestral territory. Allan García Domínguez was a community leader and an active member of the Civil Council of Popular and Indigenous Organizations in Honduras (*Consejo Cívico de Organizaciones Populares e Indígenas de Honduras- COPINH*.) The information received states that since April 2013, the Lenca people has been holding demonstrations against a hydro-electric project in the Agua Zarca sector of the Guacarque River, part of the Lenca’s ancestral territory. The project was awarded to private companies through a concession. According to the leaders of the Lenca people, there was no prior consultation on the project. According to COPINH, in this context, violent acts and threats against the lives of indigenous leaders of COPINH have taken place, allegedly for reasons related to their opposition to the project.<sup>622</sup>

### **Indigenous defenders in Brazil**

According to the information received, the indigenous peoples in Brazil are being affected by a situation of violence that has increased in the last years. The IACHR was informed of the aggressions, murders, and actions of criminalization against indigenous leaders. As it was informed to the IACHR, State authorities are not investigating or identifying those responsible for these acts. Therefore, the incidents remain in impunity. Testimonies from Guarani-Kaiowá indigenous

<sup>620</sup> IACHR. *Hearing on the Human Rights Situation of Defenders of the Environment in the Context of Extractive Industries in America*, 156<sup>th</sup> Period of Sessions. October 19, 2015.

<sup>621</sup> IACHR. *Preliminary Observations concerning the Human Rights Situation in Honduras*. Press Release 146A/2014. December 5, 2014.

<sup>622</sup> [IACHR Condemns the Murder of Lenca Indigenous Leader and injuries to a Child in Honduras Military Operation](#). Press Release 52/13. Washington, D.C., July 19, 2013.

leaders indicate that this is linked to the lack of demarcation and protection of their ancestral lands which allows agro-industries of crops such as soy and sugar cane to enter their territories, and generate this environment of violence. They indicated that in the last years, several indigenous leaders have been attacked, murdered, tortured and disappeared.<sup>623</sup>

### **Retaliation related to the defense of the environment, indigenous lands and access to water of the Yaqui people in Mexico**

The Commission has granted precautionary measures to protect the life and physical integrity of human rights leaders and defenders who have suffered alleged retaliation measures for their activities. In the matter of Lauro Baurneo Mora and others (Mexico), the Commission received information on the alleged context of insecurity which resulted from the failure to consult indigenous peoples prior to the implementation of a project which would affect the “Yaqui” river, in the State of Sonora, Mexico. According to the petitioners, the river serves as “the lifeblood of the agricultural, cattle-raising and fishing activities” of the indigenous communities, as well as being central to the cosmovision of the Yaqui indigenous peoples generally. In addition, the petitioners alleged that, due to the pollution of the river, the members of the indigenous communities were suffering violations of their right to life and physical integrity. In follow-up exchanges, the IACHR received information on threats, harassment and intimidation measures taken against certain Yaqui leaders for their work defending their natural resources, and specifically their access to their groundwater reserves. As a result, the Commission granted precautionary measures requesting of the State that it protect the right to life and physical integrity of the leaders which had been identified as the targets of these measures.<sup>624</sup>

## **2. Women**

318. The IACHR has identified a pattern of discrimination and various specific forms of violence towards indigenous, tribal and Afro-descendant women. Access to natural resources used by women to provide for their families is limited due to the presence of third parties in their lands and territories.<sup>625</sup> This violates the harmony of indigenous and tribal peoples with their way of life, erodes the activities carried out by women, often leads to the loss or reduction of their role in the community, and can generate a gradual and slow disintegration of the

<sup>623</sup> IACHR, *Hearing on Reports of Violence against Indigenous Peoples in Brazil*, 156<sup>th</sup> Period of Sessions, October 20, 2015.

<sup>624</sup> IACHR, *Matter of Lauro Baurneo Mora and others (Mexico)*, MC 452-13, December 20, 2014.

<sup>625</sup> IACHR, *Hearing on the Human Rights Situation of Indigenous Women in Nicaragua*, 153<sup>rd</sup> Period of Sessions, October 28, 2014.

networks and social fabric of such peoples.<sup>626</sup> The pressure on lands and natural resources due to encroachments by third parties and companies forces women to find ways to provide resources for their families or otherwise to migrate to urban centers to search for jobs. In the cities, they usually face numerous difficulties and have few possibilities for subsistence, due to existing discrimination.

