

**PERUVIAN FEDERATED COMMUNITIES
FROM LAS CUATRO CUENCAS
VS PLUSPETROL NORTE AND MINISTRY
OF ENERGY AND MINES**

AMICUS CURIAE

SALA CIVIL DE LA CORTE SUPERIOR DE JUSTICIA DE LORETO.
EXPEDIENTE N° 00098-2022-0-1903-SP-CI-01

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I STATEMENT OF INTEREST FROM AMICI

Indigenous Peoples Rights International (IPRI) is an international indigenous peoples' rights organization founded that supports indigenous communities in Asia, Africa, and Latin America. It was established to lead and coordinate the Global Initiative to Address and Prevent Criminalization, Violence, and Impunity against Indigenous Peoples. IPRI employs the world's foremost experts on the laws surrounding free, prior and informed consent (FPIC).

Oxfam works in more than 80 countries around the globe to combat poverty and injustice. In addition to responding to humanitarian crises, Oxfam tackles the root causes of poverty such as inequality; discrimination; and unequal access to land, food, and other resources. As part of its mission to safeguard human rights, Oxfam works to advance land and natural resource rights on behalf of indigenous peoples (IPs). Oxfam supports IPs to secure property rights to their ancestral territories, advocates that governments adopt standards in line with their international obligations, and assist communities to obtain compensation when companies or governments violate their land rights. In addition, Oxfam works to ensure that private sector actors respect the human rights of communities whose lives they impact. We have developed rich expertise in the field of business and human rights, successfully advocating for adoption of these standards with a range of multinational corporations across the extractive, agribusiness, financial, apparel, and other industries. Oxfam's decades of experience in business and human rights provides it with unique insight into the legal norms that companies must adopt.

Land Rights Now is an international alliance that campaigns to secure the land rights of IPs. Over 700 organizations across the world have signed up to join the initiative recognizing that secure land rights are a necessary condition to eradicate poverty and hunger, to fight climate change, and build a world of justice where human rights are protected for all. Land Rights Now mobilizes and engages active citizens, media, communities and organizations worldwide to promote and secure the land rights of Indigenous Peoples and local communities. The organization works with alliance participants and provide global campaign support to amplify the voices of communities and help defend their land rights worldwide.

The Benjamin N. Cardozo School of Law's Benjamin B. Ferencz Human Rights & Atrocity Prevention Clinic (Clinic) works in the areas of atrocity prevention and Indigenous rights and is dedicated to strengthening laws, norms, and institutions to prevent mass atrocities, including genocide, and protecting and ensuring justice for affected populations. The Clinic has worked on land rights and Indigenous rights in Brazil for almost a decade to ensure compliance with international human rights and domestic law obligations, including through the enforcement of obligations of prior consultation and free, prior and informed consent. The Clinic partners with organizations engaged in human rights work. The Clinic litigates before international and regional tribunals, investigates human rights violations, writes policy papers, engages in strategic advocacy before the United Nations (UN) and other relevant bodies, and conducts empirical studies on the impact of human rights abuses and human rights mechanisms.

The Human Rights Center of the University of Vale do Rio dos Sinos – UNISINOS – was founded in April 2008 to organize and coordinate the work of human rights researchers. The Center hosts theoretical and applied research projects conducted by professors, undergraduate and graduate students that engage with the decolonial theory of human rights, particularly of vulnerable and minority groups. UNISINOS's applied academic research focuses on advocacy projects on behalf of Brazilian indigenous communities.

II SUMMARY OF ARGUMENT

The Juzgado Mixto de Nauta de la Corte Superior de Justicia de Loreto rightly held that government entities and private sector actors must respect Indigenous land rights in accordance with national and international law. We respectfully urge the Civil Chamber of the Superior Court of Justice of Loreto to uphold the Court's findings that companies operating in indigenous territories must provide Indigenous Peoples with meaningful free, prior and informed consent (FPIC); ensure that companies operating on indigenous territories respect their land and natural resource rights; and compensate populations whose rights have been violated by their operations.

Peru's international legal obligations to respect and recognize indigenous peoples' land rights are unambiguous. International instruments which Peru has adopted,¹ binding case law from the Inter-American Court of Human Rights (IACtHR), and other legal authorities² confirm that:

1. indigenous peoples have a collective right to own, control, possess, manage, distribute and effectively enjoy their traditional lands, territories and resources, including the right to restitution thereof where used, occupied or damaged without their consent, all within the framework of, and without prejudice to, their inherent right to self-determination;
2. governments have an obligation to regularize, respect, protect and fulfil those rights, including, under certain circumstances, a positive obligation to adopt special measures to ensure respect for these rights;
3. governments are obligated to secure, and corporations have a responsibility to provide, indigenous communities with meaningful FPIC³ when a project may impact their lands, which includes the right to reject proposed projects; and
4. governments and corporations must offer communities reasonable benefits from any exploitation of their lands, and furnish access to remedy when their land rights are violated.

¹ U.N. D.R.I.P., 61st Sess., U.N. Doc. No. 53 (A/61/53), (Sept. 13, 2007) [hereinafter UNDRIP]; American Declaration on the Rights of Indigenous Peoples, AG/RES. 2888, (June 15, 2016) [hereinafter ADRIP]; Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO 169]. These and other treaties will be discussed in Part III.A.1. *infra*.

² See, e.g., UN Human Rights Committee, *Poma Poma v. Peru*, Doc. CCPR/C/95/D/1457/2006, (March 27, 2009); UN Committee on the Elimination of Racial Discrimination, *Lars-Anders Ågren et al. vs. Sweden*, CERD/C/102/D/54/2013, (Dec. 18, 2020); UN Committee on the Elimination of Racial Discrimination, *Anne Nuorgam et al v. Finland*, CERD/C/106/D/59/2016, (June 14, 2022) (upholding FPIC for indigenous communities).

³ The right to free, prior, and informed consent (FPIC) obligates actors to meaningfully consult with, and gain approval from indigenous communities whenever a project will significantly affect the indigenous communities' access to their lands or natural resources. This right is codified in the International Labour Convention Concerning Indigenous and Tribal Peoples in Independent Countries No. 169. Fergus MacKay, *A GUIDE TO INDIGENOUS PEOPLES' RIGHTS IN THE INTERNATIONAL LABOUR ORGANIZATION*, 52-53, (2002), <https://www.forestpeoples.org/sites/pp/files/publication/2010/09/iloguideiprightsjul02eng.pdf> [hereinafter ILO Guide]; see also Representative of the Comm. of Experts on the Application of Conventions and Recommendations, Rep. III(4A), at 287, Int'l Lab. Conf., 93rd Session, Geneva (2005). Further, FPIC requires consultation in accordance with the community's own prescribed process, and is not simply the opportunity to disagree with a government's or company's proposal. Jennifer Corpuz, Onel Masardule, & Mikhail Todyshev, *Indigenous Peoples' Free, Prior, and Informed Consent in the Convention on Biological Diversity: An Overview*, 78-94 (2010). The requirements of FPIC will be elaborated upon in Part III.B.

