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AMICUS CURIAE

Submitted before the Honorable Constitutional Court of Colombia
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Regarding: The Acción de Tutela (T – 9079598) of the Yukpa on Free Prior Informed Consent.
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1. INTRODUCTION

1.1. Interest of the Amicus Curiae

1. This Amicus Curiae Brief is submitted by the Business and Human Rights Clinic of the Amsterdam Law School of the University of Amsterdam, in light of its extensive experience as one of the leading centers for legal training and research. The Amsterdam Law Clinics deals with a wide range of complex legal cases usually involving issues affecting the public interest and seeks to contribute to cases and projects that advance human rights. In the Business and Human Rights Clinic, LLM students - under close supervision of academic and external supervisors with particular expertise - conduct legal research and engage in legal work to enhance corporate accountability efforts if business activities adversely impact human rights.
2. Therefore, the Business and Human Rights Clinic is well qualified to offer its expertise and provide an overview of the instruments and norms of international human rights law relevant to the case. Accordingly, the purpose of this Amicus Curiae Brief is to present a legal opinion on whether the decisions of the first¹ and second² instances comply with the international legal framework regarding the protection of the territories of nomadic and semi-nomadic people.
3. This Amicus Curiae Brief was elaborated by the LL.M. students Paula Alvarez Vidal, Sophie Bühlmann, Mathilde Lutak, and Georgios Porfyrides under the academic supervision of Linde Bryk, LL.M., Director of the Business and Human Rights Clinic of Amsterdam University, and Claudia Müller-Hoff, LL.M., independent legal advisor.
4. The signatories of this Amicus Curiae Brief declare with their signature their academic approval of the content of this legal brief, while recognizing the sole authorship of the mentioned team of Master students.

1.2. Legal concerns and their relevance

5. The case **expediente T – 9079598** presents different legal difficulties that this amicus will address through the scope of applicable international and regional human rights law. First, the amicus will examine whether nomadic and semi-nomadic peoples are entitled to benefit from the same protection as indigenous communities, in order to understand which rights are inferred from this status and how they apply to the Yukpa community. Following that, the territorial aspects of those rights are assessed, with a specific analysis of the concept of ‘broad territory’ within the international legal framework and jurisprudence. Finally, the amicus will consider the current legal standards in relation to the right to prior consultation and to Free Prior and Informed Consent (hereafter: FPIC) in situations where projects have already begun or terminated and how the international normative framework assesses the extent to which its rights are applicable to nomadic and semi-nomadic populations especially for ancestral territory.

1.3. Summary of argument

6. In determining the norms and principles of international and regional human rights law applicable in the present case, it is essential to underline that Colombia is a State party to several instruments

¹ Administrative Court 04 of the circuit Valledupar, August 17, 2022, reference 20-001-33-33-004-2022-00343-00.

² Cesar Administrative Tribunal, September 27, 2022, reference 20-001-33-33-004-2022-00343-01.



protecting indigenous peoples' rights: the Indigenous and Tribal Peoples Convention 1989 (No. 169; ILO C169 in the following), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1966 International Covenant on Civil and Political Rights (ICCPR) and, the 1948 American Declaration of the Rights and Duties of Man. Also, the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) enjoys widespread international support, and the American Declaration on Indigenous Peoples' Rights 2016 (ADRIP) is a recognized regional standard of international law in the Americas. Subsequently, Colombia should apply and interpret its national law in light of these treaties, as once ratified they become binding international law standards. For the present case, this means that:

- a. The Yukpa people are recognized as nomadic and semi-nomadic peoples and as indigenous peoples,³ which implies that they benefit from the special protection extended to indigenous people in the international and regional legal framework.
- b. The State has the obligation to protect the Yukpa people's right to use the lands they have traditionally occupied and used, including those used to perform their ancestral cultural activities.
- c. The Yukpa people are entitled to the right to an effective remedy in case of violation of the right to prior consultation and FPIC. The establishment of a consultation is the only effective remedy that would fully address the violation to the right to prior consultation and FPIC in accordance with the standards previously confirmed by the Constitutional Court of Colombia.

2. INTERNATIONAL LEGAL STANDARDS IN RELATION TO SPECIAL PROTECTION FOR NOMADIC AND SEMI-NOMADIC GROUPS

2.1. Definition of nomadic and semi-nomadic groups

7. The current international legal framework does not provide a one-size-fits-all international legal definition of nomadic and semi-nomadic groups.⁴ Indeed, the definition of the groups may vary and encompass a wide range of different communities and cultural practices. Ultimately, their classification relies on factors such as the country's tradition, the region, and the historical and cultural context in which they are located.⁵ Scholars and doctrine have highlighted some recognizable criteria which refer to nomadic and semi-nomadic communities, as groups whose primary mode of existence is either based on cycle itinerancy, alternating between migrating and

³ See Presidential decree with the force of Law 1397 of August 7, 1996, recognizing the Yukpa peoples as an indigenous community; Constitutional Court of Colombia, Order 004 of 2009 recognizing that the Yukpa peoples are threatened by physical and cultural extermination.

⁴ Examples of cases that have addressed the definition of nomadic peoples: African Court on Human and Peoples Rights, *Case of the Ogiek v. Republic of Kenya*, Application No. 006/2012, Judgment, 26 May 2017, paras. 108, 109. African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, 4 February 2010, para 150, 151.