319. The IACHR has received information indicating that large-scale mining activities leave deep impacts on the lives and in occasions, in the bodies of women.<sup>627</sup> According to this information, women suffer indiscriminate impacts which result in different types of violence, notably symbolic violence.<sup>628</sup> In this regard, the IACHR was informed that when men go to work at companies that settle on their territory, women are forced to change their habits in the absence of the work that they used to carry out in favor of their families and communities.<sup>629</sup>
320. Indigenous women have informed the IACHR that the impacts include: the overload of work on women due to the absence of their husbands; the extra responsibilities that they must take to care for families that are affected by the defense of their lands and territories, such as orphaned children of murdered leaders; the trafficking of indigenous women and girls in oil and mining settlements; increased alcoholism in the communities by community outsiders; the rape of girls and women in communities affected by mining and oil activities by workers of said companies; children which result from the rapes; and the weakening of the communal and family life, among others.<sup>630</sup>
321. In regards to violence, it is reflected in the exacerbation of family violence and the increase of sexual violence, which often leads to rejection from the community.<sup>631</sup> Patriarchal violence against indigenous and Afro-descendent women is based on the loss or decrease in their capacity to access their own resources, when they lose the traditional economic practices that benefit their communities.<sup>632</sup> In regards to socio-political violence, the processes of company intervention are allegedly arbitrary, as they prefer to negotiate directly with the men of the community without respecting their own decision making processes, which denies women the opportunity to participate in communal assemblies, for example.<sup>633</sup> In addition,

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<sup>626</sup> IACHR, *Hearing on the Situation of Human Rights of Indigenous Peoples in Colombia*, 147<sup>o</sup> Period of Sessions, March 14, 2013.

<sup>627</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144<sup>o</sup> Period of Sessions, March 28, 2012.

<sup>628</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144<sup>o</sup> Period of Sessions, March 28, 2012.

<sup>629</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144<sup>o</sup> Period of Sessions, March 28, 2012.

<sup>630</sup> Information received by the IACHR in the regional summit about “Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects.” Panama City, July 30, 2015.

<sup>631</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144<sup>o</sup> Period of Sessions, March 28, 2012.

<sup>632</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144<sup>o</sup> Period of Sessions, March 28, 2012.

<sup>633</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144<sup>o</sup> Period of Sessions, March 28, 2012.

these extractive activities bring with them a significant “floating population,” a reference to those persons, in their majority men, that go to indigenous communities to carry out activities related to these undertakings.<sup>634</sup> In this context, there are many women from indigenous communities that have children with men from this “floating population” who are unwilling to acknowledge them and take responsibility for their children.<sup>635</sup>

### Indigenous Women Victims of Sexual Violence in Guatemala

During its visit to Guatemala in March, 2013, the IACHR received information that in January 17, 2007, “11 women were raped by a group of several men (security guards of the company, policemen and soldiers from the Army) who were the ones executing evictions. All of these events remained in impunity.”<sup>636</sup> During said visit, the IACHR traveled to the Polochic Valley, to receive witness testimony from three of the eleven women that were victims of rape; Angélica Choc, widow of Adolfo Ich Chaman; and Germán Chub, who confirmed the information received and stated that they denounced the events before the Canadian Judiciary. According to their testimony, because of these rapes they were facing “much harassment, threats, intimidation, coercion” by the company to desist from the complaint submitted.<sup>637</sup>

## 3. Children

322. Extractive and development activities directly or indirectly affect the rights of indigenous, tribal or Afro-descendant children in a special and differentiated way.<sup>638</sup> During the years of childhood development, adequate food, clean water, care and affection are essential to their survival and health.<sup>639</sup> As the Committee on the Rights of the Child has stated, “[c]hildhood is a unique period of physical, mental, emotional and spiritual development and violations of children’s rights, such as exposure to violence, child labour or unsafe products or environmental

<sup>634</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144<sup>o</sup> Period of Sessions, March 28, 2012.

<sup>635</sup> IACHR, *Hearing on Human Rights Situation of Persons Affected by the Extractive Industries in the Americas*, 144<sup>o</sup> Period of Sessions, March 28, 2012.

<sup>636</sup> IACHR. Letter to the Inter-American Commission on Human Rights from the Community Q’eqchi’ from Lot 8, Chacpayla, El Estor Municipality, Izabal, dated August 19, 2013. Information received during the visit to Guatemala.