Peru's Constitution stipulates that international treaties are in force in national law,⁴ and that any statutes or regulations must be construed in accordance with the Universal Declaration of Human Rights and other international human rights treaties.⁵ These international treaty obligations are accorded equal weight with its Constitutional protections.⁶ Because the Constitution is the supreme law of the land, any statute, regulation, or other act that violates indigenous communities' internationally protected rights – such as the granting of a concession to an oil company on indigenous lands without FPIC or access to compensation – is illegal. Corporations likewise have an obligation to respect the human rights of individuals who may be affected by their operations, and must provide compensation for affected communities when their activities cause or contribute to adverse human rights impacts.

As will be detailed below, international law thus requires Peru to recognize the indigenous land rights of the Cuatro Cuencas;⁷ to adopt special measures to ensure respect for these rights; and to ensure that their right to FPIC is respected by state agencies and foreign corporation alike. Furthermore, as the Inter-American Court of Human Rights (IACtHR) makes clear, **increasing corporate profits is not a permissible rationale to override the collective property and natural resource rights of indigenous groups that are embedded in international law.** Refusal to uphold these fundamental liberties would leave Peru vulnerable to international attention and reprobation at the IACtHR and other authoritative bodies. And as Article 205 of the Peruvian Constitution provides, affected parties may turn to international bodies when their rights have been violated in Peru without remedy.⁸ We respectfully ask the court to uphold the Juzgado Mixto de Nauta de la Corte Superior de Justicia de Loreto's decision to ensure that the Ministry of Energy and Mines and Pluspetrol Norte adhere to their international legal obligations.

4 Peru Constitution, Art. 55.

5 Peru Constitution, Art. 206, Fourth Final and Transitory Provision.

6 Juan-Andrés Fuentes, Peruvian Legal Research (Oct. 27, 2022) <https://guides.library.harvard.edu/law/peru#s-lg-page-section-8856407> (observing that Peru weights international human rights treaties as equal to the Constitution).

7 The plaintiff communities are collectively referred to as the "Cuatro Cuencas." This collective consists of more than 60 indigenous communities from the Quechua, Achuar, Kichwa, Kukama y Urarinas peoples living across four basins from the Pastaza, Corrientes, Tigre y Marañón rivers.

8 Peru Constitution, art. 205

III ARGUMENT

A. INDIGENOUS GROUPS HAVE A COLLECTIVE RIGHT TO ANCESTRAL LANDS UNDER INTERNATIONAL LAW

1. INTERNATIONAL INSTRUMENTS TO WHICH PERU IS BOUND DEMAND RESPECT FOR INDIGENOUS LAND RIGHTS

In addition to its constitutional commitment to respect native land rights,⁹ Peru is bound to respect indigenous land rights through its adherence to a host of international treaties and its endorsement of various international declarations on human rights. Preeminent among these is ILO Convention 169. ILO 169 affirms indigenous peoples' rights to live upon their ancestral lands; to freely dispose of their own natural resources and territories without interference; and to consult with communities with the aim of achieving their consent.¹⁰ Peru is similarly bound to respect indigenous land rights under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).¹¹ Passed by the UN General Assembly in 2007 and reaffirmed in 2014, UNDRIP asserts that "indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used and acquired,"¹² rights that were similarly affirmed by Peru's signing of ILO 169.¹³ This is not simply a negative right of non-interference; rather, the government's mandate is clear: "States shall give legal recognition and protection to these lands, territories and resources."¹⁴ Failing to take active steps to protect the Cuatro Cuenca's right to their ancestral lands and natural resources places Peru in violation of its international legal obligations.

Along similar lines, a litany of other treaties and declarations applicable to Peru enshrine the right to self-determination, a fundamental principle of international law that asserts that all people, including indigenous peoples, may govern on their own land. The Charter of the United Nations;¹⁵ the International Covenant on Economic, Social, and Cultural Rights (ICESCR);¹⁶ and the International Covenant on Civil and Political Rights (ICCPR) all pronounce the right to self-determination as a foundational human right.¹⁷ The right to self-determination is also pronounced with respect to Indigenous Peoples specifically in common article 3 of the UNDRIP and ADRIP.¹⁸ Because Indigenous Peoples regard land "a locus of identity and culture as much as an economic resource,"¹⁹ "to separate Indigenous Peoples from their lands is to preempt Indigenous"²⁰ right to self-determination.

9 Peru Constitution, art. 89. This Constitution adopts the right of indigenous communities to freely dispose of their own lands. It also explicitly states that this right may not be prescribed by the government, except in case of abandonment. Given that the Cuatro Cuenca communities have not abandoned their lands, Peru's Constitution also protects their right to their ancestral lands.

10 ILO 169, *supra* note 1. Peru ratified ILO 169 in 1994.

11 UNDRIP, *supra* note 1.

12 *Id.* at art. 26(1).

13 ILO 169, *supra* note 1. ILO 169 affirms indigenous peoples' rights to live upon their ancestral lands, and to freely dispose of their own natural resources and territories without interference. Peru ratified ILO 169 in 1994.

14 UNDRIP, *supra* note 1, at art. 26(3).

15 U.N. Charter art. 1, ¶ 2.; art. 55.

16 International Covenant on Economic, Social and Cultural Rights, art. 1(1), Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR].

17 International Covenant on Civil and Political Rights, art. 1(1), Dec. 16, 1966, S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR].

18 American Declaration on the Rights of Indigenous Peoples, AG/RES. 2888, art. III (June 15, 2016).

19 World Resources Institute, For Indigenous Peoples, Losing Land Can Mean Losing Lives, (May 31, 2018) <https://www.wri.org/insights/indigenous-peoples-losing-land-can-mean-losing-lives>. See also Mike Gouldhawke, "Land as a Social Relationship," Briar Patch Magazine, (Sept. 10, 2020), <https://briarpatchmagazine.com/articles/view/land-as-a-social-relationship> ("To traditionalist Indigenous Peoples, in contrast [to settler colonists], land is not a thing in itself but a social relationship between all living and non-living beings.").

20 Jeannette Armstrong, Land and Rights, University of British Columbia (2009), https://indigenousfoundations.arts.ubc.ca/land__rights/.

In common with various UN treaty bodies and Special Procedures,²¹ Inter-American authorities recognize that “the adequate guarantee of communal property does not entail merely its nominal recognition, but includes observance and respect for the autonomy and self-determination of the indigenous communities over their territory.”²² This includes legislative and administrative measures that recognize their rights in practice and “makes them enforceable before the State authorities or third parties,” and which “guarantee the right of the indigenous peoples to truly control and use their territory and natural resources, and to own their territory without any type of external interference from third parties.”²³ This includes the guarantee of free, prior and informed consent, which has been held to derive from both the right to self-determination and the prohibition of racial discrimination. Thus, the right to self-determination and self-governing translates into the right to exercise sovereignty over their traditional territories and resources.²⁴ Peru is bound under international law to comply with this central tenants of international law by respecting the Cuatro Cuenca’s right to exercise control over their lands.

