

30th March 2018

The Secretariat

Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Via: CEDR@ohchr.org

RE: Shadow report on Peru for the 95th session

Dear CERD members:

We are grateful to you for your continued attention to the situation of indigenous peoples in Peru and across the world. In order to facilitate your examination of the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in Peru, the signatory organisations below (*“the Presenting Organisations”*), submit to you for consideration during the 95th session this shadow report which reviews the latest report from Peru submitted to the Committee in December of 2016 and the latest Final Observations from the Committee about Peru provided in 2009 and 2014. This study focuses on the human rights situation of indigenous Amazonian peoples in the regions of Ucayali and San Martín in Peru. Their circumstances are, unfortunately, representative of the situation for the majority of indigenous peoples in Peru, who face a climate of impunity, a lack of implementation of a legal framework and government policies, and resistance from the State to review these laws and policies. This means the State is unable to ensure respect for their rights and improve their wellbeing given that today they are facing violence, tenure insecurity, high levels of poverty, harmful impacts on their environment and a lack of access to effective justice.

At the end of this shadow report in Section IV, the members of the Committee will find a list of suggested questions and recommendations to facilitate your communication and exchanges with the Peruvian State during this next session. The shadow report is also available (and has been sent) in Spanish. Please feel free to get in touch with the Presenting Organisations if you have any questions or require additional information.

Yours Sincerely,



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**SHADOW REPORT ABOUT PERU FOR THE
CONSIDERATION OF CERD DURING THEIR
95TH SESSION (23RD APRIL TO 11TH MAY 2018)**

**VIOLATION OF THE HUMAN RIGHTS OF
INDIGENOUS PEOPLES OF PERU – WITH A
FOCUS ON THE AMAZONIAN REGIONS OF
UCAYALI AND SAN MARTÍN**

Presented by:

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(30th March 2018)

(Original in Spanish)

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I. EXECUTIVE SUMMARY

The organisations presenting this shadow report (*see Annex 1*, collectively “**Presenting Organisations**”) take note that the Committee for the Elimination of Racial Discrimination (“**CERD**” or “**Committee**”) has, on repeated occasions, expressed their concerns to Peru with regard to the violations of indigenous peoples’ rights, particularly in relation to their property rights and to extractive industries. On different occasions the Committee has made a record of the failure to fulfil the duty of the State to guarantee “*indigenous peoples their rights over the lands, territories and natural resources that they occupy or use, by such means as the appropriate issuance of deeds of title.*”¹ Furthermore, the Committee has expressed their deep concern around the absence of processes to consult with and seek the informed consent of indigenous peoples,² adverse impacts on the peoples as a result of the extraction of natural resources which proceed before the resolution of titling applications and associated problems,³ social conflicts relating to extractive industries⁴ and the infringement of the rights of indigenous peoples in voluntary isolation and in a situation of initial contact.⁵

This report does not claim to provide an overarching analysis of the full range of indicators of discrimination and violations against indigenous peoples’ rights in Peru. Instead, it focuses on cases which are emblematic in two Amazonian regions, Ucayali and San Martín. These cases demonstrate characteristics which are representative of the infringement of rights throughout the Peruvian Amazon and other parts of the country.

As is demonstrated in the report which follows, Peru continues to ignore the calls from CERD to implement the duties and obligations which are legally applicable and to introduce reforms in laws, policies and practices. Meanwhile, the rights of indigenous peoples, affirmed by the International Convention on the elimination of all forms of racial discrimination (“**Convention**”), continue to be violated, causing serious impacts on their ways of life, wellbeing and physical, cultural and territorial integrity. We ask respectfully that during your evaluation of Peru, that you question the Peruvian delegation on the measures it is taking (i) to resolve the lack of official and actual information about the status of indigenous lands and territories (ii) to resolve the pending titling of indigenous lands (including existing property titles which do not cover the full extent of traditional territories); (iii) to refrain from issuing new rights over indigenous lands including concessions and titles and cease the exploitation of natural resources in indigenous territories (including isolated peoples) in cases where the question of indigenous land tenure and their rights to benefit from their resources and lands with the aim of enjoying their culture and way of life remain unresolved; (iv) to take measures to investigate and punish those responsible for violence, discrimination, hateful discourse and threats against indigenous rights defenders (and dissuade future incidents against these defenders); and (v) to implement measures to carry out the restitution of territories, remedy environmental damage and wherever applicable, compensate those affected.

¹ Concluding Observations from the Committee for the Elimination of Racial Discrimination on periodic reports 18 and 21 on Peru, CEDR/C/PER/CO/18-21, paragraph 15 (25th September 2014) (“**Concluding Observations 2014**”).

² Concluding Observations 2014, *paragraph 14*. *See also* Concluding Observations from the Committee for the Elimination of Racial Discrimination on periodic reports 14 and 17 on Peru, CEDR/C/PER/CO/14-17, paragraph 14 (3rd September 2009) (“**Concluding Observations 2009**”).

³ Concluding Observations 2014, paragraph 15. Concluding Observations 2009, paragraph 14.

⁴ Concluding Observations 2014, paragraph 23. Concluding Observations 2009, paragraph 15.

⁵ Concluding Observations 2014, paragraph 16.

II. BACKGROUND

In their General Recommendation Number 23, the Committee recognises that “*in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises.*”⁶ This observation unfortunately continues to be true in Peru, despite all the recommendations, suggestions and profound concerns expressed by this Committee in the last decade, as well as the concerns of the Office of the Human Rights Ombudsman of Peru and other Special Rapporteurs of the United Nations (“UN”) (discussed below).

The Presenting Organisations have reviewed the periodic reports numbers 22 and 23 presented by Peru to CERD in December of 2016 (“*Periodic Report of Peru (2016)*”)⁷ with the goal of examining what is written with respect to the situation of indigenous peoples. They have realised during the review that the report of the State has not openly spoken about the persistent problems which their own Human Rights Ombudsman has studied and identified with respect to the property rights of indigenous peoples; amongst others, these include “diverse problems such as”:

- (1) *The absence of integrated and up-to-date regulations on the subject of recognition and titling of communities;*
- (2) *The lack of adequate oversight to guarantee the recognition and titling of communities;*
- (3) *The lack of centralised information on the number of rural and native communities;*
- (4) *Inadequate specialisation and training of staff responsible for the process of recognition and titling;*
- (5) *The lack of awareness of human rights and adaptation of management tools;*
- (6) *The lack of budget prioritisation for the implementation of the process of recognition and titling of rural and native communities;*
- (7) *The shortage of guidelines to enable solutions to the controversies resulting from the overlap of rights.*⁸

It has been recognised by the jurisprudence of this Committee, as by other human rights mechanisms of the UN and the Inter-American System, that the denial of the use and enjoyment of their ancestral territories and their recognition and protection affect other rights of indigenous peoples -including, among others, their rights to culture, self-governance and

⁶ General recommendation N° 23, Committee for the Elimination of Racial Discrimination, relative to the rights of indigenous peoples, 51st session, U.N. Doc. HRI/GEN/1/Rev.7, paragraph 3 (1997) (“*General recommendation N° 23*”).

⁷ Periodic reports 22 and 23 which the State parties had to present in 2016. Peru’s report was, received by CERD on the 27th December 2016, CEDR/C/PER/22-23 (20th February 2017) (“*Periodic report of Peru (2016)*”).

⁸ *Análisis de la política pública sobre reconocimiento y titulación de las comunidades campesinas y nativas*, Defensoría del pueblo Informe No. 002-2014-DP/AMASPPI-PPI (2014).

self-determination, and to a life of integrity.⁹ As is demonstrated by the table in Annex 2, there are currently 1097 Native Communities with pending titling requests. There are 279 requests to expand land titles which have previously been granted, but which are nevertheless defective and fail to recognise the entirety of the traditional territory of the indigenous peoples in question. Whilst official and legal recognition of the State does not exist for many ancestral lands, as is explained in this shadow report, the indigenous lands are vulnerable to extractive industry projects and activities which affect the use and management of their natural resources, their ways of life and cultural integrity, including through the establishment of conservation areas without prior consultation or their free, prior and informed consent.

To demonstrate the serious circumstances and situations in which indigenous peoples live in Peru with concrete examples, the Presenting Organisations elaborate below the situation of the indigenous peoples living in San Martín and Ucayali (and where helpful, information relevant to other regions). In both regions, the paralysis or suspension of the delimitation and titling processes, has generated a huge backlog of communities waiting to be titled and tensions and conflicts of boundaries with non-indigenous third parties, including those related to illicit mining, timber and coca activities. In multiple cases, the State itself has encouraged the overlapping of titled and untitled areas with different types of land categories of both national and regional responsibility and Natural Protected Areas in the case of the Cordillera Azul National Park (San Martín), Permanent Production Forests (BPP) and forestry concessions, hydrocarbons and mining concessions; at regional level we have the Regional Conservation Areas (ACR), the Areas of Conservation and Recovery of Ecosystems (ZOCRE), conservation concessions (CC). In San Martín in particular, the State has promoted individual titling within communal lands. As a result, indigenous peoples continue to suffer with no compensation from the State and without the fundamental and necessary changes to the country's policies and laws to put an end to the discrimination and the systematic violations faced not only by indigenous peoples of San Martín and Ucayali, but also by all the indigenous peoples of Peru.

A. Ucayali

In Ucayali, there are 16 indigenous peoples and currently at least 106 Native Communities with pending titling requests. There are 41 requests to expand defective titles which haven't recognised the entirety of the traditional territory of the indigenous peoples in question (*See Annex 2*). This shadow report addresses the emblematic situation experienced by the community of Santa Clara de Uchunya of the Shipibo-Konibo people, located in the region of Ucayali, in the province of Coronel Portillo and the district of Nueva Requena. The community have been dispossessed of their ancestral lands which have been converted into a large-scale oil palm plantation. Despite the fact that the State itself has declared the privately

⁹ See Inter-American Court of Human Rights. *The case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgement of 31st August 2001. Series C No. 79, paragraph 149 (“*Awás Tingni case*”) (“Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival”). See also Inter-American Court of Human Rights. *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations, and Costs. Judgement of 28th November 2007. Series C No. 82, paragraph 82 (“*Saramaka case*”) (“Land is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people. The lands and resources of the Saramaka people are part of their social, ancestral, and spiritual essence. In this territory, the Saramaka people hunt, fish, and farm, and they gather water, plants for medicinal purposes, oils, minerals, and wood. Their sacred sites are scattered throughout the territory, while at the same time the territory itself has a sacred value to them”).

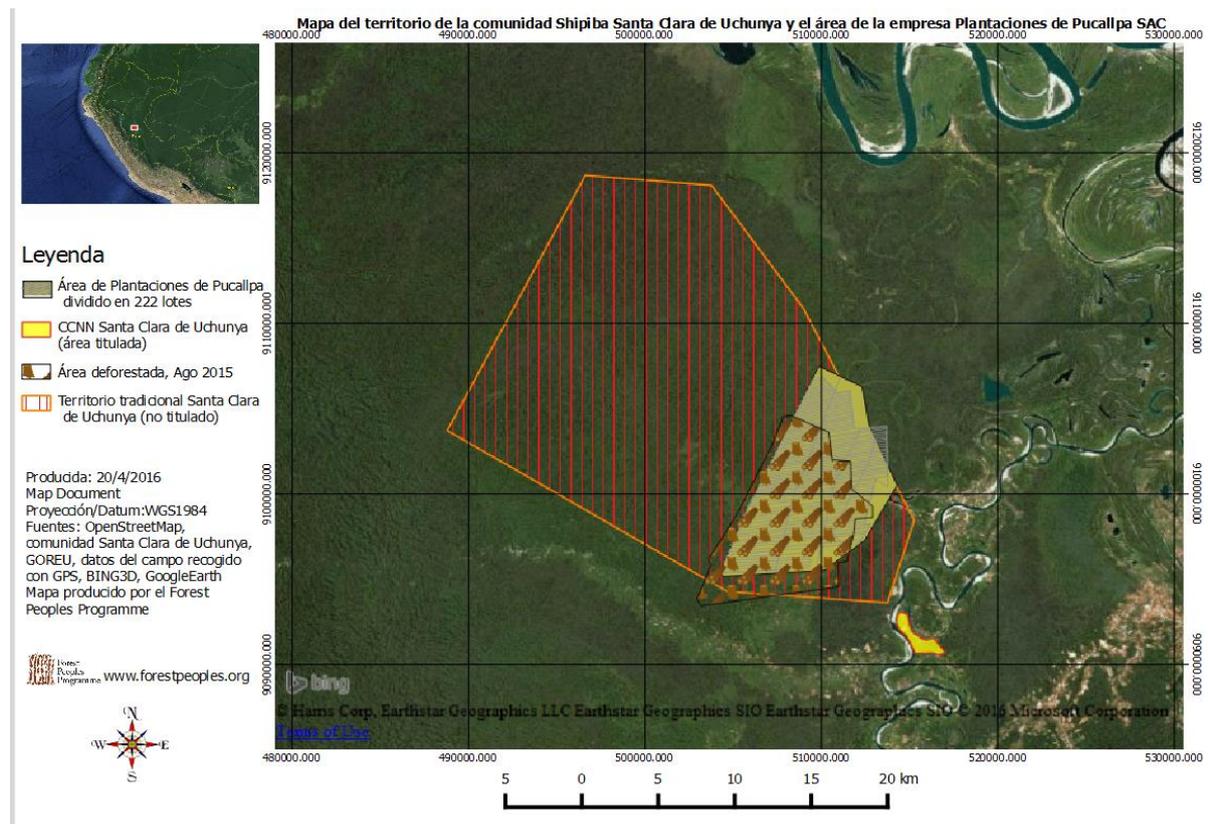
owned plantation, particularly the company *Plantaciones de Pucallpa S.A.C* (“**PP**”) (now *Ocho Sur P. S.A.C* (“**Ocho Sur**”); from now on referred to as “**PP/Ocho Sur**”)¹⁰ to be in violation of various national regulations, and in spite of resolutions of the Roundtable on Sustainable Palm Oil (“**RSPO**”) which condemned the company following a formal complaint which was presented by the community on the 5 December 2015,¹¹ the company continues to operate in the community’s traditional territory.

Furthermore, despite the fact that the community has demanded the titling of their territory for several years and has initiated various legal proceedings in the Peruvian courts to protect their rights, the dispossession of communal lands by third parties continues, without the implementation of any special measures to protect the integrity of their lands by Peru while their land title application remains pending. The apathy of the agrarian authorities of the Regional Government of Ucayali (“**GOREU**”) is made evident by the fact that up until now they have not succeeded in recognising the full extent of the community’s territory with a land title, offering an unsatisfactory extension (only 1,200 hectares) which recognises only a very reduced part of the lands which they traditionally use and occupy. (See Figure 1 demonstrating the scale of the traditional territory, the small title which now exists on the land, the overlap with the large oil palm plantation of PP/Ocho Sur and the enormous deforestation resulting from this plantation).

¹⁰ As is explained below, because of the contentious publicity around their activities and the complaints lodged to various national and international complaint bodies, in July 2016 the company transferred their investments in Ucayali to a new company. The structure of the new company and its relationship to PP has not been revealed, but the same individuals from PP are operating the new business. As such, PP and Ocho Sur seem to still be one and the same. From now on, the Presenting Organisations refer to the two companies collectively as the same entity (at least with the same beneficiaries).

¹¹ FECONAU’s complaint to the RSPO (5th December 2015) available at <https://www.rspo.org/members/complaints/status-of-complaints/view/88> (select: feconau_complaint_plantacionesdepucallpaeng_5_dec_15.pdf) (“**Complaint to RSPO**”) and Final Decision available at <https://www.rspo.org/members/complaints/status-of-complaints/view/88> (select: [Complaints Panel Decision Apr17](#)).

Figure 1:



Even this process of titling extension, as unsatisfactory as it is, has suffered lengthy delays due to armed individuals associated with the company PP/Ocho Sur, who have made threats and on several occasions have blocked community delegations and even state representatives from travelling through their territory. One such incident took place in April 2016, when they blocked access to a team from the Regional Ucayali Directorate of Agriculture (“*DRAU*”), accompanied by a community delegation, in charge of demarcating the lands proposed by the limited extension.

Furthermore, during recent years, even recent months, there has been a significant increase in violence, threats and intimidation suffered by members of the Community of Santa Clara, their leaders and the directors of the Federation of Native Communities of Ucayali and the Surrounding Area (“*FECONAU*”) who support them in defending their rights, including a recent incident in December 2017 when land grabbers understood to be associated with the palm oil operations shot at a community delegation who were collecting evidence of the destruction of community forests.

B. San Martín

In San Martín, there are currently at least 90 Native Communities with pending titling requests (including 21 communities who are not even recognised as Native Communities). In addition, there are five current requests to expand unsatisfactory titles which haven't originally recognised the entirety of the traditional territory of the indigenous communities in question. (*See Annex 2*). The situation of the Kichwa indigenous communities is emblematic of the situation faced by the other indigenous communities in San Martín. The underlying cause of these problems is the same as has been described in Ucayali – the lack of recognition of their territorial rights. Historically, the territories of the Kichwa communities have either not been titled or have only been granted unsatisfactory or inadequate titles. Similarly to Ucayali, this situation has permitted the dispossession of their territories and lands by state actors or third parties with the acquiescence or authorisation of the State.

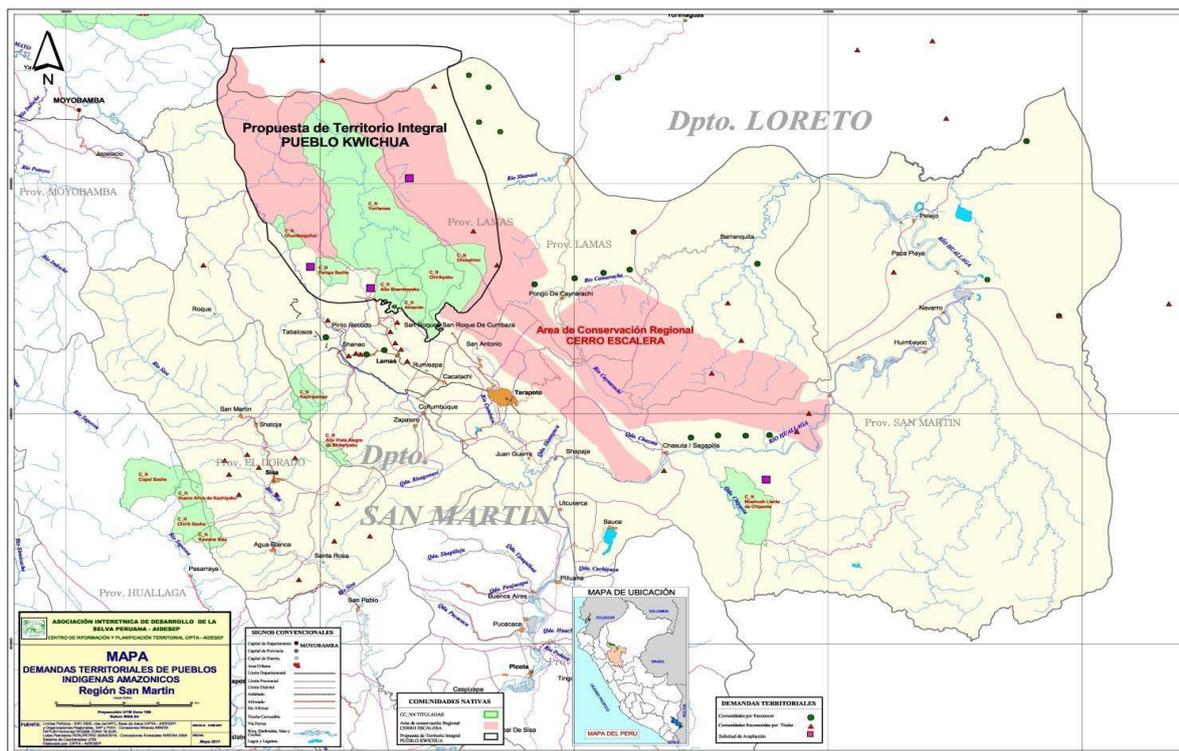
Similarly to Ucayali, the palm oil industry also represents a threat to indigenous peoples in San Martín. However, one of the central problems of the region is the grabbing of indigenous lands by the Regional Government of San Martín (“**GORESAM**”) in the name of conservation. One typical example is the Regional Conservation Area - “Cordillera Escalera” (“**ACR-CE**”), which significantly overlaps with ancestral land of the Kichwa people. It was established in 2005 with no recognition whatsoever of indigenous peoples’ territorial rights (which at the time was inhabited by at least one Kichwa settlement (Nuevo Lamas), various individuals and Kichwa families, in addition to being used for hunting, agriculture, fishing and gathering activities). In addition, at the time of its creation, formal land title applications in the vicinity and possibly within the proposed area had already been filed by various Kichwa communities.¹² When the ACR-CE was created, its official justification study recognised that the area was used by Kichwa communities, including eight Kichwa titled communities adjacent to the proposed area, as well as five communities which had been formally requesting their land titles and recognition for several years (at least since 2001), three of which share a border today with the ACR-CE: Shilcayo, Tupac Amaru and Tununtunumba.¹³ The ACR-CE was created without any formal procedures of prior consultation with the affected indigenous communities,¹⁴ let alone respect for their right to give or withhold their free, prior and informed consent. Approximately 17 Kichwa communities are affected by the ACR-CE. The map in Figure 2 (below) was AIDSESEP’s first attempt at producing a map which is indicative of the integral territory of the Kichwa people in 2010, and shows the overlap with the ACR-CE.

¹² Original records of these submissions were not available from government agencies for verification, but community testimony indicates that at least one of the submissions overlapped the proposed Reserve.

¹³ Justificatory study for the Establishment of the Regional Cordillera Escalera Conservation Zone - San Martín, Transitory Council of Regional Administration San Martín, 2002.

¹⁴ At this time, information meetings were carried out in which the ACR-CE project was presented, without any maps, and as an action that had already been determined, to the communities. These meetings did not comply in any way with the minimum requirements for consultation which are obligatory under international human rights law.

Figure 2:



Despite the fact that the decree for the creation of the ACR-CE recognises the ‘traditional or acquired rights’ and mentions the traditional uses of the Kichwa people associated with their subsistence¹⁵ and the need to consult with them prior to its creation,¹⁶ it also requires that these uses should be regulated in order to conform to the aims and objectives of the ACR-CE and its management plan.¹⁷ In practice, without consulting indigenous peoples, and certainly without any compensation, the use of and access to forest by Kichwa communities have been severely limited by the existence of the ACR-CE and the implementation of its conservation plans. See examples of the limitations and restrictions detailed below in Section III(C).

These restrictions on a handful of Kichwa communities are emblematic of the situation of many Kichwa communities which depend on the ACR-CE. They demonstrate the pattern of oppressive restriction of rights to the traditional use of and access to the forest which has been caused by the ACR-CE in practice, and which also violates the rights to self-determination, food and culture all protected by the Convention. On several occasions, the Kichwa people have tried to initiate dialogue with the Peruvian Government about their

¹⁵ Supreme Decree N° 045-2005-AG, Art. 3 (25th December 2005) (“On traditional rights and acquired rights: Respect the real rights acquired according to law, prior to the establishment of the regional conservation area and regulate the exercise of these rights in harmony with the objectives and purposes of creation of the area, as regulated by the General Law of the Environment, the Law of Natural Protected Areas, its Regulations and the National Strategy for Protected Natural Areas - Master Plan”) (unofficial translation).

¹⁶ *Ibid*, Art. 3, from Chapter II of the National Strategy for Protected Natural Areas - Master Plan. (“Establishing that each process of creating a Regional Conservation Area (ACR) must necessarily undergo a careful process of consultation with local human populations, particularly if they are areas occupied by indigenous peoples.”) (unofficial translation).