<sup>637</sup> IACHR. Witness statement received by the IACHR in the El Rodeo Community, Cahaboncito, Panzós, Alta Verapaz, on August 24, 2013 during the visit to Guatemala.

<sup>638</sup> UNICEF, UN Global Compact and *Save the Children*. *Children’s Rights and Business Principles*, p. 2.

<sup>639</sup> UNICEF, UN Global Compact and *Save the Children*. *Children’s Rights and Business Principles*, p. 3.

hazards may have a lifelong, irreversible and even transgenerational consequences.”<sup>640</sup>

323. The Commission considers that the effective enjoyment of the rights of the indigenous and Afro-descendent boys and girls is closely related to the protection of the right to ownership of their communities and peoples. Indeed, as stated previously, “[t]he loss of cultural identity because of the lack of access to ancestral territory has a direct impact upon the rights of the children of the dispossessed communities.”<sup>641</sup> Similarly, the Inter-American Court has stated that the States have the obligation “to promote and protect the right of indigenous children to enjoy their own culture, their own religion, and their own language.”<sup>642</sup>
324. As established by the Inter-American Court, “within the general obligation of the States to promote and protect cultural diversity, a special obligation can be inferred to guarantee the right to a cultural life of indigenous children.” Therefore, the Court has considered that “the loss of traditional practices, such as male and female initiation rites and the Community’s languages, as well as the harm arising from the lack of territory, particularly affect the cultural identity and development of the children of the Community, who will not be able to develop that special relationship with their traditional territory and that particular way of life unique to their culture if the necessary measures are not implemented to guarantee the enjoyment of these rights.”<sup>643</sup>
325. Also, the Committee on the Rights of the Child has established that “environmental degradation and contamination arising from business activities can compromise children’s rights to health, food security and access to safe drinking water and sanitation.”<sup>644</sup> The Committee has also noted that the rights of indigenous children may be particularly at risk in this context when facing the selling or leasing of land to investors that can deprive local populations of access to natural resources linked to their subsistence and cultural heritage.<sup>645</sup>

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<sup>640</sup> UN. Committee on the Rights of the Child. *General Comment Nº 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*. CRC/C/GC/16. 17 April, 2013, para. 4.

<sup>641</sup> IACHR. *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, 30 December, 2009, para. 205 (162).

<sup>642</sup> I/A Court of HR. *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgement of August 24, 2010, Series C No. 214, paras. 261-263 (261).

<sup>643</sup> I/A Court of HR. *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgement of August 24, 2010, Series C No. 214, paras. 261-263. I/A Court of H. R. *Case of the Rio Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 4, 2012. Series C No. 250, paras. 143-144.

<sup>644</sup> UN. Committee on the Rights of the Child. *General Comment Nº 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*. CRC/C/GC/16. 17 April, 2013, para. 19. Similarly, see United Nations, Committee on the Rights of the Child. *Concluding observations on the combined second to fourth periodic reports of Guyana, adopted by the Committee at its sixty-second session (14 January–1 February 2013)*, CRC/C/GUY/CO/2-4. 5 February 2013. Para. 22.

<sup>645</sup> UN. Committee on the Rights of the Child. *General Comment Nº 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*. CRC/C/GC/16. 17 April, 2013, para. 19; and UN. Committee

326. On the other hand, the IACHR takes note that many of the reported allegations of adverse effects on the personal integrity of indigenous peoples due to the mining, such as dermatological and respiratory diseases, mainly affect children. According to UNICEF, the UN Global Compact and Save the Children, “[c]hildren are even affected by everyday hazards differently and more severely than adults. Due to their physiology, children absorb a higher percentage of pollutants to which they are exposed, and thus their immune systems are more compromised and vulnerable.”<sup>646</sup>
327. The IACHR has also been informed that the lack of prior consultation with indigenous peoples and communities, as well as the strong pressure on community leaders promoted by external agents, has generated community division and fragmentation, breaking the social fabric and eroding traditional authority. It was informed that, among the mechanisms used, indigenous children have been subjected to influences and harassment in schools, particularly against children belonging to families that are opposed to a company.<sup>647</sup> The Commission has also received worrying information about situations that have directly affected the right to life of indigenous children.

