Ante la Corte Constitucional de Colombia

Honorable Magistrado Jorge Enrique Ibañez Najar

Numero de expediente: T-5.443.609

Amicus Curiae De

Colombian Caravana & *ABColombia*

En el asunto de la solicitud para que la Honorable Corte Constitucional decrete medida provisional para garantizar el cumplimiento de las órdenes emitidas en la Sentencia SU-698 de 2017. Acción de tutela promovida por miembros de las comunidades indígenas Wayúu de Paradero y La Gran Parada, contra Carbones del Cerrejón Limited, Autoridad Nacional De Licencias Ambientales, el Ministerio de Ambiente y Desarrollo Sostenibles y otros.

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PART. I INTRODUCTION

1. This *amicus curiae* submission is respectfully presented to the Constitutional Court of Colombia in connection with the Court's ongoing supervision of the implementation of Sentencia SU-698 of 2017 ("the Judgment") by the parties.

2. In the Judgment the Constitutional Court held that the diversion of the Bruno stream by the Carbones del Cerrejón mining company constituted a violation of the fundamental rights to water, health and food security of members of the Wayúu indigenous peoples of Paradero and La Gran Parada, and held that the defendants should remedy this by performing various orders.

3. This *amicus curiae* is presented on behalf of ABColombia and the Colombian Caravana. ABColombia is a network of five British and Irish agencies with programmes in Colombia: CAFOD, Christian Aid UKI, Oxfam GB, SCIAF and Trócaire. The Colombian Caravana is a UK registered organisation whose members monitor human rights abuses faced by legal professionals within Colombia. Members of the group have participated in a number of international delegations to Colombia, most recently in 2018, and the group carries out advocacy work at the domestic and international level in support of Colombian human rights lawyers and the rule of law in Colombia.

4. For the purposes of this *amicus curiae*, ABC Colombia and the Colombian Caravana have instructed (by way of Sue Willman, senior partner at Deighton Pierce Glynn and Chair of the Human Rights Committee of the Law Society of England & Wales) three barristers who are members of the Bar of England & Wales. Jelia Sane, Dr Keina Yoshida and Camila Zapata Besso are all barristers at Doughty Street Chambers (London) specialising in international human rights law. Dr Yoshida also holds a PhD from and is a research officer at the London School of Economics, where she specialises in international environmental law and has published articles on the subject in several peer-reviewed journals.

5. This *amicus curiae* has also relied on the research of members of the King's Legal Clinic at the Dickson Poon School of Law, King's College, University of London, UK, including the doctoral candidate Clara María López who is supervised by the Assistant Director of the Legal Clinic, Sue Willman. Technical and other assistance has been provided by the charity London Mining Network.

6. This submission seeks to assist the Court by addressing the norms and standards under international human rights law and environmental law that are most relevant to the Court's determination of the issues in this case. It does not address the domestic legal framework or the merits of the underlying claim. It is structured in three parts, as follows:

    a. The right to a healthy environment and its relationship to the rights to water, food, health and culture, including in respect of indigenous peoples, under international human rights law;
    b. The rights of indigenous people to prior consultation and free, prior and informed consent under international human rights law;

c. The principle of prevention and the precautionary principle in international environmental law and its relationship with precautionary measures in international human rights law.

The submission of amicus curiae briefs

7. The authors are guided by both regional and domestic practice regarding the submission of *amicus curiae* briefs. Article 2(3) of the Rules of Procedure of the Inter-American Court of Human Rights ("IACtHR") defines an amicus curiae as "*the person or institution who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject matter of the proceeding by means of a document or an argument presented at a hearing.*"[1]

8. The IACtHR has highlighted the general value of amicus curiae briefs:

> "*[...] the Court notes that amici curiae briefs are filed by third parties which are not involved in the controversy but provide the Court with arguments or views which may serve as evidence regarding the matters of law under the consideration of the Court. Hence, they may be submitted at any stage before the deliberation of the pertinent judgment. Furthermore, in accordance with the usual practice of the Court, amici curiae briefs may even address matters related to the compliance with judgment. On the other hand, the Court emphasizes that the issues submitted to its consideration are in the public interest or have such relevance that they require careful deliberation regarding the arguments publicly considered. Hence, amici curiae briefs are an important element for the strengthening of the Inter-American System of Human Rights, as they reflect the views of members of society who contribute to the debate and enlarge the evidence available to the Court.*"[2]

9. In the Colombian context, the use of amicus briefs is contemplated by Article 13 of Decree No. 2067 of 4 September 1991, which states:

> "*El magistrado sustanciador podrá invitar a entidades públicas, a organizaciones privadas y a expertos en las materias relacionadas con el tema del proceso a presentar por escrito, que será público, su concepto sobre puntos relevantes para la elaboración del proyecto de fallo. La Corte podrá, por mayoría de sus asistentes, citarlos a la audiencia de que trata el artículo anterior. El plazo que señale, el magistrado sustanciador a los destinatarios de la invitación no interrumpe los términos fijados en este Decreto. El invitado deberá, al presentar un concepto, manifestar si se encuentra en conflicto de intereses.*"

10. The Constitutional Court upheld this provision and dismissed the claim of unconstitutionality in its Judgment C-513/92 of 10 September 1992. The Constitutional Court noted that interventions assist in the aim of democratic

[1] Rules of Procedure of the Inter-American Court of Human Rights, approved by the Court during its LXXXV Regular Period of Sessions, held from 16 to 28 November 2009.
[2] *Kimel v Argentina*, Merits, Reparations and Costs, IACtHR Series C No 177 (2 May 2008), §16.

participation provided for by the Colombian Constitution, thereby creating a presumption in favour of acceptance.

PART II. APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW

a) *The right to a healthy environment and its relationship to human rights*

11. The right to a healthy environment has been expressly recognised in several national constitutions[3] and regional human rights instruments,[4] including the 1981 African Charter on Human and People's Rights (Art 24, "African Charter");[5] the 2004 Arab Charter on Human Rights (Arts 38 and 39, "Arab Charter"),[6] and the 2012 ASEAN Human Rights Declaration (Art 28(f)).[7] One notable exception is the European Convention on Human Rights, which does not recognise a free-standing right to a healthy environment. Nonetheless, the European Court of Human Rights ("ECtHR") has acknowledged on numerous occasions that environmental harm may affect individual well-being and, consequently, gives rise to breaches of Convention rights, including the right to life (Art 2)[8] and the right to private and family life (Art 8(1)).[9]

12. Within the Inter-American system, the right to a healthy environment is expressly guaranteed by Article 11 of the Additional Protocol to the American Convention of Human Rights on Economic, Social and Cultural Rights ("Protocol of San Salvador"),[10] which reads:

> "*1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.*
> *2. The States Parties shall promote the protection, preservation, and improvement of the environment.*"

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[3] Amongst others, the Constitutions of the following States establish the right to a healthy environment: Constitution of Colombia, Art 79; Constitution of the Argentine Nation, Art 41; Constitution of the State of Bolivia, Art 33; Constitution of the Federative Republic of Brazil, Art 225; Constitution of the Republic of Chile, Art 19; Constitution of Costa Rica, Art 50; and Constitution of the Republic of Ecuador, Art 14.

[4] The right to a healthy environment is not, as yet, explicitly enshrined in an international treaty. For a summary of the evolution of the right at the global level, *see* UN Human Rights Council ("HRC") 'Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (24 December 2012) UN Doc A/HRC/22/43 ("Preliminary report of the Independent Expert John H. Knox") §§12-17.

[5] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217. Art 24 reads *"[a]ll peoples shall have the right to a general satisfactory environment favourable to their development*." See also Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) OAU Doc Cab/Leg/66.6 ("Maputo Protocol"). Art 18 provides that women *"shall have the right to live in a healthy and sustainable environment*".

[6] Arab Charter on Human Rights, League of Arab States (adopted 22 May 2004, entered into force 15 March 2008). Art 38 reads: *"Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights."* Under Art 39 (right to health) States are required to take the necessary steps to "*fight environmental pollution*".

[7] ASEAN Human Rights Declaration (adopted 18 November 2012). Art 28(f) reads: *"Every person has the right to an adequate standard of living for himself or herself and his or her family including: [...] f. The right to a safe, clean and sustainable environment."*

[8] See e.g. *Öneryildiz v Turkey* App no 48939/99 (ECtHR, 30 November 2004).

[9] See e.g. *López-Ostra v Spain*, App no 16798/90 (ECtHR, 9 December 1994).

[10] See also American Declaration on the Rights of Indigenous Peoples, AG/Res/2888 (15 June 2016), Art 19.

13. In its landmark *Advisory Opinion OC-23/17 on the Environment and Human Rights* ("*Advisory Opinion OC-23/17*"),[11] the IACtHR clarified that the right to a healthy environment under Article 11 forms part of the economic, social and cultural rights protected under Article 26 of the American Convention on Human Rights ("American Convention").[12]

14. The jurisprudence of the IACtHR recognises that the right to a healthy environment is an autonomous right insofar as it protects the *components* of the environment, for example rivers and forests, as legal interests *in themselves* even in the absence of a risk of harm to human beings. As stated by the IACtHR, the right:

> "*[p]rotects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.*"[13]

15. In this way, the right to a healthy environment is complementary to the rights of nature approach in which natural entities are protected via legal personhood.

16. The Working Group on the Protocol of San Salvador ("Working Group") has indicated that Article 11 of the Protocol establishes, at a minimum, five State obligations. These are:

    a. Guaranteeing everyone, without any discrimination, a healthy environment in which to live;
    b. Guaranteeing everyone, without any discrimination, basic public services;
    c. Promoting environmental protection;
    d. Promoting environmental conservation, and,
    e. Promoting improvement of the environment.[14]

17. The Working Group has further elaborated that the exercise of the right to a healthy environment must be governed by criteria of availability, accessibility, sustainability,

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[11] *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC23/17*, IACtHR Series A No 23 (15 November 2017) ("*Advisory Opinion OC-23/17*"), §57.