¹⁷ *Ibid*: Art. 4, On the use of renewable natural resources (specifying that within the Regional Conservation Area "Cordillera Escalera" the direct use of renewable natural resources is permitted, primarily by the local population, under approved management plans, supervised and controlled by the competent national authority, with the exception of timber exploitation. The options of use and exploitation of these resources will be defined by management objectives, zoning and the master plan for the use of the area’s resources).

territorial rights, which has not resulted in any concrete solution. For example, in 2011, the Ethnic Council of the Kichwa Peoples of the Amazon (“*CEPKA*”) sent a request to State authorities for the *joint management* of the ACR-CE by the State and the Kichwa peoples (a proposal supported by a detailed legal technical report). Despite various meetings in 2011 and 2012, the authorities did not take the proposal forward, which has been left effectively rejected. Similarly, in June 2015 various indigenous leaders, as well as representatives of the regional authorities, signed the “Act of Tarapoto”, according to which the participants committed to working together on, among other things, the titling of indigenous territories, without the application of “leasehold use contracts”, which are not equivalent to land rights. (See Section III(A)(i) for more information on such leasehold contracts.) Nonetheless, there continues to be no notable progress.

Faced with this situation, in August 2017 the Kichwa community of Nuevo Lamas de Shapaja filed a lawsuit with the provincial court of Lamas, demanding the integral titling of their territory and a process of consultation for the creation of the ACR-CE. As will be discussed in more detail, after the legal action was admitted in September 2017, a vicious media campaign began against the community and their allies, driven by GORESAM and some civil society organisations. These campaigns – often pejorative, defamatory and even racist – depict indigenous peoples as predators of the forests, a threat to the water which comes from the ACR-CE or puppets of extractive companies. The campaigns have opposed the titling of their lands with the argument that this would leave the area vulnerable to oil drilling.

Unphased by this opposition to the full recognition of their rights, various other Kichwa communities in San Martín, including the villages of Mishkiyakillo and Alto Pucalpilllo, which have still never secured titles to their ancestral lands, continue to seek the full titling of their lands and an effective consultation process for the ACR-CE.

Although the ACR-CE constitutes the main object of focus in San Martín in this report, it is worth highlighting that human rights violations are also rife as a result of exploitation of natural resources, including the expansion of large-scale agriculture. Various indigenous communities in San Martín have suffered the harmful effects of the expansion of oil palm plantations, including Nuevo Ica, which is in the process of being recognised as a rural community, the small village of Leoncio Prado and the indigenous communities of San Fernando and San José Obrero. Overall, land-grabbing for conservation and by non-state actors with the purpose of exploitation are putting the cultural and physical continuity of the Kichwa communities in the region at risk.

The following sections offer more details on the previous recommendations of the Committee, the inadequate responses from Peru to date, and the ongoing violations in San Martín and Ucayali as a result of actions and omissions by the State.

The Presenting Organisations also offer in Section IV, a list of suggested questions which the Committee can present to the Peruvian delegation during the upcoming sessions in April, as well as a set of recommendations which could be incorporated into the Committee’s

Concluding

Observations.

III. THE SITUATION OF INDIGENOUS PEOPLES' RIGHTS IN UCAYALI AND SAN MARTÍN

The Presenting Organisations have not structured this shadow report according to the chapters and the organisation of Peru's Periodic Report (2016), as this report doesn't include sufficient content about indigenous peoples and their corresponding human rights to permit an adequate analysis of the issues. Therefore, with the exception of the reference to access to justice (Section III(I) below), the following information is organised primarily according to the themes and their corresponding articles detailed in the latest Concluding Observations from CERD on Peru related to the State periodic reports 18 to 21 (25th September 2014) ("*Concluding Observations 2014*").¹⁸

A. Structural discrimination (articles 1, 2 and 5)

In the concluding observations from 2009, the Committee expressed their continued concern "*that a high proportion of persons among the indigenous peoples and Afro-Peruvian communities continue to suffer in practice from racism and structural racial discrimination in the State party*" and asked that the State provide a "*comprehensive national policy against racism and racial discrimination.*"¹⁹ Furthermore, while it was recognised that the domestic legal framework offers certain protections for the rights of those indigenous peoples constituted as rural or native communities, CERD expressed their concern "*for the situation and rights of the indigenous peoples and Afro-Peruvian communities not yet established as campesino or native communities*" and recommended that the State "*continue to promote the urgent adoption of a framework law on the indigenous peoples of Peru covering all communities, while endeavouring to equate and harmonize terminology in order to ensure the effective protection and promotion of the rights of all indigenous peoples and Afro-Peruvian communities.*"²⁰

Despite these recommendations, five years later in the Concluding Observations from 2014, the Committee continued to notice "*with concern that members of indigenous peoples and Afro-Peruvians continue to be subjected to structural discrimination and are constantly faced with a lack of economic opportunities, poverty and social exclusion.*"²¹

In the latest Periodic Report in 2016, Peru emphasises that it "*has implemented policy measures to promote the rights of indigenous peoples, campesino communities and persons of African descent.*"²² The State describes some initiatives related to indigenous languages and linguistic rights, including a new strategy presumably "*to enhance the living conditions and the development of the Amazon's native communities*", which includes measures to provide indigenous communities with social services.²³ However, Peru does not mention five important examples contributing to structural discrimination which act as an obstacle to indigenous peoples' full enjoyment of their rights. These five examples are:

¹⁸ Concluding Observations from the Committee for the Elimination of Racial Discrimination on periodic reports 18 to 21 of Peru, CEDR/C/PER/CO/18-21 (25 September 2014) ("*Concluding Observations 2014*"). See also Concluding Observations from the Committee for the Elimination of Racial Discrimination on periodic reports 14 to 17 of Peru, CEDR/C/PER/CO/14-17 (3 September 2009) ("*Concluding Observations 2009*").

¹⁹ Concluding Observations 2009, paragraph 10.

²⁰ *Ibidem.*, 11.

²¹ Concluding Observations 2014, paragraph 8.

²² Periodic Report of Peru (2016), paragraph 4.

²³ *Ibidem.*, paragraphs 4-8.

- (i) The application of the “legal” framework of ‘leasehold use contracts’ (*cesion en uso*) in indigenous lands;
- (ii) Discrimination in Peruvian procedural legislation;
- (iii) Discriminative application of the system of free rights of use (*servidumbre gratuita*);
- (iv) The imbalance between indigenous rights and the public interest;
- (v) The priority and preferential treatment awarded to private rights over the recognition and protection of the property rights of indigenous peoples;
- (vi) Corruption in the system of management and recognition of lands and resources.

In the paragraphs below there is a more detailed explanation of each discriminatory element to indigenous peoples.

i. The discriminatory application of the “legal” framework of leasehold use contracts to indigenous lands – limiting, if not extinguishing, their property rights without due process.

The Convention, as affirmed by the Committee, declares that indigenous people have the right to property (including the right to own, develop, control and use their lands and resources) which they have “*traditionally owned or otherwise inhabited or used.*”²⁴ The same is stated, without qualifications, in Convention 169 of the International Labour Organisation concerning Indigenous and Tribal Peoples (“*ILO 169*”), the Declaration of the United Nations on the Rights of Indigenous Peoples (“*UNDRIP*”) and the Constitution of the Republic of Peru.²⁵ This right is the same wherever it applies to ancestral lands, whether they encompass forests or wetlands, arid or agricultural lands, or coastal lands.

Despite this, the State has indicated that in the Amazon it will not title lands classified as forest with the exception of those which are suitable for agriculture and livestock. Taking into account that approximately 2% of the Amazon is suitable for agriculture and 11% suitable for livestock, and that the vast majority, if not almost the entirety of the Amazon is ‘forest’, it can be concluded that Peru will not title the lands of native communities. The principal law which underpins the State’s position is, alongside other regulations, article 11 of Legislative Decree No. 22175 of Peru, the General Law of Communities and Agrarian Development of the Forest and Montane Forest (“*Law of Native Communities*”). This article establishes that indigenous lands suitable for forest use will be handed over to indigenous peoples only in the form of leasehold use (*cesion en uso*) and not as property.²⁶ In accordance with the Ministerial Resolution No. 0355-2015-MINAGRI, issued on 8 July 2015, which approved the “Guidelines for the implementation and approval of soil studies for the classification of lands according to best use capacity with the aim of formalising the lands of native communities”,²⁷ the classification of soils is a requirement for the titling of native

²⁴ General Recommendation No. 23, paragraph 5.

²⁵ Articles 13 and 14 of Agreement 169 of the ILO; Articles 25-26 of UNDRIP and Articles 70 and 88 of the Political Constitution of Peru.

²⁶ See Legislative Decrees No 22175, Law of Native Communities, Art. 11 (1978) (highlighting “The part of the territory of the Native Communities that corresponds to lands with forest aptitude, will be ceded to them, in use and their use will be governed by the legislation on the matter” (unofficial translation)); see also “The contracts of “leasehold use” over forests make a mockery of indigenous peoples land rights.” Servindi (17 September 2014), available at www.servindi.org/actualidad/113577.

²⁷ See “Lineamientos para la Ejecución y Aprobación de Estudios de Levantamientos de Suelos para la Clasificación de Tierras por su capacidad de Uso Mayor, con fines de Saneamiento Físico Legal y Formalización del Territorio de las Comunidades Nativas”, Ministerial Resolution No. 0355-2015-MINAGRI, Art. 1 (8 July 2015).

communities.²⁸ The only thing which this ruling achieves is the creation of obstacles in the titling of native communities. It consists of the requirement for an analysis of soil types to be carried out in Lima at great expense to the communities. By its very nature this regulation is discriminatory and constitutes an obstacle for indigenous peoples to access their property rights.²⁹

For example, in San Martín, following a request from the Native Kichwa Community of Nuevo Lamas de Shapaja for their land titling, the Regional Government of San Martín recognised only 31 hectares of traditional land as property,³⁰ and 1620 hectares (more than 98% of their traditional land) was given to them via a *leasehold contract for forest use and/or protection*, despite being the ancestral land of this community.³¹ Of the 1,620 hectares under the contract, 1,313 overlap with the ACR-CE conservation area, and the rest is classified as apt for forest use or protection. Through the leasehold contracts, only the use of tics products is permitted, but it is not issued as property, indeed as the same regulation [article 999 of the Civil Code] says, it is about “using and temporarily enjoying the goods of others” (*unofficial translation*).³²

The contract with the Kichwa community reiterates both *explicitly and implicitly* that the State is the owner and that the community is a ‘leaseholder’. There is not even any attempt to justify imposing these restrictions on the ancestral rights of indigenous peoples on the basis of an analysis of the proportionality, necessity and legitimacy of the restrictions (which should be demonstrated when imposing restrictions on territorial rights). According to the contract, a large part of the area is under a leasehold contract (470 hectares) where the Kichwa can do absolutely *nothing* on their own land. In another area classified for ‘restoration’ (845 hectares), they can only make use of a tree if it has fallen and if they have permission from the ACR-CE. In the areas outside the ACR-CE (305 hectares) but also governed by the lease, there are additional restrictions and they can only use natural resources with management plans, payments and administrative procedures. To top it off, daily activities such as hunting and harvesting are restricted without a management plan and the acquisition of prior permits which require payment, constituting barriers to the use and

²⁸ *Ibidem.*, paragraph 5 (emphasis added): "In order to proceed with the titling of Native Communities, it is necessary to determine the best use capacity of the lands ... which determines if the lands have aptitude for cultivation or pasture, over which property titles will be granted, or if they are appropriate for forestry, corresponding in this case to leasehold use rights" (unofficial translation).

²⁹ According to Pedro García Hierro, "The classification requirement progressively became a means to paralyse land titling (due to not having adequate technical equipment), to avoid titling (in cases like the Upper Cenepa, where lands were not titled because the whole area was issued to mining companies, despite being classified for forestry or protection), to make land titling more expensive (by requiring communities and their organisations to pay for the investigation and analysis) or, finally, to restrict new related rights. For example: the communities that do not have a contract, that is, the vast majority, are denied the possibility of managing their timber and obtaining permits for it because classification is an indispensable requirement in order to obtain authorisation for use under the new forest legislation." Pedro García Hierro, "Basic arguments about the irrationality and unconstitutionality of the leasehold use contract in use of forest land in indigenous territories" Available at: <http://nuestrosderechos.pe/argumentos-basicos-acerca-de-la-irracionalidad-e-inconstitucionalidad-del-contrato-de-cesion-en-uso-de-suelos-forestales-en-territorios-indigenas/> (unofficial translation).

³⁰ Title approved by Directorate Resolution No. 17-2016-GRSM/DRASAM/DTRTyCR dated 20 February 2016.

³¹ Leasehold Contract of Lands Suitable for Forest Use and/or Protection of the Native Kichwa Community “Nuevo Lamas de Shapaja” No. 001-2016-GRSM/ARA/DEACRN.

³² Request for Legal Protection of the Native Community of Nuevo Lamas before the Civil Court of the Province of San Martín – Tarapoto (7 August 2017.) See also article 18 of the Law of Native Communities stating that "Native Communities located within the boundaries of National Parks, whose activities do not violate the principles that justify the establishment of said conservation areas, may remain in them without title deed." (unofficial translation).

enjoyment of the area.³³ The contract states that any act of non-compliance by the community (which presumably also applies to individuals from the community) will result in the voiding of the contract and presumably the extinguishment of any rights.

In truth, the leasehold framework (confirmed by the Law of Native Communities and the Ministerial Resolution referenced above) is a form of structural discrimination by the legal framework. The lawsuit filed in 2017 by the community of Nuevo Lamas backs up this point. It is a way of eradicating the property rights of indigenous peoples - one *which only applies to indigenous peoples and their lands but not to individual private lands, nor to the lands of rural communities*. It is a form of dispossession carried out by limiting indigenous peoples' ownership, use and control of natural resources, without conforming to constitutional requirements (as well as the due process required under international law when dealing with expropriations and limitations to indigenous property rights).³⁴ Until this framework is annulled and there is a restitution of lands and resources acquired under its application, structural discrimination within the legal framework in Peru will continue.

ii. Peru's procedural laws which complicates the process of a constitutional lawsuit for the violation of indigenous property rights

In May 2016, the community of Santa Clara de Uchunya brought a constitutional lawsuit against the Regional Government of Ucayali, the company PP/Ocho Sur and other public entities. This aims to secure the restitution of property rights over their ancestral territory, which is currently occupied by the palm oil company, and environmental remediation. The order was declared inadmissible on two occasions, by the Juzgado Mixto de Campoverde and the Sala Civil de Pucallpa. Since August 2017, through an appeal for constitutional damages, the order has ended up in the Constitutional Court and its admission is still waiting to be resolved. Alongside their appeal, the community requested precautionary measures to be taken out on their behalf. However, these were not granted.

As a result, we can affirm that the design of Peruvian procedural legislation - wherever it does not make provisions to ensure the application of constitutional processes to highly vulnerable indigenous peoples - is discriminatory and requires indigenous people to go through complex and even slower procedures in order to achieve the restitution of territorial rights. Therefore, a reform is needed to introduced distinct procedural criteria to favour indigenous peoples' access to justice, in view of their vulnerability.

iii. The discriminative application of the system of free rights of use

The State has discretely issued indigenous community lands to oil companies under the system of free rights of use (*'servidumbre gratuita'*), without giving them any prior compensation, on the basis of article 92 onwards of the Regulation of the Transportation of Hydrocarbons via Pipelines (Supreme Decree No. 081-2007-EM), which in turn builds upon the Organic Law regulating hydrocarbons activities within the national territory (Law No.

³³ Leasehold contract of Lands Suitable for Forest Use and/or Protection of the Native Kichwa Community "Nuevo Lamas de Shapaja" No. 001-2016-GRSM/ARA/DEACRN.

³⁴ For example, see Inter-American Court of Human Rights. *Case of the Saramaka People v. Suriname*. Preliminary objections, merits, reparations and costs. Judgement of 28 November 2007. Series C No. 172, paragraphs 127 and 128 ("a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society" and "additionally, when it does not deny their survival as a tribal people.")

26221). The free rights of use system ignores provisions under international law with which Peru is obliged to comply, which state that the simple fact of indigenous peoples' possession and ancestral use of their lands is equal to the right to (and therefore State recognition of) property.³⁵ This relates to a large body of jurisprudence of the Inter-American Court of Human Rights which has been reaffirmed and consolidated on numerous occasions. In other words, it is not possible to give out free rights of use in favour of oil companies in the lands of indigenous peoples.³⁶

iv. The absence of effective measures in national law to avoid the imbalance between indigenous rights and public/national interests

In the Concluding Observations on Indonesia from August 2007, the Committee expressed their concern “that in practice the rights of indigenous peoples have been in danger, due to interpretations by the State party being adopted in the national interest, modernisation and economic and social development (articles 2 and 5)” and recommended that the State party:

should amend its domestic laws, regulations and practices to ensure that the concepts of national interest, modernization and economic and social development are defined in a participatory way, encompass world views and interests of all groups living on its territory, and are not used as a justification to override the rights of indigenous peoples...³⁷

These considerations, which should prevail in a democratic State like Peru, are not incorporated or implemented into their legal and political framework – certainly not in practice. In relation to San Martín, as has previously been mentioned, the grabbing of indigenous lands in the name of conservation has emerged as a key issue in the region. Beyond the specific case of the ACR-CE, there is a systemic policy of discrimination through which indigenous rights are almost automatically undervalued and/or ignored in the “general public interest”, as represented by conservation. *Very often, this happens without carrying out an evaluation of the necessity and proportionality of the proposed measures. In this way, the rights of indigenous peoples are denied treatment which is appropriate to their status as “rights”, considering that the rights of indigenous peoples are automatically overridden by the “public” interest of conservation.*

In relation to Ucayali, San Martín and other regions with similar circumstances concerning the palm oil industry, we must also remember that the recent National Plan for the Sustainable Development of Palm Oil in Peru 2016-2025, which is problematic for the indigenous peoples in these regions and others but which was not consulted (see Section III(G)), declares “*the installation of oil palm plantations to be of national interest.*”³⁸ It is

³⁵ The Inter-American Court of Human Rights establishes that “1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title;”. Inter-American Court of Human Rights. Case of the Sawhoyamaya Indigenous Community v. Paraguay Merits, Reparations and Costs. Judgement of 29 March 2006. Serie C No. 146, paragraph 128.b

³⁶ See: *La titulación de tierras indígenas frente a las servidumbres petroleras*, available at: <https://www.servindi.org/actualidad-noticias/07/12/2016/la-titulacion-de-tierras-indigenas-frente-las-servidumbres-petroleras>

³⁷ Concluding Observations on Indonesia, paragraph 16 CEDR CERD/C/IDN/CO/3 (15 August 2007). See also Concluding Observations on Australia, CERD/C/AUS/CO/14 (14 April 2005), paragraph 16.

³⁸ See Resolution No. 0281—2016-MINAGRI, considering paragraph 3 (16 June 2016) available at: <http://www.minagri.gob.pe/portal/download/pdf/marcolegal/normaslegales/resolucionesministeriales/2016/junio/rm281-2016-minagri.pdf>.

clear that the imbalance between indigenous rights and public interests will continue in the future if there isn't a fundamental change in the circumstances and the methods used to consider, without discrimination, the balance between national interests and the interests of protecting and promoting indigenous rights.

- v. The priority and preferential treatment awarded to private rights and not to the property rights of indigenous peoples: the State continues to issue rights to non-indigenous people while suspending the recognition of traditional lands of indigenous peoples and denying provisional protection to the integrity of the land they claim.*

As is explained in more detail in Section III(C) which follows, in Ucayali, the community of Santa Clara de Uchunya has been requesting recognition of their ancestral lands for years, but instead of attending to their requests which are legitimate according to the law (which indicates a time limit of 30 days), the State continues to issue possession certificates and titles to third parties and palm oil companies. Between the years 2012 and 2016, 95 possession certificates were issued on the land which Santa Clara claims as its own, in favour of 222 settlers. In May 2016, the community filed a lawsuit in the national courts to put an end to the operations of PP/Ocho Sur and secure the restitution of their ancestral lands. However, since the case began, new possession certificates have been issued behind the community's back.

In regard to San Martín, it is worth mentioning that following the filing of the lawsuit by Nuevo Lamas in August 2017, the headquarters of the ACR-CE wrote a letter³⁹ to the Regional land Titling Director, in which they stated that. *"From this moment, any activity related to the recognition, delimitation and titling of native communities with proposed leasehold use contracts within the Regional Conservation Area" Cordillera Escalera", will cease, including those which are governed by the round table for land titling" (emphasis added).* He added that *"all of this is dependent upon the legal process initiated by [CEPKA] and the Native Community of Nuevo Lamas de Shapaja. Therefore, we highlight our complete willingness to return to work regarding these processes once these actors have withdrawn their demand."* (unofficial translation). In reality, this letter represents a threat, not only against the community implicated in the proposed action, but also to other indigenous communities seeking land titling in the region of San Martín: the titling procedures will come to a halt if the lawsuit continues. In this way, the authorities attempt to dissuade indigenous peoples from seeking protection of their rights, and makes compliance with a state obligation (the delimitation and titling of indigenous lands) dependent on the passive acceptance of other (previous and continuing) violations of their human rights. This position is still in force and in March 2018, the Director of the titling agency wrote to the coordinator of a United Nations Development Programme (PNUD) project for the titling of indigenous lands in San Martín, passing on a request from the Special Project for Central Huallaga and Lower Mayo (PEHCBM), in coordination with the ACR-CE authorities and the Regional Water Authority, requesting the suspension of titling of other communities due to the lawsuit filed by Nuevo Lamas.⁴⁰ Meanwhile, the State and Regional Government never considered altering the limits or regulations which apply to the ACR-CE, nor the suspension or cancellation of those interests awarded to non-indigenous people in the San Martin region.

³⁹ Letter from Marco A. Flores Reateguá (headquarters of the Regional Conservation Area "Cordillera Escalera") to Nemesio Pinchi Diaz (Regional Director of Titling, Reversion of Lands and Rural Cadastre, Regional Agrarian Agency – GORESAM), 17 August 2017.

⁴⁰ Coordination note No. 071-2018-GRSM-DRASAM-DTRTYCR from Nemesio Pinchi Diaz to Charly Eduardo Morales Quintana, 5 March 2018.

What is described above in respect to Ucayali and San Martín demonstrates not only how the State continues to recognise the rights of non-indigenous people in indigenous territories, but also that the State has not fulfilled its duty to “abstain from carrying out acts which could lead to agents of the State itself, or third parties which act with its acquiescence or tolerance, affecting the existence, value, use and enjoyment of goods located in the region” under territorial claims.⁴¹ Instead of applying effective safeguards to protect indigenous lands which remain untitled, the State continues to authorise activities and interests which can cause irreparable damage (such as deforestation and pollution) and limits for extended periods indigenous peoples’ access to and use of natural resources.

vi. Uncontrolled corruption in the system of management and recognition of lands and resources

The representatives and members of the community of Santa Clara de Uchunya have been speaking out against the corruption of the Regional Government of Ucayali and the municipal authorities in the District of Nueva Requena, which have supported the expansion of oil palm plantations in the region. In particular, they have reported the corruption in DRAU (the State entity which has authorisation to title indigenous lands, as well as issuing titles for private property and companies), which instead of titling ancestral community lands has continued to publicly undermine the struggle of Santa Clara for legal recognition of their traditional lands and to issue possession certificates to certain individuals participating in land trafficking. Instead of complying with their duties and obligations to title indigenous lands, the local authorities are facilitating illegal land acquisitions which are now being exploited by PP/Ocho Sur. In the press, the Director of DRAU, Isaac Huamán Pérez, who should maintain a certain neutrality, has expressly declared his support for the palm oil company.⁴²

In addition, on the one hand Mr. Huamán Pérez has repeatedly expressed his rejection of customary land rights of indigenous peoples – and even more categorically in the case of Santa Clara de Uchunya stating that “ancestral property is a thing of the past” and unequivocally stating that indigenous peoples want to enforce “the law of the jungle”.⁴³ On the other hand, he has made several public announcements on the urgent need to recognise the ‘*customary possession rights*’ of settlers, including the need to change the prevailing forest laws and to dissolve the ‘permanent production forests’ to achieve this goal, making

⁴¹ Inter-American Court of Human Rights. *The Case of the Mayagna (Sumo) Awajitjuna Community v. Nicaragua*. Merits, Reparations and Costs. Judgement of 31 August 2001. Series C No. 79, paragraph. 164.

