

## *Amicus Curiae*

### **Submission by the United Nations Special Rapporteur on the rights of indigenous peoples, José Francisco Calí Tzay, in the case #13.641 *Comunidades y Rondas Campesinas de Cajamarca y sus líderes v. Peru* before the Inter-American Commission on Human Rights**

**March 15, 2022**

#### **INTRODUCTION**

1. The United Nations (UN) Special Rapporteur on the rights of indigenous peoples, José Francisco Calí Tzay, has the honour to submit this amicus curiae brief in the case of *Comunidades y Rondas Campesinas de Cajamarca y sus líderes v. Peru*, #13.641 for the consideration of the Inter-American Commission of Human Rights (IACHR).

2. The Special Rapporteur is an independent expert appointed by the UN Human Rights Council in March 2020 to monitor and promote the full realization of indigenous peoples' rights worldwide. He is specifically mandated by Human Rights Council resolution 42/20 to, inter alia, promote the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and international instruments relevant to the advancement of indigenous peoples' rights. The Special Rapporteur works in close cooperation with other UN mechanisms and regional human rights bodies in carrying out his mandate. This amicus curiae brief is also informed by his experience as the first indigenous person to be appointed to a UN human rights treaty body. The Special Rapporteur was an expert member of the UN Committee on the Elimination of Racial Discrimination (CERD) for 16 years, and President of the Committee from 2016 to 2018.

3. In the performance of his mandate, the Special Rapporteur is accorded certain privileges and immunities as expert on mission for the United Nations pursuant to the Convention on the Privileges and Immunities of the United Nations adopted by the United

Nations General Assembly on 13 February 1946. The submission of the present amicus curiae brief is provided by the Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as, a waiver, express or implied, of any privileges or immunities which the United Nations, its officials or experts on mission, pursuant to 1946 Convention on the Privileges and Immunities of the United Nations. Authorisation for the positions and views expressed by the Special Rapporteur, in full accordance with his independence, was neither sought nor given by the United Nations, including the Human Rights Council or the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

4. At issue in this case is the indigenous identity of the communities represented by the Rondas Campesinas. This amicus curiae brief will address the legal concept of indigenous peoples' right to identity and recognition, including the right of indigenous peoples to self-identify as an act of self-determination and the obligation of States to provide express recognition and effective legal protection of indigenous peoples' collective identity.

5. The Special Rapporteur on the rights of indigenous peoples reports annually to the UN Human Rights Council and to the UN General Assembly on thematic issues of international concern. The Special Rapporteur through his work on the mandate, is in a unique position to assess the human rights law implications related to a State's refusal to recognize indigenous peoples' identity and the rights associated with their status under international law. This case offers an opportunity for the Commission, in addressing this important issue, to set international best practice for compliance with human rights law.

## **DEFINING INDIGENOUS PEOPLES**

6. There is no strict legal definition of 'indigenous peoples' in international law, based on the consensus of States and indigenous peoples that a definition is not necessary to protect their rights. The UN Declaration on the Rights of Indigenous Peoples was adopted without a definition of indigenous peoples and rests on self-identification. This is consistent with international practice that does not define the terms 'peoples' and 'minorities.'<sup>1</sup>

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<sup>1</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities A/RES/47/135 (1992).

7. For practical purposes, the most commonly cited description to aid in the understanding of the term indigenous peoples derives from a report commissioned by the United Nations in 1986 written by Martinez Cobo. These guidelines were developed based on the common characteristics and shared experience of groups that had self-identified as indigenous but is not a comprehensive list or prescribed formula for deciding who is indigenous. According to Cobo:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the 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.

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- Occupation of ancestral lands, or at least of part of them
- Common ancestry with the original occupants of these lands
- Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.)
- Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language)
- Residence on certain parts of the country, or in certain regions of the world
- Other relevant factors<sup>2</sup>

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<sup>2</sup> UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4. paragraphs 379-382.

