AMICUS CURIAE

CASE OF THE KICHWA PEOPLE OF SARAYAKU VS ECUADOR

SUBMITTED BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

AMNESTY INTERNATIONAL

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Amnesty International is a global movement of more than 3 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

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I. INTRODUCTION

Amnesty International is submitting to the Honourable Inter-American Court of Human Rights (Court) this amicus curiae brief in the case of Kichwa People of Sarayaku and its members v. Ecuador.

In this case the Inter-American Commission on Human Rights (the Commission) has brought proceedings based on actions and omissions that were detrimental to the Kichwa People of Sarayaku and its members (the victims) by having allowed a private oil company to operate within their ancestral territory without consulting with them beforehand. The Commission found that by doing this, the State of Ecuador (Ecuador), left the Kichwa People of Sarayaku unable to practice their traditional means of subsistence within their territory and limited their freedom of movement within that territory. The case also concerns the fact that the Kichwa People of Sarayaku were denied judicial protection and the right to due process of law.[1]

A. PURPOSE OF AMICUS BRIEF

The purpose of this Amicus Curiae Brief is to offer assistance to the Inter-American Court of Human Rights in its consideration of the case of the Kichwa People of Sarayaku by elaborating points related to issues of consultation and consent.

In presenting these considerations, Amnesty International has focused on international law and standards provided in both universal and regional international agreements, all of which are binding on Ecuador; customary international law; the jurisprudence of the UN treaty bodies, and the UN Declaration on the Rights of Indigenous peoples.

B. INTERESTS OF THE AMICUS CURIAE

As part of Amnesty International's mission to take action to prevent grave abuses of human rights, the organization has a particular interest in the application of international human rights standards to the recognition and protection of the human rights of Indigenous peoples, who are typically among the most marginalized and frequently victimized groups in societies around the world and in particular in the Americas.

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[1] Application filed by the Inter-American Commission of Human Rights with the Inter-American Court of Human Rights against the Republic of Ecuador, case 12.465 Kichwa People of Sarayaku and its member, 26 April 2010.

The present case before this Court raises issues of great significance for the development of human rights law and the rights of indigenous peoples' in particular. This Court has underscored the importance of consultation and free, prior and informed consent (FPIC) of indigenous peoples in the context of development projects, especially in the case of *Saramaka People v Suriname (Saramaka)*[2]. The standard set out by the Court has been used and supported by different national[3] and international bodies as the clearest standard on the issue and one that should serve as a catalyst for the development of international law.

We argue that in Kichwa People of Sarayaku and its members v Ecuador the Court should apply the *Saramaka* standard, and crucially further elaborate this jurisprudence, in line with international human rights law at present.

This is of the utmost importance, since the Honourable Court's ruling in this case will have an impact not only on the Kichwa People of Sarayaku and its members, but also on many other Indigenous Peoples across the Americas, who are facing grave human rights violations in the context of economic development. While acknowledging the importance of economic development, Amnesty International considers that economic development must not undermine the duty of the state to protect the human rights of indigenous Peoples.

C. SUMMARY OF ARGUMENT

We commence with a description of the principles of consultation and consent already defined by this Court in *Saramaka*, specifically that: (a) in relation to activities that may affect Indigenous Peoples (IPs) and their territories, states must enter into consultations with the affected communities with the objective of obtaining agreement; and (b) where an activity has potential to have a significant impact on indigenous peoples and their territories and resources, states must obtain indigenous peoples free, prior and informed consent to the activity (Chapters II and III).

We then elaborate these arguments further, in line with current state of international law, arguing that:

- According to Saramaka free, prior and informed consent is required in

[2] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations and Costs)", Serie C No. 172, judgment of 28 November 2007.

[3] See for example Corte Constitucional Republica de Colombia, Sala Séptima de Revisión, "Sentencia T-769 de 2009".

relation to developments and investment plans that may have a **"significant impact"** on the rights of Indigenous Peoples irrespective of the scale of any development or investment plan (Chapter IV A) and that in those cases the project cannot go ahead without the community's consent (Chapter IV B).

- "Significant impact" on Indigenous Peoples should be considered from the perspective of affected indigenous peoples and should take into account their present situation; that is, current vulnerabilities and historical inequities Chapter V).

- By applying the standards set by this Court in *Saramaka People v Suriname* to the present case, the state of Ecuador should have obtained the **consent** of the Kichwa People of Sarayaku, prior to Compañía General de Combustibles conducting exploration activities on their territories, and that for that reason, Ecuador should be ordered by this Court to abstain from starting any new development in Sarayaku's ancestral territory, extractive or any other project that will significantly impact the community, without Sarayaku's free, prior and informed consent should (Chapter VI).