[12] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123. Art 26 provides: "*The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires*." See also *Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina*, Merits, Reparations and Costs, IACtHR Series C No (6 February 2020), §202, and Inter-American Commission on Human Rights, 'Climate Emergency: Scope of Inter-American Human Rights Obligations', Resolution 3/2021 (31 December 2021), which builds on the decision of the IACtHR.

[13] *Advisory Opinion OC-23/17*, §62. See also *Lhaka Honhat v Argentina*, §203.

[14] *Working Group* on the *Protocol* of *San Salvador*, 'Progress Indicators: Second Group of Rights' (5 November 2013) OEA/Ser.L/XXV.2.1, GT/PSS/doc.9/13, §26; *Advisory Opinion OC-23/17*, §60.

acceptability and adaptability.[15] In particular, and insofar as is relevant to the issues before this Court:

a. States must ensure availability or existence of sufficient resources so that all persons, according to their specific characteristics, can benefit from a healthy environment and have access to basic public services;
b. States must guarantee, without discrimination, physical accessibility to a healthy environment. Physical accessibility requires all sectors of the population to have access to a healthy environment i.e. "*for the environment in which persons carry out their lives to be healthy and that they not be required to leave their homes […] to find favorable environmental conditions*";
c. States must ensure that future generations will also enjoy the benefits of a healthy environment, including by ensuring that the extraction of natural resources is carried out sustainably in a manner that allows for their renewal and mitigates environmental risks;
d. The constituent elements of the environment (e.g. water) must meet technical conditions of quality that make them acceptable, in line with international standards.[16]

18. In the case of *Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina*, the IACtHR for the first time ruled on the scope of the right to a healthy environment as a free-standing right derived from Article 26 of the American Convention, as well as on the rights to adequate food, water, and to participate in cultural life, in the context of a dispute involving an indigenous community. The IACtHR found that, in line with their general obligations under Article 1(1) of the American Convention, States are duty-bound to *respect* the right to a healthy environment and, specifically, to refrain from unlawfully polluting the environment in a way that has a negative impact on the conditions that permit a dignified life for the individual. The obligation to *ensure* the right to a healthy environment imposes, *inter alia*, a corresponding obligation on States to prevent violations of this right, including by preventing third parties from breaching protected rights in the private sphere.

19. In the context of environmental protection, this may include a duty to take positive measures to regulate, supervise or monitor the activities of those third parties that are likely to cause environmental damage.[17] This duty also forms part of the principle of prevention in environmental law elaborated further in the final section.

20. That there exists a close relationship between environmental protection and the enjoyment of human rights has been widely recognised. For example, the UN Independent Expert on the issue of human rights obligations relating to the enjoyment

[15] *Working Group* on the *Protocol* of *San Salvador,* 'Progress Indicators: Second Group of Rights', §29; *Advisory Opinion OC-23/17,* §60.
[16] *Working Group* on the *Protocol* of *San Salvador*, 'Progress Indicators: Second Group of Rights', §§30-34. Similarly, the African Commission has found that the right to a general satisfactory environment, as guaranteed by Art 24 of the African Charter, requires States to take "*reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources*": *see* African Commission on Human and Peoples' Rights, *Case of the Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, Communication 155/96, Decision of October 27, 2001, at §52.
[17] *Lhaka Honhat v Argentina*, §207.

of a safe, clean, healthy and sustainable environment (now Special Rapporteur)[18] has stated that human rights and the environment are "*inherently interdependent*" because:

> "*Human rights are grounded in respect for fundamental human attributes such as dignity, equality and liberty. The realization of these attributes depends on an environment that allows them to flourish. At the same time, effective environmental protection often depends on the exercise of human rights that are vital to informed, transparent and responsive policymaking.*"[19]

21. This interconnection between human rights and the environment has also been upheld by a number of regional human rights bodies. The IACtHR has observed that there exists an *"undeniable link*" between the protection of the environment and the enjoyment of other human rights,[20] noting that *"environmental degradation may cause irreparable harm to human beings; thus a healthy environment is a fundamental right for the existence of human kind".*[21] The right to a healthy environment is said to have an individual dimension, insofar as its violation may have direct and indirect impacts on individual human beings, as well as a collective dimension in that it constitutes a *"universal value"* owed to both present and future generations.[22]

22. Similarly, the Inter-American Commission on Human Rights ("IACommHR") has stressed that *"several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality, and are profoundly affected by the degradation of natural resources."*[23] The African Commission has indicated that the right to a healthy and satisfactory environment as guaranteed under Article 24 of the African Charter "*is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual".*[24] In the European sphere, as highlighted, the case law of the ECtHR recognises the nexus between environmental protection and human rights. For example, in *Tătar v Romania*, the ECtHR ruled that States are required to evaluate the risks associated with activities that involve environmental harm, such as mining, and to take adequate measures to protect

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[18] The Independent Expert was appointed by the HRC in March 2012 for a three year term. His mandate was subsequently extended in 2015 as Special Rapporteur on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. See HRC 'Resolution 19/10, Human rights and the environment' (19 April 2012) UN Doc A/HRC/RES/19/10, and 'Resolution 28/11, Human rights and the environment' (26 March 2015) UN Doc A/HRC/28/11.

[19] Preliminary report of the Independent Expert John H. Knox, §10. Similarly, some instruments that regulate the protection of the environment refer to human rights law. See UN Conference on the Environment and Development, 'Rio Declaration on Environment and Development' (13 June 1992) UN Doc. A/CONF.151/26 (vol. I), and UN Conference on the Human Environment, 'Stockholm Declaration on the Human Environment' (16 June 1972) UN Doc A/CONF.48/14/Rev.1. In the OAS, see e.g. 'Human Rights and the Environment in the Americas', AG/RES. 1926 (XXXIII-O/03), approved at the fourth plenary session held on June 10 June 2003; 'Water, Health and Human Rights', AG/RES. 2349 (XXXVII-O/07), approved at the fourth plenary session held on 5 June 2007, and 'Human Rights and Climate Change in the Americas', AG/RES. 2429 (XXXVIII-O/08), approved at the fourth plenary session held on 3 June 2008.

[20] *Kawas-Fernández v Honduras*, Merits, Reparations and Costs, IACtHR Series C No 196 (3 April 2009), §148; *Advisory Opinion OC-23/17*, §47.

[21] *Advisory Opinion OC-23/17*, §59.

[22] *Advisory Opinion OC-23/17*, §59.

[23] IACommHR, 'Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources – Norms and jurisprudence of the Inter-American human rights system', OEA/Ser.L/V/II. Doc. 56/09 (30 December 2009), §190

[24] *Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, Comm No 155/96, ACommHPR (27 October 2001), §51.

the right to private and family life, and *"to allow the enjoyment of a healthy and protected environment".*[25]

23. Thus, environmental damage may constitute a violation of the right to a healthy environment as such and of other protected human rights. These rights, detailed in the sections below, generally fall into two categories: (i) substantive rights whose enjoyment is particularly vulnerable to environmental harm, including the right to health, the right to water, the right to food, and the right to culture; and (ii) procedural rights whose exercise supports better environmental decision-making, such as the right to participation in decision-making.[26]

24. Additionally, it is highlighted that environmentally-related human rights breaches may be felt more acutely by certain groups. Of particular relevance is the widespread recognition that that indigenous peoples are especially vulnerable to environmental degradation owing to their unique spiritual and cultural relationship with their ancestral territories, their economic dependence on environmental resources, and the fact that they often live in, or proximate to, marginal lands and fragile ecosystems which are particularly sensitive to alterations in the physical environment.[27]

25. In *Advisory Opinion OC-23/17*[28] the IACtHR summarised its jurisprudence on the issue of indigenous rights and environmental protection as follows:

> "*In cases concerning the territorial rights of indigenous and tribal peoples, the Court has referred to the relationship between a healthy environment and the protection of human rights, considering that these peoples' right to collective ownership [under Article 21 of the American Convention] is linked to the protection of, and access to, the resources to be found in their territories, because those natural resources are necessary for the very survival, development and continuity of their way of life.*[29] *The Court has also recognized the close links that exist between the right to a dignified life and the protection of ancestral territory and natural resources. In this regard, the Court has determined that, because indigenous and tribal peoples are in a situation of special vulnerability, States must take positive measures to ensure that the members of these peoples have access to a dignified life – which includes the protection of their close relationship with the land – and to their life project, in*

[25] *Tătar v Romania,* App no 67021/01 (ECtHR, 27 January 2009) (in French only), §112.
[26] *Advisory Opinion OC-23/17,* §64.
[27] *Advisory Opinion OC-23/17,* §67. See also HRC, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (15 January 2009) UN Doc A/HRC/10/61, §51; Preliminary report of the Independent Expert John H. Knox, §45; HRC, 'Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (30 December 2013) UN Doc A/HRC/25/53, §§76-78. The unique relationship between indigenous peoples and their territory is broadly recognised under international human rights law, for a summary of the key principles, see generally IACommHR, 'Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources – Norms and jurisprudence of the inter-American human rights system'.
[28] *Advisory Opinion OC-23/17,* §48.
[29] See e.g. *Yakye Axa Indigenous Community v Paraguay*, Merits, Reparations and Costs, IACtHR Series C No 125 (17 June 2005), §137; *Sawhoyamaxa Indigenous Community v Paraguay*, Merits, Reparations and Costs, IACtHR Series C No 146 (29 March 2006), §118.

both its individual and collective dimension.[30] *The Court has also emphasized that the lack of access to the corresponding territories and natural resources may expose indigenous communities to precarious and subhuman living conditions and increased vulnerability to disease and epidemics, and subject them to situations of extreme neglect that may result in various violations of their human rights in addition to causing them suffering and undermining the preservation of their way of life, customs and language*.[31]"

26. Finally, in relation to the activities of extractive industries and the protection of indigenous and environmental rights, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has stated that "*the implementation of natural resource extraction and other development projects on or near indigenous territories has become one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights.*"[32]

27. While it is primarily the responsibility of States to ensure that human rights are respected, protected and fulfilled, corporations, private actors and non-state actors also have obligations under human rights law which are enforced through States' due diligence obligations. This is illustrated by the adoption of the UN Guiding Principles on Business and Human Rights[33] which rest on three essential pillars: (i) the duty of States to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication, (ii) the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved, and (iii) the need for greater access by victims to effective remedies, both judicial and non-judicial.