Beyond explicit protection for indigenous land rights and self-determination, numerous other enumerated rights would continue to be violated should the state disregard indigenous peoples’ rights to land. Nearly every facet of indigenous life is inextricably linked to the community’s close connection to land,²⁵ meaning that states must protect indigenous land rights in order to uphold the ICESCR’s rights to food (Art. 11), water (Art. 11), health (Art. 12), cultural life (Art. 15), housing (Art. 12), and freedom to naturally dispose of one’s own wealth (Art. 1(2)).²⁶ In a similar vein, the ICCPR’s rights to life (Art. 6), subsistence (Art. 1(2)), freedom of movement and choosing one’s own residence (Art. 12), and freedom from arbitrary intrusion into one’s home (Art. 16) are just a few of the international human rights obligations that oblige Peru to protect the Cuatro Cuenca’s ability to reside on their lands.²⁷ Peru is similarly obligated to respect indigenous land rights under the American Convention on Human Rights,²⁸ as failure to respect these principles may threaten indigenous communities’ rights to life, property, and associated rights, as expounded on by the Inter-American Court of Human Rights (IACtHR), as will be detailed through the Court’s jurisprudence in Part 2 below.

Furthermore, Peru has embraced indigenous land rights through its adoption of the American Declaration on the Rights of Indigenous Peoples (ADRIP), which confirms that Indigenous Peoples “have the **right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use**, as well as those which they have otherwise acquired.”²⁹

These treaties are further complemented by Peru’s obligations under the Convention on Biological Diversity. Signatories must “respect, preserve, and maintain knowledge, innovations and the practices of indigenous and local communities that involve traditional ways of life relevant for the conservation and sustainable use of biological diversity...[and Peru shall protect and encourage] the customary use of biological resources, in accordance with traditional cultural practices that are compatible with the requirements of conservation or sustainable use.”³⁰ Granting oil concessions to a company that for years contaminated indigenous peoples’ soils, waters, game, and natural resources renders the

21 See e.g., *Tiina Sanila-Aikio vs. Finland*, CCPR/C/124/D/2668/2015 (2019), ¶ 6.8 (observing that ICCPR, art. 27, “interpreted in light of the UN Declaration and article 1 of the Covenant, enshrines an inalienable right of indigenous peoples to ‘freely determine their political status and freely pursue their economic, social and cultural development’”); *Klemetti Käkkäläjärvä et al. v. Finland*, CCPR/C/124/D/2950/2017, ¶ 9.8; and *General Recommendation No. 39 on the Rights of indigenous Women and Girls*, CEDAW/C/GC/39 (2022), ¶ 57(b) (calling on states parties to “Recognize legally the right to self-determination and the existence and rights of Indigenous Peoples to their lands, territories, and natural resources in treaties, constitutions, and laws at the national level”).

22 *Lhaka Honhat v. Argentina*, Judgement, (ser. C) No. 400, ¶ 153 (Feb. 6, 2020) [hereinafter *Lhaka Honhat*]. See also: *Kuna Indigenous People of Madungandí and Emberá Indigenous People of Bayano v. Panamá*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 284, ¶ 259 (Oct. 14, 2014) [hereinafter *Kuna and Emberá*, para. 259 (the establishment of a legal mechanism for the recognition of collective property rights “cannot exclude rights of indigenous peoples that are associated mainly with the right to self-government according to their traditional uses and customs”); and *Entitlement of legal Entities to Hold Rights under the Inter-American Human Rights Systems*, OC-22/16 (2016), para. 79 (“The Committee that supervises the implementation of the International Covenant on Economic, Social and Cultural Rights by the States Parties has interpreted that the right to self-determination is applicable to indigenous communities”).

23 See also *Kuna and Emberá; Xucuru Indigenous People v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct. H.R. (ser. C) No. 346, ¶ 115 (Feb. 5, 2017) [hereinafter *Xucuru*].

24 Karen Engle, Indigenous Rights Claims in International Law: Self-determination, Culture, and Development, in ROUTELEDGE HANDBOOK OF INTERNATIONAL LAW 331, 333 (D. Armstrong, ed., 2009); Ronald Niezen, THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY 29-36, 40-52 (2003); Comm. on Human Rights, Indigenous Issues: Rep. of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, ¶ 38, UN Doc. E/CN.4/2000/84 (Dec. 6, 1999) (Chairperson-Rapporteur of the UN Comm., Luis-Enrique Chavez) (all observing that indigenous advocates have long focused upon self-determination as a grounding principle of indigenous rights).

25 *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001) [hereinafter *Awas Tingni*].

26 ICESCR, *supra* note 16. These rights are similarly recognized by the Peruvian Constitution.

27 ICCPR, *supra* note 17. These rights are similarly protected by the Peruvian Constitution.

28 American Convention on Human Rights, “Pact of San Jose, Costa Rica,” Organization of American States, (Nov. 22, 1969) [hereinafter ACHR].

29 ADRIP, *supra* note 1, at art. XXV(3).

30 Convention on Biological Diversity, G.A. Res. 1760 U.N.T.S. 79, art. 8(j), art. 10(c), (June 5, 1992).

preservation of biological diversity and the maintenance of traditional life an impossibility. Allowing Pluspetrol Norte to devastate local health and ecosystems with impunity places the Ministry of Energy and Mines well out of step with international law.

2. THE INTER-AMERICAN COURT OF HUMAN RIGHTS CONFIRMS INDIGENOUS PEOPLES' COLLECTIVE LAND RIGHTS, INCLUDING THE RIGHT TO CONTROL THEIR OWN RESOURCES AND BE FREE FROM INTERFERENCE FROM THIRD-PARTY ACTORS

Peru is likewise bound to respect indigenous land rights under the American Convention on Human Rights (ACHR).³¹ The IACtHR has repeatedly ruled against states for failing to respect indigenous peoples' collective land rights or to protect their lands and natural resources from the incursion of corporate operations. This includes ten recent decisions affirming indigenous rights to their ancestral lands and natural resources, starting with 2001's *Awas Tingi v. Nicaragua*, and continuing through *Moiwana Community v. Suriname*, *Yakye Axa v. Paraguay*, *Sawhoyamaxa v. Paraguay*, *Saramaka v. Suriname*, *Xákmok Kásek v. Paraguay*, *Sarayaku v. Ecuador*, *Kaliña and Lokono Peoples v. Suriname*, *Xucuru v. Brazil*, and culminating with 2020's *Lhaka Honhat v. Argentina*.³² Regardless of the specific country in question or the financial gains at stake, the IACtHR repeatedly confirms that indigenous land rights must be respected.