- The American Convention on Human Rights now requires that Ecuador adopt measures (legislative and otherwise) to give effect to the principles of consultation and consent set out in the Court's jurisprudence (Chapter VII).

II. STATES OBLIGATIONS IN RELATION TO CONSULTATION AND CONSENT UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS

The 2007 ruling of S*aramaka People v Suriname* establishes clear standards of consultation and consent in relation to Indigenous and tribal peoples. *Saramaka* provides that: (1) in relation to activities that may affect indigenous peoples and their territories, states must enter into consultations with the affected communities with the objective of obtaining agreement; and (2) where an activity has potential to have a significant impact on

indigenous peoples and their territories and resources, states must obtain indigenous peoples free, prior and informed consent to the activity.

Saramaka concerned the grant of logging and mining concessions on the traditional lands of tribal peoples without the state (in that case Suriname) seeking consent or engaging in consultation with the community. The community brought a claim against Suriname alleging violation, *inter alia*, of the article 21 right to property of the Convention. The Court ruled that the state violated this right. The court explained that "under specific, exceptional circumstances," indigenous and tribal peoples' property rights may be restricted by states, and that this includes permits for development or investment within or affecting their territories. But this did not mean that states may restrict indigenous and tribal peoples' property rights for any reason. Rather, the court had repeatedly held that a state may restrict the use and enjoyment of the right to property only "where the restrictions are: a) previously established by law; b) necessary; c) proportional; and d) with the aim of achieving a legitimate objective in a democratic society."[4] In addition, this Court noted that in relation to indigenous and tribal peoples, "another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group as a tribal people."[5] Survival in this context clearly referred both to the community's "physical *and* cultural survival."[6] These requirements apply in all cases, even when the State invokes the public interest or eminent domain to justify a restriction on Indigenous Peoples' lands.

Elaborating on these principles, the Court in *Saramaka* further noted that for the state to guarantee that proposed restrictions do not amount to a denial of survival as a tribal people, the State must abide by several safeguards: (1) their "effective participation … in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within …[their] territory"; (2) the receipt of a reasonable benefit from any such plan within their territory; and (3) the prior preparation of an

[4] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations and Costs)", Serie C No. 172, judgment of 28 November 2007, paragraphs 128.

[5] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations and Costs)", Serie C No. 172, judgment of 28 November 2007, paragraphs 128.

[6] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations and Costs)", Serie C No. 172, judgment of 28 November 2007. Emphasis added. This term is used by the Court in paragraphs 85, 86, 90, 96 and 120.

independent environmental and social impact assessment.[7] In addition, for large-scale development or investment projects that would have a major impact within indigenous peoples' territory, the State has a duty, not only to consult with them, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[8]

These standards of protection established by the Court are intended to preserve, protect and guarantee the community's culture and connection with their territory and resources. For the Court, culture was to be read in a holistic sense, encompassing values but also their unique perspectives, religions, practices and traditions:

> "The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity."[9]

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[7] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations and Costs)", Serie C No. 172, judgment of 28 November 2007. Paragraph 129.

[8] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations and Costs)", Serie C No. 172, judgment of 28 November 2007, P 143.

[9] Inter-American Court of Human Rights, "*Case of the Indigenous Community Yakye Axa v. Paraguay.*

Merits, Reparations and Costs". Judgment of 17 June 2005, Series C No. paragraph 135.

III. GENERAL DUTY OF ENSURING EFFECTIVE PARTICIPATION INCLUDING CONSULTATION WITH THE OBJECT OF OBTAINING AGREEMENT

Saramaka states that the "State must ensure the effective participation of the members of [indigenous and tribal] people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan" within their territory.[10] To this end, the state must "actively consult" with the people "in good faith, through culturally appropriate procedures and with the objective of reaching an agreement."[11]

This obligation to consult Indigenous peoples with the objective of reaching an agreement in relation to any activity that may affect them is embodied in the International Labour Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples, 1989 (ILO Convention 169). Consultation is described as the cornerstone of this Convention.[12] ILO Convention No. 169 was established to revise ILO Convention No. 107 on Indigenous and Tribal Populations, 1957 (Convention No. 107). The objective of integration in Convention No. 107 was to be replaced "by recognition of the principle of respect for the identity and wishes of the populations concerned and to

[10] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations and Costs)", Serie C No. 172, judgment of 28 November 2007, P 129

[11] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations and Costs)", Serie C No. 172, judgment of 28 November 2007, P 133. Art 6.2 of ILO Convention 169 states "The consultations carried out in application of this Convention shall be undertaken […]with the objective of achieving agreement or consent to the proposed measures."