28. Principle 17 of the Guiding Principles provides that businesses should proceed with due diligence in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts. Human rights due diligence (a) should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships, (b) will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations, and (c) should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve. Principle 18 states that in order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should (a) draw on internal and/or independent external human rights expertise, and (b) involve meaningful consultation

[30] See e.g. *Yakye Axa Indigenous Community v Paraguay*, §163; *Kaliña and Lokono Peoples v Suriname*, Merits, Reparations and Costs, IACtHR Series C No 309 (25 November 2015), §181.
[31] See e.g. *Yakye Axa Indigenous Community v Paraguay*, §164; *Kichwa Indigenous People of Sarayaku v Ecuador*, Merits and Reparations, IACtHR Series C No 245 (27 June 2012), §147.
[32] HRC, 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, "Extractive industries operating near or within indigenous territories"' (11 July 2011) UN Doc A/HRC/18/35, §57.
[33] HRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (21 March 2011) UN Doc A/HRC/17/31.

with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.[34]

29. In its recent 'General Comment 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights' ("ICESCR")[35] in the context of business activities, the Committee on Economic, Social and Cultural Rights ("CESCR") reiterated that States should ensure that the impacts of business activities on indigenous peoples and specifically their rights to land, resources, territories, cultural heritage, traditional knowledge and culture are incorporated into human rights impact assessments. In exercising due diligence, businesses should consult and cooperate in good faith with the indigenous peoples concerned through indigenous peoples' own representative institutions in order to obtain their free, prior and informed consent before the commencement of activities.[36] These rights are further explored below at part II(f) of this *amicus curiae* submission.

b) *The right to water*

30. The human right to water has been described as "*indispensable for leading a life in human dignity*", a "*prerequisite*" for the full realisation of other protected human rights, and as "*one of the most fundamental conditions for survival*".[37] The right to water forms part of the right to an adequate standard of living established by Article 11 of the ICESCR; it has also been recognised in a number of other human rights instruments, including under Article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),[38] and Article 24(2) of the UN Convention on the Rights of the Child ("CRC").[39]

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[34] The authors note that the following soft guidelines in relation to extractive industries recognise the sensitive relationship between indigenous peoples and mining activities, and the need to obtain the consent of indigenous peoples: the International Council on Mining and Metals' Position Statement on Indigenous Peoples and Mining (<https://www.icmm.com/position-statements/indigenous-peoples>); the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (<https://www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector_9789264252462-en>) and the Performance Standards on Environmental and Social Sustainability (<https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards>).

[35] ICESCR (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[36] CESCR, 'General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) UN Doc E/C.12/GC/24, §17.

[37] CESCR, 'General Comment No.15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (20 January 2003) UN Doc E/C.12/2002/11, §§1-3.

[38]Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 ("CEDAW"). Art 14(2) states: "*States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right […] (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications*."

[39]Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 ("CRC"). Art 24 states: "*1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (c) To combat disease and malnutrition […] through, inter alia […] the provision of […] clean drinking-water, taking into consideration the dangers and risks of environmental pollution*".

31. At the regional level, the right to water is protected under Article 26 of the American Convention,[40] and as part of the right to health under Article 14(2)(c) of the African Charter on the Rights and Welfare of the Child[41] and Article 39 of the Arab Charter.[42] The right to water also forms part of the right to food security guaranteed by Article 15(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol").[43]

32. CESCR General Comment No.15 contains authoritative guidance[44] on the scope and content of the right to water. In summary:

    a. The elements of the right to water must be "*adequate"* for human dignity, life and health, in accordance with Articles 11(1) and Article 12 of the ICESCR.
    b. The requirement of "adequacy" must be interpreted broadly, recognising that water is not primarily an economic good, but a social and cultural good. The manner of realisation of the right to water must be sustainable, ensuring that the right can be realised for both present and future generations.
    c. What is "*adequate*" in this context may vary; however, in all circumstances, water must be *available*, of appropriate *quality* and *accessible*. This, in turn, means that the water supply for each person must be *"sufficient and continuous*" for both personal and domestic use; safe and free from hazards that may endanger human health (e.g. chemical substances); and water and water services and facilities must be accessible, without discrimination, to everyone. Accessibility has four overlapping components: physical (i.e. within safe physical reach for all sections of the population); economic (i.e. affordable for all); non-discrimination, and information (i.e. individuals have the right to seek, receive and impart information on water-related issues).[45]

33. Whilst Article 2 of the ICESCR prescribes that all Covenant rights must be enjoyed without discrimination, the CESCR has emphasised that States have a special obligation to provide those who do not have sufficient means with the necessary water

[40] *Lhaka Honhat v Argentina*, §222.
[41] African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49. Art 14 states: "*1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. 2. State Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures: (c) to ensure the provision of adequate nutrition and safe drinking water*."
[42] Art 39 of the Arab Charter provides: "*1. The State Parties shall recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the right of every citizen to enjoy free and non-discriminatory access to health services and health care centres. 2. The steps to be taken by the State Parties shall include those necessary to: e. Ensure basic nutrition and clean water for everybody*".
[43] Art 15 of the Maputo Protocol provides: "*States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to: a) provide women with access to clean drinking water*".
[44] The IACtHR has referred to the considerable weight it attaches to General Comments in interpreting corresponding international legal norms in a number of judgements, see e.g. *Lhaka Honhat v Argentina*, §217; *Muelle Flores v Peru*, Excepciones Preliminares, Fondo, Reparaciones y Costas, IACtHR Series C No 375 (6 de Marzo de 2019), §184; *Poblete Vilches y otros v Chile*, Fondo, Reparaciones y Costas, IACtHR Series C No 349 (8 de Marzo de 2018), §115, §118 and §120, as has the ICJ in the *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* Case 103 (Judgment) ICGJ 428 (ICJ 2010), §66.
[45] CESCR General Comment No. 15, §§11-12.

and water facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services. In particular, States should give "*special attention*" to individuals and groups who have traditionally faced challenges in exercising their right to adequate water and, *inter alia*, ensure that indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution and provide them with the resources to design, deliver and control their access to water. [46]

34. As with other ICESCR rights, the *specific* legal obligations of States are to respect, protect and fulfil the right to adequate water.[47] In particular and insofar as is relevant

    a. The obligation to *respect* requires State parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to water. This includes, *inter alia*, refraining from engaging in *"any practice or activity that denies or limits equal access to adequate water"*, from "*arbitrarily interfering with customary or traditional arrangements for water allocation*", and from "*unlawfully diminishing or polluting water*";
    b. The obligation to *protect* mandates State parties to prevent third parties, including corporations, from interfering in any way with the enjoyment of the right to water. Amongst others, States must adopt necessary and effective measures to prevent third parties from denying individuals equal access to adequate water and from polluting and inequitably extracting from water resources, including natural resources. In cases where water services, such as rivers, are operated or controlled by third parties, States are duty bound to prevent them from compromising equal, affordable and physical access to sufficient, safe and acceptable drinking water;
    c. The obligation to *fulfil* encompasses three separate obligations: to facilitate, promote and provide. Facilitation requires that positive measures be taken to assist individuals and communities to exercise their right to water; promotion requires States to ensure appropriate education concerning the protection of water resources, amongst others. The duty to provide arises where individuals or groups are unable, for reasons beyond their control, to realise the right to water themselves by the means at their disposal.[48]

35. The CESCR has further noted that as part of their obligation to fulfil:

> "*States parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations. Such strategies and programmes may include: (a) reducing depletion of water resources through unsustainable extraction, diversion and damming; (b) reducing and eliminating contamination of watersheds and water-related ecosystems by substances such as radiation, harmful chemicals and human excreta; (c) monitoring water reserves; (d) ensuring that proposed developments do not interfere with access to adequate water; (e) assessing the impacts of actions that may impinge upon water availability and natural-*

[46] CESCR General Comment No. 15, §16(d).
[47] CESCR General Comment No. 15, §20.
[48] CESCR General Comment No. 15, §§20-29.

ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity."[49]

36. In addition, States have a number of core, non-derogable obligations to ensure the immediate satisfaction of, at the very least, essential minimum levels of the right to water. These minimum core obligations include ensuring (i) access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease and (ii) the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups.[50]

37. The right to water is inextricably linked, *inter alia*, to the right to health, the right to adequate food, the right to life and the right to a healthy environment under international human rights law. The CESCR has explicitly recognised the importance of ensuring sustainable access to water for agriculture in order to realise the right to adequate food[51] and found that States' obligations under Article 1(2) of the ICESCR to ensure that a people is not "*deprived of its means of subsistence*" includes ensuring adequate access to water to secure the livelihoods of indigenous groups.[52] The IACtHR has similarly observed that the right to water, together with the right to food, and the right to participate in cultural life, is "*particularly vulnerable*" to environmental degradation, [53] and that "*access to food and water may be affected if pollution limits their availability in sufficient amounts or affects their quality*".[54]

c) *The right to adequate food*

38. The right to adequate food is said to be of "*crucial importance*"[55] for the enjoyment of all rights and "*indivisibly linked to the inherent dignity"* of human beings.[56]

39. The legal basis of the right to food in international human rights law is contained in Article 11(1) of the ICESCR which recognises "*the right of everyone to an adequate standard of living for himself and his family, including adequate food*" and Article 11(2) which provides for "*the fundamental right of everyone to be free from hunger"*.[57] At the regional level, the right to food is recognised, *inter alia*, in the

[49] CESCR General Comment No. 15, §28.
[50] CESCR General Comment No. 15, §37.
[51] CESCR General Comment No. 15, §7.
[52] CESCR General Comment No. 15, §7.
[52] CESCR General Comment No. 15, §7.
[53] *Advisory Opinion OC-23/17*, §66.
[54] *Advisory Opinion OC-23/17*, §111; see also *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No 172 (28 November 2007), §126; *Xákmok Kásek Indigenous Community v Paraguay*, Merits, Reparations and Costs, IACtHR Series C No 214 (24 August 2010), §195 and §198.
[55] CESCR, 'General Comment No. 12: The Right to Adequate Food (Art. 11)' (12 May 1999) UN Doc E/C.12/1999/5, §1.
[56] CESCR General Comment No. 12, §4.
[57] See also: Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III), Art 25(1); CEDAW, Art 12; CRC, Arts 24 and 27, and Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, Arts 25 and 28.