The Court grounds indigenous land rights in a wide array of the ACHR's enumerated rights, including the rights to property, self-determination, life, cultural identity, equality and non-discrimination, *vida digna* (dignified life), social and economic development, and legal certainty. The breadth of legal grounding underscores how deeply embedded indigenous land rights are throughout the international human rights law framework. Article 21 of the ACHR, which enshrines the right to property, has become a central pillar of the Court's decision-making. Beginning with the landmark *Awas Tingi* decision, the IACtHR has consistently found that the right to property protects indigenous groups' communal right to land³³ and the liberty to "live freely in their own territory."³⁴

The IACtHR also observes that even absent official title, states must recognize these territorial rights, and that physical possession alone offers sufficient evidence that the land belongs to the indigenous group.³⁵ As the Court explains, "**with respect to ancestral lands, it is precisely the possession or prolonged occupation that gives rise to the right to demand official recognition and registration of property.**"³⁶ Furthermore, a lack of physical possession does not mean an indigenous group has lost its land rights: communities unwillingly dispossessed of their lands or resources maintain property rights that are imbued with "equivalent effects to those of a state-granted full property title," even when lacking official title.³⁷ Rather than restricting its evaluation to official titles, the IACtHR examines real-life factors such as a community's traditional use, spiritual and ceremonial ties, settlements, crop plantings, hunting grounds, fishing grounds, and use of natural resources.³⁸ Hence, **even if concessions to Pluspetrol Norte provide the company with a veneer of legitimacy, because**

31 Peru ratified the American Convention on Human Rights in 1978. American Convention on Human Rights "Pact of San Jose, Costa Rica," Organization of American States, (Nov. 22, 1969) https://www.oas.org/dil/treaties_B32_American_Convention_on_Human_Rights_sign.htm. Article 21 guarantees the right to property, and states that anyone deprived of their property must receive just compensation.

32 *Awas Tingi*, supra note 25, at ¶ 148; *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 133 (June 15, 2005) [hereinafter *Moiwana Village*]; *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 125, (June 17, 2005); *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 120 (Mar. 29, 2006) [hereinafter *Sawhoyamaxa*]; *Saramaka People v. Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 89 (Aug. 12, 2008) [hereinafter *Saramaka*]; *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 86 (Aug. 24, 2010) [hereinafter *Xákmok Kásek*]; *Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012); *Kuna Indigenous People of Madungandí and Emberá Indigenous People of Bayano v. Panamá*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 284, (Oct. 14, 2014) [hereinafter *Kuna and Emberá*]; *Kaliña and Lokono Peoples v. Suriname*, Merits, Costs, Reparations and Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶ 115 (Nov. 25, 2015) [hereinafter *Kaliña and Lokono Peoples*]; *Xucuru Indigenous People v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 346, ¶ 115 (Feb. 5, 2017) [hereinafter *Xucuru*]; *Lhaka Honhat v. Argentina*, Judgment, (ser. C) No. 400, ¶ 98 (Feb. 6, 2020) [hereinafter *Lhaka Honhat*].

33 *Awas Tingi*, supra note 25, at ¶ 140.

34 *Id.* at ¶ 149.

35 *Id.* at ¶ 151; *Kuna and Emberá*, supra note 32.

36 *Kuna and Emberá*, supra note 32, at ¶ 121.

37 *Sawhoyamaxa*, supra note 32, at ¶ 128.

38 *Id.* at ¶ 131.

the Cuatro Cuencas have traditionally relied upon the lands in question for subsistence and spiritual needs, the communities' land rights remain protected by international law and the Inter-American Court. These rights have long existed for these indigenous communities, beginning with Peru's ratification of the UN Charter, which protects the right to self-determination, and strengthening with the passage of subsequent treaties and declarations directly protecting indigenous land rights including (the Convention on Biological Diversity, UNDRIP, and ADRIP) and indirectly protecting indigenous land rights (the ACHR, ICCPR, ICESCR, UN Charter). The Juzgado Mixto de Nauta de la Corte Superior de Justicia de Loreto rightly recognizes these rights **have already existed**; the Court could not have created these rights out of thin air, as Pluspetrol Norte contends, because they have long existed for the community under binding international and constitutional law.

3. INTERNATIONAL AUTHORITIES REITERATE OBLIGATION TO RESPECT INDIGENOUS LAND RIGHTS, PROVIDE FPIC, AND ENSURE ACCESS TO REMEDY OR REMUNERATION

While treaty obligations and jurisprudence from the IACtHR cement Peru's commitment to ensuring respect for the Cuatro Cuenca's land rights, these principles are also widely adopted by other international authorities. For example:

- The UN Economic and Social Committee released a General Comment on the right to land in January 2023, reaffirming that “[T]he collective ownership of lands, territories, and resources of Indigenous Peoples shall be respected, which implies that these lands and territories shall be demarcated and protected by State Parties.”³⁹ **This expressly includes preventing third parties from infringing upon those land rights.**⁴⁰ The Comment continues on to embrace FPIC, and notes that the Inter-American system confirms that “**Indigenous Peoples who have unwillingly lost possession of their lands without their free and prior consent after a lawful transfer to third parties “are entitled to restitution thereof** or to obtain other lands of equal extension and quality.”⁴¹
- The Committee on the Elimination of Discrimination Against Women issued a General comment on the rights of Indigenous women and girls in 2022, which includes a robust section outlining indigenous women's land rights.⁴² The Committee recognized the rights of indigenous women to ownership and control over lands encompassed by their customary tenure systems, the requirement for companies and states to conduct meaningful FPIC with indigenous women before any project that may affect their territory breaks ground, and the obligation for states to “prevent and regulate activities by businesses...that may undermine the rights of Indigenous women...to their lands, territories and environment, including measures to punish, ensure the availability of remedies, grant reparations and prevent the repetition of these human rights violations.”⁴³
- In 2021, the UN Human Rights Committee ruled that Paraguay violated the human rights of the indigenous Campo Agua'ẽ by allowing toxic runoff from corporate operations to pollute their lands and source of livelihood.⁴⁴ The Committee declared the “inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence, food, and cultural identify.”⁴⁵ It further found that FPIC is of fundamental importance and must

39 UN Economic and Social Committee, General comment no. 26 (2002) on land and economic, social and cultural rights, ¶ 11, (Jan. 24, 2023) [hereinafter UN ESC General Comment on Land].

40 *Id.* at ¶ 26

41 *Id.* at ¶ 17 (citing *Sawhoyamaya*, ¶ 128).

42 UN Committee on the Elimination of Discrimination Against Women, General recommendation No. 39 (2022) on the rights of Indigenous women and girls, CEDAW/C/GC/39, (Oct. 31, 2022), Section IV(G), available at https://tbinetnet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fGC%2f39&Lang=en.

43 *Id.*

44 UN Human Rights Committee, Benito Oliveira Pereira and Lucio Guillermo Sosa Benega and the Indigenous Community of Campo Agua'ẽ, of the Ava Guarani People v. Paraguay, Comm. No. CCPR/C/132/D/2552/2015, <https://bit.ly/3v6xCS>.