⁵ Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Final report submitted by the Special Rapporteur, Mr. José Martínez Cobo, *Study on the Problem of Discrimination against Indigenous Populations*, E/CN.4/Sub.2/1983/21/Add.8, 1983, par. 21.



sedentary phases, or to those who engage in both pastoralism and agriculture and seasonally move between fixed settlements and broader areas.⁶

8. In spite of the absence of an official definition, international and regional human rights laws move towards the affirmation and protection of nomadic and semi-nomadic communities' rights. In the advisory opinion on the judicial status of Western Sahara given by the International Court of Justice in 1975, the Court declared that nomadism gives rise to legal ties between the nomads and their territory.⁷ Subsequently, it can be inferred from it that their specific lifestyle did not exclude them from exercising their rights. One important element is the protection relating to their identity, cultural rights, and their diversity in its whole aspect which includes practices of traditional activities such as fishing, hunting and the right to live in reserved territories, as the right to maintain and develop their culture, in conformity to their system of life.⁸ The UN Committee on Economic, Social and Cultural Rights, in its General Comment on Article 15 (1)(a) also observed that "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."⁹ In this respect, human rights jurisprudence on several occasions emphasized the deep-rooted relationship between their cultural identity and ancestral territories.¹⁰ Another aspect of their protection requires States to adopt necessary measures guaranteeing the full exercise of their rights. The UN Declaration on Indigenous Peoples, states that "indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture and States shall provide effective mechanisms to prevent any action that deprives them of "their integrity as distinct peoples, or of their cultural values or ethnic identities."¹¹ For indigenous communities, including nomadic and semi-nomadic groups, integrity as distinct peoples, cultural values or identities might be preserved by ensuring their access to territories of sufficient extent and quality to people shifting cultivators or pastoralist peoples, nomadic or semi-nomadic peoples, peoples displaced from their territories, or peoples whose territory has been fragmented, inter alia.¹²
9. The absence of one international definition enables these principles to encompass a wider scope of application on these elements of protection and include different types of communities,

⁶ Jérémie Gilbert et al, 'Nomads', Christina Binder et al. (eds), *Elgar Encyclopaedia of Human Rights*, 2022, 556, 557.

⁷ International Court of Justice, *Western Sahara Advisory Opinion*, ICJ GL No 6, Reports, October June 16, 1975. par. 152.

⁸ UN Human Rights Committee, General Comment No. 23, 1994: Article 27 rights of minorities, CCPR/C/21/rev.1/Add.5, par. 7; cited in: IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130, footnote No. 97.

⁹ UN Committee on Economic, Social and Cultural Rights, General comment No. 21, *Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, para. 36,37. Available at: <http://www.refworld.org/docid/4ed35bae2.html>.

¹⁰ Inter-American Court for Human Rights, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, par. 131. Inter-American Commission on Human Rights, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, par. 120(c).

¹¹ Articles 8(1) and 8(2)(a) of the United Nations Declaration on the Rights of Indigenous People, 2007. NDRI; See also Article 4(2), UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 3 February 1992, A/RES/47/135, available at: <http://www.refworld.org/docid/3ae6b38dO.html>.

¹² Inter-American Commission on Human Rights, *Indigenous and tribal peoples' rights over their ancestral lands and natural resources*, Norms and jurisprudence of the Inter-American Human Rights System, 2009, OEA/Ser.L/V/II. Doc. 56/09, par. 81.



whereas a definition can potentially exclude groups that would not fulfil all the criteria found in a definition. In conclusion, international and human rights law takes into account the cultural diversity of these communities and provides them with the same rights and protection of settled minorities.

2.2. Nomadic and Semi-nomadic peoples' special protection as indigenous people

10. Nowadays nomadic populations fit generally into the legal categories of indigenous people which represent one of the most diverse populations. The United Nations Special Rapporteur on Minorities specifies the criteria to identify indigenous populations as follows: "Indigenous communities, peoples and nations which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations, their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."¹³ A wide variety of nomadic and pastoralist communities recognized themselves as being indigenous peoples, despite their living, cultural, traditional, and religious differences.¹⁴ International legal bodies such as the United Nations Human Rights Committee, the Inter-American Commission on Human Rights, and the African Court on Human and Peoples' Rights apply a similar approach and refer to the distinctive nature under different appellations such as "indigenous", "tribal people" and "minorities."¹⁵ It is under the rubric of the legal protection offered to those categories that international law recognizes and protects the rights of nomadic populations. Hence, all nomadic and semi-nomadic peoples necessarily fit into one of those categories, although they constitute distinct groups due to their mobile style of life.
11. The international legislation provides a minimum standard of legal protection for indigenous communities, which does not exclude the adoption of more advanced measures of protection by national States. The Colombian State provides a timeline of the rapid deterioration of survival conditions of the Yukpa community and since 2009 the Honorable Constitutional Court declared them as being in physical and cultural extermination.¹⁶ Forcibly displaced due to armed conflict, mining, and territorial conflicts they are unable to practice their traditional and cultural activities such as fishing, hunting, and gathering. Their displacements have affected the territorial and historical connection of the community with their lands, as their mobility and traditional practices have been hindered which left them in a critical territorial and humanitarian situation. Considering their national recognition as indigenous peoples and their particular vulnerability,

¹³ United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* E/CN.4/Sub.2/1986/7/Add A, par. 379. UN Doc.

¹⁴ The Food and Agriculture Organization of the UN (FAO) and its partners have launched (27 april. 2015) an online knowledge hub for pastoralists, which aims to hosts a knowledge repository, contacts to pastoral networks, and discussion forums for the networks and partnering institutions. It is a database that classifies and provides access to literature on pastoralism, <http://www.fao.org/pastoralist-knowledge-hub/en/> (last visited March 31, 2023) This website offers information on the existing pastoralist regional and sub-regional networks.

¹⁵ UN Human Rights Committee, CCPR General Comment No. 23 Article 27(rights of minorities), article 1 (right to self-determination) 8 April 1994, In 1997 the Committee on the Elimination of Racial Discrimination adopted its General Recommendation on indigenous peoples, in which it set forth, inter alia, the obligations of States Parties in relation to the protection of indigenous lands and territories, and underscored the right of indigenous peoples to "to own, develop, control and use their communal lands, territories and resources."