African Charter on the on the Rights and Welfare of the Child[58] and the Maputo Protocol.[59]

40. The right to food is very closely linked other fundamental rights.[60] In the *Case of the Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* ("*SERAC and CESR v Nigeria*") the African Commission considered whether the actions of the Nigerian government, through its involvement in oil exploitation in the Niger delta, contributed both directly and indirectly to violations of the rights of the Ogoni people, including their right to food. The African Commission observed that:

> "*The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.*"[61]

41. Similarly, the UN Human Rights Committee ("CCPR") has found that the protection of the right to life requires States to adopt a number of positive measures, including measures to eliminate malnutrition.[62]

42. Within the Inter-American system Article 34(j) of the Charter of the Organization of American States ("OAS Charter")[63] provides:

> "*The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: [...] j. Proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food*."

43. Article XI (Right to the preservation of health and to well-being) of the American Declaration on the Rights and Duties of Man provides:

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[58] The African Charter on the Rights and Welfare of the Child recognises the right of children to nutrition in Art 14(2)(c), (d) and (h) in the context of the right to health and health services.
[59] Art 15 of the Maputo Protocol concerns the right to food security and requires State Parties to ensure that "*women have the right to nutritious and adequate food*."
[60] CESCR General Comment No. 12, §11.
[61] *SERAC and CESR v Nigeria*, §64.
[62] CCPR, 'General Comment No. 6: Article 6 (Right to Life)' (30 April 1982) 16th session, §5.
[63] Charter of the Organization of American States (signed 30 April 1948, entered into force 13 December 1951) 119 UNTS 3.

"*Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources*."

44. Article 12 (Right to food) of the Protocol of San Salvador states:

"*1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.*
2. In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies."

45. In *Lhaka Honhat v Argentina*, the IACtHR, for the first time, described the scope of the right to food as follows:

"*Del artículo 34.j de la Carta, interpretado a la luz de la Declaración Americana, y considerando los demás instrumentos citados, se pueden derivar elementos constitutivos del derecho a la alimentación adecuada. Esta Corte considera que el derecho protege, esencialmente, el acceso de las personas a alimentos que permitan una nutrición adecuada y apta para la preservación de la salud. En ese sentido, como ha señalado el Comité DESC, el derecho se ejerce cuando las personas tienen "acceso físico y económico, en todo momento, a la alimentación adecuada o a medios para obtenerla [sin que] deb[a] interpretarse […]en forma estrecha o restrictiva asimilándolo a un conjunto de calorías, proteínas y otros elementos nutritivos concretos".*"[64]

46. In General Comment No. 12 (The Right to Adequate Food (Art. 11)) the CESCR emphasised that the "*core content*" of the right to adequate food is twofold and encompasses:

a. The availability of food *"in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture".* Availability in this context includes *"the possibilities [...] for feeding oneself directly from productive land or other natural resources"*;
b. The accessibility of such food "*in ways that are sustainable and that do not interfere with the enjoyment of other human rights.*" The concept of accessibility includes both economic and physical accessibility, and in respect of the latter the CESCR notes that the "*particular vulnerability"* of indigenous peoples whose access to their ancestral lands may be threatened (and thus, their ability to physically access adequate food). [65]

47. Similarly, the UN Office of the High Commissioner for Human Rights ("OHCHR") has observed that the realisation of indigenous peoples' right to food:

[64] *Lhaka Honhat v Argentina*, §216.
[65] CESCR General Comment No. 12, §§8-13, cited with approval in *Lhaka Honhat v Argentina*, §218.

"*[…] depends crucially on their access to and control over the natural resources on their ancestral lands, as they often feed themselves by cultivating these lands or by collecting food, fishing, hunting or raising animals on them. The confiscation of lands without the free, prior and informed consent of the indigenous peoples concerned and the lack of legal recognition of indigenous forms of landownership are serious obstacles to the realization of the right to food.*"[66]

48. Importantly, and as noted by the IACtHR in *Lhaka Honhat*, the CESCR has further emphasised that *"the notion of sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations"*[67] and that the right to adequate food is "*inseparable from*" social justice, requiring the adoption, *inter alia*, of appropriate environmental protection policies at the national level.[68]

49. Under the ICESCR States are under an obligation to *respect* existing access to adequate food and must not to take any measures that result in preventing such access; second, States must *protect* the right to adequate food, including by taking the measures necessary to ensure that enterprises or private persons do not deprive individuals of their right of access to adequate food; third, States must *fulfil* the right to food, which in turn encompasses positive obligations to facilitate and to provide. In this regard, the OHCHR has specifically noted that the extractive industries may threaten the right to food, including by "*contaminating land and water sources*" or "*evicting farming, fishing or nomadic communities from their land and water without due process"* and recalled that *"businesses and other non-State actors should not infringe on the enjoyment of human rights and that effective remedies for victims need to be in place where harm occurs*".[69]

d) *The right to health*

50. Article 12 of the ICESCR guarantees the "*right of everyone to the enjoyment of the highest attainable standard of physical and mental health".*[70]As with other international human rights, the obligations of States under Article 12 are threefold: to *respect* the right to health by refraining from direct interference with its exercise; to *protect* the right to health by preventing third-party interference with its enjoyment; and to take steps to *ensure* its fullest possible realisation.[71]

51. In the Inter-American system, the right to health is established by Article 10 of the Protocol of San Salvador which states, insofar as is relevant:

[66] UN OHCHR, 'The Right to Adequate Food, Fact Sheet No. 34' (April 2010), p13.
[67]CESCR General Comment No.12, §7; *Lhaka Honhat v Argentina,* §220.
[68] CESCR General Comment No.12, §4; *Lhaka Honhat v Argentina,* §245.
[69] OHCHR, 'The Right to Adequate Food, Fact Sheet No. 34', p25.
[70] All key international and regional human rights treaties recognise the right to health. See, *inter alia*, Universal Declaration of Human Rights, Art 25(1); Arts 11(1)(f), 12 and 14(2)(b) of the CEDAW, Art 24 of the CRC; Art 16 of the African Charter, and International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Art 5(e).
[71] CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (11 August 2000) UN Doc E/C.12/2000/4, §33.

> "*1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.*
> *2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right: […] f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable*." [72]

52. Moreover, the IACtHR has expressly acknowledged that the right to health is further protected under Article 26 of the American Convention, it being derived from the provisions of Articles 31(i) and (l) and Article 45 of the OAS Charter.[73]

53. The right to health is closely linked to the right to life, as well as the rights to a healthy environment, to water and to adequate food (generally understood as being amongst "*underlying determinants of health*").[74] As noted by the IACtHR in the case of *Poblete Vilches and Ors v Chile*:

> "*La Corte estima que la salud es un derecho humano fundamental e indispensable para el ejercicio adecuado de los demás derechos humanos. Todo ser humano tiene derecho al disfrute del más alto nivel posible de salud que le permita vivir dignamente,[75] entendida la salud,[76] no sólo como la ausencia de afecciones o enfermedades, sino también a un estado completo de bienestar físico, mental y social, derivado de un estilo de vida que permita alcanzar a las personas un balance integral. El Tribunal ha precisado que la obligación general se traduce en el deber estatal de asegurar el acceso de las personas a servicios esenciales de salud,[77] garantizando una prestación médica de calidad y eficaz, así como de impulsar el mejoramiento de las condiciones de salud de la población*."[78]

54. In particular, Article 12(2)(b) requires States to take the necessary steps for *"the improvement of all aspects of environmental […] hygiene*". The CESCR Committee has underscored that this duty encompasses, *inter alia*, ensuring access to an adequate supply of safe and potable drinking water and food and nutrition, and preventing and reducing individuals' exposure to detrimental environmental conditions that directly or indirectly impact on human health.[79]

55. In *SERAC and CESR v Nigeria*, the African Commission noted, in respect of the rights to health and to a healthy environment, that:

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[72] Other regional instruments which protect the right to health include the African Charter, Art 16, and the Arab Charter, Art 39.
[73] *Lhaka Honhat v Argentina*, §222. See also *Poblete Vilches y otros v Chile*, §106.
[74] CESCR General Comment No. 14, §4.
[75] CESCR General Comment No. 14, §1.
[76] Cf. *inter alia*, Constitution of the World Health Organisation (adopted by the International Health Conference held in New York from 19 to 22 June 1946, signed on 22 July 1946 by representatives of 61 States (Off. Rec. Wld Hlth Org.; Actes off. Org. mond. Santé, 2, 100) and entered into force on 7 April 1948), Preamble.
[77] Cf. *Mutatis mutandis*, *Ximenes Lopes v Brazil*, Judgment, IACtHR Series C No 149 (4 July 2006), §128.
[78] *Poblete Vilches y otros v Chile*, §118.
[79] CESCR General Comment No. 14, §15.