[12] Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), para. 31.

provide for increased consultation with, and participation, by these populations in decisions affecting them".[13]

ILO Convention No. 169 clarifies that indigenous peoples' right to consultation extends even to decisions about natural resources that remain under state ownership: "In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands."[14]

Further, Convention No. 169 establishes that indigenous peoples "have the right to decide their own priorities for the process of development as it affects their lives . . . [and hence] they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."

Consequently, the ILO Convention stipulates that consultations "shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."[15]

Greater clarity on the meaning of this duty has been provided by the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples. According to the Special Rapporteur, the duty to consult arises:

> "whenever a legislative or administrative decision may affect indigenous peoples in ways not felt by the State's general population, and in such cases the duty applies in regard to those indigenous groups that are particularly affected and in regard to their particular interests … The specific characteristics of the required consultation procedures will vary depending on the nature of the proposed measure, the scope of its impact on indigenous peoples, and the nature of the indigenous interests or rights at stake. Yet, in all cases in which the duty to consult applies, the

[13] See ILO Submission to the UN working group on Indigenous populations, 1985.

[14] Art 15(2).

[15] Art 6(2).

> objective of the consultation should be to obtain the consent or agreement of the indigenous peoples concerned." [16]

In *Saramaka* the Court gave specific guidelines as to what issues must be subject to consultation, when the consultation must take place, why the indigenous people must be consulted and how the consultation must be carried out.[17] The Commission has also extensively covered the conditions for a proper consultation in its submission. However, we respectfully request the court to specify those guidelines as follows:

First, to explicitly recognize that the fact that in most cases indigenous peoples' consent is an objective but not a required outcome of the consultation process, does not mean that the State duty to consult is limited to compliance with formal procedures. As the Special Rapporteur explained, "the language of the [UN Declaration on the Rights of Indigenous peoples] suggests a heightened emphasis on the need for consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process."[18]

Secondly, that the State itself has the duty to carry out adequate consultation, even when a private company is the one promoting or carrying out the activities that may negatively affect indigenous peoples' rights and lands. In short, no state may negotiate or contract away its human rights obligations under international law. As it was established by the Special Rapporteur "In accordance with well-grounded principles of international law, the duty of the State to protect the human rights of indigenous peoples, including its duty to consult with the indigenous peoples concerned before carrying out activities that affect them, is not one that can be avoided through delegation to a private company or other entity. The Special Rapporteur has observed several instances in which the State hands over consultation obligations to the private

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[16] UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, par.63 & 65.

[17] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations and Costs)", Serie C No. 172, judgment of 28 November 2007, paragraphs 133-137.

[18] UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, par. 46.

company involved in a project. In addition to not absolving the State of ultimate responsibility, such delegation of a State's human rights obligations to a private company may not be desirable, and can even be problematic, given that the interests of the private company, generally speaking, are principally lucrative and thus cannot be in complete alignment with the public interest or the best interests of the indigenous peoples concerned.."[19] On the same topic, the Special Rapporteur explained that sue to the unbalance of power between the company and the indigenous people, it would be unlikely that one could say that the consultation carried out by the company is adequate and free.[20] In these instances, the private company's responsibility to respect the human rights of indigenous peoples is in addition to the State duty to protect. [21]

IV. SPECIFIC DUTY TO OBTAIN FREE, PRIOR AND INFORMED CONSENT

Even though arriving to an agreement should be the goal of every consultation, in some specific cases the Court has set up a heightened standard, establishing the obligation of the State to obtain free, prior and informed consent. *Saramaka People v. Suriname* establishes the principle that "**depending upon the impact** of the proposed activity, the State may additionally be required to obtain consent from the Saramaka people".[22] The Court has explained that when the impact is major, the state has a duty not only to consult but also to obtain indigenous peoples free, prior and

[19] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, A/HRC/12/34 15 July 2009, paragraphs 54-55.

[20] Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Hearing on the Case of the Kichwa People of Sarayaku vs Ecuador before the Inter-American Court of Human Rights, San Jose, Costa Rica, 7th July 2011.