⁴² In an interview published by DRAU on social media in May 2015, Huamán Pérez indicated: “... (PP / Ocho Sur) are not working in an indigenous territory. In addition, it is important to clarify to the community that these soils have been classified as agricultural land. They are not soils classified for permanent production forests; therefore they are not affecting the forest as defined by the law. They are operating on lands that have been titled to farmers and have been used for different purposes. I repeat: the works that Plantaciones de Pucallpa are doing are within their properties because, as they have purchased lands which were titled to more than 200 peasants, those lands already belong to them. That is already a settled issue. Nothing can be done.” (Source: <https://www.facebook.com/325624984307249/videos/369134206622993/>). In an interview in September 2017 on the situation of Santa Clara de Uchunya, Huamán Pérez indicated: “Oil palm works like a big carbon sink. If I have 10 million, 500 thousand hectares in the region, and today only 35 thousand are palm, can I think of allocating 100 thousand to this crop? Why is it forest? And what about economic development? It is true, the land is degraded, biodiversity is lost. But can one not make a small sacrifice?” *Ideele Magazine*, ‘Santa Clara: entre la palma y el tráfico de tierras’ (Source: <https://revistaideele.com/ideele/content/santa-clara-entre-la-palma-y-el-tr%C3%A1fico-de-tierras>).

⁴³ “Communities have rights over titled lands, ancestral property is a thing of the past because we are one country; if not we would be governed by the law of the jungle.” Complete interview with Huamán Pérez available at *Ideele Magazine* (<http://revistaideele.com/ideele/content/santa-clara-entre-la-palma-y-el-tr%C3%A1fico-de-tierras>).

clear the priority he attributes to the rights of non-indigenous people and their uses.⁴⁴

B. Crime of racial discrimination and discourse of racial hatred (article 1, paragraphs 1 and 4)

In the Concluding Observations 2014, the Committee urges:

*the State party to include in its criminal legislation the offence of racial discrimination and an offence that combines all the elements of article 4 of the Convention while also conforming with general recommendation No. 35 (2013) on combating racist hate speech. The Committee also recommends that the State party should ensure that racial motivation is considered an aggravating circumstance when sentence is passed.*⁴⁵

In the latest Periodic Report from 2016, Peru describes that “*there are no separate criminal offences of racial discrimination and/or racist hate speech in the domestic legal order*” and instead of this “*the dissemination of ideas of racial superiority and all acts of racial discrimination are punishable under article 323 of the Criminal Code, which expressly criminalizes discrimination based on racial, ethnic or cultural identity.*”⁴⁶

There is no evidence that the Criminal Code, in practice and much less in theory, is sufficient, nor that it has dissuaded racial discrimination and discourse of racial hatred by third parties – including Government civil servants

In reality, despite these State declarations (which are not supported by concrete evidence), article 323 of the Criminal Code does not protect indigenous peoples from acts of racial discrimination in Peru. This shadow report documents acts of violence and threats (Section III(F)) and Annex 4 below) against members of the Community of Santa Clara de Uchunya and the Kichwa people for no other reason than for being indigenous and defending and exerting their rights. However, on the whole investigations to identify the perpetrators and criminal proceedings to punish them effectively are not carried out. As a consequence, there is a general sense of impunity.

Racism and hateful declarations are observed not only from private non-indigenous individuals, but also from civil servants from local and regional governments. For example, the mayor of the district of Nueva Requena where Santa Clara de Uchunya is situated, headed up a march in May 2016 declaring community leaders and their representative organisation FECONAU as ‘*personas non grata*’ in the area.⁴⁷ More recently, in October 2017, the same mayor ‘*denied that there had been destruction of forests in Uchunya and denounced as a liar*’ Robert Guimaraes, the President of FECONAU, for defending the rights of the

⁴⁴ Video of interview with Huamán Pérez, 12 September 2017 (Source: <https://www.facebook.com/325624984307249/videos/668639416672469/>). Audio of Huamán Pérez in which he encourages the appropriation of lands categorised as ‘permanent production forests’ (BPP) by settlers (source: <http://www.keneamazon.net/Documents/Press-Release/Nota-de-Prensa-005-2017-KENE/Anexo-I.mp3>). Original press release: <http://www.keneamazon.net/Documents/Press-Release/Nota-de-Prensa-005-2017-KENE/Nota-de-Prensa-005-2017-KENE.pdf>. The Director of the Area of Native Communities of the DRAU, Antonio Collantes, recently confirmed that it is common for BPPs to coincide with indigenous peoples’ lands (source: <https://www.servindi.org/actualidad-entrevistas-noticias-audios/21/02/2018/bpp-es-principal-obstaculo-en-proceso-de>).

⁴⁵ General Observations (2014), paragraph 10.

⁴⁶ Periodic Report of Peru 2016, paragraph 34.

⁴⁷ A video of local press coverage available at <https://www.youtube.com/watch?v=rJYwSqSI0TM>.

community.⁴⁸ Not even the Regional or National Government punished these acts motivated by hatred for indigenous people. Similarly, as has been indicated previously (see note 42 above), the director of the DRAU, Huamán Pérez, has denied indigenous peoples' property rights in his public announcements and referred to the law which protects them as "the law of the jungle". Nor has he been punished for these public announcements while acting in an official capacity. It is worth pointing out that announcements of this kind, together with the tone of local media coverage, have not contributed at all to reducing ethnic tensions; one article entitled "Fear of violence between natives and mestizos", interviewed a local lawyer who accused "pseudo indigenous leaders" of "making white terrorism".⁴⁹

Additionally, as is mentioned above, the response to the lawsuit of the Kichwa community of Nuevo Lamas in San Martín (July 2017) reflects the discriminatory and defamatory discourse with elements of racial hatred to which indigenous communities are exposed when they demand that their rights be respected, protected and upheld. Following the filing of the lawsuit a powerful media campaign was launched to condemn it.

This campaign was characterised by misinformation and exaggeration, authored in part by GORESAM. GORESAM broadcast a publicity video on local television channels and social networks accusing indigenous people of bringing destruction to the environment, stating:

*"With the request for land titling by the Native Community of Nuevo Lamas, the suspension of the creation of the ACR Cordillera Escalera is requested, this will allow the entry of oil companies, illegal logging, land trafficking, indiscriminate hunting, destruction of water sources thereby putting at risk the lives of more than 300 thousand people."*⁵⁰

Previously, several media articles attempted to raise doubt as to who was truly "behind" the lawsuit, calling the legitimacy of the communities and/or named activists into question, as well as the NGOs who were supporting them, implying corruption or a lack of representation on the part of the leaders, and unfounded links between the leaders/the NGOs and oil companies.⁵¹ Consequently, the campaign provoked a backlash of hate and intolerance on social media. For example, CEPKA and their consultants have noticed a series of messages posted on Facebook following the media campaign carried out by GORESAM and other organisations. One featured a photo of CEPKA leaders posted with the comment, "*The oil companies and the enemies of the people, these bastards and their madness!!*"⁵² Another said, "*The next march should be to expel or educate these natives in defense of our mountain*

⁴⁸ *Diario Ahora*. 27 October 2017. Available at: https://issuu.com/diarioahora/docs/pucallpa_27_de_octubre_de_2017.

⁴⁹ *Diario Ahora*. 14 June 2016.

⁵⁰ Quoted in Edgar Alarcon, "GORESAM impulsa campaña de miedo y desinformación contra las comunidades indígenas", *Diario El Poder*, 7th November 2017, available at: <http://diarioelpoder.com/page/noticia/goresam-impulsa-campa%C3%B1a-de-miedo-y-desinformaci%C3%B3n-contra-las-comunidades-ind%C3%ADgenas/206>.

⁵¹ See, for example, Karina Pinasco Vela, "¿Qué hay detrás de la titulación de comunidades nativas en San Martín?", *Voces*, 8th November 2017, available at: <https://www.diariovoces.com.pe/92859/hay-detras-titulacion-comunidades-nativas-san-martin>; Lenin Quevedo Bardaléz, "Defender la Cordillera Escalera", *Voces*, 15 September 2017, available at <https://www.diariovoces.com.pe/88937/defender-cordillera-escalera>; "GORESAM reafirma su compromiso de luchar por la vigencia de ACR Cordillera Escalera", *Voces*, 9 November 2017, <https://www.diariovoces.com.pe/92989/goresam-reafirma-compromiso-luchar-vigencia-acr-cordillera-escalera>; "Acción de Amparo de Nuevo Lamas podría 'suspender' el ACR Cordillera Escalera", *Voces*, 15 September 2017, available at <https://www.diariovoces.com.pe/88939/accion-amparo-nuevo-lamas-podria-suspender-acr-cordillera-escalera>.

⁵² Marco Morales, 20 November 2017, available at <https://www.facebook.com/marco.moralesangulo/posts/2089944014352938>.

range who should be denounced as invaders and destroyers of the cordillera escalera.”⁵³ In addition, a public demonstration was organised to “safeguard” the ACR-CE.⁵⁴ GORESAM, instead of refuting the false information circulating in the region and moderating the discriminatory discourse, actively encouraged the distortion of facts with their own announcements and communications to the press.⁵⁵ The vehemence and aggression of public opposition to the lawsuit filed by an indigenous community for their rights to be duly recognised demonstrates a prevailing attitude that is discriminatory and hateful towards indigenous peoples and the absence of any interest from the State to investigate and punish those who incite violence and promote racial hatred. Article 323, contrary to what has been declared by the State, has not acted as an instrument to dissuade these serious forms of discrimination.⁵⁶

C. Indigenous peoples and exploitation of natural resources* (article 5)

In the Concluding Observations from 2009, the Committee expressed “*its concern at the considerable tension, even leading to violence, generated in the country by the exploitation of the subsoil resources of the traditional territories of the indigenous peoples*”, took note of the need to consult and to engage in processes of consent “*prior to the exploitation of natural resources in their territories is not fully respected in practice*”, and “*expresses concern at the negative impact on health and the environment of companies’ extractive activities conducted at the expense of the exercise of the right to land and the cultural rights of the indigenous peoples concerned.*”⁵⁷

Five years later, despite these recommendations and the adoption of a Law of Prior Consultation in 2011 (“*The Law of Prior Consultation*”), the Committee - due to reports and complaints received - had to reiterate their concern in their Concluding Observations in 2014, highlighting:

⁵³ Luchito Lopez, businessman and political activist, 9 November 2017, available at: <https://www.facebook.com/luchitlopezu/posts/10213055615684093>. See other examples of messages published on CEPKA’s Facebook page after the media campaign carried out by GORESAM and other organisations Gloria Collantes (President of the Frente de Defensa de la Cordillera Escalera and coordinator de las Cumbres Amazónicas y Andinas de la Región San Martín), referring to indigenous peoples: “they seem more like enemies of the San Martín people and our CORDILLERA ESCALERA. The Quichuas have the tradition of felling the trees and traditions from the mountains. As ever we will defend our constitutional rights.” (5 October 2017, available at: <https://www.facebook.com/GloriaElizabethCollantesLabajos/posts/1505172172909830>.) On a later occasion, the day of a breakfast with the press organised by CEPKA, IDL and FPP: “Well, with the power of the people we will kick out all of you traitors. With one voice all those from San Martín will say “Get out of San Martín, we do not want lobby groups and agents of the oil company” (1 November 2017, available at: <https://www.facebook.com/alarconz/posts/10214505427647430>, Accessed 9 March 2018). “The fight has only just started, that was just the first advance cry, soon they will see what a real confrontation means. These NGOs did not expect the people to wake up, these NGOs which only live from the misery of the people will not get by. They fooled the natives but they won’t be able to do the same with the judicial system. ...” (Miguel Ajalcrina, economist and journalist, 8 November 2017, available at: <https://www.facebook.com/migueajalcrina/posts/10214996297847031>).

⁵⁴ The organisation in question is called FRECIDES (Frente Cívico de Desarrollo y Defensa de la Provincia de San Martín). During a press conference recorded and published on Facebook, an official of this organisation made several false claims against the complainants (and their lawyers) available at <https://www.facebook.com/grupotelevisontarapoto/videos/1961978757396589/>. Other publications concerning the lawsuit with a similar discourse are available on the Facebook page of FRECIDES (<https://www.facebook.com/FRECIDES/posts/2164569513767101>).

⁵⁵ See for example, “César Villanueva: ‘Poner en peligro Cordillera Escalera es poner en peligro el agua y la vida’”, *Voces*, 5 October 2017, available at: <https://www.diariovoces.com.pe/90298/cesar-villanueva-poner-peligro-cordillera-escalera-poner-peligro-agua-vida>

⁵⁶ In fact, the atmosphere became so hostile that CEPKA, Nuevo Lamas, IDL and FPP issued a statement on 20 November 2017 with a view to refuting all the false information which was circulating and to explain in more detail the circumstances in which the lawsuit was brought forward. See: <https://www.forestpeoples.org/en/responsible-finance-palm-oil-rspo/press-release/2017/press-statement-appeal-kichwa-community-nuevo>

⁵⁷ Concluding Observations 2009, paragraph 14.

*“that concessions for the extraction of natural resources continue to infringe the rights of indigenous peoples over their lands, traditional and ancestral territories and natural resources, including waters, and generate environmental problems, such as the pollution of aquifers. The Committee expresses its concern at the lack of effective implementation of the measures adopted to mitigate environmental impacts.”*⁵⁸

Therefore, referring to their General Recommendation No. 23 (1997) and the recommendations of the Special Rapporteur on the Rights of Indigenous Peoples and their report on the situation of indigenous peoples in Peru in relation to extractive industries (A/HRC/27/52/Add.3), the Committee urged the State party to:

(a) Redouble its efforts to strengthen the legislative and administrative framework for the protection of indigenous peoples with regard to the exploitation of natural resources;

(b) Guarantee the full and effective enjoyment by indigenous peoples of their rights over the lands, territories and natural resources that they occupy or use, by such means as the appropriate issuance of deeds of title;

(c) Ensure the effective implementation of protection measures and safeguards against environmental impacts;

*(d) Guarantee that indigenous peoples affected by natural resource activities in their territories receive compensation for damage or loss suffered and participate in the benefits arising out of such activities.*⁵⁹

As is demonstrated by the response from the State, Peru has not taken the necessary measures to effectively address the Committee’s recommendations. In the words of the State “with regard to the environmental and human rights studies carried out before licences are granted to companies working in the extractive industries”, it affirms that there is a requirement for an environmental impact assessment wherever activities could entail “significant environmental implications”.⁶⁰ However, the State does not mention the requirements to review the social impacts as well - including the impacts on rights and challenges faced by indigenous peoples when they want to participate in these reviews and receive copies of the studies (both social and environmental) (this problem is discussed in Section III(G) in reference to consultations). Nor does the State cite any concrete examples of options or protection measures which they are currently implementing into their policies and projects to avoid environmental and social harm and violations of indigenous peoples’ rights. There is talk but no evidence of positive impacts because at the moment, the positive impacts - if indeed there are any - have not been significant.

The State affirms that the General Directorate of Energy and Environmental Issues (“*DGAAE*”) of the Ministry of Energy and Mines is responsible for “*promoting the execution of activities directed towards conservation and protection of the environment for the*

⁵⁸ Concluding Observations 2014, paragraph 15.

⁵⁹ *Ibidem*.

⁶⁰ Periodic Report of the State (2016), paragraph 66.

sustainable development of energy activities” (including with consultations), but since their last report in 2013, no details have been provided as to positive impacts DGAAE activities may have had for indigenous rights, or concerning any authorised progress of mitigation measures to avoid rights violations and environmental harm - including in the case of hydrocarbons exploitation in the northern Peruvian Amazon. For example, the State affirms that it carried out prior consultations in hydrocarbon blocks 189, 195, 175, 169, 164, 190, 191,192, 165, 197, 198 – but it has not provided the results of these. What projects have been suspended, altered or had special measures and plans to restore the environment incorporated into their implementation? These impacts are very different to a list of activities and/or policies. Furthermore, in the context of energy activities, State bodies have recognised that of the 190 spillages which occurred between 1997 and 2016 from Peru’s oil pipelines, the majority have been the responsibility of Petroperú (the state company under private law which operates the Oleoducto Norperuano).⁶¹ For example, in the case where 2,500 oil barrels were spilled (in June 2014) which affected the community of Cuninico, the Regulatory body (“*OEFA*”) found that Petroperú was responsible for failing to bring the spill under control on time; not maintaining the oil pipeline in the north of Peru; causing real damage to flora and fauna and for potentially causing damage to life and to health.⁶² Two years later, with the Imaza oil spill (January 2016), and the Morona oil spill (February 2016) in Loreto, the OEFA found the same results.⁶³

In fact, instead of addressing the measures and concrete actions it has taken to restore the environment and return lands and/or compensate indigenous peoples for their displacement and/or the restrictions on the use of their lands and resources caused by projects which exploit resources, prior consultation on hydrocarbon blocks, including 189, 195, 175, 169, 164, 190, 191,192, 165, 197, 198, the State addresses the “*exceptional nature*” of the relocation of peoples and doesn’t acknowledge the incidences of *total or partial economic displacement* which occur when the environment and access to natural resources are affected by projects -including in conservation zones.

More importantly, despite the few paragraphs on the Law of Prior Consultation (issue discussed in Section III(G) below), Peru does not mention the “*50.22% of native communities with no property title*” (statistics from the State itself),⁶⁴ nor any legal progress towards protection of peoples in the context of resource extraction or efforts to remedy historic or current violations. This persistent problem is not recognised by the State in their reports to CERD. Nor do they mention the fact that national legislation is not compliant with international norms in terms of the territorial rights of indigenous peoples, despite political promises from the government to redress this compliance gap as a result of climate change mitigation commitments.⁶⁵ The legal norms which regulate the extractive and infrastructure sectors have been expedited without reference to the international standards developed in international human rights law and notably the jurisprudence of the Inter-American Court of Human Rights. This results in the serious consequence that national legislation cannot ensure land rights for indigenous peoples in accordance with international agreements on human and indigenous rights.

⁶¹ See: <https://es.scribd.com/document/323262637/190-derrames-en-el-oleoducto-norperuano>.

⁶² Resolution No. 844-2015-OEFA issued by OEFA in the punitive administrative proceedings. See the resolution at: http://www.oefa.gob.pe/?wpfb_dl=15555.

⁶³ Directorate Resolution N° 1712-2017-OEFA/DFSAI dated 22 December. See the resolution at: <https://es.scribd.com/document/368086687/Resolucion-N-1712-2017-OEFA-DFSAI>

⁶⁴ Supreme decree 002-2018-JUS approves the National Human Rights Plan 2018-2021, paragraph 130 (February 2018).

⁶⁵<http://www.forestpeoples.org/topics/forest-carbon-partnership-facility-fcpf/news/2011/07/determined-lobbying-peruvian-national-in>

In addition, despite CERD's preference that the State Parties prepare their periodic reports in consultation with various government and civil society organisations, the State abstains from relating the conclusions and recommendations of its own Human Rights Ombudsman with respect to the situation in Ucayali around the palm oil industry and the titling of indigenous lands. In fact, nowhere in the State report does it describe the problems in Ucayali and San Martín with respect to the titling of indigenous lands and the environmental and social damage caused by the expansion of oil palm plantations. Below, the Presenting Organisations offer more details on these issues.

i. The destruction of indigenous territories in Ucayali

a. The State does not provide tenure security to indigenous peoples whereas it does authorise the destruction of the environment and grants rights to non-indigenous people - including a company which violates national and international laws

The Native Community of Santa Clara de Uchunya suffers due to the failure to title almost the entirety of their ancestral territory (cerca. 92,000 hectares) with the exception of an area of 218 hectares which was titled in 1986,⁶⁶ and the grabbing of these lands which allowed for the aggressive expansion of oil palm crops on their traditional land. (See Figure 1 above). The exploitation of oil palm has generated adverse impacts on primary and secondary forests, rivers, streams and diverse species of flora and fauna, leading to the destruction of important hunting and fishing zones, as well as areas which previously were abundant in fruit, medicinal plants and natural materials for crafts and construction, upon which the community depends for its sustenance. Members and leaders of the community have reported:

"We, as an indigenous community are not accustomed to living in deserts. We, as a community and as indigenous people need our forests" ⁶⁷

"The river is contaminated with different kinds of chemicals, a result of the oil palm and which comes from upriver. We can no longer drink this water. There isn't a single fish; what will we give to our children?" ⁶⁸

*"We never thought that we would have such problems with transnational companies...we live from hunting, fishing, from the resources that the forest has to offer. An indigenous people without land are nothing."*⁶⁹

It is evident that oil palm is associated with: deforestation, illegal land trafficking, corruption of public civil servants, narcotrafficking and high potential for social conflict. In the area in question, the company PP/Ocho Sur continues to operate, and was able to acquire property rights to 222 land parcels within the lands belonging to the community and consolidate this into a private plantation known as Fundo Tibecocha, which extends over 6,845.43 hectares and has been almost completely deforested through the planting of oil palm. In addition, the zones adjacent to Tibecocha which also pertain to the ancestral land of the community of

⁶⁶ This figure only refers to the current usage area according to an anthropological report carried out in 2016. The land used traditionally covers an area of 135,695.14 hectares. Castro, P. y D. Kau. 2017. *Estudio de la Territorialidad de la Comunidad Nativa Santa Clara de Uchunya*.

⁶⁷ Testimony of Rodit Guerra. Available at: <https://www.youtube.com/watch?v=RqAOMBeux6A>.

⁶⁸ Testimony of Ivan Flores. Available at: <https://www.youtube.com/watch?v=RqAOMBeux6A>.

⁶⁹ Testimony of Carlos Hoyos Soria. Available at: <http://www.proetica.org.pe/noticias/dw-alemania-estrena-documental-acerca-del-trabajo-proetica-traffic-tierras-deforestacion/>.

Santa Clara de Uchunya are being steadily acquired by third parties, alleged land traffickers linked to the palm oil company, who continue to deforest the area for the purpose of planting oil palm crops with the likely aim of selling these lands or produce to PP/Ocho Sur.

The accumulation of land by PP/Ocho Sur is the result of illegal land trafficking and the alleged corruption of public civil servants in DRAU. In this way, private individuals who are mainly non-indigenous and who lack any link whatsoever with Santa Clara de Uchunya, requested that the DRAU issue them with possession certificates for lands which the native community consider part of their ancestral territory, and which they had applied for via requests for land titling expansion which remain unresolved. The State (through the DRAU), instead of protecting the requests of the native community and determining their traditional ownership of the land, and instead of taking minimal precautions to avoid the overlap of rights to third parties (as is required by the Convention and affirmed by the American Convention on Human Rights),⁷⁰ opted to grant proof of possession in arbitrary fashion to invading settlers.

b. The dispossession of indigenous lands without their consent

The community discovered for the first time that PP/Ocho Sur was clearing forests on their ancestral lands in 2014. These operations were carried out without their knowledge or consent. When members of the community asked for an explanation, the company staff denied that the operations were happening in the community's territory and asserted that they were operating on privately-owned lands which had been legitimately bought by the company.

c. The State ignores violations reported by their own investigation

In September 2015, the official investigation carried out by the Peruvian Ministry of Agriculture determined that PP/Ocho Sur did not have the necessary permits for forest clearance and had not carried out the environmental and social impact assessments required by law. As a result, the Ministry ordered it to suspend their operations.⁷¹ However, PP/Ocho Sur never suspended their operations,⁷² and instead were allowed to continue with their activities because the other State and Regional Government bodies had no interest in enforcing the orders of the Ministry.

d. Domestic legal actions do not result in a fair outcome

In this context, in May 2016 the community filed a request for legal protection in the national courts to put an end to the operations of PP/Ocho Sur and secure the restitution of their ancestral lands.⁷³ Despite this, the admission of the case is still pending in the Constitutional Court. However, since the case began, new possession certificates have been issued without the community's knowledge, encroaching more and more onto their territory and destroying

⁷⁰ It has been clarified by the Inter-American Court that the American Convention requires that until there is delimitation, demarcation and titling of indigenous lands, resources and territories, the State "must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Awas Tingni Community live and carry out their activities." *Awas Tingni case*, paragraph 164; *Saramaka case*, paragraph 55.