¹⁶ Acción de Tutela, Pueblo indígena Yukpa v. Ministerio de Interior, 22 julio de 2022, p. 8; Solicitud de eventual revisión y selección del expediente T – 9079598, Clínica Jurídica sobre Derecho y Territorio, 28 Noviembre de 2022, p.5.



they are entitled to benefit from the protection provided by the framework of international and regional human rights law.¹⁷

3. INDIGENOUS AND NOMADIC PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS

3.1. The unique link between nomadic/semi-nomadic people and their ancestral land

12. Indigenous and tribal communities, including nomadic and semi-nomadic groups, retain their own unique ways of life, while their worldview is based on their close ties with their territories. The lands they traditionally use and occupy are critical to their physical, cultural, and spiritual vitality.¹⁸ This unique relationship includes the traditional use or presence, preservation of sacred or ceremonial sites, settlements or sporadic cultivation, seasonal or nomadic gathering, fishing and hunting, and the customary usage of natural resources or other elements that are special to their indigenous culture.¹⁹ In the *Sawhoyamaya Indigenous Community v. Paraguay*, the Inter-American Court established that the area that is being claimed by the community comprised a portion of that larger traditional territory roamed by the community and considered sites crucial for their life, culture, and history.
13. For the Inter-American Commission, the protection of the right of indigenous peoples to their ancestral territory is a principally crucial matter, given that its enjoyment entails not only safeguarding an economic unit but also the protection of the rights of a collectivity whose economic, social and cultural development is founded on its relationship with their ancestral lands.²⁰ For the Inter-American Court, the property over those lands guarantees that the members of the indigenous communities maintain their cultural heritage.²¹
14. Indigenous peoples retain a collective right to survival as organized communities. When their rights over their ancestral territories are affected, other fundamental rights such as the right to cultural identity or to the survival of the community and its members can be affected.²² Hence, the Inter-American Commission has confirmed that the ancestral territories claimed by indigenous communities are the only place where they will be completely free because it is the land that belongs to them.²³
15. The collective aspect refers to the unique relationship existing between indigenous communities and the lands they historically used.²⁴ For the Inter-American Commission, indigenous peoples' rights are exercised and enjoyed collectively as a whole,²⁵ considering that the overall territory

¹⁷ Ibid. par.16.

¹⁸ Inter-American Commission on Human Rights, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 155.

¹⁹ Inter-American Court for Human Rights, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, par. 131.

²⁰ Inter-American Commission on Human Rights, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, par. 120(c).

²¹ IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, 2005 (fn. 20), par. 146.

²² Ibid, pars. 146, 147.

²³ IACHR, *Yakye Axa v. Paraguay*. Cited in: IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, 2005 (fn. 20), par. 120(g).

²⁴ Inter-American Commission on Human Rights, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 128.

²⁵ IACHR, *Maya Indigenous Communities of the Toledo District (Belize)*, 2004 (fn. 18), par. 113.



is possessed collectively, and the people enjoy the rights to use and occupy it,²⁶ in accordance with their customs, values and uses. In this regard, the special relationship of indigenous peoples with their territories incorporates a broad concept of indigenous land used for their subsistence, cultural, and spiritual activities.

3.2. The right to use their ancestral lands and the concept of broad territory

16. The Inter-American Commission has recognized that indigenous peoples' territorial rights are not defined exclusively by their rights or titles within States' formal legal systems, but they additionally include the forms of indigenous communal property that stem from, derived from, or are grounded upon indigenous customs and traditions.²⁷
17. The indigenous people are entitled to legal recognition of their unique and specific forms and modalities of control, ownership, use and enjoyment of their territories, emanating from their culture, uses, customs, and beliefs.²⁸ On that account, the Yukpa people shall at the minimum be granted the protection of the rights to use and control the lands where they have traditionally been inhabiting and performing their cultural, spiritual and any other activities that are essential for their existence as indigenous communities.
18. Article 14.1 of ILO C169 expressly provides that the State has the obligation to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities, while particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. The provision includes lands where the people have lived over time, and which they have used and managed in accordance with their traditional practices. These are the lands of their ancestors, and which they aspire to deliver to future generations, while it may, given the respective circumstances, cover territories which have been recently lost.²⁹
19. Especially relevant for the nomadic people are the usufructuary rights to land. For nomadic peoples these include the rights to hunt, fish, graze and gather, considering that they form the basis of their culture. Article 23(1) ILO C169 provides that the traditional activities of the peoples concerned, such as hunting, fishing, trapping, and gathering, shall be recognized as important factors in the maintenance of their cultures and in their economic self-reliance and development.
20. Article 13(2) ILO C169 provides a broader concept of *territory* which covers the totality of areas indigenous people occupy or otherwise use. The notion of *usage* of indigenous lands has been interpreted by the Inter-American Court of Human Rights as incorporating an extended concept of indigenous territories encompassing not only physically occupied spaces but in addition, those used for their cultural or subsistence activities, considering this approach to be compatible with the special relationship of the indigenous communities with their land and territory, as well as with the natural resources and the environment in general.³⁰ The occupation of a territory is therefore not confined within the nucleus of houses where the people live but rather, includes a

²⁶ Inter-American Commission on Human Rights, Arguments before the Inter-American Court of Human Rights in the case of *Awás Tingni v. Nicaragua*. Cited in: Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 79, par. 140(a).

²⁷ IACHR, *Maya Indigenous Communities of the Toledo District (Belize)*, 2004 (fn. 18), par. 117.

²⁸ IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, 2006 (fn. 19), par. 120.

²⁹ ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169): A Manual. International Labour Office Project to Promote ILO Policy on Indigenous and Tribal Peoples), Geneva, 2000, at 31.

³⁰ Inter-American Commission on Human Rights, Follow-up Report - *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, par. 160.



physical area constituted by a core area of dwellings, natural resources, crops, plantations and their milieu, linked insofar as possible to their cultural tradition.³¹ Accordingly, the Inter-American Court has described the territorial use and occupation by indigenous and tribal peoples as extending beyond the settlement of specific villages so as to contain lands that are used for agriculture, gathering, hunting, fishing, transportation, cultural and other objectives.³² The same broader approach on the concept of territory has been followed in the IACHR *Saramaka People v. Suriname*³³. In the case of the *Tagaeri and Taromenane Indigenous Peoples*³⁴, the Commission also followed a more extensive approach in connection with indigenous lands concluding that the State of Ecuador did not take into account the seasonal patterns of planting and harvesting of the peoples on lands that exceed the *Tagaeri and Taromenane Intangibility Zone* and that the approval of concessions and the exploitation of those lands for mining projects, affected the peoples' gathering and hunting activities. The Inter-American Commission highlights the indigenous community's "living style that is based on a strict dependence with their ecological surrounding"³⁵ and specifically refers to "the mobility seasonal patterns in a broader territory that allows them to gather and hunt, as well as places related to their ancestors. Based on this strict dependency on territory, any change in their habitat will substantially affect their individual survival, as well as their group as indigenous people."³⁶ In light of the latter facts, the Commission has found the State of Ecuador to be responsible for the violations of the rights to equality and non-discrimination, property, a dignified life and health, established in Articles 21.1, 4.1, 26 and 24 of the American Convention on Human Rights.³⁷ The case is now pending before the Inter-American Court. However, the Commission's analysis and description of the concept of broad territory is relevant in regard to the indigenous ancestral land of nomadic and semi-nomadic people. The Commission confirms the concept of "broad territory" that the Colombian Constitutional Court has defined in previous decisions.