### **Indigenous children killed in Guatemala**

In March 2013, during its Guatemala visit, the IACHR received information about the killing of two Maya Q'eqchi' children from the Monte Olivo Community in Cobán, Alta Verapaz, by a person identified to be an employee of the company seeking to implement the *Santa Rica* hydro-electrical project on the Dolores River. At least since 2009, the communities near the Dolores River and especially their leaders have been subjected to strong intimidation and death threats to pressure them to allow the construction of the hydro-electric project. In this context, two indigenous children of approximately 9 and 13 years were shot on August 23, 2013, when they were playing in their community and they died days later in Guatemala City. These events happened while the IACHR delegation was meeting with the community leaders in Cobán.

328. The IACHR takes note that other forms of impact on children include illegal child labor,<sup>648</sup> the presence of children in the vicinity or interior of business facilities, the recruitment of children as domestic servants in workers' accommodations, and the exposure of children to industrial products, among others.<sup>649</sup> The Commission

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on the Rights of the Child. *General Comment Nº 11 (2009) on indigenous children and their rights under the Convention*. CRC/C/GC/11. 12 February, 2009, para. 35.

<sup>646</sup> UNICEF, UN Global Compact and *Save the Children*. *Children's Rights and Business Principles*, Introduction.

<sup>647</sup> Complaint from the Q'eqchi', Poqomchi' and Achi' peoples. *Analysis of the situation of racism and discrimination in Alta Verapaz*. Information received on August 23, 2013, in Cobán, Alta Verapaz, during the IACHR's visit to Guatemala.

<sup>648</sup> With regards to the use of child labor, the Commission recalls the obligations under ILO Convention 182 (1999) concerning the prohibition and immediate action for the elimination of the worst forms of child labour, and ILO Convention 138 (1973) concerning the minimum age for admission to employment.

<sup>649</sup> UNICEF, UN Global Compact and *Save the Children*. *Children's Rights and Business Principles*, p. 3.

also notes, that, as stated by the Committee on the Rights of the Child, “[w]hen business employment practices require adults to work long hours, older children, particularly girls, may take on their parent’s domestic and childcare obligations, which can negatively impact their right to education and to play; additionally, leaving children alone or in the care of older sibling can have implications for the quality of care and the health of younger children.”<sup>650</sup>

#### 4. Older persons

329. As the Commission has noted previously, older persons are among the members of indigenous and tribal peoples who are most affected in their health, basic subsistence activities and environment as a consequence of development projects.<sup>651</sup> They frequently are the ones who suffer greatly for the cultural and territorial losses, as shown by this testimony rendered by an indigenous woman and received by the IACHR in its *in loco* visit to Honduras in December, 2014:

We don’t want anything that isn’t ours. What we want is to get back what is ours, what they have stolen from us. Our parents, our grandparents, our great-grandparents have taught us what is ours. Before, we had coconuts, now we have to go buy them. And there is no land to plant yucca. But there are no jobs either. We have kids here who have graduated, who have studied, but there is no work.<sup>652</sup>

330. It is necessary to take into account that in many indigenous communities oral transmission of the culture to the younger generations is primarily entrusted to the older persons.<sup>653</sup> The older persons usually perform an essential role in reproduction of the culture of indigenous and tribal peoples, as well as assuming the role of an authority, spiritual guide, healer, among other things. The information submitted to the Commission on this matter is scarce, hence the reason it considers it to be one of the areas in which the impacts must be made more visible.

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<sup>650</sup> UN. Committee on the Rights of the Child. *General Comment Nº 16 (2013) on State obligations regarding the impact of the business sector on children’s rights*. CRC/C/GC/16. 17 April, 2013, para. 162.

<sup>651</sup> IACHR, *Access to Justice and Social Inclusion: The Roadway towards strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, 28 June, 2007, para. 253, and IACHR. *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, 30 December, 2009, para. 208.

<sup>652</sup> IACHR. *Preliminary Observations concerning the Human Rights Situation in Honduras*. Press Release 146A/2014. December 5, 2014.

<sup>653</sup> IACHR. *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II, 30 December, 2009, para. 175.