⁷¹ General Management Resolution 270-2015-MINAGRI-DVDIAR-DGAAA.

⁷² Inspection video by a DGAAA official, confirming that the company continued to operate: <https://www.youtube.com/watch?v=UPU9nRilTe8>.

⁷³ Complaint to RSPO.

it. Contrary to CERD's recommendations, the State has not taken measures to mitigate new damage to their lands and/or give them back and/or offer any form of compensation for handing these lands over to others without their free, prior and informed consent.

e. The State permits the alienation of indigenous lands through fraudulent means

In fact, according to the report of the DRAU No. 0270-2017-GRU-DRA-OA/, between the years 2012 and 2016, they have issued 95 possession certificates on the territory that the native community claims as their own in favour of 222 settlers. Furthermore, the State has approved the requests to convert these certificates into land titles, which allowed the PP company to purchase these lands through private contracts with the 'owners', thereby resulting in the fraudulent alienation of the native community's ancestral property.

These transfers of traditional property from the community of Santa Clara de Uchunya have resulted in the destructive exploitation of forests and the environment by the PP company, conflicting with the obligations of the State in accordance with the Convention and other applicable international norms.

f. The State ignores international and impartial decisions which conclude that the palm oil company is violating rights and destroying the environment

In December 2015, FECONAU, which represents 35 communities of the Shipibo-Konibo people - including Santa Clara de Uchunya - lodged a formal complaint against the palm oil company and its workers to the RSPO Complaints Panel, an organisation of which PP was a member.⁷⁴ On 25 April 2016, the RSPO ordered a preliminary stoppage to the work of the company for the alleged violation of their Procedures for New Plantations ("*PNP*") and Principles and Criteria.⁷⁵ This was a result of the fact that the RSPO does not permit the conversion of primary forests nor any work on communal lands without the free, prior and informed consent of the affected communities. The PNP also require environmental impact studies to be carried out and a review of the areas considered as high value for conservation, neither of which had been completed by the company. Furthermore, the RSPO reminded the palm oil company that intimidating communities is strictly prohibited.

Later, on 6 April 2017, the RSPO Complaints Panel made their final decision on the case,⁷⁶ in which they determined that during the period in which the palm oil company was involved, from the 14 October 2013 to the 12 October 2016, it did not comply with the RSPO Code of Conduct and their Principles and Criteria. After more than a year of deliberation, which included an independent satellite analysis ordered by the RSPO, they concluded that:

1) Plantaciones de Pucallpa cleared approximately 4489 hectares prior to becoming an RSPO member. Most of this area was forested (and most of the forest was primary forest). However, on 15 August 2014, Plantaciones de Pucallpa declared zero noncompliant land clearing.

⁷⁴ *Ibidem*.

⁷⁵ Preliminary decision- Forest Peoples Programme's Complaint against Plantaciones de Pucallpa, Peru (RSPO) (25 April 2016) available at <https://www.rspo.org/members/complaints/status-of-complaints/view/88> (select: 25-apr-2016-plantaciones-de-pucallpa-pre.-dec-cp_.pdf).

⁷⁶ Available at: <https://www.rspo.org/members/complaints/status-of-complaints/view/88>, select: Complaints Panel Decision_Apr17.

2) *Between 2014 – 2016, Plantaciones de Pucallpa continued to clear at least 1237 hectares of land, of which 423 hectares is considered primary forest, without submitting a New Planting Procedure.*⁷⁷

In this way, the RSPO concluded that there was “*clear evidence that compensation liability would have been incurred*”.⁷⁸ Unfortunately, the palm oil company had by this stage cancelled their membership to the RSPO, and therefore avoided the consequences of this decision against it and any penalty it would have otherwise incurred. Indeed, it continued to operate with the knowledge of the State, and in fact PP/Ocho Sur continues to operate, cutting down and destroying forests, with Peru’s apparent agreement.

g. Without any explanation, the State ignores the precautionary measures issued by domestic court against PP/Ocho Sur

Furthermore, this case is being investigated by the Environmental prosecutor in Ucayali (Primera Fiscalía Provincial Corporativa Especializada en Materia Ambiental de Ucayali), in file No. 3006015201-2015-122-0, following complaints presented by members of the community in May 2015. On 7 August 2017, the environmental district attorney, Luis Guzmán Ferro, formalised the preparatory investigation against the company owner, Dennis Nicholas Melka, the company Plantaciones de Pucallpa S.A.C and others for egregious crimes against public peace, criminal organisation and crimes against forests or forested areas, (article 317 of the Criminal Code). Similarly, other subjects, including both current and ex-public civil servants from the DRAU- are accused of illegally issuing rights (article 314 of the Criminal Code) and generic falsehood (article 438 of the Criminal Code).⁷⁹

On 15 December 2017, a local court issued Resolution No. 1 (file No. 00286-2017-1-5001-JR-PE-04) through which it resolved:

“Declares justified the requested precautionary measure to immediately suspend all destructive activities of forest clearance and logging which was filed against the machinery, instruments and personnel who work for the company PLANTACIONES PUCALLPA SAC and which is located in the Tibecocha sector and near the settlements of Naranjal and Unión Progreso in the district of Nueva Requena, Province of Coronel Portillo, Region of Ucayali, as requested by JULIO CÉCAR GUZMÁN MENDOZA, Specialised prosecutor in environmental crimes.” (See Annex 3 for the Resolution) (unofficial translation).

Despite this resolution, the company continues to operate with the knowledge of the State and against due process and the order of a national court.

⁷⁷ In August 2016, deforestation caused by the palm oil company in the region was confirmed by an independent study carried out by the Monitoring of the Andean Amazon Project (“MAAP”). Through a high resolution satellite analysis, they demonstrated “the deforestation of 6,464 hectares (8,855 football pitches) between 2011 y 2015, in the large scale oil palm project in the Ucayali region operated by Plantaciones de Pucallpa”, mostly in primary forests (see Annex 1-D of the Complaint to RSPO available at <https://www.rspo.org/members/complaints/status-of-complaints/view/88> (select: feconau_complaint_plantacionesdepucallpaeng_5_dec_15.pdf).

⁷⁸ See page 1 of the Final Decision of the RSPO Complaints Panel available at: <https://www.rspo.org/members/complaints/status-of-complaints/view/88>, select: Complaints Panel Decision_Apr17.

⁷⁹ See <https://es.scribd.com/document/372806090/Primera-Fiscalia-Provincial-Corporativa-Especializada-en-Materia-Ambiental-de-Ucayali>; <https://es.scribd.com/document/372802907/Primera-Fiscalia-Provincial-Corporativa-Especializada-en-Delitos-de-Corrupcion-de-Funcionarios-de-Ucayali-Primer-despacho>.

f. The State disregards the recommendations of its own Human Rights Ombudsman's Office

In 2016, the Human Rights Ombudsman of Peru investigated this trend of tenure insecurity for indigenous communities in the context of agroindustrial oil palm and cacao plantations. Affirming the injustice of the situation and the breach of the duties and obligations of the State with respect to its acts and omissions in Ucayali, the Ombudsman concluded concerning “the illegality and the inefficacy of the State”, amongst other points, the following:

In accordance with the regulations referenced (including the jurisprudence of the Inter-American Court of Human Rights and the provisions of ILO Convention 169, “the DRAU of Ucayali cannot grant certificates of possession, nor property titles over lands requested for title expansions by a native community, recognised as an indigenous people. On the contrary, this would violate, inter alia, the collective right to property and possession over the lands which they traditionally occupy.

In light of this, it is imperative that the DRAU of Ucayali complies with ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, and attends to the request to expand the titling of the territory of the native community Santa Clara de Uchunya, whose legal timeframe (30 business days) has been violated. In this sense, until the request of the native community in question has been resolved, it should abstain from granting certificates of possession and property titles to third parties in the aforementioned area, in order to protect their collective right to property and possession over the lands which they traditionally occupy (unofficial translation).⁸⁰

The Ombudsman recommended, amongst other things, that the State:

ABSTAIN from granting certificates of possession and property titles to third parties, over lands which indigenous peoples use and occupy ancestrally and traditionally, in order to protect the collective rights of property and possession, provided for by Convention 169 of the International Labor Organization, concerning Indigenous and Tribal Peoples...

ADDRESS the requests to expand the titling of indigenous territories by native communities, within the established legal timeframe (unofficial translation).⁸¹

ii. The overlap of conservation areas with indigenous territories in San Martin without prior consultation and recognition of indigenous lands

In San Martin, the principal conflict cited in this report concerns the creation of conservation areas on top of the traditional territory of indigenous peoples (the establishment of the ACR-CE), rather than the extraction of resources. However, it should be noted that historically the San Martin region has experienced the highest rate of deforestation in the Peruvian Amazon, owing to the expansion of settler agriculture and road infrastructure, as well as cattle ranching and agroindustrial crops, with serious impacts for indigenous peoples.⁸² According to official

⁸⁰ “Deforestación por cultivos agroindustriales de palma aceitera y cacao: Entre la ilegalidad y la ineficacia del Estado”, Serie Informes de Adjunta – Informe No. 011-20177-DP/AMASPP-MA, Defensoría del Pueblo de la República del Perú (2017) (“Informe de la Defensoría: Deforestación por cultivos agroindustriales de palma aceitera”), pág. 65.

⁸¹ *Ibidem.*, pág. 118.

⁸² Valqui, M., Feather, C. & R. Espinosa Llanos. 2014. *Haciendo Visible Lo Invisible: Perspectivas indígenas sobre la deforestación en la Amazonía peruana*. Lima: AIDSESP & FPP. pp. 101-108.

figures from the Ministry of the Environment of Peru, during the period 2006 – 2012, oil palm cultivation (one of the principal drivers of deforestation) “doubled in San Martín, tripled in Ucayali, while in Loreto and Huanuco there was exponential growth” (unofficial translation).⁸³

As mentioned earlier various indigenous communities in San Martín have been affected by the palm oil industry, which has become well-established in the region and is in the process of expanding, with a similar model to that in Ucayali, in which certificates of possession are issued to and deforested by individuals and subsequently converted into property titles and sold to palm oil companies. As has been suspected in a number of cases, it is documented that companies incentivise these processes while the regional agrarian agencies (such as the DRAU) incentivise deforestation. As the Human Rights Ombudsman’s Office of Peru stated:

Nevertheless, according to what the DRA of Loreto and Ucayali have reported, certificates of possession and property titles have been handed out to plot-holders who only engage in agricultural activities or cattle-ranching, even if in order to do so they had to remove the forest cover from the land, thereby turning this into an incentive to deforest Amazonian forests (unofficial translation).⁸⁴

Just as in the case of the ACR-CE, the lack of recognition, delimitation and titling of indigenous territories violates indigenous peoples’ rights in the face of these encroaching industries. It is probable that this problem will grow, along with the expansion of the industry in the region and the objectives of the National Plan for the Sustainable Development of Palm Oil in Peru 2016 – 2025, discussed in greater detail in the following section.

D. Indigenous peoples and conservation (article 5)

As mentioned above, in the Concluding Observations 2014, the Committee on the Elimination of Racial Discrimination urged the State party to “*Guarantee the full and effective enjoyment by indigenous peoples of their rights over the lands, territories and natural resources that they occupy or use, by such means as the appropriate issuance of deeds of title*” (Art 15.b.). This recommendation was made in the context of activities for the exploitation of natural resources that infringed the rights of indigenous peoples, but it is equally pertinent in the context of conservation activities with the same effect.

The question of the relation between indigenous peoples’ rights and conservation has received much attention recently. In her annual report 2015, the Special Rapporteur for the Human Rights Council touched on the subject, noting that, “*Protected areas have the potential of safeguarding the biodiversity for the benefit of all humanity; however, these have also been associated with human rights violations against indigenous peoples in many parts of the world.*”⁸⁵ Rights violations associated with conservation measures include: “*the expropriation of land, forced displacement, denial of self-governance, lack of access to livelihoods and loss of culture and spiritual sites, non-recognition of their own authorities and denial of access to justice and reparation, including restitution and compensation*”.⁸⁶ All

⁸³ *Informe de la Defensoría: Deforestación por cultivos agroindustriales de palma aceitera*, pág. 8.

⁸⁴ *Informe de la Defensoría: Deforestación por cultivos agroindustriales de palma aceitera*, p. 52.

⁸⁵ *Conservation and indigenous peoples' rights. Report to the General Assembly*, 2016, Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz, Paragraph 13.

⁸⁶ *Ibidem.*, paragraph 9.

of these violations, except forced physical displacement, have taken place in San Martín as a result of the creation of ACR-CE.

The Inter-American Court, in its Advisory Opinion on environment and human rights, has highlighted more than once the fundamental obligation to protect the rights of indigenous peoples in environmental decision-making. It has observed that “*the collective property rights [of indigenous and tribal peoples] are linked to the protection of and access to the resources that exist in their territories, since these natural resources are necessary for their own survival, development and the continuity of their way of life. Likewise, the Court has recognised the close relation between the right to a dignified life and the protection of ancestral territory and natural resources*” (unofficial translation).⁸⁷

In addition, there are already judgements in various regional human rights tribunals,⁸⁸ that have ruled that the takeover of indigenous lands for conservation is incompatible with the obligations of indigenous peoples’ human rights. We emphasise that these rulings stated that the territorial rights of indigenous peoples cannot be restricted in the absence of an analysis based on proportionality and the need to limit such territorial rights, as well as the legitimacy of the objectives sought by the State, and that the evidentiary burden of these elements rested with the State.⁸⁹ In each case, the judges observed that there was no evidence that the restriction of indigenous access was necessary to achieve the State’s conservation objectives.⁹⁰

In spite of the above, with the expansion of oil palm in Ucayali —which has caused human rights violations and massive deforestation, imposition without the prior consent and titling of indigenous territories in conservation areas in San Martín— it is clear that the State’s priority is not conservation, and certainly not conservation based on human rights.

In fact, in its Periodic Report on Peru (2016), the State does not mention the fact that the expansion of the oil palm sector is obstructing conservation and infringing the rights of indigenous peoples and that the establishment of conservation areas often violates the rights of indigenous peoples. In general in Peru, conservation areas are established without prior consultation (or consent), managed without the full and effective participation of indigenous peoples as equal parties with the State, and administered in a manner that ignores the valuable contributions of indigenous practices and worldviews. Even more importantly, the creation of conservation areas reflects an ignorance of - and has the effect of arbitrarily extinguishing - indigenous property rights (the right to the property title) over their traditional territories which fall within the conservation area.

⁸⁷ Inter-American Court of Human Rights, Opinión Consultiva OC-23/17 de 15 de noviembre de 2017, *Medio Ambiente y Derechos Humanos*, para. 48 y para. 169.

⁸⁸ The Inter-American Court of Human Rights and the African Court (and Commission) on Human and Peoples’ Rights.

⁸⁹ See Inter-American Court of Human Rights. Case: *Kaliña and Lokono v. Suriname*. Merits, Reparations and Costs. Sentence emitted 25 November 2015 (“*Kaliña and Lokono Case*”), para. 165; African Commission on Human Rights v. Kenya, Application No. 006/12, Judgement in the case of the Ogiek Community of the Mau Forest (26 May 2017) (“*Ogiek Case*”), para. 129; Inter-American Commission on Human Rights, N°. 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (for Endorois Welfare Council) (“*Endorois Case*”). para. 214.

⁹⁰ *Ogiek Case*, paragraph 130; *Endorois Case*, paragraphs 172-73.

i. Ucayali: The oil palm sector infringes indigenous rights while undermining conservation

On 4 September 2015, Resolution N° 270-2015-MINAGRI-DVDIAR-DGAAA, published by the Office of Agrarian Environmental Issues of the Ministry of Agriculture and Irrigation (**MINAGRI**), determined that up until August 2015, the company PP had illegally deforested at least 5,301 hectares of forest, most of which was primary forest, a practice which the company has unlawfully continued to date. The private plot known as ‘Fundo Tibecocha’, a consolidation of 222 plots issued by the State within the lands of the native community of Santa Clara (without first resolving their ancestral title or obtaining the community’s consent) extends to 6,845.43 hectares, of which 6,824.39 hectares had been deforested by August 2015. These lands, in spite of being classified as primary forest - which should mean that they are off limits to economic activities, according to Peruvian law - were brutally deforested in order to plant oil palm without the required licences for logging or corresponding studies for land use classification. Similarly, this MINAGRI resolution determined that PP/Ocho Sur did not have the necessary licences and caused significant environmental harm.⁹¹

In spite of serious and repeated cases of conflict between indigenous peoples and palm oil companies across the country, the State (represented by MINAGRI), continues to encourage and sponsor the large-scale cultivation of oil palm in the country, going against the recommendations of the Committee and doubling the possibility of human rights violations and promoting deforestation. In Ucayali, the GOREU has identified some 228,000 hectares as potential areas for the cultivation of oil palm.⁹² In addition, as stated in Section III(G), in June 2016 the State pre-published a proposal of the National Plan for the Sustainable Development of Oil Palm in Peru 2016-2025, with the objective of expanding the oil palm sector in the country - even in indigenous territories.⁹³ This proposal has not been previously consulted with indigenous peoples.

ii. San Martín: Conservation area established without prior consultation which continues to be managed in violation of indigenous peoples’ rights

First, we would remind the Committee that in Peru there is no recognition of the customary territorial rights of indigenous peoples within natural protected areas. This continues, although indigenous peoples retain the property rights over their ancestral lands prior to the creation of the system for natural protected areas. It is not possible, for example, that the Kichwa and other indigenous peoples, should be treated as intruders in their own territories, and that their access to the natural resources necessary for subsistence should be restricted. In this sense, the following articles are considered unconstitutional: article 4 of Law 26834 (Law of Natural Protected Areas); article 45.3 of the implementing regulation for the Law of

⁹¹ Copy of Informe del Ministerio de Agrario y Riego, Oficio No. 1564-2015-MINAGRI-DVDIAR-DGAA (4 September 2015), available at <https://drive.google.com/file/d/0Bw-OMuvfs9a4ZHp5WFnmWW03Q0U/view>.

⁹² Figures from GOREU, 2016, *Plan de competitividad de la palma aceitera - Ucayali 2016 - 2026 [Competitividad plan for oil palm - Ucayali 2016-2026]*. The comments of Isaac Huamán Pérez, Director of the DRAU, in an interview in December 2017, are noteworthy: “Ucayali will soon have 100 thousand hectares of irrigated rice, 300 thousand hectares of oil palm and perhaps 100 thousand hectares of cocoa... There is no other way, the country has no alternative path. This is an agricultural country and this the direction that we must strengthen and that is what the regional president knows, the next regional president to be elected knows it. There is no other course of action, no turning back. The path towards agricultural development is imminent so that it can become the principle economy of the region” (unofficial translation) *Diario Impetu*, 12 December 2017, Spanish original available online: https://issuu.com/impetu/docs/impetu_7_de_diciembre_de_2017.

⁹³ See Resolution No 0281—2016-MINAGRI (16 June 2016) available at <http://www.minagri.gob.pe/portal/download/pdf/marcolegal/normaslegales/resolucionesministeriales/2016/junio/rm281-2016-minagri.pdf>.

Natural Protected Areas, approved by DS 038 – 2001 –AG (2001); articles 1, 2, 4 and 5 of Supreme Decree 001-2000-AG. Taken together, these laws violate, and even arbitrarily extinguish, the property rights of indigenous peoples whenever their territories fall within areas considered for conservation.

In this context, we refer to the case of the ACR-CE, which overlaps indigenous territories in San Martín. There are several elements which demonstrate that the ACR-CE does not adhere to an approach of rights-based conservation:

1. The ACR-CE was created without the prior consultation, let alone the consent, of the indigenous peoples affected, even though there were people living in and using the area and some had even submitted demands for titling which are likely to have overlapped the ACR-CE prior to its creation.
2. There was never—and still has not been—a genuine recognition of the pre-existing territorial rights of the indigenous peoples of the region, nor any analysis of the legitimacy, proportionality or need to restrict those rights, as required by the Convention.
3. The rights of the indigenous peoples to access and use the natural resources and traditional places within the ACR-CE have been severely restricted, without any solid justification, without prior consultation, compensation, nor effective legal recourse.
4. The existence of the ACR-CE has been (and continues to be) used as a justification to refuse the integral titling of indigenous territories. Indigenous peoples are only offered “leasehold use” contracts which are not equivalent to property titles (as previously discussed in Section III(A)(i)).
5. In spite of several attempts by the affected indigenous communities (including a proposal for co-management of the ACR-CE which would uphold the conservation objective of the area), GORESAM has refused to participate in in-depth discussions or negotiations about the ACR-CE to resolve the violation of human rights.

In addition, with regard to the limitations and restrictions of access and use by indigenous peoples, the Presenting Organisations wish to also highlight the following:

1. Since the creation of the ACR-CE, by order of the Directors of the protected area, the Kichwa communities have to request prior authorisation in order to carry out their traditional activities within the ACR-CE,⁹⁴ including hunting, fishing, foraging, agriculture, construction or repairs, small scale logging etc. When the activities are approved, the authorisation is usually limited.⁹⁵

⁹⁴ To see an example, go to: Jefatura ACR-CE, Informe No. 148-2016-GRSM/PEHCBM-DMA/EII-ANP/JARR, “Autorización de Ingreso de comm Mishki Yakillo al interior del ACR CE” [Entry Authorisation for community Mishki Yakillo inside the ACR-CE] (2 September 2016).

⁹⁵ For example, the hunting authorisation emitted by the Directors of the ACR-CE for the community of Mishkiyakillo in 2016 limited the hunt to a total of 12 specimens of only three species, in addition to an unlimited number of “conejos” (Resolución Jefatural ACR-CE No. 014-2016/GRSM/PEHCBM/DMA/ACR-CE). See also Oficio No. 028-2016-GRSM/PEHCBM-DMA/ACR-CE, which imposes the requirement of accompaniment by park rangers as a condition for community members to enter the protected area.

2. Between 2009 and 2013, six members of the Kichwa community of Ankash Yaku de Achinamisa were prosecuted for the alleged crime of logging as a result of carrying out their traditional agricultural activities within the ACR-CE.⁹⁶
3. In 2010, eight people from the Kichwa community of Alto Pucalpilllo were prosecuted due to carrying out traditional agricultural activities. The criminal proceedings ended in acquittal in 2012, due to a legal technicality. As a consequence, the threat of further criminal proceedings for carrying out traditional activities continues for community members.
4. In August 2016, the Direction of the ACR-CE wrote to the Kichwa community of Mishkiyakillo claiming that illegal hunting of a protected species (*huangana*) had taken place and that a community *tambo* (shelter or cabin) had been built, threatening the community with criminal proceedings if it happened again. The context: in May 2016, the community had written to the Direction of the ACR-CE requesting permission to enter the protected area to repair a traditional community *tambo* and to hunt for a community festivity; the ACR-CE had responded approving the hunting request (although only for 4 species) but without mentioning the *tambo*. In response to the August 2016 letter, the community noted that they do not hunt *huangana*, that these specimens had been killed in self-defence when they attacked members of the community.
5. In September 2016, the community of Mishkiyakillo requested prior permission to plant bananas for food in an old garden (*purma*). This is a traditional method of rotational agriculture known as 'crianza de *purmas*' where the land is left to rest for several years to allow fertility to return (more details below). The request was denied by the Directors of the ACR-CE, stating that the requested agricultural activity was not compatible with the regulations of the ACR-CE.⁹⁷

While it is evident that the indigenous peoples do not represent a threat to the conservation of the area, but rather an ally, these State actions have been carried out in a manner that ignores this context. The affected indigenous peoples have already strongly resisted the entry of hydrocarbons companies in their territories. Now faced with the ACR-CE, they propose, at least, a co-management of the ACR-CE.

The State created the conservation area without respecting indigenous peoples' rights and manages the area in a way that continues to violate rights. An example of this is the attitude of those who manage the ACR-CE with respect to the traditional activities which contribute to conservation.