21. Similarly, under Article 26(2) UNDRIP, 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. Depending on the individual indigenous people involved and the circumstances surrounding it, their special relation to traditional lands may be manifested in various ways, and it may include the traditional use or presence through spiritual or ceremonial ties, settlements or sporadic cultivation, seasonal or nomadic fishing, hunting and gathering, the use of natural resources in connection to their customs and any other element defining their culture.³⁸ In the same line with the UNDRIP, the ADRIP provides in Article XXV³⁹ for their 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. The ICCPR is also affording protection for indigenous peoples' land rights. Article 27 ICCPR which protects minority rights has been

³¹ IACHR, *Yakye Axa Community v. Paraguay*. Cited in: IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, 2005 (fn. 20), par. 120(h).

³² IACHR, *Maya Indigenous Communities of the Toledo District (Belize)*, 2004 (fn. 18), par. 129.

³³ Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 114.

³⁴ IACHR, *Pueblos Indígenas Tagaeri y Taromenane (En Aislamiento Voluntario) v Ecuador*, Informe No. 152/19, Caso 12.979, (28 of September of 2019).

³⁵ *Ibid*, par. 13.

³⁶ *Ibid*. (Not official English translation is available). Original version: Los PIAV viven según un patrón de movilidad estacional en un territorio amplio que permite tanto ejercitar su actividad de recolección y caza, así como la búsqueda de lugares relacionados a los ancestros¹¹. Debido a esta estricta dependencia con el ecosistema, cualquier cambio en el hábitat natural puede perjudicar tanto la supervivencia física de sus miembros, así como la del grupo como pueblo indígena.

³⁷ *Ibid*, par. 138.

³⁸ IACtHR, *Sawhoyamaya Indigenous Community v. Paraguay*, 2006 (fn. 19), par. 131.

³⁹ para. 3.



interpreted by the Human Rights Committee (HRC) so as to cover the indigenous peoples' specific relationship with their lands. On Article 27, regarding the particular way of life associated with the use of land resources, the Commission noted in its General Comment No. 23⁴⁰ that the reference makes the provision especially relevant to the situation of nomadic peoples as it embraces their right to exercise their specific use of their ancestral lands. From this aspect, Article 27 shall be considered as protecting the right of nomadic people to maintain their customary lifestyle and use of those territories.

22. Given the aforementioned, the state maintains the obligation under Article 14(1) ILO C169, in conjunction with Articles 13(2) and 23(1), Article 26(2) UNDRIP, Article XXV ADRIP and Article 27 ICCPR to protect the Yukpa peoples' rights to use the lands they have been traditionally occupying with nomadic or semi-nomadic rotations overtime as a customary way of living and they practiced their cultural activities such as cultivation, hunting, fishing, and gathering. Such a continuous cultural connection with the specific territories has not been disrupted. Their physical connection, however, has been significantly affected and interrupted due to the community's displacement as a result of the armed and mining conflicts which have led to the State's reaction and declaration of the Yukpa peoples as being in a situation of high vulnerability and risk of physical and cultural extermination by the 1397 of August 7th Presidential Decree, the Auto 004 of 2009, the Follow-up Report on compliance with the 004 of 2009 Order, and the Auto 471 of 2019 of the Constitutional Court.
23. The Inter-American Court has additionally recognized that the possession of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property, and that, notwithstanding the absence of an official title, such possession should be protected as a right to property.⁴¹ The Court has also underlined the importance of the indigenous peoples' property rights to land to be understood in a collective manner.⁴² This conceivably represents a central development for nomadic peoples, who often lack official title to their ancestral territories and usually retain a collective approach to territorial property.
24. In the same way and as observed in the *Moiwana Community* case,⁴³ the Inter-American Court does not rely on the official domestic recognition of the indigenous peoples' rights to their territories, but on the factual communal and customary possession. In this regard, the Yukpa community maintains its international legal protection irrespectively of the absence of official delimitation of their territories by the state but rather based on their customary and communal possession and usage of those lands.
25. Additionally, Article 7 ILO C169 provides for the right of indigenous peoples 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. Accordingly, governments shall ensure that, whenever appropriate, studies are carried out, in cooperation with the people concerned, to assess the social, spiritual, cultural, and environmental impact of planned development activities. These assessments must address the concept of the extended territory, within which those development projects occur, and indigenous and nomadic people traditionally use for cultural, spiritual, social and economic activities (broad territory).

⁴⁰ Para. 7, General Comment No. 23: Article 27 (Rights of Minorities), HRI/GEN/1/Rev.7 at 158; 1[^]3 IHRR 1 (1994)

⁴¹ IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001 (fn. 26), par. 151.

⁴² IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001 (fn. 26), paras. 148, 149 and 151.

⁴³ Inter-American Court for Human Rights, *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, par 131.



26. Those studies may be conducted under the framework of a prior environmental and social impact assessment which, according to ILO Convention 169,⁴⁴ is an obligation of the States to conduct before the approval of any plans and projects.⁴⁵ The results of these studies shall be considered as fundamental criteria for the implementation of these activities.⁴⁶ This is an essential obligation and a respective right of the communities concerned, in view of the fact that free and informed consent cannot otherwise be achieved. The Inter-American Court has also described the relevant standards⁴⁷ based on which the impact assessments must be conducted so as to comply with the Court's orders.⁴⁸

4. INTERNATIONAL LEGAL STANDARDS IN RELATION TO THE RIGHT OF PRIOR CONSULTATION AND FPIC IN SITUATIONS WHERE OPERATIONS HAVE ALREADY BEGUN OR TERMINATED

4.1. Indigenous peoples' right to free, prior, and informed consent

27. The right to FPIC forms part of the fundamental human right to self-determination, which is guaranteed in Article 1 ICESCR and Article 1 ICCPR, as well as in Article 3 UNDRIP. The ILO C169 contains a comprehensive framework of consultation and participation rights,⁴⁹ and additionally, the right to FPIC is expressly guaranteed in UNDRIP.⁵⁰ The State's obligation to consult is furthermore recognized as a general principle of international law by the Inter-American Court of Human Rights.⁵¹ The right to FPIC is of particular importance for indigenous peoples, whose rights and livelihoods are often affected by development projects or other activities on their lands. The right to consultation provides them with an instrument of participation that aims to establish a dialogue between the parties involved.⁵² Consultations should be carried out in a manner that respects the indigenous community's customs and traditions, the principle of good faith and through culturally appropriate procedures. The

⁴⁴ Article 7(3).