The IACHR received information that in 2006, Ricardo Castellon, an Ngobe indigenous elder of the Valle del Agua Arriba Community in the Bocas del Toro Region of Panamá, was deceived into vacating the land where he lived with his family. According to the information received, Mr. Castellon was driven to the Changuinola Mayor's Office by a municipal officer in a state car and without any relatives, even though he did not know how to read or write and could not communicate in Spanish. The Commission was informed that in said office, he was convinced of putting his digital fingerprint on a document entitled "mutual agreement" by which he yielded, without knowledge, the rights to his family land to a non-indigenous third party. According to his relatives' statements, when he realized what had happened the elder lost his speech for three days. Pursuant to the document, in 2006, the Mayor of Changuinola would have authorized the eviction by the municipal of Almirante and the national police. His family was evicted and their houses destroyed. The information submitted indicates that these events have not been investigated and those responsible have not been identified.<sup>654</sup>

## 5. Persons with disabilities

331. The IACHR has noted that indigenous peoples have acquired different types of disabilities as a result of the implementation of exploitation, extraction and development projects, although information on this matter is scarce. Disabilities are incurred as a result of various forms of overexploitation of indigenous labor and their submission to dangerous working conditions. For instance, the IACHR was informed that members of indigenous communities, such as the miskitos divers in Nicaragua and Honduras, have acquired respiratory difficulties and other physical disabilities.<sup>655</sup>
332. The IACHR has also been informed that regarding the physical or sensory disabilities incurred during operations to suppress social protest opposing such projects. With regard to Peru, for example, it was reported to the Commission that members of the peasant community of Kañaris were injured by the impact of bullets and tear gas canisters discharged by police during a peaceful strike against the mining project, Kañariaco. It was reported that, as a consequence, one of the

<sup>654</sup> IACHR, *Hearing on the Right to Property and the Right to a Healthy Environment of Indigenous Peoples in Bocas del Toro, Panama*, 154<sup>o</sup> Period of Sessions, March 20, 2015. Information received by the IACHR in the regional summit about "Human Rights Violations of Indigenous and Afro-descendant Peoples in the context of extractive and touristic projects." Panama City, July 30, 2015.

<sup>655</sup> IACHR, *Hearing on the situation of human rights of indigenous peoples in Nicaragua*, 150<sup>th</sup> Period of Sessions, March 25, 2014; and *Hearing on Case 12.738 – Opario Lemoth Morris and others (Buzxos Miskitos)*, Honduras, 143<sup>rd</sup> Period of Sessions, October 24, 2011.

members of Kañaris allegedly lost his vision in one eye and was left unable to walk.<sup>656</sup>

333. Also, in Guatemala, the information available to the Commission states that, together with the police, private security guards from the Chabil Utzaj Company allegedly participated in violent evictions of the Maya Q'eqchi communities in Valle de Polochic in March, 2011, as well as in later attempted evictions in Caboncito and Sepurlimite. These events resulted in the death of several community members and adverse effects to the physical integrity of others. It was also reported that in 2006 and 2007, the Guatemalan Nickel Company (*Compañía Guatemalteca de Niquel*) promoted forced evictions in the Q'eqchi' communities in the Municipalities of Panzos, Alta Verapaz and in El Estor, Izabal, in the Valle del Polochic, to execute mining extraction activities. The Commission is especially concerned about information received that indicates that on September 27, 2009, private security personnel from the company injured Germán Chub with a firearm as he tried to stop an eviction, leaving him with a permanent physical incapacity.<sup>657</sup>

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<sup>656</sup> IACHR, *Hearing on the Rights of Indigenous Peoples to Legal Recognition and Property in Peru*, 153<sup>rd</sup> Period of Sessions, October 31, 2014.

<sup>657</sup> IACHR. Information received during the visit to Guatemala, August, 2013.

CHAPTER 5  
RECOMMENDATIONS



## RECOMMENDATIONS

334. On the basis of the information and the analysis made by the Commission throughout the present report, and in order to contribute to the protection of human rights in the region in relation to extractive, exploitation, and development activities,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE AMERICAN STATES:

### ***A. Recommendations on State human rights obligations in the context of extractive, exploitation, and development activities***