[21] The UN "Protect, Respect and Remedy" Framework endorsed in 2008 identifies three overarching principles for business and human rights including: the state duty to protect (Pillar 1); the business responsibility to respect human rights (Pillar 2); and the right to judicial and non-judicial remedies (Pillar 3).

[22] Inter-American Court of Human Rights, "Case of Saramaka People v. Suriname, Interpretation of the Judgement on preliminary Objections, Merits, Reparations and Costs", August 12, 2008. Parr. 17.

informed consent in accordance to their customs and traditions.[23] In the context of the *Saramaka* case, the Court has emphasized that large-scale development or investment projects have the clear potential of affecting the integrity of indigenous people's lands and resources and that is why in these cases the obligation to seek free, prior and informed consent arises.

This interpretation is in line with the development of international human rights law. In endorsing the requirement, the Court referred to the UN Declaration on the Rights of Indigenous peoples, specifically article 32 which requires free, prior and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.. Drafted over twenty years of negotiations between Indigenous peoples and states, the UN Declaration on the Rights of Indigenous peoples provides a clear, authoritative statement of the human rights of Indigenous peoples.

The standard of free, prior and informed consent has also been endorsed and applied by the UN treaty bodies, including the Committee on the Elimination of Racial Discrimination (CERD) and UN Human Rights Committee. General Recommendation XXIII of the CERD calls upon States parties:[24]

> "… to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands, territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories."

The *Ángela Poma Poma* case before the Human Rights Committee concerned an Amyran indigenous community that had been forced to give up their farming livelihood due to river diversions, the drilling of wells and other water-related development that impacted the effective use of their farm lands. The Committee adopted the view that the development violated the right of the author to enjoy her own culture together with the other members of her group, in accordance with article 27 of the International

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[23] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations and Costs)", Serie C No. 172, judgment of 28 November 2007, paragraphs 133-137.

[24] See also, UN Committee on the Elimination of Racial Discrimination, "General Recommendation XXIII: Indigenous Peoples" (18 August 1997) A/52/18, annex V, para 5.

Covenant of Civil and Political Rights.[25] In addition, the Committee was of the view that "the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy". For the Committee, "participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community." [26]

A. THE IMPACT OF A DEVELOPMENT ON INDIGENOUS PEOPLES TRIGGERS THE HIGHER STANDARD OF FREE, PRIOR AND INFORMED CONSENT

According to Saramaka, what triggers the duty to obtain free, prior and informed consent is the *scale of the impact* (significant or not) on the community of the proposed development project; irrespective of the size of the project. A large scale development project will certainly have significant impact, but a small scale project can also have significant impact for certain indigenous peoples.

Amnesty International acknowledges that there is merit in the argument that any process of state engagement with Indigenous peoples should relate to an activity's potential impact on Indigenous peoples and their territories and natural resources — the greater the potential harm, the greater the need for comprehensive safeguards.

Major development or investment projects will have a "profound impact" on a "large part" of indigenous peoples' territory. *Saramaka* establishes a presumption that in large-scale development or investment projects, the impact will be significant and thus it will trigger the free, prior and informed consent requirement. But that cannot rule out the possibility that in other cases, smaller scale developments, impacting discrete parts of indigenous territory or a few members, may have a significant impact on an indigenous community.

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[25] Human Rights Committee, *Ángela Poma Poma v. Peru*, Communication No. 1457/2006, Views adopted on 24 April 2009, UN Doc. CCPR/C/95/D/1457/2006 (Annex), para. 7.7.

[26] *Ibid.*, para. 7.6.

Amnesty International submits that Saramaka, in line with the development of international law, establishes that what matters for the duty of the State to seek free, prior and informed consent **is the impact of the activity on an indigenous community, its culture and territories, irrespective of the scale of the development or the extent of territory affected.** Limiting the safeguard to only large scale projects risks undermining the very justification for putting the safeguards in place. As noted above, the safeguards outlined in the *Saramaka* ruling are intended to preserve, protect and guarantee the special relationship that the members of indigenous and tribal peoples have with their territory, which in turn ensures their survival as indigenous people.

Thus, the question which triggers the obligation to seek free, prior and informed consent has to be what impact the activity—significant or not and regardless of the extent of territory covered—will have on the community and its culture, and relationship with the land and natural resources.