⁹⁶The case was archived in December 2015, with a judgement by the Criminal Court of Appeals of the Superior Court of Justice of San Martín-Tarapoto in favour of the community members and their right to use the natural resources within the ACR-CE for subsistence and traditional activities. See: <http://www.servindi.org/actualidad/16/01/2016/archivan-acusacion-contra-indigenas-por-aprovechar-recursos-dentro-de-area>

⁹⁷ Letter sent by Directors of ACR-CE to the indigenous community Mishkiyakillo, 5 September 2016, Carta No. 037-2016-GRSM/PEHCBM/DMA-ACR-CE.

The agricultural system practiced by the Kichwa-Lamista communities, which they refer to as “*purmeo*”, has been described as a form of agroforestry crop rotation.⁹⁸ It consists of a dynamic and productive management of forestry *purmas* (fallow land). These are small-scale (approximately half a hectare), long-term endeavours; a mature *purma* can be 15-20 years old,⁹⁹ and *purmas* of different ages combine to create a mosaic forest landscape. Within these cyclical agroforestry systems, there is no clear distinction between forest and agriculture, given the intimate and sophisticated intercalation of crops and trees over time.¹⁰⁰ Apart from ensuring the subsistence of Kichwa-Lamista families, these systems stand out for their agrobiodiversity,¹⁰¹ the regeneration of soil fertility¹⁰² and the maintenance of hydrological cycles.¹⁰³ Making use of their traditional ecological knowledge, the Kichwa-Lamista select the timber species which, as well as favouring the ecological processes mentioned above, also tend to attract certain animals which, in turn, transport seeds from different places, thus increasing the biological diversity of these “cultivated” spaces.¹⁰⁴ *Purmeo* is also implemented to recover degraded lands, although it requires more effort. We highlight that although ‘*purmeo*’ constitutes a cultural practice of transcendental importance for the Kichwa-Lamista people, the regional authorities who manage conservation initiatives do not consider it as such and exclude it from the “ancestral customs” which are permitted within conservation concessions, including the ACR-CE.¹⁰⁵

The limitations imposed on the indigenous Kichwa communities by the ACR-CE signify a severe violation of their human rights, not only territorial rights, but also rights to food, culture and self-determination. These restrictions have no justification and have been maintained in spite of efforts, initiated by the indigenous communities, to establish a dialogue, and of the expressed desire of the communities to support the conservation of the area.

The absence of prior consent, the lack of prior recognition of indigenous peoples’ ownership and possession, the lack of respect for the valuable contribution to conservation of indigenous traditional practices, the limitations to access and use of indigenous peoples’ lands and natural resources represent continuing violations of the rights of indigenous peoples according to the Convention. The manner in which Peru established the ACR-CE and continues to manage the area should concern the Committee as a very poor precedent which may be repeated in other parts of Peru.

⁹⁸ Romero, L. and K. Marquardt, 2015. ‘La agricultura indígena del Kechwa-Lamas y los servicios ecosistémicos ¿Qué hay para aprender?’ Servindi – Servicios de Comunicación Intercultural. Source: <https://www.servindi.org/actualidad/142740> (Accessed: 01.03.18).

⁹⁹ Marquardt et al. 2012. ‘Farmers’ Perspectives on Vital Soil-related Ecosystem Services in Intensive Swidden Farming Systems in the Peruvian Amazon’. *Hum. Ecol.* 41: 139–151

¹⁰⁰ Marquardt, Milestad and Salomonsson, 2013. ‘Improved fallows: a case study of an adaptive response in Amazonian swidden farming systems’. *Agriculture and Human Values* 30 (3), p.425.

¹⁰¹ Choba Choba, 2001. *Diversidad Chacarera en los Quechua-Lamas del Bajo Mayo*. San Martín: PRATEC.

¹⁰² Marquardt et al. 2012. ‘Farmers’ Perspectives on Vital Soil-related Ecosystem Services in Intensive Swidden Farming Systems in the Peruvian Amazon’. *Hum. Ecol.* 41: 139–151

¹⁰³ Romero, L. 2009. ‘Crianza del puquio’, in PRATEC (eds), *Cambio Climático y sabiduría andino amazónica: Prácticas, percepciones y adaptaciones indígenas*, pp. 157-167. Lima: PRATEC.

¹⁰⁴ Marquardt, Milestad y Salomonsson, 2013, p.423. The authors indicate that 20 families actively use 118 tree species in the *purmas* studied.

¹⁰⁵ Egerlid, J., Marquardt, K. and Ö Bartholdson. 2016. ‘Forest conservation versus indigenous forest territory rights in the Peruvian Amazon: the case of the Kechwa-Lamas village Alto Huaja and the roles of external actors’, *Int. J. Agricultural Resources, Governance and Ecology*, Vol. 12, No. 4, pp.381–405.

E. Indigenous peoples in voluntary isolation or in initial contact (article 5)

In the Concluding Observations 2014, the Committee noted its satisfaction with some of the measures taken to protect indigenous peoples in voluntary isolation or in initial contact (*PIACI*, according to Spanish acronym), however, the Committee expressed its concern about “*the gaps in their implementation. The Committee reiterates its concern about the plan to extend the exploration and extraction of natural gas in the Kugapakori-Nahua-Nanti Reserve, which may put at risk the physical well-being of the indigenous peoples living in the area and infringe their rights*” (art. 5).¹⁰⁶ As a result, CERD recommended:

*“that the State party should intensify the protection that it provides to indigenous peoples in a situation of voluntary isolation or initial contact and adopt the measures required to ensure their due implementation. The Committee urges the State party to comply with the recommendations of the Special Rapporteur on the rights of indigenous peoples in his report (A/HRC/27/52/Add.3) with regard to indigenous peoples in a situation of voluntary isolation or initial contact, particularly those living in the Kugapakori-Nahua-Nanti Reserve.”*¹⁰⁷

The Presenting Organisations have read and closely reviewed what the State has emphasised on this subject in the latest Periodic Report by Peru (2016) (especially paragraphs 70-75).¹⁰⁸ Unfortunately, it fails to mention many facts and creates the impression that the situation of the PIACI has improved substantially, when this is not the case.

We would remind the Committee, that the Peruvian Amazon shelters a wide range of PIACI, in the Departments of Ucayali, Madre de Dios and Cusco, Loreto, Huánuco, Junín and probably Puno.¹⁰⁹ In spite of different degrees of contact and cultural and social differences, all PIACI face similar situations of extreme vulnerability because of the high recurrence of contagious diseases, pollution, anaemia, malnutrition, territorial loss and external influences in decision-making, in addition to a lack of protection by the State. The Committee recognised these threats faced by PIACI and in March 2013, especially, recommended the State “immediately suspend” plans to extend Camisea Gas Project (Block 88) activities within one of the reserves established for PIACI, the Kugapakori Nahua Nanti Reserve (*RTKNN*, according to Spanish acronym).¹¹⁰

a. The State is not taking the necessary measures to remediate mercury pollution in PIACI reserve

In 2014, elevated levels of mercury were detected in the population of one of the communities in initial contact that lives in the RTKNN (Santa Rosa de Serjali). In spite of the

¹⁰⁶ Concluding Observations 2014, paragraph 16.

¹⁰⁷ *Ibidem*.

¹⁰⁸ Informe Periódico del Perú (2016), paragraphs 70-75.

¹⁰⁹ Known indigenous peoples in initial contact are made up by individuals of the peoples: Chitonahua, Nahua (or Yora), Mastanahua, Isconahua and Matsigenka. Because of their way of life, it is difficult to express precisely the number of peoples living in isolation, but it is possible to state that there are at least 15 in the most remote regions of the Amazon on the borders of Ecuador, Brazil and Bolivia.

(For more information, please see: “Situación de los Pueblos en Aislamiento y Contacto Inicial de la Amazonía Peruana 2017” prepared by AIDSESEP and available here (in Spanish): <http://www.aidesep.org.pe/aidesep-presento-informe-sobre-la-situacion-de-los-piaci-en-el-peru/>).

¹¹⁰ Letter from CERD to Peru (March 2013) available here (in Spanish): <https://www.forestpeoples.org/es/topics/industrias-extractivas/news/2013/03/el-comite-para-la-eliminacion-de-la-discriminacion-racial>.

calls by civil society for decisive action by the State, even in demands to the UN Special Rapporteur on the Rights of Indigenous Peoples,¹¹¹ to date the State has not taken a single serious and robust measure to identify the sources and means of contamination for the population, nor the possible exposures to mercury of other nearby populations. Instead of carrying out these actions, the State has limited its actions to trying to improve medical services for the affected community, which it documented in its last periodic report. Yet in January 2018, the Guardian reported: “One Nahua man, who prefers to remain anonymous, told the Guardian “almost everyone” is contaminated with mercury and the government has “forgotten” them. He said that no one from the authorities has visited Santa Rosa de Serjali since March 2017, that the only advice they have received is to “eat well” and avoid drinking alcohol, and the only possible explanation given for the mercury is that two species of fish might be contaminated”.¹¹²

Although the high levels of mercury are well known since 2014, three and a half years have elapsed and the State has yet to take necessary action. The absence of serious action by the Government is confirmed by a Ministry of Health Report (ASIS Nahua, January 2018) about the Nahua’s health situation which concludes: “The exposure to mercury is a grave problem for the Nahua population ... The high incidence in children and women of childbearing age represents an important risk for the local population. It is necessary to develop further studies to determine the source or origin of the mercury, and to be able to define the best intervention strategies” (unofficial translation).¹¹³

b. New law adopted this year promotes the construction of infrastructure which will impact PIACI

Currently —and in spite of public commitments on the part of the Peruvian Government in defence of PIACI, including those mentioned in the last Periodic Report (2016), such as Law 28736— the right to life, health, subsistence and territory, among others, continue to be infringed by the actions and omissions of the Peruvian State. A new law adopted this year threatens the PIACI with the construction of new infrastructure. On 22 January 2018 (after reporting to the Committee on the subject) the Congress of the Republic of Peru enacted the bill 1123/2016-CR (with number 30723) which promotes the construction of highways and truck paths in the Amazonian region of Ucayali. As observed by the Human Rights Ombudsman’s Office, as well as other entities and organisations including the UN’s Special Rapporteur on the Rights of Indigenous Peoples,¹¹⁴ these will have serious consequences for indigenous peoples in isolation and natural protected areas.¹¹⁵

This law was developed and approved without an adequate consultation process, even in accordance with the new Law of Prior Consultation (see below). The enactment of the law, in addition, in the context of the Pope’s visit, generated a media and political scandal which led to the publication of Supreme Decree 005-2018-MTC, which orders the modification and up-

¹¹¹ June 2017, Petition by IDL and AIDSESEP to the Special Rapporteur available here: <https://www.forestpeoples.org/es/node/50111>.

¹¹² See article available here: <https://www.theguardian.com/environment/andes-to-the-amazon/2018/jan/24/amazon-tribe-mercury-crisis-leaked-report>.

¹¹³ *Análisis de Situación de Salud del pueblo Nahua de Santa Rosa de Serjali en la Reserva Territorial Kugapakori Nahua Nanti y Otros*, Ministerio de Salud (2017) available here (Spanish only): http://www.dge.gob.pe/portal/docs/asis/Asis_Nahua.pdf, pg. 148.

¹¹⁴ <http://acnudh.org/ley-sobre-construccion-de-carreteras-en-peru-amenaza-la-supervivencia-de-pueblos-indigenas-amazonicos-en-aislamiento-experta-de-la-onu/>.

¹¹⁵ <https://www.servindi.org/actualidad-noticias/08/12/2017/proyecto-de-ley-amenaza-indigenas-en-aislamiento-y-contacto-inicial>.

dating of the Ministry of Transport and Communications' system for classifying roads, to exclude all territorial and indigenous reserves, natural protected areas and others. The Supreme Decree could be useful if it is implemented according to applicable law on human rights. For this to occur, mechanisms of coordination and interoperability need to be activated between ministries. Thus, the Ministry for Culture (*MINCUL*) and the National Service for Natural Protected Areas (*SERNANP*) will have to channel information to the Ministry of Transport and Communications about indigenous reserves and national protected areas so that new transport routes can avoid these areas. This has not yet happened. Meanwhile, the threat of Law 30723 (now passed) continues: it could achieve advances in the promotion of road building in Ucayali and on the border with Brazil. In addition, it is important to be aware that there are 5 pending applications for indigenous reserves for PIACI in Loreto, Ucayali and Huánuco, which are not considered by the Supreme Decree and which could be seriously affected by a series of road-building projects. Also overlooked are territorial corridors, or continuous territories of peoples in isolation or initial contact, which are currently under a variety of legal categories. The Supreme Decree does not take this reality into account either.

c. Although a law exists to supposedly guarantee the protection of PIACI, the State continues to authorise projects in areas where PIACI are known to be living

In accordance with article 5(c) of the Law for the protection of indigenous or aboriginal peoples in isolation or initial contact (Law No. 28736), the State must guarantee full respect for the principle of strict protection for the ancestral territory of PIACI. This means that settlements cannot be established that are different to those of the indigenous peoples who live within the reserve, all activities different to the traditional uses and ancestral customs of the indigenous inhabitants must be forbidden, as well as the granting of rights that incur natural resource extraction. Meanwhile, in practice, the State continues to approve new activities, like the case of the expansion of activities for gas exploitation in Block 88.

d. The recommendations by the Platform on PIACI deserve consideration by the State

To better understand the current situation for PIACI, we would like to refer the Committee to a recent report by the platform of indigenous organisations for the Protection of PIACI in Peru (the "*Platform*"). This report highlights, with evidence, the following current problems:

a. A serious health crisis, including mercury contamination affecting the Yora/Nahua people within the RTKNN [subject to recommendation of the Committee].

b. The vulnerability and lack of protection of the Mashco Piro in the Upper Madre de Dios River.

c. The lack of protection for indigenous PIACI reserves (created and requested) and their overlap by gas, oil and timber concessions, roading building projects and natural protected areas.¹¹⁶

¹¹⁶ AIDSESEP presents Report and Recommendations about PIACI to the IACHR at the hearing taking place currently in Uruguay (23 October 2017), available here (in Spanish): <http://www.aidesep.org.pe/aidesep-presenta-informe-y-recomendaciones-a-la-comision-interamericana-de-derechos-humanos-sobre-los-piaci-en-la-audiciencia-que-se-viene-realizando-en-estos-dias-en-uruguay/>.

Faced with this situation, the members of the Platform proposed the following recommendations for the Peruvian State at a recent hearing before the Inter-American Commission for Human Rights in Montevideo, Uruguay, on 23 October 2017:

- a. Promptly and efficiently address the serious health crisis affecting the Yora/Nahua in the RTKNN. In addition, identify, with robust and independent studies, the sources, patterns, routes and points of mercury exposure.
- b. In relation to indigenous peoples, in particular the Mashco Piro on the Upper Madre de Dios River: do not accelerate interactions or generate dependence, nor encourage their integration to national society. Within this framework, we urge the Peruvian State to fulfil Precautionary Measure N° 262/05 issued by the Inter-American Commission on Human Rights (“*Commission*” or “*IACHR*”) for the Mashco Piro, Yora and Amahuaca in Madre de Dios, in force since 2007, and urgently implement effective actions for their protection.
- c. Safeguard the integrity of indigenous peoples in isolation and initial contact, removing from the National System of Highways and the roadway classification system, all road projects that affect PIACI territories, officially recognised or otherwise, and forbid all new initiatives or road infrastructure projects that could affect them.
- d. Modify article 5, section C of Law [28736]... which permits the execution of economic activities within the Indigenous Reserves established for these peoples, thus ignoring the extensive case law of the Inter-American Court and Commission on Human Rights, which establish a series of legal tests and safeguards which States must address before authorising such activities simply on the basis of the “national interest”.¹¹⁷

F. Social conflict arising out of projects involving natural resource exploitation and conservation measures * (articles 5, inc. A, and 6)

In the Concluding Observations from 2009, the Committee expressed its “deep concern at the violence triggered by conflicts between projects aimed at the exploitation of natural resources and the rights of indigenous peoples” (in this instance referring to events that took place in Bagua, on 5 and 6 June 2009).¹¹⁸ This Committee urged the urgent implementation of the necessary steps to set up an independent commission that included indigenous representatives to carry out a thorough, objective and impartial investigation.¹¹⁹

In the Concluding Observations from 2014, the Committee:

“is sorry to learn that acts of violence arising out of opposition to projects involving natural resource exploitation continue to occur and that, as in the case of the tragic events in Bagua, they are not exhaustively investigated. The Committee notes with concern information received recently about criminal prosecutions and the disproportionate use of force against members of indigenous peoples opposed to extractive projects. The Committee is also concerned by the negative impact that may

¹¹⁷ *Ibidem*.

¹¹⁸ Concluding Observations 2009, para. 15.

¹¹⁹ *Ibidem*.

be felt by indigenous peoples of the adoption of the recent amendments to the Criminal Code (Act No. 30151), exempting law enforcement officials from criminal liability when they cause injury or death as a result of the use of force in the course of their duties.”¹²⁰

In addition, it urged the State to:

(a) Strengthen mechanisms to prevent social conflict by promoting the effective participation of members or representatives of indigenous peoples to enable them to express freely their opposition to projects involving natural resource exploitation;

(b) Conduct an exhaustive inquiry into violations of human rights that arise out of opposition to extractive projects;

(c) Adopt the necessary measures to guarantee respect for the principle of proportionality and strict necessity in the recourse to force against persons belonging to indigenous peoples;

(d) Consider repealing Act No. 30151 and ensure that those responsible for the excessive use of force, to the detriment of members of indigenous peoples, are brought to trial.¹²¹

In the last Periodic Report (2016), Peru offered no response to, nor an outline of, the measures it is taking to address violence against indigenous peoples opposing projects that exploit natural resources, as well as the impact of the recent Penal Code reform and the arising impunity, with regards to abuses by government forces.¹²² Nor does it recognize that there are reprisals, such as violence and threats, against indigenous defenders who defend their rights and oppose projects undertaken without respect for their human rights.

i. Ucayali - Attacks, threats and retaliatory litigation against rights defenders continue unimpeded by the State

The insecurity over the community of Santa Clara de Uchunya’s traditional territorial tenure, and the accumulation and exploitation of land by the palm oil company, and other private companies typically associated with the palm oil sector, has led to a high level of racial hatred and violence, as a consequence of this territorial uncertainty, including retaliatory litigation.

For example, in August 2017, during a football tournament, an employee of PP/Ocho Sur advised a community member that he had overheard other workers of the company talking and saying that, “*If the [indigenous] authorities of Santa Clara have enough time to remove the corpses, then, they are free to enter our plantation!*”. Furthermore, when the community requested explanations from PP/Ocho Sur over their operations in the territory, these explanations were always delivered aggressively and, after the community protested, the company filed legal complaints against community leaders for alleged coercion and

¹²⁰ Concluding Observations 2014, para. 23.

¹²¹ *Ibidem*.

¹²² See generally, Peru Periodic Report 2016 and particularly paras. 143-157 (presumably responding to the Committee’s concern “about social conflicts surrounding projects involving natural resource exploitation”).

attempted theft.¹²³ In actual fact, the situation is so out of control that the local Prosecutor investigating the company and the Regional Government has also been the victim of several incidences of retaliatory litigations.¹²⁴

As recently as 20 October 2017, allies of Santa Clara de Uchunya and other indigenous communities, from Ucayali and FPP, presented a report to the UN Special Rapporteurs concerning the situation of human rights defenders and the rights of indigenous peoples, with respect to incidents of violence and threats against the community members of Santa Clara, who defend themselves against violations of their property, culture and way of life, further supplementing this report with additional information on 12 December 2017.¹²⁵

Attacks suffered by officials as well as by community members (male and female) from Santa Clara de Uchunya throughout recent years have been widely publicised, these include: attempted assassinations, arson, beatings, assaults by armed men with sticks and machetes, roadblocks to enable illegal logging and by armed groups of up to 100 and 400 people, hooded men screaming death threats and more.

For example, in January of this year, two armed and hooded individuals arrived at the family home of one of the elders of the community and showed their daughter-in-law a shotgun, telling her they were looking for the leaders and members of the community and that they were “*prepared to kill*”.¹²⁶ In February 2017, one community member Huber Flores was beaten at night by a group of armed men, who left after being scared by passers-by. In May 2017, representatives of the DRAU and members of the Community of Santa Clara began the preliminary stages of land demarcation when they were aggressively confronted by approximately 400 people who blocked their passage, overhearing, “*If the authorities and community members try to enter here, blood will flow.*” Furthermore, leaders and activists associated with the community as well as FECONAU have been subjected to ongoing defamation campaigns in local media, as well as retaliatory litigation (legal persecution) and death threats. ***In Annex 4 there is an exhaustive list of threats and acts of violence with additional details.***

Most of the time those responsible are known locally, as workers and land traffickers linked to the company PP/Ocho Sur. For example, those who threatened Huber Flores are known associates of the PP/Ocho Sur, with known interests in adjacent lands, lands which have since been converted to oil palm plantations. These include: Juan Canayo Cachique, Willian Canayo Cachique, Harry Canayo Cenepo Amasifuen, Jairo Ramirez and Reynaldo Benito Rengifo. Those who have threatened leaders and members of FECONAU include Wilfredo Caballero Carrasco, who is a known associate of PP/Ocho Sur, and who has threatened Mr.

¹²³ After a community delegation seized chainsaws which were being used to clear forest on traditional community lands, several community members were accused of ‘aggravated robbery’ by Julián Asunción Agurto Rojas (Case 605-2015, Provincial Criminal Prosecutor's Office of Campo Verde); the case was filed in May 2017. On another occasion, when a community delegation tried to carry out the demarcation and delimitation of the ancestral territory in 2016, they were accused of having burned houses by Eufracio Regalado Leon Ravelo (case No. 2016-304); This process is in the stage of prosecution control. Mr. Wilfredo Caballero Carrasco, a known associate of the oil palm company, made two complaints against community members of Santa Clara de Uchunya in 2017: one for the crime of aggravated damage (case no. 2017-482) and another for the offense of abuse of authority (case no. 2017-435); both cases are in the investigation stage.

¹²⁴ “Fiscal de Ucayali que investiga deforestación denuncia represalias e intentos para dañar su imagen”, IDEELE RADIO (9 February 2018): <https://ideeleradio.pe/lo-mas-visto/ucayali-fiscal-denuncia-amedrentamiento-por-denunciar-a-organizacion-que-contamina-territorio-ancestral/>

¹²⁵ Submissions to the Special Rapporteur on Human Rights Defenders and the Special Rapporteur on the Rights of Indigenous Peoples (20/10/2017) and supplementary information 12/12/2017 (Caso No: 685cha06).

¹²⁶<https://www.forestpeoples.org/es/node/50204>

Huber Flores verbally on other occasions. The other perpetrators could not be identified, yet there are indications that they too are associated with the same groups. There have been a number of witnesses to the incidents described.

On 14 March 2017, Huber Flores made a request to the National Police Force in Pucallpa to guarantee his personal security. These were allegedly granted on 17 August 2017; yet in reality, no police protection or other measures have materialized.¹²⁷ To protect himself and his family, Mr. Huber Flores and his family had to temporarily relocate to Lima and Pucallpa. In addition, both Policarpo Sanchez and Robert Guimaraes of FECONAU, who have also received death threats, formally requested personal security guarantees in 2017. No measure has been filed by the State or Regional Government to protect them.

With respect to the list of threats and acts of violence listed in Annex 4, the Government has taken no action in compiling an adequate investigation nor in the sanctioning of any of the possible perpetrators of these threats and acts of violence. Nor has the Government taken any measures in the general protection of leaders and the community who are challenging the exploitation of their resources, the appropriation of and damage to their traditional lands and resources. The company PP/Ocho Sur continues to operate unimpeded despite its continued violations of indigenous peoples' rights and their alleged link to the perpetrators of these attacks and threats.

ii. The Indigenous Peoples of San Martín and retaliatory litigation in the absence of concrete actions to support rights defenders.