1. Design, implement and effectively enforce a normative framework for the protection of human rights applicable to extractive, exploitation, and development activities, in the terms explained in the present report. This includes adopting appropriate legislative and other measures for the protection of the relevant human rights in this matter, repealing the domestic legal provisions that are inconsistent with the rights enshrined in the Inter-American instruments, and refraining from adopting laws contrary to human rights in this context.
2. Prevent, mitigate, and suspend the negative impacts on the human rights of individuals, groups and collectivities affected by extractive and development activities. In particular, identify and give adequate follow-up to the impacts generated by a particular plan or project on the human rights of the populations affected by it, both before the approval or granting of permits, and during their implementation through monitoring and control measures. Once possible risks to rights are identified, adopt preventive and corrective measures to ensure the protection of rights which otherwise would be affected.
3. Take reasonable steps to prevent violations of human rights where there is a real and immediate risk for an individual or group of individuals associated with extraction or development activities. For this purpose, to take into account the need for mechanisms to respond to urgent communications related to potential incidents, the establishment of systems of early warning, to inform the local population about the possible risks related to the operation, and to take action to achieve coordination and cooperation between different administrative authorities that ensure that risks of those who learn about these incidents do not become serious enough to put their lives in danger.

4. In terms of general measures for prevention, give preference as far as possible to companies that show a favorable record in terms of respect for human rights in public bidding processes, and promote respect for human rights by the companies that carry out commercial transactions.
5. Adopt the necessary measures to put in place or strengthen systems of monitoring and control of extraction or development, in a manner consistent with the obligations of human rights and in a manner that is oriented to avoid the violation of the rights of the population in the area in which these activities take place. This implies having a legal and institutional framework that ensures the protection of the environment and human rights in these contexts through, among other things, periodic monitoring and imposition of sanctions or measures of correction against non-compliance. These evaluation and control mechanisms must be transparent and independent from the control mechanisms of the companies and any type of influence structures.
6. Take decisive measures to ensure the right of access to information by persons or groups of persons affected by activities of extraction or development, in relation to environmental conditions, impacts, activities, business structure and in general, all information that is necessary for the exercise or protection of human rights in this context. This implies supplying information held by the State in a timely, accessible and complete manner, guided by the principles of maximum disclosure and good faith, and in general, by the standards set by the inter-American system on this field.
7. Take the necessary actions to ensure that all persons and groups who are potentially affected by an extractive or development projects or activities can access mechanisms needed to participate effectively in the decision-making processes.
8. Prevent attacks and harassment against leaders or other persons involved in processes of defense of the rights of indigenous and tribal peoples and Afro-descendent communities affected by extractive or development activities. In particular, when the State has knowledge of a real and immediate risk, take reasonable steps to prevent its realization; seriously investigate the facts that are brought to their knowledge; as well as, where appropriate, punish the perpetrators and provide adequate reparations to victims, whether for the acts were committed by State agents or private citizens.
9. Take decisive measures to ensure supervision and effective control of private security firms and their agents. This includes ensuring that domestic legislation regulates the kind of functions that can be undertaken by private security, the type of armament and material means which are permitted to be used; establish adequate mechanisms for the control of their activities, and implement a public record with accessible and adequate information on these companies.
10. Take decisive actions to fight against impunity for human rights violations committed in the context of business activities of extraction or development, through extensive and independent investigations, imposing sanctions on the

perpetrators and intellectual authors and providing individual and collective reparations to the victims.

11. Effectively comply with the obligation to investigate, prosecute and punish the perpetrators of the violations to the right to life, personal integrity, and other human rights in the context of business activities, taking into account the duty to repair the consequences, both individual and collective, in a comprehensive and culturally appropriate manner. This shall include the adoption of measures to reduce and eliminate the specific obstacles identified in this report.
12. Provide effective protection to those denouncing transnational corporations and other non-State actors in a way that victims can act freely in the courts, through the implementation of early warning systems and other similar mechanisms.
13. States of origin in the Americas should adopt appropriate mechanisms of supervision and regulation of the activities of their companies and nationals abroad in line with the relevant international human rights standards. They should also refrain from offering public support to companies involved in human rights violations and to initiatives oriented to influence the adoption of norms or public policies which are solely favorable to their economic interests, in detriment of human rights protection in the host countries.
14. Calls on states of origin in the Americas to establish and enforce adequate and effective mechanisms to guarantee the access to justice to peoples, communities, and persons affected by the activities of companies which are registered, domiciled or have their principal headquarters or center of activities in said country.