In determining whether the impact will be profound or significant, and paying regard to the need to protect culture, Amnesty International submits that in line with the present development of international law, the Court should take into account the following specific factors: (1) the current situation of the community: that is, current vulnerabilities and historical inequities (the cumulative effects of past violations); and (2) the views of indigenous peoples themselves of the impact of the development in light of their rights and interests in the territory (these points will be developed below). This approach brings indigenous peoples concerns to the core of any deliberations and advances the broader goal of maintaining the continuity of culturally distinctive indigenous communities.

B. A PROJECT CANNOT GO AHEAD WITHOUT THE COMMUNITY'S CONSENT

Given that the requirement of consent is a heightened safeguard for the rights of indigenous peoples, when the standard applies a project cannot go ahead without the affected Indigenous Peoples' consent. This is a logical consequence of the free, prior and informed consent requirement established in *Saramaka* and it should be clearly stated by the Court in the present case. The rights protected with the duty to obtain free, prior and informed consent have also strong connection with the right to life, to cultural identity and the cultural and physical subsistence of the community as such, as well as indigenous peoples' right over land and natural resources. Thus, it is reasonable to expect that the State can not execute a plan that will violate those rights.

This Honourable Court has already stated that extractive concessions in indigenous territories have the potential to cause ecological damage, endanger

the economic interests, survival, and cultural integrity of the indigenous communities and their members, in addition to affecting the exercise of their property rights over lands and natural resources. [27]

In cases where impact is significant and thus free, prior and informed consent is required, the human rights of indigenous people trump other legitimate objectives, such as national development or national interest in increasing revenues that would eventually come from the extractive project proposed. The Court should clearly establish this principle, implicit in the *Saramaka* case, to stop the unhelpful and sometimes ill intentioned argument that extractive projects that serve the national interest by increasing national wealth must not be obstructed by small groups of indigenous peoples. The right to development cannot be pursued as a zero sum game in which the rights of indigenous communities are sacrificed – to do so effectively undermines the principle of the universality of rights.

The Court should insist that the duty to free, prior and informed consent is a safeguard that ensures that when there is a conflict of interest between development or investment and indigenous peoples' cultural or physical survival, indigenous peoples rights have stronger protection under international law and thus the State cannot go ahead with the proposed project without the consent of the affected Indigenous Peoples.[28] Free, prior and informed consent protects indigenous peoples especially in the context in which there is economic interest from non-state actors who usually have stronger capacity to influence decisions by States than affected and marginalized communities. This asymmetry of power among indigenous peoples and other actors, including the State, and the State obligation to address it has been recognized by the Special Rapporteur in a recent report.[29]

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[27] Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations and Costs)", Serie C No. 172, judgment of 28 November 2007, paragraph 194-D.

[28] "The Court emphasized in the Judgment that the phrase "survival as a tribal people" must be understood as the ability of the Saramaka to "preserve, protect and guarantee the special relationship that [they] have with their territory," so that "they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected." That is, the term survival in this context signifies much more than physical survival. Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs)", judgment of 12 August 2008, paragraph 37.

[29] Relator Especial de Naciones Unidas sobre los derechos de los pueblos indígenas, James Anaya. La situación de los pueblos indígenas afectados por el proyecto hidroeléctrico El Diquís en Costa Rica, 30 de mayo de 2011, parr 35-6.

V. HOW SHOULD IMPACT BE DETERMINED?

A. INDIGENOUS PEOPLES' PRESENT STATUS

In considering the potential impact of an activity, the state should have regard to the situation of the community (informed by present vulnerabilities and historical inequities), and the nature of the indigenous interests and rights at stake.

The present status will require inquiries into pre-existing conditions: gender and demographic factors, housing and accommodation, employment, educational needs, communities' health status, security; and an assessment of the full range of human rights potentially affected, including cultural and spiritual connections to the land.

But it should also consider "historical inequities", that is, the cumulative effects of past violations of the rights of the community. The UN Human Rights Committee has established the principle that failure of the state to protect indigenous land and resource bases, including the continuing effects of past wrongs, may lead to a violation of the right to culture. The leading case is *Ominayak v. Canada*, where the Committee found that the historical inequity of the failure to assure to the Lubicon Lake Band a reservation to which it had a strong claim and the effect on the Band of certain more recent developments, including oil and gas exploration, "threaten the way of life and culture of the Lake Lubicon Band" and were thus violating minority rights, contrary to Article 27 of the ICCPR. This inquiry would include the relatively recent disclosure of previous or related activities undertaken by the state, or third parties, but also the longer history of the indigenous peoples dealings with the state.