⁴⁵ IACtHR, *Saramaka People v. Suriname*, 2007 (fn. 33), par. 148.

⁴⁶ Article 7(3) ILO Convention 169.

⁴⁷ The Court held that one of the most complete and used standards for prior environmental and social impact assessment (ESIA) for indigenous peoples are the Akwé:Kon 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 sands and waters traditionally occupied or used by indigenous and local Communities (Inter-American Court for Human Rights, *Case of the Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, par. 41). According to the Akwé:Kon Guidelines, such assessments include "the likely impacts, both beneficial and adverse, of a proposed development that may affect the rights, which have an economic, social, cultural, civic and political dimension, as well as the well-being, vitality and viability, of an affected community - that is, the quality of life of a community as measured in terms of various socio-economic indicators, such as income distribution, physical and social integrity and protection of individuals and communities, employment levels and opportunities, health and welfare, education, and availability and standards of housing and accommodation, infrastructure, services". (Akwé:Kon Voluntary Guidelines, par. 6(f)).

⁴⁸ IACtHR, *Saramaka People v. Suriname*, 2007 (fn. 33), par. 41.

⁴⁹ Articles 6, 15, 17, 22, 27, 28 ILO C169 regarding situations where the right to FPIC applies and Articles 13-19 ILO C169 regarding the rights of indigenous peoples to their lands and territories, see Inter-American Court of Human Rights, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and reparations, Judgment of June 27, 2012, Series C No. 245, par. 163.

⁵⁰ Articles 10, 19, 29(2) and 32(2) UNDRIP.

⁵¹ IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012 (fn. 4949), par. 164.

⁵² IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012 (fn. 494949), par. 186.



objective of the consultations is reaching an agreement or obtain consent to the proposed measures.⁵³ There are thus certain situations in which States do not only have a duty to consult the indigenous peoples, but also to obtain their free, prior, and informed consent.⁵⁴ First, cases involving a permanent relocation of the indigenous community, a forceful removal from their lands is prohibited and their free, prior and informed consent needs to be obtained.⁵⁵ Second, obtaining consent is mandatory in situations of large-scale development or investment projects aimed at the exploitation of natural resources, which will presumably have a detrimental impact on the indigenous peoples' capacity to use and enjoy their lands.⁵⁶ Third, no storage or disposal of hazardous materials shall take place on indigenous peoples' lands or territories without having obtained their free, prior and informed consent.⁵⁷ The obligation to consult the indigenous peoples lies with the State.⁵⁸

28. The indigenous peoples' right to consultation and FPIC is furthermore supported by jurisprudence of regional human rights bodies. The African Commission recognized that Kenya did not carry out a meaningful consultation with the Endorois, an indigenous community who used to live around Lake Bogoria, regarding projects that affected their ancestral lands. Moreover, the State failed to obtain the Endorois' free, prior and informed consent before evicting them from their lands. The African Commission also underlined the State's duty to obtain the indigenous peoples' free, prior, and informed consent according to their customs and traditions in cases where development or investment projects are presumed to have a major impact on that community's territory.⁵⁹ The African Court of Human and Peoples' Rights found that the Ogiek peoples, an indigenous community living in the Mau Forest, continuous eviction from their lands without the Kenyan State having carried out effective consultations, entailed a violation of their right to development within the meaning of Article 22 of the African Charter on Human and Peoples' Rights.⁶⁰ In brief, international law guarantees indigenous peoples' a right to consultation and FPIC. Under special circumstances, the State is even obliged to obtain the indigenous peoples' consent, before carrying out a certain project.⁶¹
29. The State of Colombia recognizes the Yukpa people as indigenous peoples living a nomadic or semi-nomadic lifestyle, who are threatened with physical and cultural extermination. As

⁵³ IACtHR, *Saramaka People v. Suriname*, 2007 (fn. 33), par. 133; IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012 (fn. 49), par. 185; Article 6(2) ILO C169; Articles 19 and 32(2) UNDRIP.

⁵⁴ IACHR, *Indigenous and Tribal Peoples' Rights over their ancestral lands and natural resources, Norms and Jurisprudence of the Inter-American Human Rights System* (fn. 12), par. 334.

⁵⁵ *Ibid.*, par. 334; Article 16(2) ILO C169; Article 10 UNDRIP.

⁵⁶ IACtHR, *Saramaka People v. Suriname*, 2007 (fn. 33), paras. 134-137. Affirmed in CERD, 'Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador' (2 June 2003), UN Doc CERD/C/62/CO/2, par. 16; IACHR, *Indigenous and Tribal Peoples' Rights over their ancestral lands and natural resources, Norms and Jurisprudence of the Inter-American Human Rights System* (fn. 12), par. 334.

⁵⁷ Article 29(2) UNDRIP; IACHR, *Indigenous and Tribal Peoples' Rights over their ancestral lands and natural resources, Norms and Jurisprudence of the Inter-American Human Rights System* (fn. 12), par. 334.

⁵⁸ IACtHR, *Kichwa Indigenous People v. Ecuador*, 2012 (fn. 49), par. 187; IACtHR, *Saramaka People v. Suriname*, 2007 (fn. 33), par. 129; Article 6 ILO C169; Articles 19 and 32(2) UNDRIP.

⁵⁹ ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 2009 (fn. 4), par. 290, 291.

⁶⁰ ACHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, 2017 (fn. 4), par. 210, 211.