45 *Id.* at ¶ 8(6).

accompany any project that interferes with an indigenous community's economic activities or cultural practices.⁴⁶ Importantly, the Committee confirmed that the State's failure to investigate or repair damages incurred responsibility under the ICCPR's Art. 2(3), or the right to effective remedy.⁴⁷

- The UN Committee on the Elimination of Racial Discrimination issued analogous reasoning in its 2020 *Ågren* decision, finding that Sweden's concession to a mining company over indigenous Sami lands violated the community's free, prior and informed consent.⁴⁸ The Committee opined that ignoring the community's ancestral land rights and declining to meaningfully consult constituted a form of discrimination, in violation of the Convention on the Elimination of Racial Discrimination.⁴⁹ It went on to write that exploitation of natural resources, *even if* characterized as a "legitimate public interest, does not absolve States parties from their obligation not to discriminate against an indigenous community that depends on the land in question by mechanically applying a procedure of consultation without sufficient guarantees or evidence that the free, prior and informed consent of the members of the community can be effectively sought and won."⁵⁰

These decisions from authoritative bodies illustrate that 1) UN treaty bodies have established the right to FPIC when a project may impact indigenous lands; 2) states have an obligation to provide remedy when these rights are violated; and that 3) claiming that a project is in the public interest does not allow the state to evade its obligation to ensure that any actors encroaching into indigenous lands have conducted meaningful FPIC.

46 *Id.* at ¶ 8(7).

47 *Id.* at ¶ 8(9).

48 UN Committee on the Elimination of Racial Discrimination, *Lars-Anders Ågren et al. vs. Sweden*, CERD/C/102/D/54/2013, (Dec. 18, 2020), <https://bit.ly/36DiSkG>.

49 *Id.* at ¶ 6(7).

50 *Id.* at ¶ 6(20) (emphasis added).

B. STATES AND CORPORATIONS ADHERE TO THEIR INTERNATIONAL LEGAL OBLIGATIONS TO RESPECT INDIGENOUS LAND RIGHTS BY PROVIDING FPIC

1. FPIC REQUIRES MEANINGFUL CONSULTATION WITH COMMUNITIES, WHICH INCLUDES THE ABILITY TO NEGOTIATE AND SHAPE PROJECTS, REFUSE ACCESS TO LANDS AND RESOURCES, AND RECEIVE REASONABLE BENEFITS FROM ANY PROJECT

The FPIC process is one way this duty to respect indigenous land rights is operationalized. FPIC requires actors to extensively consult with indigenous and tribal peoples and accommodate their views about a project's potential impacts before breaking ground, and allows communities to grant or withhold consent to any project that may affect their community or lands.⁵¹ During these consultations, communities can “negotiate the conditions under which the project will be designed, implemented, monitored and evaluated.”⁵² Consent may be withdrawn at any stage.⁵³ Furthermore, FPIC must be conducted “in good faith in both law and practice,” and refusing to grant this right is a violation of international law.⁵⁴

These FPIC requirements are triggered any time extractive or other activities could lead to damages, takings, occupation, confiscation and uses of indigenous lands, territories and resources.⁵⁵ The Committee on Economic and Social Rights further elaborates that consultation means both parties are fully informed about the process and enjoy equal access to relevant information; that decision making processes are transparent, widely publicized, conducted in local language(s), and include reasonable accommodations for everyone; and be conducted without any fear of potential retaliation.⁵⁶ Any “consultation” conducted by Pluspetrol Norte that falls short of these robust standards violates international law.

States must facilitate FPIC due to its obligations under a litany of international instruments and authorities, jurisprudence from the IACtHR, and arguably customary international law.⁵⁷ Corporations share these international law obligations and responsibilities.⁵⁸ The Inter-American Court details what FPIC obligations mean for third-party actors, writing,

51 Food and Agriculture Organization, “Indigenous Peoples: Free, Prior, and Informed Consent,” (2023), <https://www.fao.org/indigenous-peoples/our-pillars/fpic/en/>.

52 *Id.*

53 *Id.*

54 ILO Committee of Experts of the Application of Conventions and Recommendations (CEACR), INT’L LAB. ORG., GENDER AND EQUITY BRANCH, Procedure for Consultations With Indigenous Peoples, Experiences from Norway, INT’L LAB. ORG. (2016) (“Consultations must be formal, full and exercised in good faith; there must be a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord.”)

55 UNDRIP, *supra* note 1, at art. 28(1).

56 UN ESC General Comment on Land, *supra* note 39, at ¶¶ 20-21.

57 Corrine Lewis, Corporate Responsibility to Respect the Rights of Minorities and Indigenous Peoples, 2012, at 40 (“The principle of free, prior and informed consent, contained in Article 32 of the UN Declaration on the Rights of Indigenous Peoples is arguably developing into a customary international law standard.”).

58 See ILO Guide, *supra* note 3, at 27.

“ The State must abstain from carrying out actions, infrastructure works or undertakings on indigenous territory that could affect its existence, value, use or enjoyment by the communities victims, or ordering, requiring, authorizing, tolerating or allowing third parties to do this. If any of the said actions are carried out, they must be preceded, as appropriate, by providing information to the indigenous communities victims, and conducting prior, adequate, free and informed consultations, in keeping with the standards indicated by the Court in this judgment.”⁵⁹

The IACtHR elaborates on FPIC’s requirements in *Lhaka Honhat*, identifying three mandatory steps. Peru must:

1. Ensure the effective participation of the community in conformity with their customs and traditions, which in turn requires the continuous exchange of information with the community. This consultation must be conducted in good faith, aimed at reaching an agreement, and pursuant to culturally acceptable procedures;
2. Guarantee that no concession will be granted on indigenous territory unless and until independent and technically adept actors have concluded an environmental impact assessment; and
3. Ensure that communities receive reasonable benefits from the projects impacting their lands and lives.⁶⁰

Any concession on indigenous lands concluded without formal and robust consultation with local indigenous communities, unaccompanied by transparent and continuous dialogue, and without the sharing of benefits to local communities – such as the concession granted to Pluspetrol Norte – violates international law.

2. STATES MUST MEANINGFULLY CONSULT INDIGENOUS GROUPS PRIOR TO RESTRICTING LAND RIGHTS, AND WEIGH THE RESTRICTION’S NECESSITY AND PROPORTIONALITY

Despite these well-established rights, *amici* acknowledge that the IACtHR has found that States may consider certain restrictions in light of a legitimate public interest.⁶¹ To determine whether the public interest supersedes the indigenous group’s land rights, the state must weigh the necessity, proportionality, and legality of the restriction against the “legitimate objectives in a democratic society,”⁶² while still guaranteeing FPIC, the production of an environmental impact assessment, and other safeguards against dispossessing indigenous communities of their lands. The Court classifies compliance with IP rights as a fundamental and countervailing public interest consideration which must be weighed.⁶³

When considering the “proportionality” prong of this test, states must ensure that any proposed restriction on indigenous land rights do not strip the community of their customs in such a way that

⁵⁹ *Lhaka Honhat*, *supra* note 32, at ¶ 398 (emphasis added).

⁶⁰ *Id.* at ¶ 174 (referencing its case law from *Saramaka*, *Sarayaku*, *Kalina and Lokono*, as well as testimony to the UN Human Rights Committee from the UN Special Rapporteur on the human rights and fundamental freedom of indigenous peoples). See also Inter-American Commission on Human Rights, “Indigenous Peoples, Afro-Descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities,” ¶¶ 219-224 (Dec. 31, 2015), <http://www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf>.