In San Martín, indigenous rights defenders are also finding themselves to be victims of retaliatory litigation, including a wave of opposition from private parties and ironically, conservationists, as a result of their actions to defend the integrity of their natural resources and collective rights. It is unquestionable that the criminalisation of defenders of indigenous peoples' human rights - and the impacts on their social and cultural survival - results in a heightened climate of socio-environmental conflict. As the report points out in Section (D)(ii), several indigenous people have faced criminal litigation simply for carrying out their traditional activities and exercising their rights as traditional land owners in conservation areas.

Regarding the ACR-CE in San Martín, the prosecution of members of Kichwa communities for engaging in their traditional activities is generating fear and great concern amongst indigenous communities. On top of this, the mobilization of "civil society" against the lawsuit filed by the indigenous community of Nuevo Lamas, (discussed above in Section III(B) and in the corresponding footnotes), the aggressive opposition of GORESAM to this action and its continued reluctance to enter into negotiations, as well as the associated growth in hate speech and intolerance against indigenous peoples, point to the strong possibility of the outbreak of further social conflict within the area.

¹²⁷ Mongabay LatAm. 1 March 2018. <https://es.mongabay.com/2018/03/peru-santa-clara-de-uchunya/>.

In the case of natural resource exploitation, it is noted that the expansion of large-scale oil palm monocultures has generated a social conflict for several years,¹²⁸ which, at the beginning of 2018, has turned the northeast of San Martín into a deforestation 'hotspot' in the Peruvian Amazon.¹²⁹ In a pattern similar to that seen in Ucayali, affected community members point out that the communal lands are appropriated by land invaders and subsequently sold to companies, in this case those belonging to the *Grupo Palmas*, in itself a subsidiary of the Romero Group.

The situation within indigenous territories, in spite of the State's silence, and especially for those defending indigenous rights, is dire, as there is an atmosphere of impunity resulting from the absence of any measures undertaken by the State. Recently, the IACHR wrote on the issue of Defenders of Rights and among others, recommended that the State:

take the necessary measures to “[p]rotect those who defend human rights when their lives and personal integrity are in danger, adopting an effective and comprehensive prevention strategy, in order to prevent attacks against defenders. To achieve this, the State must demonstrate the political will to take effective actions, as well as allocate the necessary resources to support the responsible institutions and programs” (unofficial translation).¹³⁰

The Commission specifically recommended that:

“[a]s a public policy, States must immediately adopt the necessary measures to eradicate the impunity for violating the human rights of defenders by carrying out independent investigations into the attacks they suffer, and punishing the material and intellectual authors. The IACHR calls on States to set up specialized units, within police forces and prosecutors' offices, equipped with the necessary resources, training and specialized protocols that enable them to act - in coordination and with due diligence - in investigating attacks against human rights defenders, establishing lines of investigation that take into account the interests that may have been affected by the activities of the defender” (unofficial translation).¹³¹

iii. The State will not offer a mechanism that protects human rights defenders until 2021

In its recent report to the CERD, the Peruvian State did not acknowledge the violence and threats against rights defenders - including indigenous defenders and those that oppose the exploitation and illegal acquisition of their lands and resources – as a problem. In addition, the Peruvian State has not shown the political will to adopt measures that protect rights

¹²⁸ EIA. 2015. *Deforestation by Definition*. Washington DC: EIA. p.17.

¹²⁹ <http://maaproject.org/2018/hotspots-peru-2017/>

¹³⁰ Comisión Interamericana de Derechos Humanos. 'Hacia una política integral de protección a personas defensoras de derechos humanos': Aprobado por la Comisión Interamericana de Derechos Humanos el 30 de diciembre de 2017 (Spanish only), para. 345.

¹³¹ *Ibidem.*, para. 345, section 19.

defenders, nor the encouragement of an environment that promotes their freedom to defend rights.

For unexplained reasons, the State does not mention the fact that during the preparation of its periodic report, it was in the process of developing a national human rights plan. In February 2018, the State adopted the new “National Human Rights Plan 2018-2021” (“*PNDDHH*”). Within the current briefing, we have restricted ourselves to an evaluation of the *PNDDHH*’s content only with reference to indigenous peoples and human rights defenders.¹³² Unfortunately, its treatment of the issue of defenders, and indigenous peoples, is minimal. Regarding defenders, there are no immediate or effective commitments in the strategy to protect them. In the *PNDDHH*’s strategic section, the State only commits itself to establishing a “*register of threatening situations for human rights defenders*” by 2019 (without any further explanation of this concept), and to developing a “*mechanism implementing the protection of human rights defenders*”, by 2021 (a three year period).¹³³

This strategy, in regards to defenders, lacks details and any concrete action for achieving the objectives. For example, despite the recommendations of the Commission to “*take the necessary steps immediately*”, the *PNDDHH* does not indicate what it will do, between now and the 2019 - 2021 period, to improve the situation for defenders - by increasing investigations when there are incidents of violence and reprisals, reforms of laws, training relevant actors such as police, etcetera.¹³⁴ It is the same with respect to indigenous peoples and their insecurity of tenure. The *PNDDHH* asserts that at “*present 50.22% of all native communities are without titled property*”, yet the “*detailed*” solution to this is merely to “*improve the titling processes for indigenous lands, with a special emphasis on the Amazon*”.¹³⁵ This latter point is an objective and not a definite action. Furthermore, an attempt to “*secure the legal ordering of indigenous peoples’ territories within the current legal framework*” has been expressed as a “*strategic action*”.¹³⁶ Nevertheless, this strategy does not define how the State will achieve such clarification (no details).

During the elaboration of the *PNDDHH*, civil society representatives proposed several measures for protecting rights defenders, yet these were not acted upon nor incorporated by the State. Nor were any measures included that resemble any of the recommendations advanced by the UN Special Rapporteur on the Situation of Human Rights Defenders and / or those of the IACHR.¹³⁷

G. Implementation of the Law of the Right to Prior Consultation (articles 2 and 5)

In the 2009 Concluding Observations, the Committee expressed “*its concern at the considerable tension, even leading to violence, generated in the country by the exploitation of the subsoil resources of the traditional territories of the indigenous peoples*” while stating the requirement over the right of consultation and informed consent “*prior to the exploitation of*

¹³² Decreto Supremo 002-2018-JUS aprueban Plan Nacional de Derechos Humanos 2018-2021 (febrero de 2018).

¹³³ *PNDDHH*, p. 129.

¹³⁴ *Ibidem*, pp.128-29 (the two pages which cover the topic of defenders).

¹³⁵ *Ibidem.*, p. 130.

¹³⁶ *Ibidem.*, p. 134.

¹³⁷ See generally Situation of Human Rights Defenders, Special Rapporteur on the situation of human rights defenders, A/72/170 (19 July 2017); Comisión Interamericana de Derechos Humanos. Hacia una política integral de protección a personas defensoras de derechos humanos.

*natural resources in their territories is not fully respected in practice.*¹³⁸ Therefore, it recommended the adoption of the law of consultation and participation (possibly made in 2011), and exhorted:

*“States parties, to ensure with reference to indigenous peoples “that no decisions directly relating to their rights and interests are taken without their informed consent”. In the light of that general recommendation, the Committee urges the State party to consult the communities of the indigenous peoples concerned at each step of the process and to obtain their consent before plans to extract natural resources are implemented.”*¹³⁹

Furthermore, in the 2014 Concluding Observations, the Committee “welcomes the adoption of the Right to Prior Consultation Act [2011] and its Regulations” yet expressed their concern over “information received on the lack of resources or a proper methodology for the implementation of the consultation process. The Committee also regrets the exclusion from the consultation process of projects relating to the mining sector and the constraints placed on determining which peoples should be consulted.”¹⁴⁰ CERD recommended that the State:

- a) *Adopt an appropriate methodology for conducting prior consultation procedures in conformity with international standards and ensure the allocation of sufficient resources;*
- b) *Ensure that all projects on the development and exploitation of natural resources, including mining operations, are submitted to the consultation process with a view to obtaining the free, prior and informed consent of communities that may be affected;*
- c) *Guarantee that all indigenous communities, either from the Andean or the Amazonian region, that may be affected, directly or indirectly, by the adoption of a legislative or administrative measure should be duly consulted.*¹⁴¹

As a response, in the last Periodic Report of Peru (2016), the State discusses the subject of prior consultation including references to “24 prior consultation processes, and in 21 cases the dialogue stage had concluded with agreements between indigenous peoples and the State”;¹⁴² these included projects such as the Hidrovía Amazónica waterway improvement project, as well as “11 prior consultation processes have been launched in relation to hydrocarbon blocks 189, 195, 175, 169, 164, 190, 191, 192, 165, 197 and 198.”¹⁴³ In addition, without describing current and measurable results, it mentions that the “Ministry of

¹³⁸ Concluding Observations 2009, para. 14.

¹³⁹ *Ibidem.*

¹⁴⁰ Concluding Observations 2014, para. 14.

¹⁴¹ *Ibidem.*

¹⁴² Those prior consultation processes which have already concluded the dialogue stage with agreements dealt with the following: hydrocarbons blocks 189, 195, 175, 169, 164, 190, 191, 192, 165, 197 and 198; Regional Conservation Area Maijuna Kichwa; Hidrovía Amazónica; Proposal to Categorise Sierra del Divisor as a Reserved Area; Regulation of the Forestry and Wildlife Law; Cultural Health Policy; Proposal for Regional Conservation Area Tres Cañones; National Plan for Intercultural Bilingual Education; Regulation of the Languages Law; Proposal for Master Plan for Regional Conservation Area Imiria.

¹⁴³ Periodic Report by Peru (2016), paras. 56 and 59.

Culture has drafted a proposal for technical and policy guidelines on the recognition of native communities with the aim of standardizing the processes by which native communities are recognized; such processes are currently the responsibility of the regional governments.”

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The State failed to mention several critically important points to the Committee.

- a. ***First, the State failed to admit that it does not have a plan, nor programmed measures, to systematically remedy the violations of indigenous rights that have resulted from all the approved projects and from the granting of previous concessions that never had prior consultations nor consent processes***, even prior to adopting the Law of Consultation (Law No. 29785), published on 7 September 7 2011. The Community of Santa Clara de Uchunya, for example, was never consulted on the issuing and sale of its territory to a palm oil company nor in the issuance of possession certificates to individuals within its traditional territory. *The obligation of prior consultation and the right to consent existed prior to the adoption of the Law of Prior Consultation* and therefore also applies to Kichwa communities whose territory was overlapped with the ACR-CE in 2005. This means that violations occurred and according to the law, an effective remedy is required. The Constitutional Court of Peru affirmed this in 2010.¹⁴⁵

- b. ***The State omitted to say that the non-application of the Law of Prior Consultation is discriminatory and often not applied when there is a mandate to do so***. For example:

1. At this present moment, despite the existence of the Law of Prior Consultation and despite the fact that the Committee recommended the State’s “immediate suspension” of plans to expand the Camisea gas project (Block 88), located within one of the reserves established for the PIACI - the Kugapakori Nahua Nanti Reserve – the State went on to approve expansion without applying the Law of Prior Consultation. The absence of prior consultation was explained to the Committee in a communication from AIDSESEP, ORAU, COMARU, and FPP delivered in January 2013.¹⁴⁶

2. Despite the serious and repeated cases of conflicts between indigenous peoples and palm oil companies at a national level, in June 2016, the MINAGRI pre-published the proposal of the National Plan for Sustainable Development of *Palma Aceitera* in Peru 2016-2025 (the “**Plan**”). This Plan, which defines public policies on the matter, seeks to “*improve the competitiveness of the productive chain of oil palm, so that it is economically, socially and environmentally sustainable*”.¹⁴⁷ Nevertheless, it lacks an approach that includes the

¹⁴⁴ *Ibidem.*, para. 63.

¹⁴⁵ Constitutional Tribunal Sentence N° 0022 2009PI (9 June 2010), grounds 11 to 13 (“Convention 169 is applicable since 1995 and the obligation to consult was not created with the law”).

¹⁴⁶ “Request for Consideration of the Situation of the Indigenous Peoples living in Voluntary Isolation and Initial Contact in the Kugapakori Nahua Nanti Reserve in Peru under the UN CERD’s Urgent Action and Early Warning Procedures. 25 January 2013.

<https://www.forestpeoples.org/en/topics/extractive-industries/publication/2013/request-consideration-situation-indigenous-peoples-liv>

¹⁴⁷ See Resolution No 0281—2016-MINAGRI (16 June 2016): <http://www.minagri.gob.pe/portal/download/pdf/marcolegal/normaslegales/resolucionesministeriales/2016/junio/rm281-2016-minagri.pdf>.

perspective of indigenous peoples. The Plan, in spite of recognizing that the new oil palm plantations will overlap the territories of indigenous peoples, fails to adopt any necessary measures to protect them. For this reason, in September 2016, FECONAU requested MINAGRI to subject the Plan to a formal process of prior consultation with indigenous peoples.

In March 2017, the Vice Ministry of Interculturality ("**VMI**") issued Resolution No. 014-2017-VMI-MC, in which it ordered MINAGRI to consult the Plan with indigenous peoples, while concluding that there are 13 indigenous communities that inhabit the oil palm production zones previously identified in the National Plan proposal, in four departments: Loreto, *San Martín*, Huánuco and *Ucayali*; and, in turn, five sectors of the *Selva* Region, with agricultural potential, affecting 11 indigenous communities. In regards to the Plan the VMI said that as a consequence:

*“It would directly affect the right to decide development priorities and the participation of indigenous or native peoples located within sectors of the forest with agricultural potential, given that the increase in oil palm cultivation could influence the control over the use of natural resources in indigenous peoples’ lands or territories, particularly for the lands that are in possession or in the process of titling, as well as those that surround new palm plantations.”*¹⁴⁸

Despite this, the State has not initiated consultations with the indigenous peoples of the four departments, including *Ucayali*.

3. In addition, in August 2016, the Regional Government of *Ucayali* published the 2016-2026 Oil Palm Competitiveness Plan, through Regional Ordinance No. 006-2016-GRU-CR. This Regional Plan promoted by the palm oil industry, we estimate, should have consulted the indigenous peoples that could potentially be affected. To date, they have not initiated such consultations.

4. The Government is reluctant to consult the Moyobamba Iquitos Electricity Transmission Line project promoted by the Ministry of Energy and Mines invoking the Fifteenth, Complementary, Transitory and Final Provision of the Regulations of the Prior Consultation Law, approved by Supreme Decree 001-2012 -MC. All this despite the fact that this project has an extension of 600 kilometres, while deforesting 50 metres on either side of the extension for its entire length, and the communities will not be provided with electricity nor receive compensation.

c. The State omitted any mention of criticism by a UN rapporteur in respect to the consultations carried out on Block 169.

Block 169 extends over 400,000 hectares in the provinces of Coronel Portillo and Atalaya in the *Ucayali* region, where there are Amahuaca, Asheninka and Yaminahua indigenous

¹⁴⁸ See Resolution (Spanish only) incorporated into CAAAP press release (17 May 2017) “Ordenan consulta previa del Plan Nacional de Palma Aceitera”: <http://www.caaap.org.pe/website/2017/05/17/ordenan-consulta-previa-del-plan-nacional-de-palma-aceitera/>.

communities living. After the conclusion of the consultations, the UN Special Rapporteur on the Rights of Indigenous Peoples, noted that such a consultation on block 169 “*provides a significant example of the progress and shortcomings of the practical implementation of prior consultation related to extractive projects*” and that “*the agreements reached are inadequate*”.¹⁴⁹ It is worth noting the Special Rapporteur’s acknowledgment that the information provided by Perupetro was insufficient for making informed decisions,¹⁵⁰ that there was no access to “*the necessary measures to address power imbalances between the negotiating parties*”,¹⁵¹ and in direct opposition to the Rapporteur’s recommendations, requests by communities in respect to the prior titling of their lands were excluded from the process and merely transferred to the competent State institutions,¹⁵² and the agreements “*do not contain the fundamentals in order to be considered equitable agreements centred on the rights of indigenous peoples.*”¹⁵³

- d. ***At this present moment, the situation regarding the implementation of prior consultation in Peru is precarious, especially with regards to extractive industries. The main mining projects in the country, located on the ancestral territory of the Andean indigenous peoples, have not been subject to consultation.***

Note the following projects as examples: Antapaccay (Glencore) and Constanca (HudBay Minerals) in Cusco, and Las Bambas (Minerals and Metals Group) in Apurímac. In the hydrocarbon sector, the consultations undertaken have been flawed and harshly questioned, such as the criticisms from the UN Special Rapporteur on the Rights of Indigenous Peoples, on the case of Block 192 (Pluspetrol) in Loreto and Blocks 169 and 88.

¹⁴⁹ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples’ rights in Peru with regard to the extractive industries, A/HRC/27/52/Add.3, paras. 47 and 54 (7 May 2014) (“**Special Rapporteur Report (2014)**”).

¹⁵⁰ Special Rapporteur Report (2014), paras. 47 and 49 (“Within this legal framework, prior consultation related to Block 169 was conducted before the fundamentals of the future project had been determined, including the nomination of the project operator, the methods of exploration and extraction of gas and petroleum, and the extent of their impact...From the information available, it would appear that Perupetro did not provide indigenous peoples with information concerning the potential economic benefits and profits generated by petroleum-related activities, beyond royalties and compensation, contrary to the Special Rapporteur’s previous recommendation...”).

¹⁵¹ *Ibidem*, para. 50 (“It is worth noting that the indigenous community representatives who participated in the process did not have access to state-independent legal or expert advice, as recommended by the Special Rapporteur as part of the necessary measures to address power imbalances between the negotiating parties...”).

¹⁵² *Ibidem*, para. 51 (“During this stage, the indigenous representatives proposed the titling of their lands, as well as the provision of various social services, such as the construction of schools and health clinics, and electricity networks. However, these proposals were deemed to be “unrelated to the administrative measures” pertaining to the consultation process, and, in accordance with the Perupetro proposal, it was agreed that these requests should be referred to the competent State institutions “for evaluation within the scope of their competence and a decision on admissibility”. In the view of the Special Rapporteur, it is unwise to exclude these subjects from the dialogue process, given that security of land tenure is a subject of central importance in any discussion on extractive projects within the territories in question, and that an environment of trust needs to be created in order to reach lasting agreements”).

¹⁵³ *Ibidem*, para. 54 (“the agreements reached are inadequate for various reasons. They do not contain the fundamentals in order to be considered equitable agreements centred on the rights of indigenous peoples, such as mitigation of the impacts and the effective participation of the indigenous peoples in the development of the project and its eventual benefits... Nor is there any guarantee that the communities affected can revise or participate in the negotiation of the agreement to be signed between the Government and the contractor for oil and gas exploration and exploitation, despite the indigenous representatives having expressed this concern. In that regard, it was agreed only that “Perupetro will provide periodic information (every four months) on the activities carried out as part of the hydrocarbon exploration and exploitation projects”. Furthermore, the agreements reached do not appear to offer adequate protection for the substantive rights of the indigenous communities affected, especially during future hydrocarbon exploitation in the block.”)

- e. *The State does not mention that, with agreements presumably reached after completing the dialogue stage, in respect to several projects including the Hidrovía Project,¹⁵⁴ consultation over the Hidrovía Project was only carried out after being ordered by two domestic courts and, like Block 169, was not consistent with international standards binding on Peru.*

For example, lawyer Lic. Juan Carlos Ruíz Molleda, stated that the “consultation of the Hidrovía project was carried out without the people understanding the environmental impacts that would result from the project, what it is to dredge Amazonian rivers for larger ships to pass. That is to say there was no the Environmental Impact Assessment (EIA).”¹⁵⁵ How could a just and equitable consultation be carried out without the community having the results of the environmental assessment (least of all a study related to the social impacts)? Lic. Ruíz continued, remarking that the communities “do not have enough information, they do not have the necessary time, they do not have the necessary level of advice and the State comes with all its equipment, putting pressure and setting tight deadlines as it did in the Hidrovía Amazónica, that is not dialogue, that is imposition.”¹⁵⁶ (For more information about the consultation of this project and the claims of those affected which has resulted in a judicial order that is yet to be carried out, see Annex 5).

- f. *The State failed to mention that, in some circumstances, it only initiated prior consultations due to court orders, which themselves were the result of stakeholders demanding trials (as it was for the Hidrovía Project).*

This was the case for the consultation over the 220 kV Moyobamba-Iquitos Transmission Line project and its Associated Substations (“Transmission Line Project”). This project seeks to provide efficient and high quality energy to the city of Iquitos. To enable this, a high voltage electric transmission line in the middle of the Amazon jungle, spanning over 600 kilometers in length, has been planned to interconnect with the cities of Moyobamba (San Martín). This would require deforesting a width of 50 metres, on either side of its entire route. The deforestation of this area creates the risk of indigenous peoples’ lands being invaded, the conducting of illicit activities (illegal logging, illegal mining, land trafficking, drug trafficking, among others) and the loss of biodiversity and natural resources. Worse yet, the project has not considered providing electrical power to affected indigenous peoples, let alone providing compensation. This State project has been developed behind the backs of the Achuar, Chumicuro, Kandozi, Kukama, Shawi, Shiwillo and Urarina peoples, in San Martín and Loreto. In spite of everything, the project was awarded to the company Líneas de Transmisión Peruana S.A.C. in October 2014.

The project was, nevertheless, not consulted by the State, and consequently the Regional Organization of Indigenous Peoples of the East (ORPIO) filed, in October 2015, a request for protection before the First Civil Court of Iquitos. They demanded the suspension of the project until the completion of the consultation process. The case is still pending its First

¹⁵⁴ Periodic Report by the State (2016), para. 56, footnote 12.

¹⁵⁵ “Detrás de una consulta no hay un diálogo legítimo, sino la imposición del lado más fuerte” (article available in Spanish only) (25 February 2018): <https://consultape.com/2018/02/26/detras-de-una-consulta-no-hay-un-dialogo-legitimo-sino-la-imposicion-del-lado-mas-fuerte/>

¹⁵⁶ *Ibidem*.

Instance in court. Shortly after these actions, the VMI - rector on issues related to indigenous peoples in Peru - moved to categorically reject the possibility of consulting projects regarding public services, even when they affect indigenous peoples. This was obtained via the Vice-Ministerial Resolution N ° 013-2016-VMI-MC.

- g. ***The State will not admit to the Committee that the role of the Vice Ministry of Interculturality has been counterproductive in certain matters, if not hindering, opposing the consultations.***

The impression of the Presenting Organizations is that international standards have continually been lowered in order to carry out prior consultations in Peru. An important case that depicts this situation is that of the communities of Arboleda and San José de Llungo, in the Andean region of Puno. In 2011, both filed lawsuits that are currently before the Constitutional Court, where they are demanding the prior consultation of mining concessions established on their territories. In both processes, the VMI has requested its inclusion as an affected party and is asking the Court to reject the demands of the communities. Quite contrary to its functions, it is intervening against the rights of indigenous peoples. This, of course, leads us back to one of the main problems of indigenous peoples in Peru: mining concessions are not subject to consultation, and affected indigenous people can only use the courts, with all the associated difficulties, to claim their rights. In addition, public institutions are still reluctant to consult projects approved prior to the issuance of the Law of Prior Consultation (2011), despite the fact that this duty and obligation was affirmed in Convention No. 169 and the Convention, applicable in Peru since February 1995 and 1971 respectively.

- h. ***The State avoids mentioning that there are several deficiencies in the Law of Prior Consultation that, until they are rectified, render the law inconsistent with the standards applicable to Peru.***

1. Despite the fact that the ILO Convention 169 and the Convention have been in force since 2 February 1995 and 29 September 1971 respectively, as has been recognized by the Constitutional Court,¹⁵⁷ and as this high court has stated, since their inception, they are mandatory and enforceable, including the second final provision of the Law of Consultation (Law No. 29785), which reiterated that this law does not modify or repeal any legislative and administrative measures prior to its publication (September 2011), and in doing so makes this right applicable to any administrative and regulatory acts issued between 1995 and 2011.¹⁵⁸

2. Article 7 of the Law of Prior Consultation and the directive¹⁵⁹ that create the database of indigenous peoples, has determined, that in order to be considered an indigenous people and, consequently, for the right to consultation to apply, in addition to the requirements

¹⁵⁷ Constitutional Tribunal Sentence N° 0022 2009PI (9 June 2010), grounds 11 to 13 (“Convention 169 is applicable since 1995 and the obligation to consult was not created with the law”).