"*Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.*"[80]

56. The IACtHR has also considered the right to health through the lens of Article 4 of the American Convention which protects the right to life. For the IACtHR, Article 4 includes "*not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated.*"[81] In turn, this means that one of the "*inescapable*" obligations imposed on States under Article 4 is to generate minimum living conditions that are compatible with human dignity, including by taking positive and concrete steps towards the fulfilment of the right to a decent life, particularly in cases of persons who are vulnerable and at risk.[82] In *Advisory Opinion OC-23/17*, the IACtHR reiterated that:[83]

"*Among the conditions required for a decent life, the Court has referred to access to, and the quality of, water, food and health, and the content has been defined in the Court's case law,*[84] *indicating that these conditions have a significant impact on the right to a decent existence and the basic conditions for the exercise of other human rights.*[85]*The Court has also included environmental protection as a condition for a decent life.*[86] *Among these conditions, it should be underlined that health requires certain essential elements to ensure a healthy life;*[87] *hence, it is directly related to access to food and water.*[88] *In this regard, the Court has indicated that health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.*[89] *Thus, environmental pollution may affect an individual's health.*[90] *In addition, access*

[80] *SERAC and CESR v Nigeria*, §53.
[81] See e.g. V*illagrán Morales y otros (Caso de los "Niños de la Calle") v Guatemala*, Judgment, IACtHR Series C No 63 (19 November 1999), §144; *Yakye Axa Indigenous Community v Paraguay*, §161.
[82] *Yakye Axa Indigenous Community v Paraguay*, §162.
[83] *Advisory Opinion OC-23/17*, §§109-111.
[84] *Yakye Axa Indigenous Community v Paraguay*, §167; *Sawhoyamaxa Indigenous Community v Paraguay*, Merits, Reparations and Costs, IACtHR Series C No 146 (29 March 2006), §§156-178, and *Xákmok Kásek Indigenous Community v Paraguay*, §§195-213.
[85] *Yakye Axa Indigenous Community v Paraguay*, §163, and *Chinchilla Sandoval et al. v Guatemala*, Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No 312 (29 February 2016), §168.
[86] *Yakye Axa Indigenous Community v Paraguay*, §163, *Xákmok Kásek Indigenous Community v Paraguay*, §187, and *Kaliña and Lokono Peoples v Suriname*, §172.
[87] As above, these essentials include food and nutrition, housing, access to clean potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment. See CESCR General Comment No. 14, §4.
[88] *Yakye Axa Indigenous Community v Paraguay*, §167; *Sawhoyamaxa Indigenous Community v Paraguay*, §§156-178, and *Xákmok Kásek Indigenous Community v Paraguay*, §§195-213.
[89] *Artavia Murillo et al. ("In vitro fertilization") v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No 257 (28 November 2012), §148, citing the Constitution of the WHO.
[90] CESCR General Comment No. 14, §34.

to food and water may be affected if pollution limits their availability in sufficient amounts or affects their quality.[91]"

57. In the specific context of indigenous communities, in *Yakye Axa Community v Paraguay* the IACtHR ruled that the State had breached Articles 1(1) and 4(1) of the American Convention by failing to take the necessary measures to ensure that an indigenous community had decent living conditions.[92] In particular, the IACtHR noted that:

> "*[m]embers of the Yakye Axa Community live in extremely destitute conditions as a consequence of lack of land and access to natural resources [and]….could have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional land. Displacement of the members of the Community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. These conditions have a negative impact on the nutrition required by the members of the Community who are at this settlement….Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water.*"[93]

58. The IACtHR's reasoning on the relationship between access to natural resources, health and living conditions of indigenous communities finds echo in CESCR General Comment No. 14, which states that:

> "*The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their free will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.*"[94]

[91] *Saramaka People v Suriname*, §126; *Xákmok Kásek Indigenous Community v Paraguay*, §§195-198; CESCR General Comment No. 12, §7 and §8; CESCR General Comment No. 15, §10 and §12.
[92] *Yakye Axa Indigenous Community v Paraguay*, §176.
[93] *Yakye Axa Indigenous Community v Paraguay*, §164.
[94] CESCR General Comment No. 14, §27.

e) *The right to culture*

59. The right to participate in cultural life ("the right to culture") is said to be *"essential for the maintenance of human dignity*".[95] At the universal level, Article 15 of the ICESCR recognises the right of everyone to take part in cultural life, whilst Article 27 of the International Covenant on Civil and Political Rights ("ICCPR")[96] specifically enshrines the right of individual members of minority groups to enjoy their own culture in community with other members of their group.[97]

60. In the Inter-American System, the right of everyone to take part in the cultural life of the community is recognised in Article 14(1)(a) of the Protocol of San Salvador which states:

> "*The States Parties to this Protocol recognize the right of everyone: […] To take part in the cultural and artistic life of the community*".

61. Similarly, Article 13 of the American Declaration on the Rights and Duties of Man recognises the right of every person to take part in the cultural life of the community, and Article 6 of the American Declaration on the Rights of Indigenous Peoples enshrines the collective right of indigenous peoples to their own cultures, whereas the American Convention reiterates in its Preamble that "*in accordance with the Universal Declaration of Human Rights […] everyone may enjoy his […] cultural rights*."

62. In *Lhaka Honhat v Argentina* the IACtHR held that the autonomous right to take part in cultural life, which includes the right to cultural identity, is derived from Article 26 of the American Convention as interpreted in light of, *inter alia*, Articles 30, 45(f), 47 and 48 of the OAS Charter and Article 14.1.a of the Protocol of San Salvador.[98] In

[95] CESCR, 'General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the ICESCR)' (21 December 2009) UN Doc E/C.12/GC/21, §1.

[96] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[97] See also Universal Declaration of Human Rights, Art 27; International Convention on the Elimination of All Forms of Racial Discrimination, Art 5(e)(vi); CEDAW, Art 13(c); CRC, Art 30; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, Art 43(1)(g); Convention on the Rights of Persons with Disabilities, Art 30(1); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135 (18 December 1992), Art 2(1) and (2). At the regional level, the right to culture is protected under Art 17 of the African Charter, Art 42 of the Arab Charter and Art 32 of the ASEAN Human Rights Declaration. The United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) ("UNDRIP") contains 17 articles concerning cultural rights, including, *inter alia*, the right of indigenous peoples and individuals not to be subjected to forced assimilation or destruction of their culture and the right to effective mechanisms to prevent any action that deprives them of their integrity as a distinct peoples, or of their cultural values or ethnic identities (Art 8(1) and (2)(a)); the right of indigenous groups to practice and revitalize their cultural traditions (Art 11); to manifest, practise, develop and teach their spiritual and religious traditions (Art 12); to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources (Art 25) and to maintain, control, protect and develop their cultural heritage and traditional cultural expressions (Art 31).

[98] *Lhaka Honhat v Argentina*, §§195-197 and §§231-234; see also *Maya Kaqchikel Indigenous Peoples of Sumpango et al v Guatemala*, Merits, Reparations and Costs, IACtHR Series C No 440 (6 October 2021), §§118-131. At §238 of *Lhaka Honhat* the IACtHR took account of the Preamble to the UNESCO Universal Declaration on Cultural Diversity (2 November 2001) in recognising that cultural diversity and its richness should be protected by States because it "*is as necessary for humankind as biodiversity is for nature[;] it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations*."[98] In this regard

Advisory Opinion OC-23/17, the IACtHR stated that "*cultural identity*" is a "*fundamental collective human right of indigenous communities that must be respected in a multicultural pluralist and democratic society*".[99]

63. The CESCR's 'General Comment No. 21: Right of everyone to take part in cultural life' defines culture under Article 15 of the ICESCR as "*a broad, inclusive concept encompassing all manifestations of human existence"* including "*religion or belief systems, rites and ceremonies […] customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence"*.[100] The term "*to take part*" under Article 15 is made up of three interrelated main components: (a) participation in, (b) access to, and (c) contribution to cultural life. "*Access*", in particular, includes the right "*to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities*."[101] States must respect, protect and fulfil the right to take part in cultural life.[102] The obligation to respect precludes direct and indirect interference by the State with the enjoyment of the right; the obligation to protect requires States to take steps to prevent third parties from interfering with the right, and the obligation to fulfil prescribes that adequate measures to taken to ensure the full realisation of the right.[103]

64. International human rights law recognises the special relationship that indigenous peoples have with their land and resources, and its connection to their right to culture and cultural identity. As the CESCR explains:

> "*The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.*"[104]

65. Article 27 of the ICCPR has been consistently interpreted as applying to the relationship between indigenous peoples, their lands, natural resources and traditional

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it is pertinent to note that the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 1, Art 11, obliges States to preserve, protect and promote the manifestations of intangible cultural heritage that have been added to the Representative List of the Intangible Cultural Heritage. Under Art 15, States are required to endeavour to ensure the widest possible participation of communities, groups and individuals that create, maintain and transmit such heritage, and to involve them actively in its management. In 2010, Colombia inscribed an integral part of the cultural heritage of the Wayúu, the Wayúu normative system, onto the List.

[99] *Advisory Opinion OC-23/17*, §113.

[100] CESCR General Comment No. 21, §§11-13.

[101] CESCR General Comment No. 21, §§15(b).

[102] CESCR General Comment No. 21, §48. See also CCPR 'General Comment No. 23: Article 27 (Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5, §6.1.

[103] CESCR General Comment No. 21, §§62-63.

[104] CESCR General Comment No. 21, §36. The CCPR takes the same approach in General Comment No. 23, §7.

subsistence activities. For example, in *Lubicon Lake Band v Canada*, the CCPR held that the rights protected by Article 27 "*include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong*",[105] which included the right of the Lubicon Cree to engage in subsistence activities in their traditional hunting, fishing and trapping grounds. This was violated by Canada's failure to observe the Lubicon Lake Band's land rights, and unrestricted oil and gas activities which threatened their way of life, environmental and economic base and culture. In *Kitok v Sweden*, the CCPR held that the Sami peoples' traditional hunting, fishing and reindeer husbandry activities were "*an essential element in the culture of an ethnic community*" falling under the protection of Article 27 of the ICCPR.[106] The same finding has since been made, *inter alia*, in relation to the Maori people's use and control of fisheries,[107] and the Aymara community's raising of llamas.[108]

66. The collective right of indigenous peoples to their culture is also enshrined in the International Labour Organisation's Indigenous and Tribal Peoples Convention 169 ("ILO Convention 169").[109] This establishes, *inter alia*:

    a. That governments should promote the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions (Article 2(2)(b));
    b. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination (Article 3);
    c. That special measures shall be adopted for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned (Article 4);
    d. In applying the provisions above, the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals (Article 5);
    e. That handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development (Article 23).