B. THE VIEWS OF INDIGENOUS PEOPLES OF THE IMPACT OF THE DEVELOPMENT

In considering the potential impact of an activity, the state should have regard to the views of the community as to the potential impact of the activity. This will include consideration of the cultural and spiritual values

that the Indigenous Peoples attribute to their lands and resources; the location of burial grounds, and ritual or ceremonial activities and historical monuments and other sacred sites and information on traditional knowledge, innovations and practices.

VI. APPLICATION OF THE STANDARDS TO THE SARAYAKU CASE

The Kichwa People of Sarayaku are indigenous peoples. Applying *Saramaka* to the present case, the circumstances were such that the state of Ecuador should have initiated an adequate consultation before unilaterally deciding to start an oil exploitation project in Sarayaku's territory and grant concessions to do so. Furthermore, the State shouldn't have allowed Compañía General de Combustibles to conduct exploration activities on the territories of the Kichwa People of Sarayaku without their prior consent. At that point it was clear that the planned developments would have involved intrusive activities with a direct and significant impact on a remote subsistence-based community. As noted by the Commission, "Between October 2002 and February 2003, the oil company's activity within block 23 advanced 29% into the interior of Sarayaku territory. In that period, the CGC pumped 467 wells with a total of 1433 kilograms of explosives and left the explosives planted on the lands of the Indigenous peoples living in block 23."[30]

Amnesty International believes that the facts established by the Commission and the representative of the victims and proved by witnesses and experts during the hearing before the Honorable Court, establish that a similar project in the future will have significant impact on the Kichwa People of Sarayaku. One expert eve stated that it was stadistically proven that a crisis that the one suffered by the Sarayaku with the intromission of the company in their territory, risk the very survival of the indigenous people, and Sarayaku is at a "point of non return" after which their culture and identity

[30] Application filed by the Inter-American Commission of Human Rights with the Inter-American Court of Human Rights against the Republic of Ecuador, case 12.465 Kichwa People of Sarayaku and its member, 26 April 2010, paragraph 77.

as a people could be lost.[31] Thus, the Court should order to the State, as a measure of non-repetition, to refrain in the future from allowing extractive companies to operate within their ancestral territory or develop any other project that will significantly impact the community without Sarayaku's free, prior and informed consent. This resolution should explicitly state that the community have the right to give or withhold such consent and the State has to respect such decision. [32]

VII. THE NEED FOR LAW REFORM TO GUARANTEE THE RIGHT TO CONSULTATION AND TO FREE, PRIOR AND INFORMED CONSENT

We note the Commission has asked this Court to order Ecuador to: "Adopt, pursuant to its domestic procedures and with the indigenous peoples' participation, the legislative or other measures necessary to **give effect to the right to prior consultation**, in good faith and with the representative institutions of those peoples, in accordance with the standards of international human rights law."

Amnesty International agrees that even though the right to consultation and

[31] Expert testimony of Rodrigo Villagra before the Interamerican Court of Human Rights in the Case of the Kicwua People of Sarayaku Vs Ecuador, San Jose, Costa Rica, 7th July 2011.

[32] In the Saramaka case, the Court ordered as a measure of satisfaction and guarantee of non-repetition, that the State must adopt measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, or when necessary, the right to give or withhold their free, prior and informed consent (Inter-American Court of Human Rights, "Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations and Costs)", Serie C No. 172, judgment of 28 November 2007, paragraph 214.8). We believe it will be important for the Court to reiterate that principle in this case but, at the same time, to order the state to refrain from allowing extractive companies to operate within their ancestral territory or develop any other project that will significantly impact the community in Sarayaku's territory without their FPIC.

free, prior and informed consent is operational without the need of national legislation, the reality shows that almost every country in the region confronts challenges at times of applying this right and thus there is a need for clear and robust procedures to give effect to these rights. However, Amnesty International argues that legislation can not only regulate the right to consultation. Following *Saramaka*, Ecuador must adopt measures (legislative, executive and judicial) to give full effect to the principles contained in *Saramaka*, namely: (1) in relation to activities that may affect indigenous peoples and their territories, the state must enter into consultations with the affected communities with the objective of obtaining agreement; (2) where an activity has potential to have a significant impact on indigenous peoples and their territories and resources, the state of Ecuador must obtain indigenous peoples' free, prior and informed consent to the activity. This includes the right to give or withhold consent, and the obligation of the State to respect such a decision. In addition, these measures should require that impacts on indigenous peoples be considered from the perspective of affected indigenous peoples taking into account their present situation; that is, current vulnerabilities and historical inequities.

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