¹⁵⁸ ‘¿Son válidas las concesiones mineras y petroleras no consultadas?’, (article available in Spanish only): <https://www.servindi.org/actualidad/71081>. See also ‘¿Tienen validez los actos administrativos y legislativos no consultados con los pueblos indígenas expedidos antes de la Ley de Consulta?’, available (Spanish only) at <https://www.servindi.org/actualidad/51225>.

¹⁵⁹ The Ministerial Order N° 202-2012-MC approved Directive N° 03-2012/MC, which regulates the functioning of the Official Database of Indigenous or Original Peoples.

established by the applicable international law, the people are required to remain in the territory or preserve the language.¹⁶⁰ Although it has been said that they are not mandatory in regards to the Directive, these requirements are being used by many mining companies to evade consultation.

3. The Law of Prior Consultation does not guarantee the inclusion of indigenous peoples who have already been deprived by the interests which the State has granted to others. Without completing the obligation of registering the ancestral territories of the native and rural communities (which in the case of native communities amounts to approximately 20 million hectares),¹⁶¹ the Government continues to hand out all forms of rights over these territories (through mining and hydrocarbons easements, certificates of possession, mining concessions, etc.); not only does this create legal insecurities for indigenous peoples, it also displaces them from their ancestral territories. This makes it difficult to evaluate when there is an impact on indigenous peoples, which is essential to examine the relevance of consultation in specific cases.¹⁶² It is difficult to consult with those who have been displaced, yet it is easy to advance the idea that there are no indigenous people present to participate in the consultations.

i. ***The State does not mention that in the practical application of the consultation process, there are several violations of the international standards applicable to Peru:***

1. In spite of being a requirement of the applicable standards, in practice, there is no consultation prior to the granting of concessions. Although this is the first decision that affects the right of ownership over the territory of rural and native communities, the Ministry of Culture, the Ministry of Energy and Mines and the Geological, Mining and Metallurgical Institute (in the case of mining concessions or oil companies) do not consult over this first decision. In effect, the Regulation of the Law of Consultation, approved by Supreme Decree N ° 001-2012-MC, establishes in its article 3.i that the acts that should be consulted among others are the “*administrative act that authorizes the beginning of an activity or project.*”

2. Companies continue to hold information workshops with the complacency of the Vice Ministry of Interculturality, despite the fact that the Prior Consultation Law, the Convention and ILO Convention 169 all require that it be carried out by the State.¹⁶³ All this, despite the Supreme Court and the Constitutional Court¹⁶⁴ of Peru having indicated that informative

¹⁶⁰ ‘Ministerio de Cultura bloquea la consulta previa de las concesiones mineras e invisibiliza a los PPII en Espinar’, available (Spanish only) at: <https://www.servindi.org/actualidad/128135> See also ‘Federación distrital de campesinos de Cusco presenta demanda contra la directiva del Ministerio de Cultura por desnaturalizar el Convenio 169 de la OIT’, available (Spanish only) at: <https://www.servindi.org/actualidad/83701>.

¹⁶¹ These lands span 20 million hectares, though are not confined to the legal entity of communities. Those 20 million hectares include communal reserves, territorial reserves and an estimation of integral territories.

¹⁶² ‘El artículo 14 del Reglamento de la Ley N° 30230 no es idóneo para proteger los derechos de las comunidades campesinas y nativas’, available (Spanish only) at: <https://es.scribd.com/document/367824865/El-Articulo-14-Del-Reglamento-de-La-Ley-30230-Es-Insuficiente>. See also ‘¿Cómo despojar a las comunidades nativas de sus territorios ancestrales a través de las “constancias de posesión”?’, available (Spanish only) at: <https://www.servindi.org/actualidad-noticias/24/04/2016/constancias-de-posesion-instrumento-ilegal-para-el-despojo-comunal>.

¹⁶³ They justify this based on the second final provision of the Law of Prior Consultation, which establishes that this law does not derogate or leave without effect rules for citizen participation, which are the same as those used by companies and the State to pass off their information workshops as prior consultations. We refer here to Supreme Decrees No 012-2008-MEM (which approved the Regulation for Citizen Participation in Hydrocarbon Activities) and article 4 of Supreme Decree No 028-2008-MEM (which approved the Regulation for Citizen Participation in Mining Activities).

¹⁶⁴ Constitutional Tribunal Sentence 05427-2009-PC, legal basis 62.

workshops do not exonerate the State of its obligation to carry out consultations; this led the Supreme Court to declare that regulatory norms that validate consultation with informative workshops¹⁶⁵ are unconstitutional. Workshops held by companies do not absolve the State of its obligation and duty to consult with indigenous peoples.

3. The companies, with the acquiescence of the State, use the "prior agreement" as a way to avoid prior consultations.¹⁶⁶ This figure is included in article 7 of the "Law on private investment in the development of economic activities in the lands of the national territory and of peasant and native communities" (Law No. 26505). Such an article requires prior agreements before establishing mining rights.¹⁶⁷ Unfortunately, in practice, through it, agreements between the affected communities and companies have been promoted, in contexts of the asymmetry of power,¹⁶⁸ and therefore, in unfavourable conditions for the native communities. These agreements, which are conducted without the presence of the State, are simply the imposition of contracts where communities are coerced and forced to renounce their rights, simply disguising these agreements as if they were contracts between equal parties. These contracts are widely used, for example, to buy the territories of rural communities at ridiculous prices.¹⁶⁹

4. In the application of the Law of Prior Consultation, there is an emphatic ignorance over the obligation to obtain consent.¹⁷⁰ Despite the fact that the purpose of the consultation process is that an agreement can be reached between both the State and the indigenous peoples affected by the particular actions, or for them to give their consent regarding the specific actions, in reality, the consultation process has become a bureaucratic procedure, one where the State does not exhaust the means to reach an agreement. The normative basis of this position is Article 15 of the Law of Prior Consultation, approved by Law 29785, where it is clearly stated that if no agreement between both parties is reached, the State is at liberty to make the decision.¹⁷¹ A good example of this is the consultation process of Block 192, where the MINEM never sought to reach an agreement with the indigenous organizations FEDIQUEP and FECONACO, but rather sought to impose unilateral and uncompromising measures, all with the consent of the VMI. In addition, the law does not deal with the due process that must be applied if the State decides, contrary to the decision of the people, to continue with the project and/or activities in question.

¹⁶⁵ On 23 May 2013, the Permanent Chamber for Constitutional and Social Law of the Supreme Court issued a ruling in the Acción Popular legal proceedings on file no. 2232-2012, presented by IDL against article 4 of Supreme Decree N° 028-2008-EM, for attempting to pass off information workshops as prior consultations. Said judicial body ultimately and definitively declared the aforementioned article 4 to be unconstitutional, ruling that as a consequence it be removed from the judicial code for essentially attempting to exonerate the State of its obligation to conduct prior consultation processes with indigenous peoples using information workshops.

¹⁶⁶ '¿Cómo sacarle la vuelta al derecho a la consulta previa de los pueblos indígenas? ¿El derecho civil vs el derecho constitucional?', available (Spanish only) at: [:https://www.servindi.org/actualidad/56131](https://www.servindi.org/actualidad/56131). See also 'Crítica a la figura del "acuerdo previo" entre pueblos indígenas y empresas que realizan actividades extractivas en territorios indígenas', available (Spanish only) at: <https://jruizmollada.blogspot.co.uk/2013/04/critica-la-figura-del-acuerdo-previo.html>

¹⁶⁷ Article 7 highlights "Without the prior agreement of the land-owner, the establishment of mining exploitation rights does not proceed. In the event that the Council of Ministers agree to consider the deposit to be of national interest, on the report of the Ministry of Energy and Mines, the owner will be compensated beforehand, by the mining title-holder with the corresponding fair market value and compensation." (unofficial translation).

¹⁶⁸ 'La estrategia de "invisibilización" de los derechos de los pueblos indígenas: Comunidades campesinas de Puno firman "Acuerdo Marco"', available (Spanish only) at: <https://www.servindi.org/actualidad/102151>.

¹⁶⁹ "¿Son válidas las compras que las empresas mineras hacen de las tierras de comunidades campesinas a precios ínfimos?", available (Spanish only) at: <https://www.alainet.org/es/active/50953>.

¹⁷⁰ See (Spanish only): <http://observatoriopetrolero.org/lote-192-la-desnaturalizacion-de-la-finalidad-de-la-consulta-previa/>.

¹⁷¹ Art. 15 of the Law of Prior Consultation ("The final decision as to the approval of the legislative or administrative measure corresponds to the competent State entity" (unofficial translation)).

H. Multiple forms of discrimination (articles 5 and 6)

In its Concluding Observations (2014), the Committee expressed its concern that:

*“indigenous and Afro-Peruvian women continue to encounter multiple forms of discrimination in the areas of education, employment and health, that they continue to be victims of gender-based violence and that they face difficulties in gaining access to justice. The Committee is also dismayed by reports of discrimination suffered by many female domestic workers owing to their ethnic origin.”*¹⁷²

Moreover, it recommended that **“The Committee also urges the State party to take measures with an intercultural focus to improve access by women who are victims of discrimination and violence to education, employment, health and justice.”**¹⁷³

In the last Periodic Report by Peru (2016), the State does not recognise the impact on women of social conflicts arising from insecurity of tenure for indigenous peoples and the interference with their property rights and culture caused by extractive industries and conservation areas established without respect for their rights.¹⁷⁴

To the extent which large-scale natural resource extraction projects threaten the territorial integrity of indigenous peoples, they entail far-reaching changes for indigenous Amazonian women, who play a pivotal role in the reproduction of community life in its various dimensions: through raising and forming, socially and culturally, their children; farming and foraging activities which ensure community food security; the creation of handicrafts which express collective identity and memory, and which furthermore currently constitute an important source of income for the household economy. All of these practices are affected by insecurity of territorial tenure, which also increases the vulnerability of women to sexual abuse and violence.

In reality, indigenous women are suffering adverse impacts, discrimination and violence which do not arise from family or domestic problems (the focus of the State), but from the violation of the collective rights of their indigenous people. Both in Ucayali and San Martín, for example, Shipibo-Konibo and Kichwa women are responsible for cultivating various crops which are fundamental to family subsistence, including cassava, maize, beans, squash and rice. Moreover, they emphasize that access and use of their traditional forests is essential in order for them to gather seeds, such as *huayruro*, bark and fibres from various trees and clay, which they use to create handicrafts. These handicrafts are at once an expression of indigenous identities and cultures, as well as one of the few sources of income available to women in particular and indigenous communities in general. Therefore, the loss of access to territory and above all to traditional forests produces harmful effects for women.

¹⁷² Concluding Observations 2014, para. 17.

¹⁷³ *Ibid.*

¹⁷⁴ Peru Periodic Report (2016), see generally and paras. 68, 89-94.

I. Access to the administration of justice (articles 4, 5 and 6)

Article 5 of the Convention guarantees “the right to equal treatment before the tribunals and all other organs administering justice” and article 6 requires the States Parties “shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination ... as well as the right to seek from such tribunals just and adequate reparation or satisfaction...”

In the most recent periodic report of Peru (2016), the State describes the various actions being taken by the new General Directorate of the Public Defence Service and Access to Justice of the Ministry of Justice and Human Rights to improve access to the Administration of Justice (including providing public criminal defenders, providing free legal assistance and public defenders fluent in indigenous languages)¹⁷⁵ and describes some relevant jurisprudence from its domestic courts.¹⁷⁶ As in other sections of the State report, much is omitted and it does not describe qualified positive impacts.

In this section, the Presenting Organisations offer the argument that Peru has not complied with its duties and obligations to provide access to justice with equal treatment and access to protection and just and adequate remedies.

i. Ucayali: Neither actions in national tribunals nor decisions by international bodies elicit remediation and reforms from the State

In the case of Ucayali, for example, the Community of Santa Clara has filed various lawsuits seeking the restitution of their lands, respect for the constitutional and international guarantees applicable to them within the Peruvian legal framework, the cessation of the illegal and damaging activities of PP/Ocho Sur, and sanctions and penalties for the criminal and/or illegal actions of regional and national functionaries involved in the administration and titling of lands. To date, even following the conclusions of its own MINAGRI (see sections C and D), as well as a decision by the independent and international Complaints Panel of the RSPO, the requests of the Community remain yet to be resolved and have failed to elicit a positive response from the State.

As explained above, in May 2016, the community of Santa Clara filed a constitutional lawsuit (through a constitutional procedure) against the Regional Government of Ucayali, the company PP/Ocho Sur and other public entities. The lawsuit aims to bring about the restitution of property over their ancestral territory, currently occupied by the palm oil company, and environmental remediation. The lawsuit is currently in the Constitutional Tribunal, through constitutional remedy, and more than two years since the initial complaint, a decision remains pending regarding only questions of form, and not essence. Along with the lawsuit, the community requested that protectionary measures be granted in their favour. However, these were not granted. Everything remains pending and this entails shifting the costs of the inefficiency of the institutions onto the affected indigenous people.

In the criminal procedure, in May 2015 the community lodged a criminal complaint against the company, its representatives and workers, as well as functionaries of the Regional

¹⁷⁵ *Ibidem.*, paras. 9 and 10.

¹⁷⁶ *Ibidem.*, paras. 11-17.

Government, for the commission of environmental crimes. The case was directed to the Provincial Criminal Prosecutor Office of Pucallpa and, according to the speciality involved, was subsequently sent to the First Specialised Prosecutor's Office for Environmental Matters of Ucayali, in Pucallpa. Since then, the prosecutor in charge has directed the investigation slowly and with scarce economic and logistical resources. To date, these investigations have not concluded. In August 2017 (two years and three months later), the Prosecutor's Office formalised the investigation (that is to say, it found sufficient indications to attest to the occurrence of a crime and those responsible) and ordered that an investigation be undertaken for a further six months. The prosecutor identified the commission of crimes, as well as environmental, against public administration, money laundering and organised crime. However, in December 2017, the case was referred – owing to its complexity – to the First Specialised Supra Provincial Corporate Prosecutor's Office Against Organised Crime, in Lima. *Two years and ten months after the complaint, the Prosecutor's Office continues its supplementary investigations without bringing forth charges.* On the other hand, the competent court was also altered, from the Fourth Court for Preparatory Investigation of Huanuco, to the Third National Court for Preparatory Investigation, in Lima.

In addition, towards the end of December 2017, the Public Prosecutor of the Ministry of the Environment requested protectionary measures against the palm oil company, with the purpose that it be ordered to halt its activities in the area. In February 2018, these measures were granted by the National Court. However, to date they have not been executed and those responsible continue to act with impunity and with the tacit, if not express, acquiescence of the State. *On the other hand, it is necessary to emphasise that the Public Ministry (both in Pucallpa and in Lima) has not deemed to consider that the community is affected in the case, but rather only the Peruvian State.*

ii. Generally: barriers to access to justice – especially concerning harm to indigenous peoples by environmental damage

Whilst it is not clear from the periodic report by Peru (2016), in reality, there is discrimination in the administration of justice applicable to indigenous peoples and a disavowal of the right to access justice and just and equitable remediation. In fact, the administration of justice in Peru intensifies when we refer to indigenous peoples. There presently exist barriers which constitute a denial of their right to access justice. These may be considered discriminatory. Currently, there is a need for translators and interpreters who can assist indigenous persons subject to criminal procedures, who have the capacity to enable them to participate in them and allow them to have an effective defence, especially in cases where they are tried for their participation in social conflicts. Even if it is the case that there exists a national register of interpreters and translators, we consider that it is insufficient and does not achieve its objective.

In the case of environmental justice, the Peruvian State still does not recognise the right of those indigenous peoples affected by environmental crimes to be considered as directly harmed (as a civil actor, in the Peruvian criminal procedural law), with the right to reparations. Equally, there are barriers relating to the fact that courts and prosecutors specialised in environmental matters do not exist throughout the whole country, meaning that cases which affect indigenous peoples due to the depredation of their territories have to be investigated and resolved by ordinary prosecutors and judges. It is even the case, such as

occurs in Ucayali, that there are environmental prosecutors' offices, but not courts (and vice versa). This situation is even more awkward, because it requires that indigenous persons (whether they be accused, witnesses or complainants) must travel from one locality to another. In the case which occupies us, the indigenous people in question must travel from the city of Pucallpa, capital of Ucayali, to Huánuco, capital of the department with the same name. The journey lasts approximately eight hours, it is costly and implies crossing a rugged landscape. It is necessary, therefore, the creation of prosecutors' offices and courts specialised in environmental matters at the very least in those areas where the problem is most overwhelming, like in Ucayali.

Another problem, in the case of environmental justice, is the limited operating capacity of the environmental prosecutors, which lack suitable staff and tools to carry out effective work. For instance, they lack sufficient police to accompany them in operations which involve grave danger, which in many cases makes it impossible to carry out field inspections or means that they must do so under constant risk of becoming the object of attacks. This makes it impossible to obtain evidence, which is indispensable for determining the criminal responsibility of a subject. Nor do they have sufficient means to travel (by land, air or river), which also restricts their capacity to act. This is the case for the Prosecutor's Office Specialised in Environmental Matters of Ucayali, which has to hire its own means of transport, with the costs which that generates for its already diminished budget. By the same measure, they lack specialised laboratories for analysing the necessary samples of flora and fauna, or for carrying out soil, water and air quality tests. They depend, very often, on laboratories located in the capital, Lima, with the risk that the evidence deteriorates either partially or completely.

In turn, all of this impacts directly on the duration of investigations, which become permanently prolonged. Finally, this favours a climate of impunity, especially perverse when those harmed by the crimes are indigenous peoples, who require criminal proceedings to halt attacks on their human rights. The defects of the system end up perpetuating their suffering. This is the case of the community Santa Clara de Uchunya, of the Shipibo-Konibo people, which denounced the deforestation of more than seven thousand hectares of forests within their ancestral territory owing to the installation of oil palm monocultures, with no sanctions upon those responsible to date. On the contrary, they continue to elude prosecution, which has been especially slow. For example, it is sufficient to note that the facts of the case were reported in May 2015 and until today, the process is still at its first stage. The investigation was only just formalised in August 2017.

Another grave problem is the delays in the resolution of legal proceedings. Although this issue cuts across the entire administration of justice in Peru, it is especially detrimental for indigenous peoples, who require urgent and priority attention. Even constitutional justice, where proceedings are designed to be processed with the greatest speed, indigenous peoples can spend years litigating before obtaining a final decision. This is the case, for example, for the Quechua communities of San José de Llungo and Arboleda which, as has already been indicated, have been waiting for a judgement from the Constitutional Tribunal since 2011. Even when indigenous peoples win legal proceedings, it can prove nearly impossible to execute the decisions.

IV. SUGGESTIONS FOR QUESTIONS AND RECOMMENDATIONS OF THE CERD TO THE STATE

A. Questions

Structural Discrimination

1. Please explain how the legal model of “*cesión en uso*”/“*leasehold use contracts*”, permitted by Legislative Decree 22175, is consistent with the full recognition of the property rights of indigenous peoples, which comprise the rights of ownership, use and control of the natural resources which are found in their properties of traditional use and occupation?
2. Specifically, which mechanisms exist in national law and its policies to ensure that the State guarantees a balance between national/public interests and the rights of indigenous peoples?

Insecurity of Tenure

3. What are the actions that the Peruvian State has taken to obtain updated official information on the location and territorial extension of indigenous communities and peoples? Does the Peruvian State have a single and accessible cadastre with updated georeferenced information on the full extent of indigenous peoples’ territories?
4. According to the most recent figures by AIDSESEP (Annex 2), there are more than 1,300 Native Communities with pending requests for recognition, titling and expansion of previously granted titles. Why are there so many pending requests? What new actions is the State taking to remedy this? And while these titles remain pending, what laws and policies exist to implement protective measures to secure the integrity of these lands and natural resources until tenure arrangements can be finalised?
5. Why does the State continue to grant rights to third parties in the territory of the Community of Santa Clara de Uchunya while there is an unresolved territorial claim?
6. Why does the National Human Rights Plan not provide details of the definitive steps to be taken to achieve the regularisation of indigenous territories and the recognition of such territories with land titles?
7. Do cases exist in which the State has granted the restitution of territories to indigenous peoples (or, alternatively, when it provided compensation in other lands or money), when it had issued inconsistent titles in their territories? What is the policy of the State regarding the restitution of indigenous peoples’ lands and the mechanisms to achieve this?

8. How does the State protect indigenous peoples from partial or total economic displacement, owing to restrictions on access to and use of their lands and natural resources, due to the exploitation of natural resources by palm oil or hydrocarbons companies, as well as the establishment of conservation areas?
9. We understand that various indigenous peoples are demanding that the Government title their ancestral territories to them as a people, in an integral way. The Committee received information that there are at least nine indigenous peoples calling for this, however, to date there has not been an effective and substantive response to this demand. Is the position of the State that the right to “integral territory” by people is a demand which has its basis in the rights to self-determination, autonomy and self-government? Does the legal framework of Peru allow for the recognition of territorial titles in the name of peoples, above titles of distinct communities and parts of the complete territory? How many territorial titles have been granted to peoples by the State?

Conservation and Indigenous Peoples

10. How does the State determine the balance between indigenous peoples’ territorial rights and the integration of environmental considerations in relation to conservation areas? How does it manage indigenous peoples’ territorial claims in the context of the establishment of conservation areas which may be superimposed on their lands? What does the legal framework indicate about these situations?
11. When conservation areas coincide with the territories of indigenous peoples, who maintains the property title of the area – the indigenous peoples in question or another entity? Does the State adopt this approach as a matter of course?

Restoration and Remedy for Violations

12. What actions is the State taking to retribute and remedy the violations resulting from projects and concessions which were approved and granted without the prior recognition of indigenous territories and their prior consultation and consent – including in Ucayali with respect to the areas of PP/Ocho Sur and in San Martin, with respect to conservation areas, such as the ACR-CE?

Private/Third-Party Interests

13. In view of the opinions of its own MINAGRI, the Ombudsman’s Office, the Environmental Prosecutor’s Office and the decision of the RSPO, why does the Government of Peru continue to allow Plantaciones de Pucallpa SAC (now Ocho Sur P SAC) to operate in Ucayali? Can it respond to public reports of the misrepresentation of the facts by the regional administration, and the stigmatisation and demonization of indigenous peoples and the organisations which work with them, stemming from a constitutional lawsuit brought by an indigenous community in the

San Martin region, seeking the titling of their lands within the ACR-CE?

14. Why does the National Human Rights Plan lack defined and programmed mechanisms to protect human rights defenders immediately (it only speaks of actions to be taken by 2019 and 2021)? What is the State doing, now, to ensure the sanction of those responsible and end the impunity which prevails with respect to perpetrators of violence and threats against indigenous peoples, who question the exploitation of their lands and resources?

Prior Consultation

15. What measures has the State taken to conduct consultations about Law 1123/2016-CR, which promotes the construction of highways and roads in the Amazonian Ucayali region, and to avoid causing severe impacts on indigenous peoples in isolation and initial contact?
16. Why did the State not begin prior consultations for the Hidrovia Project until a national tribunal ordered it to? Why was the environmental impact assessment (“EIA”) not shared with the communities in the prior consultations for the Hidrovia Project? Is the EIA a requirement of the Law of Prior Consultation? And if this was not complied with, how will the State resolve this important deficiency?
17. In view of the probable damages caused by the expansion of the palm oil sector in Ucayali and other departments in Peru, and the prior adoption of the Law of Prior Consultation, why did the State not conduct consultations for the National Plan for the Sustainable Development of Palm Oil in Peru 2016-2025? What measures is the State taking to remedy this situation?
18. The Committee has received information the Law of Prior Consultation is being undermined under various circumstances, particularly where companies (with the acquiescence of the State) are holding information workshops instead of consultations and obtaining “prior agreements” presumably according to Law 26505, in place of prior consultations with the aim of achieving agreements in accordance with the Law of Prior Consultation. What is the response of the State and what measures is the State taking to prevent these practices, which are inconsistent with its obligations according to the Convention?
19. We understand that Article 15 of the Law of Prior Consultation emphasises that if there isn’t agreement between both parties, then it is the State that decides. If the State decides to continue with the project or activity in question, against the decision of the affected community or people, what additional due diligence is applied to ensure that the restriction or termination of rights is legitimate and in accordance with the applicable standards for Peru under such circumstances?