## ***B. Recommendations concerning the obligations and specific guarantees for indigenous and tribal peoples and Afro-descendent communities***

15. Adopt legislative, administrative, and other measures necessary to fully implement and enforce, within a reasonable time, the right to consultation, and where appropriate, prior and informed consent of the indigenous and tribal peoples and Afro-descendent communities affected, according to international standards and with the full participation of the peoples and communities.
16. Modify the legislative, administrative and other measures that prevent the full and free exercise of the right to prior consultation, which shall ensure the full participation of indigenous and tribal peoples and Afro-descendent communities.
17. Consult the peoples and communities in a prior, adequate and effective manner, and in full compliance with international standards applicable to the matter, in the eventual case that it is intended to carry out any activity or project of extraction of natural resources in their lands and territories, or development plan of any kind that involves potential impact on their territories.

18. With regard to the concessions already granted or in implementation, establish a mechanism that allows for assessments concerning any need to modify the terms of the same to preserve the physical and cultural survival of the indigenous and tribal peoples and Afro-descendent communities at issue.

### ***C. Recommendations with regard to the impact on the full enjoyment of the rights of indigenous and tribal peoples, and Afro-descendent communities***

19. Establish indicators and monitoring systems that evaluate specifically the impact of the implementation of extractive and development projects on the human rights of the affected populations, especially taking into account the specific impacts that affect the rights of indigenous and tribal peoples and communities of African descent.
20. Ensure that indigenous and tribal peoples can use and enjoy their lands and ancestral territories, which requires that they are delimited, demarcated, qualified and registered, through special procedures and with participation of the peoples at issue. The relevant institutions should identify and recognize, in collaboration with the peoples and communities affected, the existing collective forms of property to guarantee them the adequate legal recognition of their right to collective property. Their rights over their natural resources within their territories should also be guaranteed to ensure their physical and cultural survival.
21. As for indigenous peoples in voluntary isolation, the Commission reiterates its recommendation following which these indigenous people's rejection of contact with the outside world should be understood as categorical statements of their desire to remain isolated and to reject interventions or projects, and should entail that the State refrain from undertaking any project or intervention. With regards to indigenous peoples in initial contact, their participation in consultation processes must always be voluntary, and following what the IACHR has recommended in the past, the process at issue "...should take into account the particular situation of vulnerability of the people in initial contact in question; the material, spiritual, and cultural interdependence with their territories and natural resources; their worldview and how they may interpret a consultation process; their level of contact with persons from outside their people, and other relevant aspects of their particular situation; and it should be geared towards obtaining their prior, free, and informed consent."<sup>658</sup>
22. Protect the life and integrity of persons, in compliance with its obligations under the American Convention and the American Declaration. In particular, adopt special and differentiated measures of protection to protect the life and personal

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<sup>658</sup> CIDH, Indigenous peoples in voluntary isolation and initial contact in the Americas: Recommendations for the full respect of their human rights, OEA/Ser.L/V/II.Doc. 47/13, December 30, 2013, Recommendation No 15.

integrity of leaders, and traditional indigenous and tribal authorities, threatened in the framework of the implementation of extractive or development projects or plans.

23. Take effective measures for the protection of indigenous and tribal peoples or their members covered by precautionary or provisional measures of the inter-American human rights system, implemented in coordination with the respective beneficiaries, and in a culturally appropriate manner.
24. Take all measures at its disposal to prevent unfair or unfounded trials against persons who legitimately seek respect and protection of human rights in the context of business activities of extraction and development.
25. Implement bold action to prevent and protect indigenous, tribal and Afro-descendent peoples and communities from forced displacement, as well as try to make possible the return of those displaced in the shortest time, through a process that ensures their safety and in particular, legal and material tenure of the territory in order to enable effective restitution of its traditional use, and exploitation and management by indigenous and tribal authorities.
26. Adopt the necessary measures to ensure that indigenous and tribal peoples and Afro-descendent communities who are suffering the effects of non-consulted projects, can access mechanisms to mitigate these effects and repair them properly and with cultural relevance.
27. To design plans and programs of economic and social development, to effectively guarantee and in conditions of equality the human rights of indigenous, tribal and Afro-descendent persons which could be eventually affected by extractive and development projects. These initiatives could include temporary special measures, taking into account the historical discrimination suffered by these peoples and communities, and steps to guarantee their full participation at all times.
28. In the adoption of the measures previously recommended, take into account the differentiated impacts and specific rights of women, girls and boys, older persons, and persons with disabilities.