⁶¹ *Akye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶149 (June 17, 2005).

⁶² *Id.* at ¶144.

⁶³ *Id.*; see also *Kalina and Lokono*, *supra* note 32.

group survival is endangered.⁶⁴ To protect the group's survival, in turn, states must implement certain safeguards, including guarantees that the community may have "effective participation...in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan" that the state wishes to carry out on the group's territory.⁶⁵ The Court has found that "effective participation" includes a duty to consult the affected populations at the early stage of the project.⁶⁶ Furthermore, the Court affirmed in *Xákmok Kásek* that productivity or financial gains cannot serve as the government's only stated priority for land, and that indigenous peoples' relationship to their lands must be accounted for when weighing the legitimacy of a restriction.⁶⁷ A single-minded pursuit of money thus does not allow states or corporations to dispense with indigenous land rights.

Public and private sector actors must not simply consult, but ensure they have obtained the consent of indigenous peoples before undertaking measures that impact the community's land rights.⁶⁸ The FPIC process must allow the group to participate in the plan's development and pursue judicial remedies, as necessary, should the project adversely impact the community.⁶⁹ As outlined by international treaty obligations and IACtHR jurisprudence alike, consultation cannot merely "serve as a mere formality, but rather it must be conceived as a 'true instrument for participation'" that foments meaningful dialogue between the indigenous community and the government or third party, with the ultimate goal of "reaching a consensus between the parties."⁷⁰ In fact, the Inter-American Commission has found that a standard even higher than "consultation" is warranted. When issuing its decision in the *Kuna and Emberá* case, the Commission recommended that Panama guarantee free, prior and informed consent over any plans, programs, or projects that the state wishes to develop on their territory,⁷¹ regardless of the potential scale of impact. This rationale was echoed in *Poma Poma v. Peru*, with the Human Rights Committee finding that free, prior and informed consent is a legal requirement when development projects would interfere with a community's rights.⁷²

The Cuatro Cuencas were not offered a meaningful opportunity to furnish their FPIC before Pluspetrol Norte began exploiting and degrading their lands and natural resources with the Ministry of Energy and Mine's approval. To comply with international legal obligations, we encourage the Court to uphold the lower court's decision. This will not only allow the communities access to the compensation which they are owed for previous abuses, but can offer the Cuatro Cuencas – and other indigenous communities throughout the nation – increased protection against such violations in the future.

64 *Saramaka*, *supra* note 32, at ¶128.

65 In addition to this first safeguard, the Court also held that the state must ensure that the affected indigenous community receives a "reasonable benefit" from any such plan, and the state must independent actors conduct social and environmental impacts on any such restrictions. *Id.* at ¶129.

66 *Id.*

67 *Xákmok Kásek* *supra* note 32, at ¶182 (Aug. 24, 2010) ("members of the Xákmok Kásek Community have suffered diverse effects on their cultural identity produced, above all, by the lack of their own territory and the natural resources found on it, which represents a violation of Article 21(1) of the Convention in relation to Article 1(1) thereof. These effects are one more example of the insufficiency of the merely "productive" conception of the land when considering the conflicting rights of the indigenous peoples and the private owners of the lands claimed").

68 *Sarayaku*, *supra* note 32, at ¶164 (finding that "the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law").

69 *Id.* at ¶164.

70 *Id.* at ¶186.

71 *Kuna and Emberá Peoples*, *supra* note 32, at ¶ 5(d)(ii).

72 *Poma Poma*, *supra* note 2, at ¶ 7.6.

3. STATES MUST GAIN INDIGENOUS PEOPLES' CONSENT WHEN PROJECTS HAVE LARGE IMPACTS

As part of ensuring effective participation in decision making, States must not only provide “meaningful consultation,” but need to gain consent when large-scale projects could generate significant impacts on indigenous lands.⁷³ This includes impacts that are created not only from the proposed project currently at hand, but from all accumulated impacts including past, current, and potential future projects.⁷⁴ Indigenous communities must understand and approve any projects that will have a significant impact on their lands prior to the project’s implementation.

The Juzgado Mixto de Nauta de la Corte Superior de Justicia de Loreto’s decision accords with these international legal standards: as detailed by the plaintiffs, the impact of Pluspetrol’s operations was significant and stretched over decades. The company’s failure to fix degraded and leaking oil pipelines, dumping thousands of tons of toxic waste into lands and water ways, spilling oil and refusing to provide adequate clean up have created nearly 2,000 contamination sites.⁷⁵ This widespread pollution has been linked to “extremely negative environmental, health, cultural, and economic impacts,” throughout the region, including high levels of arsenic, lead, barium, cadmium and other heavy metals in children’s and adult’s blood; the poisoning of soil and vegetation; and the poisoning of fish and game that the communities rely upon for survival.⁷⁶

By finding that the Ministry of Mining and Pluspetrol failed to live up to their legal obligations by declining to gain the community’s consent, the court has ensured that Peru is in accordance with regional and international standards surrounding the use of indigenous lands.

⁷³ Saramarka, *supra* note 32, at ¶¶ 133-5; Sarayaku, *supra* note 32, at ¶¶ 129, 134.

⁷⁴ *Id.*

⁷⁵ Additional details of the oil spills, environmental damage, and health consequences of Pluspetrol’s operations are provided in the plaintiff’s filings. They also appear in an OECD Complaint submitted to the Dutch NCP in March 2020. Specific Instance of Non-Compliance with the OECD Guidelines for Multinational Enterprises, FEDIQUEP, FECONACOR, OPIKAFPE, ACODECOSPAT, Peru EQUIDAD, Oxfam in Perú, Oxfam Novib, SOMO v. Pluspetrol, March 11, 2020 (copy on file with author). Summary available at OECD Watch, Complaint: Peruvian Indigenous Federations v. Pluspetrol, <https://www.oecdwatch.org/complaint/peruvian-indigenous-federations-et-al-vs-pluspetrol/>.

⁷⁶ Specific Instance of Non-Compliance, *supra* note 75, at 12.

C. INTERNATIONAL LAW REQUIRES STATES TO PROTECT PEOPLE FROM HUMAN RIGHTS ABUSES COMMITTED BY THIRD-PART ACTORS, CORPORATIONS TO RESPECT HUMAN RIGHTS, AND FOR STATES AND CORPORATIONS TO PROVIDE ACCESS TO REMEDY

1. THE INTERNATIONAL LEGAL FRAMEWORK ON BUSINESS AND HUMAN RIGHTS OBLIGATIONS

Private and public actors have international law obligations to respect human rights and provide remedy for harmed communities. Peru accords its international treaty obligations on par with Constitutional protections,⁷⁷ as mentioned above, which renders any statute, regulation, or agency concession to companies that lead to human rights violations illegal. This tenet of Peruvian law has been upheld in the indigenous land rights context: the Juzgado Mixto de Nauta de la Corte Superior de Justicia de Loreto recently rejected legislation that attempted to grant a concession to a logging company on indigenous land, finding that protections for indigenous populations under human rights law, including the UNDRIP, would be violated by this statute; as such, the concession was declared invalid and the Court found that ignoring this order would incur criminal liability.⁷⁸ International human rights obligations thus supersede conflicting national or municipal law.