⁶¹ Articles 6, 15(2), 16(2), 17(2) ILO C169; Articles 19, 29(2), 32(2) UNDRIP; IACtHR, *Kichwa Indigenous People v. Ecuador*, 2012 (fn. 49), par. 160, 164, 166; IACtHR, *Saramaka People v. Suriname*, 2007 (fn. 33), paras. 133-137; IACHR, *Indigenous and Tribal Peoples' Rights over their ancestral lands and natural resources, Norms and Jurisprudence of the Inter-American Court of Human Rights System*, (fn. 12), par. 334.



indigenous peoples, the Yukpa people have a right to consultation and FPIC.⁶² While the Frente Juan Andrés Álvarez del Bloque Norte de las Autodefensas Unidas de Colombia (AUC) exercised control over the Serranía de Perijá, the Yukpa were forbidden to continue their activities as hunters, gatherers and fishermen and they were forcefully displaced to the highlands of the Serranía. Around the same time, the multinational companies Grupo Prodeco and Drummond Ltd. acquired mining licences for mines located within Yukpa ancestral territory. When the mining permissions were given out, the Yukpa people were not consulted.⁶³

30. Under international law, projects aiming at the exploration and exploitation of mineral or sub-surface resources such as coal mines require a prior consultation with the people affected. In cases where a large-scale project has far-reaching consequences for the indigenous peoples' territory, which is why carrying out a consultation procedure is not sufficient, the State also needs to obtain the affected community's consent. The right to consultation and FPIC is closely intertwined with the indigenous peoples' right to their own culture and cultural identity, as well as their right to communal property.⁶⁴ Therefore, the concept of broad territory (as discussed in chapter 3.2 above) is vital for the realization of the right to consultation and FPIC. Indigenous peoples need to be consulted and, under certain circumstances, their free, prior and informed consent needs to be obtained, when carrying out activities that affect their ancestral lands.⁶⁵

4.2. Right to a remedy for the violation of the right to prior consultation and FPIC

31. The complainants argue that their right to consultation and FPIC has been violated.⁶⁶ It is a general principle of international law that every violation of an international obligation entails the State's international responsibility which implies a duty to make reparation. Victims of human rights violations have thus a right to full reparation for the harm suffered.⁶⁷ The reparations provided shall respect the principle of proportionality in respect to the gravity of the human rights violation and the harm suffered.⁶⁸ Article XIII(2) ADRIP sets out the State's duty to provide redress, developed in conjunction with indigenous peoples, in respect of situations where their property was taken without their free, prior, and informed consent. Similarly, Article 8(2) UNDRIP foresees a duty of the State to effectively prevent and provide redress for the violations of indigenous peoples' rights, relating, *inter alia*, to any actions that aim or result in a dispossession of their lands, territories or resources, or any conduct that forcibly transferred the population or which resulted in a violation or undermining of their rights.

⁶² Presidential decree with the force of Law 1397 of August 7, 1996; Constitutional Court of Colombia, Order 004 of 2009.

⁶³ Acción de Tutela, Pueblo indígena Yukpa v. Ministerio de Interior, July 22, 2022, p. 36; Clínica Jurídica sobre Derecho y Territorio, Solicitud de eventual revisión y selección del expediente T – 9079598, November 28, 2022, p. 15.

⁶⁴ IACtHR, *Kichwa Indigenous People v. Ecuador*, 2012 (fn. 49), par. 159, 160.

⁶⁵ IACtHR, *Saramaka People v. Suriname*, 2007 (fn. 33), paras. 133-137; IACHR, *Indigenous and Tribal Peoples' Rights over their ancestral lands and natural resources, Norms and Jurisprudence of the Inter-American Court of Human Rights System*, (fn. 12), par. 334.

⁶⁶ Acción de Tutela, Pueblo indígena Yukpa v. Ministerio de Interior (fn. 63), p. 125, 173.

⁶⁷ Article 31 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts 2001 (ARSIWA); IACtHR, *Case of Velásquez-Rodríguez v. Honduras*, Reparations and Costs, Judgment of July 21, 1989, Series C No. 7, par. 25; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, 2005 (fn. 10), par. 179, 180; ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Reparations, Judgment of June 23, 2022, par. 36.

⁶⁸ UNGA, Res 60/147. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (21 March 2006) UN Doc A/RES/60/147, par. 15.



32. Reparations may take the form of restitution, compensation and/or satisfaction. Non-material forms of reparation include rehabilitation, satisfaction or guarantees of non-repetition.⁶⁹ Whenever possible, victims of human rights violations shall be granted full restitution (*restitutio in integrum*). Restitution implies a restoration of the situation prior to the human rights violation and may consist, *inter alia*, of return of property. It also includes the reparation of the consequences caused by the violation.⁷⁰ When restitution of lands is not possible, the indigenous peoples' have right to compensation and unless otherwise agreed, this compensation shall take the form of lands, territories and resources that are equal in quality, size and legal status.⁷¹ The Court may also order different measures in order to make reparation for the consequences arising from the human rights violations.⁷²
33. In brief, the violation of the right to consultation and FPIC entails the State of Colombia's obligation to make full reparation for the harm suffered by the Yukpa people, with international law providing different forms of reparations.

4.3. Right to prior consultation and FPIC: temporal and substantive scope

34. From the previous sections, it can be concluded that: (1) the right to prior consultation and FPIC is clearly embedded in international law and regional law, and that (2) in the case of its violation, a right for an effective remedy exists and that the State is the one in charge of providing the affected individuals with an effective remedy. Now, the objective of the present section is to analyze the (1) temporal and (2) substantive scope of the right to prior consultation and FPIC. The first aspect is relevant to understand if the right to prior consultation remains after activities have started or are finalized, confirming that the right is not limited in time to the initiation of the activities. The second aspect will be essential to determine the more adequate effective remedy, according to the substantive content of the right itself.
35. Firstly, it is essential to emphasize that in the specific cases of indigenous people and, even more specifically, in nomadic and semi-nomadic peoples, the duty for prior consultation is vital. This is so, because, as aforementioned in relation to broad territory, the Inter-American Commission indicated the nomadic and semi nomadic peoples' living style is based on a strict dependence with their ecological surroundings and any change of their natural habitat can pose a challenge for not only their individual survival, but the indigenous community as a whole.⁷³ For these reasons, in the particular case of Yukpa People, it is of special importance to understand if the right to prior consultation in relation to broad territory has not extinguished after the initiation of the mining projects (temporal scope) and to find an effective remedy for the violation occurred.
36. In regard to the temporal scope of the right to prior consultation and FPIC, international guidelines point out that the right has a broad temporal scope. This can be inferred from the fact that once given, consent can be withdrawn at any stage of the project implementation.⁷⁴ Furthermore, the right to prior consultation enables indigenous communities to negotiate the

⁶⁹ Articles 34-37 ARSIWA; UNGA, Res 60/147 (fn. 68), paras. 18-23.