20. We understand that the Law of Prior Consultation does not have retroactive application. Therefore, what is the State doing with respect to all of the projects, administrative acts and policies which were authorised without prior consultation processes and consent prior to the Law of Prior Consultation in 2011? How is it remedying this?

Isolated Peoples

21. Concerning the mercury contamination of the Nahua community within the RTKNN, what is the source of contamination and what measures has the State taken to exclude the possibility that other neighbouring communities be affected and that there is no relation with the extraction of natural gas from the Reserve?

B. Recommendations for the State

Structural Discrimination

- 1) Amend its laws, regulations and practices to ensure that concepts of national or public interest, modernisation and economic and social development are defined in a participatory manner and take into account the perspectives and interests of all groups living in its territory - including the needs and worldviews of indigenous peoples - and that such concepts are not used as a justification to ignore and subordinate the rights of indigenous peoples, as is the case in Article 5 (paragraph C) of the law for 'isolated peoples,' which permits the extraction of resources within isolated peoples' Reserves in cases of public interest.
- 2) Reconsider the use of "leasehold use contracts" for indigenous lands in forest and conservation areas, in light of their failure to conform with the full recognition of the property rights of indigenous peoples and report on the level of compliance with applicable international standards on these rights in Peru's next report to the Committee.

Titling of Indigenous Lands and Protection of Their Integrity

- 3) Immediate rectification of the property title of the Kichwa Native Community of Nuevo Lamas de Shapaja, in order to recognize their property rights over the entirety of their ancestral territory, including those lands classified as forest or protection which were issued in the form of a "leasehold use contract".
- 4) Expedite the titling process for the lands of indigenous peoples, including the allocation of the necessary resources to the Regional Governments. While these territorial claims have not been resolved, take the necessary measures to guarantee that no other categorization or right – including among others, the creation of state conservation areas, land grants for other activities (agriculture, infrastructure

megaprojects etc.) - must be prohibited, except with the prior, free and informed consent of the indigenous peoples involved.

- 5) Ensure land titling procedures respect the traditional boundaries of the lands of indigenous peoples. When third parties have acquired rights through purchase or other processes sanctioned by the State on indigenous lands without their consent, such actions do not extinguish the right of indigenous peoples to their lands. The State should implement the appropriate measures to restore such lands to indigenous peoples.
- 6) The Regional Government of Ucayali, particularly the Regional Ucayali Directorate of Agriculture (DRAU), must resolve the title application by the Native Community of Santa Clara de Uchunya and until it does so, refrain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the community, including the granting of certificates of possession or titles to third parties, or the continued operation of the oil palm plantations.
- 7) Implement, through the relevant authorities, the recommendations of the Ombudsman's Office in its 2014 report "Analysis of public policies for the recognition and titling of peasant and native communities, Ombudsman's Office" (Report No. 002-2014 -DP / AMASPPI-PPI), and its 2017 report "Deforestation for oil palm and cocoa agroindustrial crops: Between illegality and inefficiency of the State" (Adjuntía Reports Series - Report No. 011-20177-DP / AMASPPI-MA).
- 8) Given the concern that violations of indigenous rights (particularly respect for their property) continue and that these violations still arise from continued differences between national legislation, the Convention and other international norms regarding the territories of indigenous peoples, the Committee exhorts that the State examines the legal norms that regulate the extractive or infrastructure sectors and the conservation and management of resources, and determine where they do not conform either in principle or practice to international standards and recommend and implement the necessary reforms. We urge the State to describe the results of this exercise in its next report to the Committee.

Conservation and Indigenous Peoples

- 9) Reconsider the entire legal framework in Peru and its conformity with applicable international standards while such a framework permits the establishment and management of conservation areas while the rights of ownership, possession, use and management of indigenous peoples are limited or completely ignored.
- 10) Initiate prior consultation processes regarding the establishment and/or retention of conservation areas in the territories and traditional lands of indigenous peoples, and only proceed with the free, prior and informed consent of the affected peoples. The State must prioritize the co-management of these areas (if the peoples wish) with

indigenous peoples and must also consider new arrangements for lease back of such lands, i.e. where indigenous peoples maintain their property rights but the State leases back part of their territory for conservation.

- 11) Guarantee the protection for traditional activities of indigenous peoples in conservation areas. Ensure by law that if in exceptional circumstances there are restrictions, such limits arise only as a result of detailed and specific scientific evidence which show that indigenous peoples represent an important source of harm to the environment, and through processes of free, prior and informed consent with indigenous peoples. Steps must be taken to ensure that due process is observed to guarantee that limitations must be: necessary and proportional to the objective of protection of conservation; restricted according to a current law; judicially reviewable in a court of justice; and that the affected indigenous peoples must be compensated for the loss of traditional rights while such limitations remain in force.
- 12) Recommend to the San Martin Regional Government and the Ministry of the Environment that they conduct a consultation process with the Kichwa native community of Nuevo Lamas de Shapaja and other affected indigenous peoples, in order to obtain their consent for the creation of all protected areas in the region, as well as to agree together on the arrangement of any administration for these areas of which they must be parties. Such arrangements must be consistent with national and international standards in the matter.

Isolated Peoples

- 13) Implement the recommendations advanced by the Platform of indigenous organizations for the Protection of isolated peoples in Peru in its October 2017 hearing before the Inter-American Commission on Human Rights (see Section III(E) above) and in its 2017 report on the situation of isolated peoples, including the urgent categorisation of five indigenous Reserves proposed by AIDSESEP in favour of peoples in isolation and initial contact: Yavarí Mirim, Yavarí Tapiche, Kakataibo, Sierra del Divisor and Napo-Tigre.
- 14) Take all necessary measures to guarantee full respect for the strict protection status of the ancestral lands of 'isolated peoples', including through the prohibition of any extractive activity that endangers their subsistence and the full implementation of any safeguards related to the probable impact of Law 30723. These safeguards must apply to all areas occupied by them, including those areas proposed as Indigenous Reserves.
- 15) Implement all the recommendations of the MINSA Report on the health of the Nahua people and immediately commission a robust and exhaustive independent investigation to determine the source and extent of mercury contamination.

Human Rights Defenders

- 16) Develop concrete and responsive mechanisms to protect human rights defenders, including through conducting investigations and punishing those responsible, as well as creating an environment that supports the defence of rights without reprisals. Consider and incorporate into these measures the recommendations of the UN Special Rapporteur on Human Rights Defenders in their recent report of July 2017 (A / 72/170) and the IACHR in their recent report of December 2017, "Towards a comprehensive policy of protection for human rights defenders".
- 17) Take the necessary actions to provide adequate measures to guarantee security for and create an environment in which indigenous rights leaders and community members can carry out their activities, without being the victims of violence, threats or retaliatory litigation, while ensuring that the perpetrators of this aggression are fully investigated and sanctioned.
- 18) The national and regional authorities, and also the palm oil company, Ocho Sur P S.A.C. (formerly Plantaciones de Pucallpa S.A.C.), should publicly condemn the threats and harassment suffered by the community of Santa Clara de Uchunya and any possible reprisals the community may suffer for defending their rights and territory.

Restoration and Remediation for Harms and Violations

- 19) Develop a comprehensive plan for the Amazon region to provide assistance to all native communities affected by oil spills in order to restore the environment and protect, monitor and restore the health of the communities affected by the operations.

Access to Justice

- 20) Recognising the application of the Convention to all State entities and their role in guaranteeing the right to access to justice and an effective and just remedy; the Constitutional Court should process without undue delay the cases filed by the community of Santa Clara Uchunya against the traffickers of lands, the oil palm company and the agrarian authorities, in order to ensure restitution of the rights affected and punishment of those responsible.
- 21) Adopt respectful language in response to the efforts of indigenous peoples to ensure respect of their rights through legitimate channels (such as the courts), and publicly promote the respect, protection and fulfilment of the rights of indigenous peoples and the right to legal challenge. Any language that demonises or stigmatises indigenous peoples or organisations that are supporting them should be avoided. Similarly, the State should not, in its public statements, distort the position of indigenous peoples in order to obtain political advantage, including through portraying the rights of indigenous peoples as contrary to the public interest or environment.

ANNEX 1: Description of the mandate or nature of the Presenting Organisations

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

FEDERATION OF NATIVE COMMUNITIES OF UCAYALI (FECONAU): Created in 1981, FECONAU is one of the oldest indigenous federations of the Peruvian Amazon, which participated in the creation of the Interethnic Association of Development of the Peruvian Amazon (AIDSEP), the most representative indigenous Amazonian organisation in Peru. FECONAU is the representative indigenous organisation of more than 30 native communities belonging to the Shipibo-Konibo, Asháninka, Isconahua and Awajun indigenous peoples, from the provinces Coronel Portillo and Padre Abad from the Ucayali region, in the Peruvian Amazon region. FECONAU's vision consists of indigenous peoples with clearly-defined indigenous policy and legal recognition of indigenous territories. FECONAU works for the social, political, educational and cultural development of indigenous peoples, ensuring the defence of their rights, managing and conserving indigenous territories and natural resources, participating in social spaces and building local capacity. Contact information: Jirón Callería 771, Pucallpa, Perú, feconau1@gmail.com; https://www.facebook.com/FECONAU/?hc_ref=ARQTg8v8juTreayIn9AsCRR10z4iXYfJ0YZfZ1_EINvfNcII0d24a9h5AtpOI7fVjEU&fref=nf

ETHNIC COUNCIL OF THE KICHWA PEOPLES OF THE AMAZON (CEPKA): CEPKA is a representative organisation of the Kichwa indigenous people of the San Martin region, where close to 50,000 indigenous Kichwa men and women live. CEPKA was formed in 2001 and is chaired by a Regional Council with five decentralised provincial headquarters, located in the provinces of El Dorado, San Martin, Picota, Bellavista and Lamas. It currently has 79 Affiliated Native Communities and one Rural Community. <https://www.facebook.com/Cepka-Lamas-Institucional-1953180934940426/>

LEGAL DEFENSE INSTITUTE (IDL):

IDL is a Peruvian civil society institution which aims for the promotion and defence of human rights, democracy and peace in Peru and Latin America. IDL monitors certain public policies which it considers fundamental to the success and sustainability of democracy in Peru, not only from a rights-based perspective, but also taking into account gender, social inclusion, interculturality, transparent public governance and good government. Democracy

and human rights form the inseparable axes of IDL's work. IDL comprises various programmes, each of which perform distinctive and important work: (i) legal defence; (ii) Justicia Viva; (iii) Citizen Security. One of the pillars of IDL's institutional reputation is its complete independence from governments, public servants and authorities, political parties, churches, unions, business interests and media. Contact information: Información de Contacto: Avenida Pardo y Aliaga 272, San Isidro, Lima – Perú, Tel. 511-617-5700; <https://www.idl.org.pe/>

INDIGENOUS PEOPLES COMMITTEE, THE NATIONAL COORDINATOR FOR HUMAN RIGHTS (CNDDHH): The CNDDHH is a coalition of civil-society organisms that work towards the defense, promotion and education of human rights in Peru. The CNDDHH aims to help develop a culture of human rights and peace in the country, to place human rights issues on the public agenda and to work for the consolidation of a democratic institution. Since its establishment in 1985, the CNDDHH is constituted as the primary institution of reference in Latin America that reunites a collective of human rights organisms in a country. Today, the National Coordinator for Human Rights has a Special Consultative Status before the Social and Economic Council of the United Nations (UN) and is accredited to participate in the activities of the Organization of American States (OAS). The Indigenous Peoples Committee is a space which brings together organisations which provide technical support to indigenous organisations, both within and without the CNDDHH. The Committee currently comprises of 10 members organisations, while the CNDDHH as a whole groups 82 organisations from across Peru. Coordinadora Nacional de Derechos Humanos. Calle Pezet y Monel 2467 – Lima 14, Peru. Tel: 51-01-4191111. E-mail: info@derechoshumanos.pe; <http://derechoshumanos.pe/>

ANNEX 2: Current status of the Titling of Indigenous Lands and Recognition of Indigenous Peoples, AIDSESEP (2018)

DEPARTAMENTOS	CC.NN. EN POSESION *	CC.NN. POR RECONOCER **	CC.NN. POR TITULAR	CC.NN. POR AMPLIAR	TOTAL	PRESUPUESTO (en US \$) ***	RESERVAS TERRITORIALES (5)	RESERVAS COMUNALES (6)	TERRITORIOS POR PP.II.	SUPERPOSICION DE AREAS PROTEGIDAS EN TERRITORIOS INDIGENAS	
AMAZONAS	N/D	24	8	39	71	843.300,00				* Cordillera Kampankis * Parque Ichigkat Muja * Reserva Comunal Chayu Nain	ESTANDARIZACION DEL CATASTRO DE LAS CC.NN
AYACUCHO	N/D	0	5	1	6	53.425,00					
CAJAMARCA	N/D	0	0	0	0	-					
CUSCO	N/D	14	5	18	37	217.014,00					
HUANUCO	N/D	1	6	6	13	170.588,00	CACATAIBO (parte con Ucayali)				
JUNIN	N/D	28	29	28	85	488.880,00					
LORETO	N/D	271	465	108	844	10.177.061,00	NAPO - TIGRE, SIERRA DEL DIVISOR OCCIDENTAL, TAPICHE - BLANCO - YAQUERANA, YAVARI - MIRIN	CHAMBIRA, NAPO - CURARAY, TIGRE - CORRIENTES	ACHUAL, KUKAMA, KUKAMIRIA, KANDOZI, SHAPRA, SHIWILU	* Reserva Nacional Pacaya Samiria	
MADRE DE DIOS	N/D	3	6	17	26	318.750,00			ESE' EJA	* Parque Nacional Bahuaja Sonene	
PASCO	N/D	10	26	16	52	466.380,00					
SAN MARTIN	N/D	21	69	5	95	750.275,00			KICHWA	* ACR Cerro Escalera	
UCAYALI	N/D	49	57	41	147	1.713.577,00	CACATAIBO (parte con Loreto), SIERRA DEL DIVISOR OCCIDENTAL (parte con Loreto)	INUYA - TAHUANIA, TAMAYA - CACO, YURUA		*ACR Imiria	
TOTAL :	N/D	421	676	279	1376	15.199.250,00	3'972.569.18 Has	4'108.565.75 Has			COREDOR BINACIONAL PIACI

* Comunidades Nativas poseionarias NO DETERMINADAS que no han iniciado ningún trámite para su reconocimiento y titulación.
** Comunidades Nativas que han solicitado su reconocimiento y titulación, que no han sido atendidas.
*** Presupuesto estimado para trabajos de campo y gabinete, sin incluir el requerimiento de las Regiones Agrarias

ANNEX 3: Resolución N° 1 del Expediente N° 00286-2017-1-5001-JR-PE-04



SALA PENAL NACIONAL
CUARTO JUZGADO DE INVESTIGACIÓN PREPARATORIA NACIONAL
Av. Uruguay 145 – Cercado de Lima – Teléfono 3321424 Anexo 15599

EXPEDIENTE : 00286-2017-1-5001-JR-PE-04
JUEZ : MENDIVIL MAMANI, ANGEL ERNESTO.
ESPECIALISTA : JACKELINE JESÚS YZAGUIRRE MEJÍA

AUTO DE MEDIDA CAUTELAR DE SUSPENSIÓN INMEDIATA

RESOLUCIÓN Nro. UNO
Lima, quince de diciembre del dos mil diecisiete.-

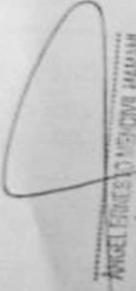
AUTOS Y VISTOS: Dado cuenta con el requerimiento de Medida cautelar de suspensión inmediata de actividades depredatorias de desbosque y tala, la misma que se dirige contra los vehículos, instrumentos, maquinarias y personas que laboren para la empresa PLANTACIONES PUCALLPA SAC, y que se encuentren en el área ubicada en el sector tubecocha, y en los caseríos Naranjal y Unión progreso del Distrito de Nueva Requena, provincia de Coronel Portillo, departamento de Ucayali, formulado por JULIO CESAR GUZMÁN MENDOZA, procurador Público especializado en Delitos Ambientales, cargo del caso; y,

CONSIDERANDO:

PRIMERO: FUNDAMENTOS DE HECHO

1. El Procurador Público Especializado en delitos Ambientales, en su calidad de parte agraviada en representación de Estado, solicita medida cautelar de suspensión inmediata de actividades depredatorias de desbosque y tala, la misma que se dirige contra los vehículos, instrumentos, maquinarias y personas que laboren para la empresa Plantaciones Pucallpa SAC, hechos que se iniciaron con la denuncia escrita de fecha 29 de mayo del 2015, por parte de los ciudadanos Washington Bolívar Díaz, e Iván Flores Rodríguez y fundamentado en el informe técnico N° 007-2015-GRU-GR-GGR-ARAU-DGFFS-AJ/DMFZ emitido por la Dirección de Gestión Forestal y de fauna silvestre del Gobierno regional de Ucayali, el cual advirtió un área aproximada deforestada de 180 hectáreas, el desvió de la quebrada de Sanuya, entre otros, así mismo verificándose que no existía solicitud de autorización de cambio de uso de tierras con cobertura boscosa en selva y ceja para cambio de aptitud agropecuaria, entre otros.

1.2. Se tiene que la presente medida, versa en virtud de la noticia criminal dado por el ciudadano Washington Bolívar Díaz e Iván Flores Rodríguez, denuncia escrita de fecha 29 de mayo de 2017, en la cual se señala que


ANGEL ERNESTO MENDIVIL MAMANI
Juez
Cuarto Juzgado de Investigación Preparatoria Nacional

JACKELINE JESUS YZAGUIRRE MEJIA
ESPECIALISTA JUEZ
Juzgado de Investigación Preparatoria Nacional
Sala Penal Nacional

ANNEX 4: List of Threats and Acts of Violence against the Community of Santa Clara de Uchunya

1 January 2014: Threats to Huber Flores, his wife Nazalith Mozombite and their son, Carlos Antonio – house burnt down after the family repeatedly refused to leave the traditional land which was wanted by PP/Ocho Sur.

September 2014: four (4) indigenous leaders from Saweto, Ucayali, were murdered for their fight against illegal logging and the titling of their ancestral land.

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

11 February 2017: Huber Flores was beaten up by a group of armed men, who withdrew after being frightened off by passers-by.

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

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

27 May 2017: representatives from the DRAU and members of the community of Santa Clara embarked upon the first stage of demarcating their traditional lands - only 750 hectares - when they were aggressively confronted by approximately 400 people who wouldn't let them through to carry out their work. The following was overheard: “If the authorities and the

community members try to enter here, then blood will flow.” When they returned to the village, the delegation from the DRAU and the community members were again intercepted by another group which included employees of PP/Ocho Sur, among them Bernado Evaristo Agurto Rojas and his two sons, who told them, “You do not pass one metre further, if you do, blood will flow.”

June 2017: FECONAU visited the community of Santa Clara. During their visit, a group of 30 community members, accompanied by civil servants from the district attorney’s office, went to inspect the lands which were subject to possession certificates recently issued by the DRAU. During the inspection, they were intercepted by a group of approximately 100 people armed with stakes and machetes. The armed group told them, “If you want to pass through here you will not be able to.” The community members and attorneys had to put an end to their inspection, fearing for their lives.

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

1 September 2017: Three men who were unknown to the victim came at night to Richard Fasabi’s house where he lived with his wife. They said to him, “This land is ours...we were looking for you to tell you this, Richard, two things: you’re going to leave here, because these lands belong to the company...if not, you’re going to have to face the consequences.” For his safety, Fasabi went to live with his father, where an old school friend came to see him. The friend is the General Manager of PP/Ocho Sur and came with the message, “Why don’t you sell these lands? This company is mercenary and you’re going to have to face the consequences.” Fasabi and others feel as though they have become the company’s “targets.”¹⁷⁷

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

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

23 September 2017: Fifteen (15) men who are known associates of PP/Ocho Sur arrived at Huber Flores’ house and asked him to leave. He responded, “If you want me to leave, you

¹⁷⁷ Richard Fasabi’s statement included in the r 2017 supplement submitted to the UN Special Rapporteur on Rights Defenders. Fasabi said, “I’m a target, so is she [my partner]...that’s why we always have to take care, wherever we go. Initially they just dealt with me directly, but when they saw the kind of hard fight I was putting up, they started to threaten her as well. All I ask is that justice is done here, that the authorities do not sell our lands and that the voice of the community be heard before the settlers are able to expand as far as the river.” (unofficial translation).

will have to kill me.” They answered, “Then you know what will happen.”

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

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

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

*For a wider description of the threats and acts outlined above, see: FPP reports, Santa Clara consultants and other indigenous communities from Ucayali to the UN Special Rapporteur on Rights Defenders and the Special Rapporteur on the Rights of Indigenous Peoples (20 October 2017) and their supplement dated 12 December 2017 (Case No: 685cha06).

ANNEX 5: Additional Information Relating to Prior Consultation and the Hidrovía Project

In the infrastructure sector, the case of the Amazon Hidrovía is anecdotal. The project aims to make river transport possible for medium and large-scale boats through the Marañón, Huallaga, Ucayali and Amazon rivers in Peru, and hence create ‘river highways’ which allow commercial traffic between Peru and Brazil, as well as an exit out towards the Pacific Ocean. To this end, work to deepen and clean (dredge) the four Amazonian rivers needed to be carried out in ‘impassable areas’ (*malos pasos*). By ‘impassable areas’, the Peruvian State refers to sand banks (sand beaches) on the riverbanks, islands, *palizadas* (piles of sticks and branches which accumulate and float on the rivers) and the *quirumas* (sticks embedded in the riverbeds, either on their own or in piles). Afterwards, navigation channels and a network of gauging stations will be set up in order to accurately determine daily water levels throughout the entire river network. The channels should establish a route between the port terminals of Yurimaguas, Pucallpa and Iquitos. However, this project has not taken into account the impacts it would have on riverside indigenous peoples, whose sustenance depends directly on their proximity to the rivers. In this way, where the Peruvian State only sees *impassable areas*, indigenous peoples find especially important places where they carry out agricultural activities and hunting, both on the riverbanks and in the expanses of water. Furthermore, certain sites hold special spiritual significance.

From the outset, the State categorically rejected the consultation of the project, for which the Asociación Cocama de Desarrollo y Conservación San Pablo de Tipishca (ACODECOSPAT) – an indigenous organisation of Kukama communities - intervened in November 2013, presenting a constitutional lawsuit against the Peruvian State, demanding that the project be suspended until they had been consulted. In October 2014, the Mixed Jurisdiction Court of Nauta declared that there were grounds for the demand and ordered the consultation of the whole project. Months later, in March 2015, the Civil Tribunal of Iquitos upheld the sentence. So, the State - through the Ministry of Transport and Communications - agreed to carry out the consultation, and to this end summoned 14 indigenous peoples from Loreto and Ucayali: Achuar, Asháninka, Awajún, Bora, Capanahua, Kichwa, Kukama, Murui-Muinani, Shawi, Shipibo-Konibo, Tikuna, Urarina, Yagua and Yine.

The process culminated in an act which was signed in Iquitos in September 2015. While it is true that it was positive to the extent that it allowed for flexibility concerning some of the rules around conducting consultations, in reality the agreement was made blindly, without accurate and complete information on the environmental and social impacts of the project, particularly in relation to the dredging of the Amazonian rivers. This was because they didn’t have access to an Environmental Impact Assessment (EIA). The reason for this lies in the structure of public investment projects in Peru. We think that this reveals a deeper problem: the conditions do not exist for a horizontal dialogue. In reality, consultation in Peru is usually a mechanism by which the strongest impose on the weakest.