Peru's and Pluspetrol's duties to respect human rights and provide access to remedy stem from a variety international and regional authorities. In addition to widely accepted standards promulgated by UN bodies like the United Nations Guiding Principles on Business and Human Rights (UNGPs),⁷⁹ the Inter-American system has increasingly trained its focus on private sector accountability. The IACtHR has held over 40 hearings related to corporate human rights abuses,⁸⁰ issued numerous thematic reports and granting precautionary measures that restrain companies from taking action that could infringe on peoples' rights.⁸¹ As Peru grants human rights treaties like the ACHR constitutional status, each of the IACtHR's pronouncements that provide clarity around the ACHR's meaning should be applied robustly. *Amici* respectfully contend that this generates the following international law obligations with respect to how Peru must monitor the behavior of third-party actors operating in their sovereign territory:

1. Peru must ensure third-party actors, including private businesses, respect human rights;
2. Peru and companies operating on its territory have a responsibility to respect human rights, including by providing access to remedy for communities adversely impacted by their operations;
3. Companies operating in Peru have an obligation to respect the human rights of individuals and groups, including indigenous peoples, who may be affected by their operations.

These international law obligations will be considered in turn.

⁷⁷ Fuentes, *supra* note 6

⁷⁸ Organization Regional de Pueblos Indígenas del Oriente v. Loreto Public Prosecutor, Amparo Action, File No. 00299-2020-0-1903-JR-CI-02, Superior Court of Justice of Loreto, (Nov. 21, 2022), available at Resol. N° 14 + Sentencia. Exp. 00299-2020.pdf (archive.org). See also Indigenous Peoples Rights International, Digest: Upholding Indigenous Peoples Rights, Legislation and Jurisprudence, p. 26 (April 2023), https://www.iprights.org/images/articles/resources/2023/Xanharu - Digest Issue 3/Digest_ISSUE 3 OPTIMIZED.pdf

⁷⁹ UN Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 7 April 2008, A/HRC/8/5, available at <https://www.refworld.org/docid/484d2d5f2.html> [hereinafter UNGPs].

⁸⁰ Ana María Mondragón, *Corporate Impunity for Human Rights Violations in the Americas: The Inter-American System of Human Rights as an Opportunity for Victims to Achieve Justice*, HARV. INT'L L. J. (2019) https://harvardilj.org/2016/07/corporate-impunity-for-human-rights-violations-in-the-americas-the-inter-americansystem-of-human-rights-as-an-opportunity-for-victims-to-achieve-justice/#_ftnref13. See, e.g. Forced Displacement and Development in Colombia, 153 Period of Sessions, (Oct. 27, 2014); Extractive Industries and Human Rights of the Mapuche People in Chile, 154 Period of Sessions; Corporations, Human Rights, and Prior Consultation in the Americas, 154 Period of Sessions; Reports of Destruction of the Biocultural Heritage Due to the Construction of Mega Projects of Development in Mexico, 153 Period of Sessions; Impact of Canadian Mining Activities on Human Rights In Latin America, 153 Period of Sessions; Human Rights Situation of Persons Affected by the Extractive Industries in the Americas, 144 Period of Sessions.

⁸¹ See, e.g., Inter-Am. Comm'n H.R., Indigenous and Tribal Peoples' Rights over their Lands and Natural Resources, OEA/Ser.L/V/II. Doc. 56/09. (Dec. 30, 2009); Inter-Am. Comm'n H.R., Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco, OEA/Ser.L/V/II. Doc. 58. (Dec. 24, 2009).

2. PERU HAS A RESPONSIBILITY TO ENSURE THIRD PARTIES RESPECT HUMAN RIGHTS

All states have a responsibility to ensure that private sector actors respect human rights. To ensure such respect, “international law has established state obligations to prevent and punish violence perpetrated by private actors,” and to provide harmed individuals with redress.⁸² The UNGPs, adopted by the UN General Assembly in 2011, affirms that “[s]tates must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”⁸³

In the Americas, to satisfy its obligations to “prevent and punish” third-party actors involved in human rights abuses, states must conduct due diligence. The IACtHR has repeatedly found that “[t]he obligation to act with the necessary due diligence to protect individuals from human rights violations committed by private actors, including corporations, is well-established in InterAmerican case-law, including the recognition that the State can be held internationally responsible for human rights violations committed by private actors.”⁸⁴ This precept has been long-enshrined in case law that binds Peru. In 1988, the IACtHR issued its seminal *Velasquez-Rodriguez v. Honduras* decision, finding that states are required to prevent, investigate, and punish any violations of internationally recognized human rights, regardless of the legal nature of the entity committing the direct abuse.⁸⁵

Importantly, due diligence obligations increase when the affected population struggles to protect itself absent state action. In *Pueblo Bello v. Colombia*, the IACtHR explained that the obligation to protect against and respond to third-party abuses becomes greater when the afflicted population is particularly vulnerable.⁸⁶ What’s more, the IACtHR has found that these obligations apply in the case of communities who were denied remedy following a violation of the right to a healthy environment,⁸⁷ a critical facet of the claim communities are pressing in the instant case. The IACtHR reaffirmed that the obligation to safeguard against corporate abuses extends to the indigenous communities, noting that indigenous peoples have the right to “truly control and use their territory and natural resources, and to own their territory **without any type of external interference from third parties.**”⁸⁸ This pronouncement from 2020’s *Lhaka Honhat* decision echoes earlier judgements including 2014’s *Kuna and Emberá*, at ¶111, 2015’s *Kaliña and Lokono*, at ¶139, and 2017’s *Xucuru*, at ¶116.

It is beyond dispute that Peru is bound to ensure that Pluspetrol Norte does not violate human rights with impunity. Given that the communities harmed by the oil spills and land encroachment were particularly vulnerable to Pluspetrol Norte’s operations, since their survival relies upon the health of the waterways that Pluspetrol Norte has contaminated, Peru’s due diligence obligations to ensure protection and remedy are even greater.

82 Katrin Tiroch, *Violence against Women by Private Actors: The Inter-American Court’s Judgment in the Case of Gonzalez et al. (“Cotton Field”) v. Mexico*, 14 MAX PLANCK YEARBOOK UN LAW p. 376 (2010).

83 UNGPs, *supra* note 79, at art 1.

84 Conectas, DAR, Dejusticia, Observatorio Ciudadano, ICAR, PODER, DPLF, “Human Rights Due Diligence to Identify, Prevent, and Account for Human Rights Impacts by Business Enterprises,” 168th Period of Sessions, <https://www.conectas.org/wp/wp-content/uploads/2018/05/Corporate-Due-Diligence-Report-Structure-of-Topics168th-Period-IACHR.pdf>.