⁷⁰ UNGA, Res 60/147 (fn. 68), par. 19; IACtHR, *Velásquez-Rodríguez v. Honduras*, 1989 (fn. 67), par. 26; IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012 (fn. 49), par. 280.

⁷¹ Article 16(4) ILO C169; Article 28(2) UNDRIP.

⁷² IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, 2005 (fn. 10), para. 181; IACtHR, *Kichwa Indigenous Peoples of Sarayaku v. Ecuador*, 2012 (fn. 49), para. 280.

⁷³ IACHR, *Pueblos Indígenas Tagaeri y Taromenane (En Aislamiento Voluntario) v Ecuador*, 2019 (fn. 34), par. 13.

⁷⁴ Food and Agricultural Organization of the United Nations (FAO). *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities*, 2016, par 13.



conditions under which the project will be designed, implemented, monitored and evaluated.⁷⁵ Both statements confirm that the temporal scope of the right to prior consultation and FPIC is broad and not simply limited to giving the consent prior to initiation of activities, but also includes the involvement of the community during the whole process and the possibility of withdrawing their consent at any stage of activities. The Inter-American Commission has also upheld a broad conception of the right to prior consultation and FPIC, stating that the consultation procedures “must guarantee participation by indigenous peoples, through the consultation process, in all decisions on natural resource projects on their lands and territories, from design, through tendering and award, to execution and evaluation.”⁷⁶ In the *Kichwa Indigenous People v. Ecuador* case, the Inter-American Court of Human Rights confirmed this conclusion by stating that in cases where a project may affect indigenous peoples’ territory or other rights essential to their survival as a people, the aforementioned consultation and participation rights must be guaranteed at all stages of the planning and implementation of this project. It is the duty of the State to make sure these rights are not ignored by private parties.⁷⁷

37. Having confirmed that the right to prior consultation has a broad temporal scope and that the right’s scope is not confined temporally to the moment prior before the start of activities, it can be confirmed in the present case, that the right to prior consultation and FPIC has not expired after the mining activities have been initiated. Therefore, the next logical step would be to analyze the substantive scope of the right to comprehend which would constitute the most effective remedy to the violation.
38. In the previous sections, it has been argued that there is an inherent right to effective remedy in the case of any human rights violation. In the present case, if the Yukpa people’s right to prior consultation has been violated, they are entitled under to the right to an effective remedy. The following analysis of international standards and regional jurisprudence will attempt to discuss which form of reparations would constitute an effective remedy for the violation of the right.
39. Under international law, the right to an effective remedy entails the victim’s right to (a) equal and effective access to justice; (b) adequate, effective, and prompt reparation for harm suffered and (c) access to relevant information concerning violations and reparation mechanisms.⁷⁸ In relation to the second element, the adequate and effective form of reparation should be found for the present case.
40. International standards indicate that, without prejudice to other forms of reparation, an effective remedy for the violation of the right to prior consultation and FPIC could be constituted by an “agreement either to permanently suspend operations in the disputed area and/ or proceed with a newly negotiated agreement involving all the requirements of an FPIC process.”⁷⁹ Hence, in order to effectively remedy the violation of the right to prior consultation and FPIC, a consultation with indigenous people may have to be undertaken in order to decide whether to suspend or proceed with the already initiated activities. This position is very similar to the concept of “posterior consultation” previously adopted by the Colombian constitutional court in its sentence SU-123 de 2018.
41. Examples of the “consulta posterior” provided as an effective remedy after the violation of the right to prior consultation and FPIC, in line with the position adopted by the Colombian

⁷⁵ Ibid, p. 13

⁷⁶ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, 2017 (fn. 30), par. 248.

⁷⁷ IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012 (fn. 49), par. 167.

⁷⁸ UNGA, Res 60/147 (fn. 68), par. 11.

⁷⁹ FAO, 2016, (fn. 74), p. 29.



Constitutional Court, are found in human rights regional jurisprudence. In the aforementioned and paradigmatic Ogiek case, the African Court ordered different forms of reparation such as compensation, but more importantly, it ordered Kenya to “take all necessary measures be they legislative or administrative to identify, in consultation with the Ogiek and/or their representatives, to delimit, demarcate and title Ogiek ancestral land.”⁸⁰ Additionally, the Court not only required the State of Kenya to suspend the project, but order that “where concessions and/or leases have been granted over Ogiek ancestral land to non-Ogiek and other private individuals or corporations, the Respondent State must commence dialogue and consultations between the Ogiek and/or their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations.”⁸¹ The African Court confirms in this case, that an effective remedy for the violation of the right to prior requires the establishment of a new consultation process and the achievement of indigenous’ people consent for the operations to be restarted. In sum, the African Court stated that without a posterior consultation, the unconsented operations should not continue.

42. In the American regional system, the Inter-American Commission and Court of Human Rights have as well confirmed, in several cases, that the effective remedy in cases of violation of the right to prior consultation and FPIC, requires a posterior consultation and achievement of consent. The effective remedy to secure the full protection of the right is to ensure that “indigenous communities are informed, heard and taken into consideration in the follow-up and monitoring.”⁸²
43. In *Maya Indigenous Community of Toledo District v Belize*, the Inter-American Commission established that, in order to remedy the damage inflicted to the Mayas people, the Government should, “adopt in its domestic law, and through fully informed consultations with the Maya people, the legislative, administrative, and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which the Maya people have a communal property right, in accordance with their customary land use practices.”⁸³ A consultation should be established to determine the Mayan ancestral territory and, more importantly, “until those measures have been carried out, abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people.”⁸⁴ Therefore, the remedies should not be only established through a consultation with the Mayas Indigenous Community but also, activities in the territories that affect the community should cease until those measures are taken.
44. The Commission upheld the later jurisprudence on posterior reports, indicating that a consultation procedure “will establish the benefits that the affected indigenous peoples are to receive, and compensation for any environmental damages, in a manner consistent with their own development priorities.”⁸⁵
45. The Inter-American Court has progressively confirmed the concept of effective remedy through consultation and consent. The latter can be seen through the chronological evolution from first

⁸⁰ African Court on Human and Peoples’ Rights, *Case of the Ogiek v. Republic of Kenya*, 2017 (fn. 4), par. 116.