67. The Inter-American system has made it clear that the impact of constructions and mega-projects on indigenous peoples may attract State responsibility. The IACommHR has found for example that the incursion into traditional Yanomami territory in Brazil by highway construction workers, geologists, mining prospectors and farm workers, without adequate protection for the safety and health of the Yanomami people, caused conflicts and displacement that affected their lives,

[105] *Lubicon Lake Band v Canada, Ominayak (on behalf of Lubicon Lake Band) v Canada*, Merits, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984, §32.2.
[106] *Ivan Kitok v Sweden*, Communication No. 197/1985, U.N. Doc. CCPR/C/33/D/197/1985 (27 July 1988), §9.2. See also *Länsman et al v Finland*, UN Doc CCPR/C/52/D/511/1992 (8 November 1994).
[107] *Apirana Mahuika et al v New Zealand*, Views, Comm No 547/1993, UN Doc CCPR/C/70/D/547/1993 (27 October 2000), §9.3.
[108] *Ángela Poma Poma v Peru*, Views, Comm No 1457/2006, UN Doc CCPR/C/95/D/1457/2006 (27 March 2009), §7.3.
[109] ILO Convention 169 (adopted 27 June 1989, entered into force 5 September 1991).

security, health and cultural integrity.[110] The IACommHR found the Brazilian government liable for having failed to take timely and effective measures to protect the human rights of the Yanomamis.

68. The IACommHR also considered that the rights of indigenous people were threatened where the traditional lands of the indigenous peoples in the Oriente region of the Ecuadorian Amazon were "*invaded*" and "*degraded*" by oil exploration and other activities, recognising that for indigenous peoples the "*continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being*", given the land's capacity "*for providing the resources which sustain life*", *and "the geographical space necessary for the cultural and social reproduction of the group*."[111]

69. The IACtHR has also held the right to culture to fall within the protective scope of Article 21 of the American Convention (right to property) in a number of cases involving indigenous communities. It has held that the right to property extends to the communal ownership of land by indigenous peoples that is, from their cultural perspective, part of their tenure system,[112] and also the broad natural resources with which indigenous peoples have a close relationship as the essential basis of their physical and cultural survival, traditional way of life, distinct cultural identity, social structure, economic system, customs, spiritual beliefs and traditions and the transmission of these to future generations.

70. For example, in *Yakye Axa Indigenous Community v Paraguay* the IACtHR observed that indigenous communities shared a "*close relationship*" with their traditional territories and the natural resources therein, "*not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity".* Consequently, "*the close ties of indigenous peoples with their traditional territories and the natural resources therein associated with their culture, as well as the components derived from them, must be safeguarded by Article 21.*"[113]

71. In *Saramaka People v Suriname*, the IACtHR elaborated on the relationship between Article 21 and the protection of indigenous culture as follows: [114]

[110] IACommHR, Case No. 7615 (Brazil), IACommHR Res. No. 12/85, OAS Doc. OEA/Ser.1/V/II.66, doc. 10, rev. 1 (5 March 1985), §§7-11.
[111] IACommHR Report on the Situation of Human Rights in Ecuador, OAS Doc OEA/Ser.L/V/II.96, doc 10, rev. 1, Chapter IX (April 24, 1997), conclusion.
[112] *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Merits, Reparations and Costs, IACtHR Series C No 79 (31 August 2001).
[113] *Yakye Axa Indigenous Community v Paraguay*, §135 and §137. See also *Kichwa Indigenous People of Sarayaku v Ecuador*, §145; *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v Panama*, Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No 284 (14 October 2014), §111-112; *Garífuna Community of Punta Piedra and its members v Honduras*, Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No 304 (8 October 2015), §165; *Triunfo de la Cruz Garífuna Community and its members v Honduras*, Merits, Reparations and Costs, IACtHR Series C No 324 (8 October 2015), §100; *Kaliña and Lokono Peoples v Suriname*, §129, and *Xucuru Indigenous People and its members v Brazil*, Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No 346 (5 February 2018), §115.
[114] *Saramaka People v Suriname*, §§121-122.

"*[…] members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake. Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people. That is, the aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States [...] This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities' right to the use and enjoyment of their property. From this analysis, it follows that the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life.*"

72. The IACtHR recognised that the extraction of natural resources would directly and indirectly affect the Saramaka peoples' subsistence resources, which were protected under Article 21. For example, extraction activities could affect the availability of clean natural water which would in turn affect fishing, and wood-logging in the forest would affect hunting and gathering resources.[115] It held that restrictions on the property right of members of indigenous and tribal peoples, particularly those regarding the use and enjoyment of their traditionally owned lands and natural resources, are never permissible where they "*deny their survival as a tribal people*."[116]

73. Similarly, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* the African Commission considered that the "*very essence*" of Article 17 of the African Charter had been denied by the eviction of the Endorois people from their ancestral lands, and by the restriction of access to their cultural sites and vital resources for the health of their livestock, which created a major threat to their pastoral way of life.[117]

f) The right of indigenous peoples to prior consultation and free, prior and informed consent

The right to prior consultation

74. Article 6 of ILO Convention 169 establishes the binding duty on States to consult with indigenous peoples, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or

[115] *Saramaka People v Suriname*, §126.
[116] *Saramaka People v Suriname*, §128. See also *Poma Poma v Peru*, §7.6, where the CCPR stated that measures interfering with the right to culture under Art 27 of the ICCPR "*must respect the principle of proportionality so as not to endanger the very survival of the community and its members*."
[117] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Comm No 276/2003, ACommHPR (4 February 2010).

administrative measures which may affect them directly. All such consultations must be undertaken "*in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.*"[118]

75. Article 7 of ILO Convention 169 states as follows:

> "*1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.*
> *2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.*
> *3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.*
> *4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.*"

76. In respect of the exploitation of mineral or sub-surface resources pertaining to indigenous lands and territories which they occupy or otherwise use, Article 15 of ILO Convention 169 states:

> "*1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.*
>
> *2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities*."

[118] The UNDRIP also enshrines the right of indigenous peoples to prior consultation in good faith "*through their own representative institutions in order to obtain their free and informed consent*" before adopting and implementing legislative or administrative measures that may affect them (Art 19), and prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (Art 32(2)).

77. The communal right to land under ILO Convention 169[119] was upheld by the ILO Committee of Experts on the Application of Conventions and Recommendations in finding that Colombia was required to adequately apply the Convention's consultation provisions before authorising petroleum exploration in traditional U'wa territories:

> "*The Committee considers that the concept of consultation with the indigenous communities that might be affected with a view to exploiting natural resources must encompass genuine dialogue between the parties, involving communication and understanding, mutual respect and good faith, and the sincere desire to reach a consensus. A meeting conducted merely for information purposes cannot be considered as being consistent with the terms of the Convention. Furthermore, according to Article 6, the consultation must be "prior" consultation, which implies that the communities affected are involved as early on as possible in the process, including in environmental impact studies. Lastly, the Committee wishes to emphasize that, as in the present case, meetings or consultations conducted after an environmental licence has been granted do not meet the requirements of Articles 6 and 15(2) of the Convention.*"[120]

78. The ILO Committee of Experts has also held that Article 7 of ILO Convention 169 requires environmental, social, spiritual and cultural impact assessments to be carried out with the involvement of indigenous peoples affected by development activities.[121] As such the obligation of prior consultation "*implies that the peoples concerned should be consulted before finalizing the environmental study and the environmental management plan*".[122]

79. In General Comment No. 23, the CCPR states that the enjoyment of the right to culture under Article 27 of the ICCPR requires the "*effective participation of members of minority communities in decisions which affect them*."[123] In General Comment No. 21, the ESCR Committee states that the obligation to "*fulfil*" the right to participate in cultural life under Article 15 ICESCR requires the "*enactment of appropriate legislation and the establishment of effective mechanisms allowing persons, individually, in association with others, or within a community or group, to participate effectively in decision-making processes*".[124]

80. In the Inter-American context, the right to participate emanates from both Article 23 (right to participate in government) and Article 21 (right to property) of the American

[119] ILO Convention 169, Arts 12-19.
[120] ILO Committee of Experts, 'Third Supplementary Report of the Committee established to examine the representation alleging non-observance by Colombia of Convention 169, made under Article 24 of the ILO Constitution by the Central Unitary Workers' Union' (2001), §90.
[121] See, for example, ILO Committee of Experts, 'Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP)' (2012), §34, and ILO Committee of Experts, 'Observation - ILO Convention 169 – Chile' (adopted 2018, published 108th ILC session (2019)).
[122] ILO Committee of Experts, 'Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)' (2001), §39.
[123] CCPR General Comment No. 23, §7.
[124] CESCR General Comment No. 21, §54(a).

Convention,[125] as well as the right to culture which flows from the latter. [126] In *Kichwa Indigenous People of Sarayaku v Ecuador* the IACtHR recognised that "*the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law.* "[127]

81. In *Saramaka People v Suriname* the IACtHR set out the following three safeguards which States must abide by in order to preserve, protect and guarantee the special relationship that indigenous peoples have with their territory, which in turn ensures their survival as a tribal people:

> "*First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within the community's territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment*."[128]

82. In relation to the first safeguard, the effective participation of the community, the IACtHR expanded as follows:

> "*[…] in ensuring the effective participation of members of the Saramaka people in development or investment plans within their territory, the State has a duty to actively consult with said community according to their customs and traditions. This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, the Saramakas must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State. The State must also ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily. Finally, consultation should take account of the Saramaka people's traditional methods of decision-making*."[129]

83. In *Kichwa Indigenous People of Sarayaku v Ecuador*, the IACtHR stated that "*engaging in consultations without having regard to their essential characteristics, compromises the State's international responsibility.*"[130]

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[125] *Kaliña and Lokono Peoples v Suriname*, §§202-203 and §230.
[126] *Kichwa Indigenous People of Sarayaku v Ecuador*, §159.
[127] *Kichwa Indigenous People of Sarayaku v Ecuador*, §164.
[128] *Saramaka People v Suriname*, §129. See also *Kichwa Indigenous People of Sarayaku v Ecuador*, §186 and *Kaliña and Lokono Peoples v Suriname*, §201.
[129] *Saramaka People v Suriname*, §133.
[130] *Kichwa Indigenous People of Sarayaku v Ecuador*, §177.