85 *Velasquez-Rodriguez v. Honduras*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

86 *Pueblo Bello Massacre v. Colombia*, Inter-Am.Ct.H.R. (ser. C) No. 140 (2006).

87 See, e.g., Inter-Am. Ct. H.R., Advisory Opinion OC-23/18, *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)*, (ser. A) No. 23 (Nov. 15, 2017), available at http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf

88 *Lhaka Honhat*, *supra* note 32, at ¶ 98 (emphasis added).

3. PERU HAS A RESPONSIBILITY TO HOLD THIRD PARTIES ACCOUNTABLE AND GUARANTEE ACCESS TO REMEDY

In addition, states have a responsibility to ensure that aggrieved populations have access to remedy under the American Convention on Human Rights,⁸⁹ the UNGPs,⁹⁰ and Inter-American jurisprudence alike. This holds true regardless of the legal personality of the primary perpetrator.

The Court has found that in order to establish due diligence, the state must pursue its investigation into a third-party violator in “serious, effective, and exhaustive manner.”⁹¹ This “serious, effective and exhaustive” standard applies to Peru’s obligation to ensure adversely impacted communities have access to remedy, including in the context of environmental degradation of indigenous lands. The Peruvian government has yet to pursue any such investigation of Pluspetrol Norte’s activities, regardless of the widespread damage on local health, livelihoods, and ecosystems. The Court determined that “[s]tates must, at a minimum, regulate, supervise, and monitor activities under their jurisdiction that could cause significant harm to the environment...and mitigate any significant harm to the environment in line with the best available science.”⁹²

Given the notoriety that extractive companies have gained for wreaking havoc on indigenous land and resource rights, the Inter-American Commission has provided additional guidance on state obligations to protect indigenous peoples from the excess of mining and gas companies.⁹³ The Commission observes that states must:

- Design, implement, and enforce a legal framework that addresses the activities of foreign extractive companies;
- Prevent, mitigate, and eradicate human rights abuses;
- Supervise the development and operations of extractive activities;
- Guarantee active participation and access to information for communities whose lives may be impacted by these companies;
- Prevent violence and other illegal activities committed by extractive companies in areas populated by indigenous communities; and
- Guarantee access to justice, including by conducting investigations, sanctions, and providing reparations for abuses.⁹⁴

Along similar lines, the Inter-American Commission has found that states have an obligation to ensure access to justice when extractive companies harm communities’ right to a healthy environment.⁹⁵ These requirements are similarly echoed in ADRIP, which demands that “States shall provide redress...with respect to Indigenous Peoples when their...property [is] taken without their free, prior and informed consent.”⁹⁶

By failing to regulate, supervise, or mitigate Pluspetrol Norte’s oil operations and the attendant environmental degradation and public health consequences, Peru stands in violation of its obligations

⁸⁹ ACHR, *supra* note 28, at art. 25(1) (“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention”).

⁹⁰ UNGPs, *supra* note 79, at art. 25 (“As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy”).

⁹¹ *Radilla Pacheco v. Mexico*, Inter-Am. Ct. H.R. (ser. C) No. 209 (2009), at ¶ 234.

⁹² Inter-Am. Ct. H.R., Advisory Opinion OC-23/18, *supra* note 87.

⁹³ Inter-American Commission on Human Rights, “Indigenous Peoples, Afro-Descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities,” (Dec. 31, 2015), <http://www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf>.

⁹⁴ *Id.*

⁹⁵ *Id.* at ¶ 5.

⁹⁶ ADRIP, *supra* note 1, at Art. XIII(3).

under the ACHR. The Cuatro Cuencas have enjoyed no mitigation of the environmental harm, compensation for these human rights violations, or access to justice. Peru must ensure that the Cuatro Cuencas, whose land rights and right to a healthy environment have both been repeatedly violated, have the opportunity to receive access to compensation.

4. INTERNATIONAL LAW REQUIRES CORPORATIONS OPERATING IN PERU TO RESPECT HUMAN RIGHTS

Finally, international law affirms that private sector actors have a direct obligation to respect the human rights of communities that are likely to be impacted by their operations. Businesses must avoid causing or contributing to adverse human rights impacts, either in their own operations or throughout their supply chains.⁹⁷ These obligations are detailed at length in the aforementioned UN Guiding Principles on Business and Human Rights, the globe's most widely adopted standard on corporate human rights obligations. This instrument outlines how private sector actors must operationalize that responsibility and address such impacts when they occur.⁹⁸

Binding jurisprudence likewise recognizes the corporate responsibility to respect human rights: **the IACtHR has found that companies themselves have a direct responsibility to respect human rights.** As the Court writes in *Kaliña and Lokono v. Suriname*, a case centered on a mining company's abuses against local indigenous populations, businesses must "respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities."⁹⁹ This was reiterated in 2021's *Lemoth Morris v. Honduras*, with the Court citing the UNGPs as the authoritative standard for corporations¹⁰⁰ and opining that companies are "primarily responsible for behaving responsibly in the activities they carry out."¹⁰¹ The Court continued on to find that business must adopt "preventative measures" to protect the human rights of their workers and local communities, must continuously assess and then mitigate against these human rights risks, and must remedy any damages.¹⁰² Pluspetrol Norte's behavior in the Peruvian Amazon stands in stark contrast to these duties: the company has neither respected the human rights of the Cuatro Cuencas communities, prevented abuse, mitigated the pervasive and serious damaged, nor accepted responsibility for its role in spilling destructive and even deadly toxins into the community's lands and waters. Pluspetrol Norte is in violation of its international human rights obligations to the Cuatro Cuencas.

97 UNGPs, supra note 79, at art. 11 ("Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved").

98 UNGPs, supra note 79, at art. 13

99 *Kaliña and Lokono Peoples*, supra note 32, at ¶ 224.

100 *Lemoth Morris v Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 432, (Aug. 31, 2021), ¶ 47.

101 *Id.* at ¶ 51.

102 *Id.*

4. CONCLUSION

As with all indigenous populations living throughout Peru, the sixty communities that comprise the Cuatro Cuencas deserve respect for their internationally guaranteed rights to their ancestral lands and natural resources. Pursuit of profit does not constitute a “legitimate” public interest that gives companies a *carte blanche* to dispense with these rights, particularly in light of the disproportionate adverse impacts these operations have had on the ability of the communities to survive. The Ministry of Energy and Mine’s and Pluspetrol Norte’s failure to provide the communities with meaningful FPIC, access to reasonable benefits from their operations, or access to remedy in light of human rights violations leaves the state and company alike in violation of international law. *Amici* respectfully urge the Court to confirm the Juzgado Mixto de Nauta de la Corte Superior de Justicia de Loreto’s decision.

**PERUVIAN FEDERATED COMMUNITIES FROM LAS CUATRO CUENCAS
VS PLUSPETROL NORTE AND MINISTRY OF ENERGY AND MINES**

AMICUS CURIAE

SALA CIVIL DE LA CORTE SUPERIOR DE JUSTICIA DE LORETO. EXPEDIENTE N° 00098-2022-0-1903-SP-CI-01