⁸¹ *Ibid*, par. 117.

⁸² Inter-American Commission on Human Rights, Report N° 30/04, Petition 4617/02, *Friendly Settlement Mercedes Julia Huenteao Beroiza et Al* (Chile), March 11, 2004, par. 33, Agreement Framework, 3 a) Agreement Framework, 3 a).

⁸³ IACHR, *Maya Indigenous Communities of the District of Toledo, Belize*, 2004 (fn. 18), par. 197.1.

⁸⁴ *Ibid*, 197.2

⁸⁵ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, 2007, (fn. 30), par. 248.



cases such as the paradigmatic cases *Awas Tingni Community v. Nicaragua* in 2001 to a more elaborated recent jurisprudence understanding reparations when violations of FPIC are present. In the case of *Yakye Axa Indigenous Community v. Paraguay*, the Court ruled that if the State could not return to the ancestral territory to Yakye Axa Community, the State should grant alternative land based on a consultation “in accordance with (the community's) own manner of consultation and decision-making, practices and customs.”⁸⁶ This precedent was upheld in posterior cases.⁸⁷ The Court also took a similar approach in *Moiwana Community v. Suriname*, as it established that for the remedies awarded to be effective and the Moiwana Community to return to their ancestral land, “the State must take appropriate measures to guarantee their security, which shall be designed in strict consultation with said community members.”⁸⁸

46. One of the most relevant cases for the purpose of providing a “posterior consultation” as an effective remedy is the case *Saramaka People v. Suriname*, in which the Court ruled that a “posterior” consultation should be created in order to establish the measures to protect the affected communities. In its own words, the Court ordered that the adoption of domestic legislation of administrative, legislative and other measures needed to protect, the indigenous people’s territory, should be done through an “effective and fully informed consultations with the Saramaka people.”⁸⁹ A similar stance was taken in *Kichwa v. Ecuador*, where the Court decided that if activities were to be restarted again that affect Sarayaku People, they “shall be previously, adequately and effectively consulted, in full compliance with the relevant international standards.”⁹⁰
47. In relation to the present case, it is relevant to emphasize, if prior consultation has not been respected, that the State is the actor in charge of providing effective remedy and compensation for the damages caused. As stated by the Inter-American Commission, “carrying out consultation procedures is a responsibility of the State, and not of other parties, such as the company seeking the concession or investment contract. Consultation with indigenous peoples is a duty of States, which must be complied with by the competent public authorities.”⁹¹
48. It can be concluded that from the existing guidelines, international protection standards and regional jurisprudence:
 - a. The right to prior consultation and FPIC has a broad temporal scope which entails that a consultation should not be only understood as obligatory prior to the initiation of activities and its non-fulfilment leads to the extinction of the right, but that even if activities have already started or even terminated, the right to FPIC subsists during all stages of the project.
 - b. An effective remedy and reparation after the violation of the right to prior consultation is the establishment of a new consultation with the purpose of (re)gaining, affected indigenous communities’ consent or for the establishment of damages. In this sense, there is an obligation for the State to grant an effective consultation after violation has been found in order to resume activities, start any new activity in ongoing process or to establish remedies if the projects have finalized.

⁸⁶ IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, 2005 (fn. 10), par. 217.

⁸⁷ IACtHR *Sawhoyamaya Indigenous Community v. Paraguay*, 2006 (fn. 19) par. 135 and par. 212.

⁸⁸ IACtHR, *Moiwana Community v. Suriname*, 2005 (fn. 43) par. 212.

⁸⁹ IACtHR, *Saramaka People v. Suriname*, 2007 (fn. 33), par. 191. Same standard was upheld in Inter-American Court of Human Rights, *Case of Kaliña and Lokono Peoples v. Suriname*. Merits, Reparations and Costs. Judgement of November 25, 2015. Series C No. 309.

⁹⁰ IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, 2005 (fn. 49), par. 299.

⁹¹ IACHR, *Indigenous and Tribal People’s Right over their ancestral lands and natural resources, Norms and Jurisprudence of the Inter-American Human Rights System* 2009 (fn. 12) par. 291.



5. CONCLUSION

49. Both concepts of broad territory and consultation, more specifically consent processes after the initiation of projects, have been the subjects of relatively limited development in international and regional jurisprudence. The jurisprudence of the Constitutional Colombian Court in present judgements is remarkable for the accuracy and completeness in terms of the concept of broad territory and the broad temporal scope of the right to prior consultation and FPIC, as well as, the establishment of an effective remedy being the creation of a posterior consultation in order to redress the damage inflicted by the violation of the right to prior consultation and FPIC. The case at stake might provide an ideal opportunity for the Colombian Constitutional Court to continue developing and consolidating both concepts in Colombian constitutional law, as well as, the regional and international legal protection framework for vulnerable communities in regard to their broad territory and the right to consultation and FPIC when activities are ongoing or have been finalized.

Subsequently, in light of the arguments aforementioned, we respectfully request before the Court:

1. That the Honorable Colombian Constitutional Court accepts us as Amicus Curiae, so that we may submit for consideration this statement briefly summarizing our research and legal analysis of nomadic and semi-nomadic peoples' rights under international legal standards relevant to the case of the Yukpa people.
2. To acknowledge that the scope of the process of participation and consultation of indigenous peoples in any development project or activity must be broad enough to include the full extent of the lands they traditionally occupy and use, that are essential to their identity and culture and closely related to their spiritual, economic, and social well-being.
3. To recognize that in the event of violation of the right to prior consultation and free, prior, and informed consent: (1) the right must be understood as possessing a broad temporal scope, which implies that is not extinguished after the activities have started; and (2) the right to effective remedy would entail the establishment of a "posterior" consultation with purposes of achieving affected communities' consent or establishing damages if activities have terminated.

Date: 5 April 2013

Linde Bryk

Director Business and Human Rights Clinic

Date: 5 April 2013

Prof. dr. André Nollkaemper