84. Turning to the third safeguard, the requirement for environmental and social impact assessments, it is pertinent to that in note that in *Advisory Opinion OC-23/17* the IACtHR explicitly indicated that affected indigenous communities "*should be allowed to take part in the environmental impact assessment process through consultation*".[131] The Expert Mechanism on the Rights of Indigenous Peoples has recently advised States to "*ensure that indigenous peoples have the opportunity to participate in impact assessment processes (human rights, environmental, cultural and social), which should be undertaken prior to the proposal*" and be "*objective and impartial.*"[132] This *amicus curiae* deals in the next section with the requirements of environmental and social impact assessments, as set out by the IACtHR in *Advisory Opinion OC-23/17*.

85. In *Kaliña and Lokono Peoples v Suriname*, the IACtHR recognised that mining activities that resulted in an adverse impact on the environment and, consequently, on the rights of the Kaliña and Lokono indigenous peoples, were carried out by private agents (Suralco and BHP Billiton-Suralco). It took note of the UN Guiding Principles on Business and Human Rights in finding that the State failed to comply with the safeguard requirement of environmental impact assessments.[133]

86. The above is now underscored by the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ("the Escaz*ú* Agreement"), signed by Colombia in December 2019, which places a duty on States to support vulnerable persons or groups in order to engage them in an active, timely and effective manner in decision-making processes with respect to projects, activities and processes that may have a significant impact on the environment, in observation of domestic and international obligations in respect of the rights of indigenous peoples.[134]

The right to free, prior and informed consent

87. The right of indigenous peoples to free, prior and informed consent is grounded in the fundamental rights to self-determination guaranteed by common Article 1 of the ICCPR and ICESCR,[135] and the right to freedom from racial discrimination protected

[131] *Advisory Opinion OC-23/17*, §166.
[132] See HRC, 'Study of the Expert Mechanism on the Rights of Indigenous Peoples, Free, prior and informed consent: a human-rights based approach', UN Doc A/HRC/39/62 (10 August 2018), to which Colombia and its Defensoría del Pueblo submitted a contribution ("Expert Mechanism Study on Free, prior and informed consent"), Annex, §15. See also the 'Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities', adopted at the seventh meeting of the Conference of the Parties to the Convention on Biological Diversity (2004, CBD Guidelines Series).
[133] *Kaliña and Lokono Peoples v Suriname*, §§223-226.
[134] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, adopted on 4 March 2018 in *Escazú*, Costa Rica.
[135] The CESCR has repeatedly cited Art 1 of the ICESCR in urging States to respect the principle of free, prior and informed consent. See its 'Concluding observations on the fifth periodic report of Australia', UN Doc E/C.12/AUS/CO/5 (11 July 2017), §15(d) and §16(e), and its 'Concluding observations on the fourth periodic report of Paraguay', UN Doc E/C.12/PRY/CO/4 (20 March 2015), §6 and §6(a).

under Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination.[136]

88. Under the United Nations Declaration on the Rights of Indigenous Peoples,[137] serious infringements on the rights of indigenous peoples require their free, prior and informed consent before they can be undertaken, namely: the forcible removal or relocation of indigenous peoples from their lands or territories (Article 10); the taking of their cultural, intellectual, religious and spiritual property (Article 11(2)); the confiscation, taking, occupation, use or damage of the lands, territories and resources which they have traditionally owned or otherwise occupied or used (Article 28(1)), and the storage or disposal of hazardous materials in their lands or territories (Article 29(2)). Although it is not binding per se, the UNDRIP is important because, as a declaration of principles, it has influenced the interpretation of pre-existing instruments of international law.

89. In General Comment No. 21 the CESCR states that the right to take part in cultural life under Article 15 of the ICESCR includes the right of indigenous peoples to free, prior and informed consent:

> *"States parties must […] take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories. […] States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights*. […] *In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk*."[138]

90. The CCPR in *Ángela Poma Poma v Peru* considered that the consequences of a water diversion authorised by the State as far as llama-raising was concerned had a "*substantive negative impact*"[139] on the author's right to enjoy the cultural life of the community to which she belonged. It stated that where measures "*substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community*", "*participation in the decision-making process*

[136] See the Committee on the Elimination of All Forms of Racial Discrimination, 'Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador' (Sixty second session, 2003), U.N. Doc. CERD/C/62/CO/2, June 2, 2003, §16, which states that "*[a]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, […] merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples,* and recommends "*that the prior informed consent of these communities be sought*". See also the Expert Mechanism Study on Free, prior and informed consent, §3, which states that "*[f]ree, prior and informed consent is a human rights norm grounded in the fundamental rights to self-determination and to be free from racial discrimination*".

[137] The UNDRIP provides a contextualised elaboration of these binding human rights obligations "*as they relate to the specific historical, cultural and social circumstances of indigenous peoples*," as was recognised by former Special Rapporteur on the rights of indigenous peoples James Anaya. See HRC, 'Report by Special Rapporteur James Anaya on the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' (11 August 2008) UN Doc A/HRC/9/9. See also the American Declaration on the Rights of Indigenous Peoples, Arts 13(2); 18(3) and 28(3).

[138] CESCR General Comment No. 21, §§36- 37 and §55(e).

[139] *Poma Poma v Peru*, §7.5.

must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community."[140] In those circumstances, the State's failure, *inter alia*, to consult with the community and require studies to be undertaken by a competent independent body in order to determine the impact that the measure would have on their traditional economic activity violated Article 27 of the ICCPR.[141]

91. In *Saramaka People v Suriname*, the IACtHR stated that where large-scale developments or investment projects will have a "*major impact*" within a territory, the State has a duty not only to consult with the indigenous peoples, but also to "*obtain their free, prior and informed consent, according to their customs and traditions*".[142] In relation to the logging concessions granted within Saramaka territory, the IACtHR reiterated that the question for the State was not "*whether to consult with the Saramaka people, but whether the State must also obtain their consent*".[143]

92. Similarly, in *Endorois Welfare Council v Kenya*, the African Commission held that the right to development under Article 22 of the African Charter required free, prior and informed consent where development or investment projects would have a "*major impact*" within Endorois territory.[144]

93. The authors note that in its Judgment SU-123/18 of 15 November 2018, the Constitutional Court of Colombia recognised three situations in which consent is mandatory:

> "*(i) where the measure consists of removing or relocating the community from its land or territories, (ii) where the measure involves the storage or disposal of hazardous or toxic materials in their lands or territories, and (iii) where the measures involve a serious social, cultural and environmental impact which places an indigenous peoples' means of subsistence at risk.*"[145]

94. Given that the nature of the impact of a measure affects the extent of the State's duty to consult with indigenous peoples, prior environmental and social impact assessments must be a condition precedent for both the State and the indigenous community in question to come to an informed decision as to whether a particular project requires prior consultation or the more stringent obligation to obtain free, prior and informed consent.

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[140] *Poma Poma v Peru*, §7.6.
[141] *Poma Poma v Peru*, §7.7.
[142] *Saramaka People v Suriname*, §134.
[143] *Saramaka People v Suriname*, §147.
[144] *Endorois Welfare Council v Kenya*, §291.
[145] Constitutional Court of Colombia, Judgment SU-123/18 (15 November 2018), §11.3. See also §15.3 where the Constitutional Court explained that "*in those cases where the intensity of the effect on the indigenous community requires that there be free, prior and informed consent, the State in principle only has the ability to implement the measure if it obtains the free, prior and informed consent of the community. The consent of the community is thus binding, given that without it the implementation of the measure entails a violation of its rights. However, in exceptional cases, such as the need to relocate a community to prevent or mitigate a natural disaster, the measure can be implemented without the consent of the community, but in any event the State should guarantee the fundamental rights and physical-cultural survival of the diverse indigenous community, and should ensure that they receive adequate reparations for that decision.*"

PART III. APPLICABLE INTERNATIONAL ENVIRONMENTAL LAW

a) The Precautionary Principle and Interim Measures

95. This section addresses the precautionary principle, which is now well established as a fundamental principle of international environmental law. Principle 15 of the Rio Declaration on Environment and Development ("Rio Declaration") provides that "*[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*."[146]

96. The 1992 Convention on Biological Diversity sets out in its Preamble that "*where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such as threat*."[147] Since this formulation the principle has developed as a positive basis for obligations to take precautionary measures to anticipate, avert or mitigate sources of threat to biodiversity and environmental damage.

97. As discussed above, *Advisory Opinion OC-23/17* provides important guidance in this area. It notes that the precautionary principle has been incorporated into the domestic law and the case law of the highest courts, including by Colombia.[148] The IACtHR explains that the precautionary principle is relevant to interpreting the American Convention:

> "*the Court understands that States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in severe and irreversible damage to the environment, even in the absence of scientific certainty. Consequently, States must act with due caution to prevent possible damage. Thus, in the context of the protection of the rights to life and to personal integrity, the Court considers that States must act in keeping with the precautionary principle. Therefore, even in the absence of scientific certainty, they must take 'effective' measures to prevent severe or irreversible damage*."[149]

98. The IACtHR was therefore unanimously of the opinion that:

> "*States must act in accordance with the precautionary principle to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in serious or irreversible environmental damage, even in the absence of scientific certainty, in accordance with paragraph 180 of this Opinion*."[150]

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[146] Rio Declaration, Principle 15. See also *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Request for the Indication of Provisional Measures: Order)* [2006] ICJ Rep 113, §164, and *Southern Bluefin Tuna, New Zealand v Japan (Provisional Measures) ITLOS Cases No 3 and 4* [1999] 38 ILM 1624-1656.
[147] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 69, Preamble.
[148] *Advisory Opinion OC-23/17*, § 178.
[149] *Advisory Opinion OC-23/17*, §180.
[150] *Advisory Opinion OC-23/17*, §244(6).

99. It is important to note that both environmental law principles and human rights law are mutually reinforcing. CCPR 'General Comment No. 36, Article 6: right to life' provides that the degradation of the environment, climate change and unsustainable development constitute some of the most pressing threats to the ability of present and future generations to enjoy the right to life. It provides:

> "*The obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments.*"[151]

100. The duty to protect life requires States to take special measures of protection towards persons in situations of vulnerability including indigenous peoples.[152] These relevant considerations include the deprivation of the land, territories and resources of indigenous peoples.[153] It is well recognised in international human rights law, as set out above, that economic projects such an mining might have such impact on the environment that they significantly impact on the rights of the community, its subsistence and economic activities (for example, access to clean water) and survival.

101. There are therefore important interconnections between the right of indigenous and tribal peoples to the use and enjoyment of their lands and the right to those resources necessary for their survival.[154] This in turn may affect how the precautionary principle is interpreted, for example, where activities may impact not only on the environment but also on human health.[155]

102. More recently, the Escazú Agreement provides at Article 3 that "*Each party shall be guided by the following principles in implementing the present Agreement: (e) preventative principle; (f) precautionary principle*". Article 8(2) on the right of access to justice includes, that each Party shall have, considering its circumstances: (d) the possibility of ordering precautionary and interim measures, *inter alia*, to prevent, halt, mitigate or rehabilitate damage to the environment.

103. The precautionary principle requires parties to act with prudence and caution to ensure that effective conservation measures are taken to avoid irreparable harm. Applying the precautionary principle and as set out above, courts may make orders to halt operations until further consultations take place, exchange information, carry out

[151] CCPR, 'General Comment No. 36, Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36, §62.
[152] CCPR General Comment No. 36, §23.
[153] CCPR General Comment No. 36, §26.
[154] *Sawhoyamaxa Indigenous Community v Paraguay*, §155; *Yakye Axa Indigenous Community v Paraguay*, §175.
[155] See *Vilnes and Others v Norway* App nos 52806/09 and 22703/10 (ECtHR, 5 December 2013), which concerned the adverse health effects suffered by former divers engaged in diving operation, §244.

environmental impact assessments or suspend operations altogether on the basis of the principle. The application of the precautionary principle will thus depend upon the facts of a given situation in how it is implemented.

104. In this way, precautionary or interim measures may be necessary to comply with the precautionary principle. In *Community of San Mateo de Huanchor v Peru*,[156] the IACommHR adopted precautionary measures requiring an environmental impact assessment for the removal of sludge. This case concerned the effects stemming from the environmental pollution emitted by a field of toxic waste sludge belonging to a mining company. On 17 August 2004 the IACommHR adopted precautionary measures to guarantee the life and personal security of the community, which included the drawing up as quickly as possible an environmental impact assessment study required for removing the sludge containing the toxic waste, which was located in the vicinity of the town of San Mateo de Huanchor.

b) The Prevention Principle

105. The precautionary principle sits alongside another important principle of international environmental law: the principle of prevention. The focus of this principle is not on transboundary harm but rather on the obligation to prevent damage to the environment *per se*.[157] It enshrines a duty to prevent, reduce, and control pollution and environmental harm on the basis that this harm is often irreversible. It is a principle of customary international law.[158]

106. This principle further sits alongside normative recognition and the protection of the rights of nature recognised by the Colombian Constitutional Court.[159] The rights of nature framework understands natural entities as having standing or rights in and of themselves to protection from harm.

107. This framework is also reinforced within international environmental law by the well-established principle of inter-generational equity.[160] The Climate Change Convention places a duty on current generations to act as responsible stewards of the

[156] *San Mateo de Huanchor v Peru*, Case 504/03, IACommHR Report No. 69/04, OAS Doc. OEA/Ser.L/V/II.122, doc. 5, rev. 1 (15 October 2004).

[157] Pierre-Marie Dupuy and Jorge E. Vinuales, *International Environmental Law* (2nd edn, Cambridge University Press, 2015), p66; UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, Art 193. In *South China Sea Arbitration before an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, Republic of Philippines v People's Republic of China*, PCA case No. 2013-19, Award (12 July 2016), §940, the Tribunal provided that "*the obligations in Part XII apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it. Accordingly, questions of sovereignty are irrelevant to the application of Part XII of the Convention*."

[158] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, [1996] ICJ Rep 226, §29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, §140.

[159] Constitutional Court of Colombia, Judgment T-622/16 (The 'Atrato River Case') (10 November 2016).

[160] See for example International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72; UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269, Art 2(5)(c), and the Convention on Biological Diversity, Preamble. See also Philippe Sands and Jacquiline Peel, Principles of International Environmental Law, (4th Ed, Cambridge University Press, 2019), p221, where they explain that the principle protects natural resources including the marine environment, the environment generally, water resources and biological diversity.

planet and ensure the rights of future generations to meet their developmental and environmental needs.[161] This principle aims to protect and enhance the environment, and halt the destruction of land and forests. It aims to ensure ecological balance and improve the living conditions of their populations.[162] This is particularly pertinent to situations where a forest, flora or fauna is being or potentially being threatened with extinction.

108. Protection, vigilance and prevention are all part of obligations on authorities under the prevention principle. This requires State authorities to take pro-active measures to prevent damage and to ensure that they are effectively implemented. Within this principle there are two procedural aspects: (i) the duty to conduct an environmental impact statement and (ii) a duty of cooperation, through notification and consultation.[163]

109. The IACtHR has also made clear in *Advisory Opinion OC-23/17* that States must comply with the obligation of prevention. It states:

> "*[…] based on the obligation of prevention in environmental law, States are bound to use all the means at their disposal to avoid activities under their jurisdiction causing significant harm to the environment. This obligation must be fulfilled in keeping with the standard of due diligence, which must be appropriate and proportionate to the level of risk of environmental harm. In this way, the measures that a State must take to conserve fragile ecosystems will be greater and different from those it must take to deal with the risk of environmental damage to other components of the environment. Moreover, the measures to meet this standard may change over time, for example, in light of new scientific or technological knowledge*."[164]

110. The IACtHR has reiterated that the appropriate measures to be taken in any given situation will vary according to the conditions but that there are certain minimum measures to be taken in line with this general obligation in order to prevent human rights violations as a result of damage to the environment. These include obligations to: (i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate.[165]

111. With respect to environmental impact assessments, the process for making these assessments must be clear and, under the prevention principle, States' control to ensure that compliance with environmental laws and regulations does not end with environmental impact assessments, but rather that States continuously monitor the environmental impact of a project or activity. *Advisory Opinion OC-23/17* sets out in

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[161] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, Art 3(1): "*The Parties should protect the climate system for the benefit of present and future generations of humankind*"; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), Preamble.

[162] See for, example, Lomé Convention (adopted 15 December 1989, entered into force 1 September 1991) 1924 UNTS 3, Art 33.

[163] Dupuy and Vinuales, *International Environmental Law*, p69.

[164] *Advisory Opinion OC-23/17*, §142.

[165] *Advisory Opinion OC-23/17*, §145.

detail the duty to require and approve environmental impact statements.[166] This builds on Principle 17 of the Rio Declaration which provides that:

> "*Environmental impact assessments, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority*."

112. The IACtHR has underlined the importance of these assessments in relation to activities implemented in the territory of indigenous communities. As set out in *Advisory Opinion OC-23/17* the IACtHR has established that the purpose of the assessments "*is not merely to have an objective measurement of the possible impact on the land and peoples, but also to ensure that the members of these peoples are aware of the possible risks, including the environmental and health risks, so that they can evaluate, in full knowledge and voluntarily, whether to not to accept the proposed development or investment plan*."[167] The IACtHR notes that the obligation to conduct environmental impact assessments has been recognised in Colombia.[168]

113. The IACtHR sets out a number of key principles in relation to environmental impact assessments:

a. The assessment must be made before the activity is carried out;
b. It must be carried out by independent entities under the State's supervision and if it is carried out by a private entity, the State must take steps to ensure independence;
c. It must include the cumulative impact;
d. Indigenous communities should be allowed to take part in the environmental impact assessment process through consultation;
e. Respect for the traditions and culture of indigenous peoples;
f. Content of environmental impact assessments will depend on the specific circumstances of each case and the level of risk of the proposed activity.[169]

114. The duty of prevention also includes within it a duty of mitigation, meaning that State authorities must rely on the best available data and technology and collect all necessary information about the existing risk of damage.[170]

115. Taken together the prevention principle and the precautionary principle create obligations both to ensure significant damage is not caused to the environment and to protect the environment, which in turn ensure the rights to life and integrity of persons. This applies through a consideration of human rights generally and the rights of indigenous peoples specifically. They can require the halting of projects or interim measures in order to ensure that irreversible damage is not inflicted on the environment.

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[166] *Advisory Opinion OC-23/17*, §156-170.
[167] *Advisory Opinion OC-23/17*, §156.
[168] Cf. Law No. 1753 of Colombia, National Development Plan 2014-2018 'All together for a new country' (9 June 2015), Art 178; Law No. 99 of Colombia, creating the Ministry of the Environment among other matters (22 December 1993), Art 57.
[169] *Advisory Opinion OC-23/17*, §§162-173.
[170] *Advisory Opinion OC-23/17*, §172.

PART IV. CONCLUDING REMARKS

116. The protection of the environment, including its natural entities such as rivers, trees and rainforests, is essential for human survival. It is also inextricably linked with ways of living and being for indigenous peoples who have special connections to their territories. International law, both with respect to international human rights law and environmental law, sets out important principles in relation to environmental protection. These principles should be interpreted together with the specific international human rights norms which have developed to protect the rights of indigenous peoples, particularly in relation to the impact of investment and development projects. Careful scrutiny is required to ensure that irreversible damage is not caused contrary to the precautionary principle and that fundamental human rights are not infringed. These principles and protections are crucial to ensuring the protection of rivers and their intrinsic value, as well as the rights of indigenous peoples to water, adequate food, health and culture, which are essential to their human dignity.

24 May 2022

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