8. The United Nations Permanent Forum on Indigenous Issues has also set out its understanding of the term 'indigenous' based on the following:

- Self-identification as indigenous peoples at the individual level and accepted by the community as their member
- Historical continuity with pre-colonial and/or pre-settler societies
- Strong link to territories and surrounding natural resources
- Distinct social, economic or political systems
- Distinct language, culture and beliefs
- Form non-dominant groups of society
- Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities

9. Finally, Article 1(b) of International Labor Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169), to which Peru is a party, refers to indigenous peoples as:

peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

10. Peruvian law recognizes the juridical personality of the Rondas Campesinas as autonomous, democratic, communal organizations and applies the rights recognised to indigenous peoples and peasant and native communities to the Rondas Campesinas.<sup>3</sup> They are a form of territorial organization established either within communities or outside them, in "caseríos", "estancias" or "centros poblados", that have their own culture, and rules of customary law and justice. Under this system, the Rondas exercise their jurisdiction and administer justice by keeping the peace, resolving conflicts and

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<sup>3</sup> Ley de Rondas Campesinas (2003) Art. 1 "[...]The rights recognized to the indigenous peoples and peasant and native communities apply to the Peasant Rounds in what corresponds to them and favors them." See also: Peruvian Constitution (1993) Art, 89: "'The Peasant and Native Communities have legal existence and they are juridical people. They are autonomous in their organization, in communal work and in the use and free disposal of their lands, and as in the economic and administrative, within the framework which the law establishes...'"

defending their lands against megaprojects. They observe and transmit customs such as “pararaico” which is based on principles of reciprocity; “minga” or “faena”, the collective work; honoring mother earth; and agricultural practices that are similar to those of the Incas.

11. Accordingly, the Rondas Campesinas meet many of the elements set out by the United Nations and ILO above, including but not limited to historical continuity and descent from pre-colonial societies; connection to the lands and resource; distinct social, economic, cultural, political and legal institutions; and resolve to preserve, and transmit their ancestral lands, culture and systems as distinct peoples and communities.

### **Minorities and tribal peoples**

12. It is important to distinguish “indigenous peoples” from “ethnic minorities” under international law. Minority populations fall under a separate human rights regime, although they share many of the same characteristics and concerns as indigenous peoples regarding discrimination and cultural integrity, they lack the place-based and spiritual connection to lands and resources and corresponding legal rights. Furthermore, indigenous peoples have collective rights enjoyed by groups or communities and the right to self-determination.

13. The two groups are treated differently under international law, most notably in the adoption of two separate international instruments affirming their rights, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), along with the creation of UN bodies and mechanisms dedicated specially to indigenous peoples’ rights: the Permanent Forum on Indigenous Issues (UNPFII), Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and Special Rapporteur on the rights of indigenous peoples (SRIP). The UN has warned of characterizing indigenous peoples as “cultural communities, national minorities or tribal groups” which may be considered assimilationist language<sup>4</sup> and acknowledged that “indigenous peoples have suffered from definitions imposed on them by others.”<sup>5</sup>

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<sup>4</sup> UN Expert Mechanism on the Rights of Indigenous Peoples, Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation, A/HRC/EMRIP/2019/3/Rev.1, para. 16 (EMRIP Report).

<sup>5</sup> <https://www.ohchr.org/documents/issues/ipeoples/undripmanualforhris.pdf>

14. The term ‘tribal’ peoples refers to groups that generally lack historical pre-colonial occupation, however under international law, they share the same rights as indigenous peoples. ILO 169 uses the inclusive terminology of “indigenous and tribal peoples” while acknowledging that indigenous peoples are descended from populations that pre-existed the State.<sup>6</sup> Similarly, the Inter-American system defines the term tribal peoples as peoples who are not indigenous to the region but share similar characteristics with indigenous peoples in terms of distinct culture, customs and connection to ancestral territories.<sup>7</sup> In the *Case of the Saramaka People v. Suriname*, the Inter-American Court considered “that the members of the Saramaka people make up a tribal community whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions.”<sup>8</sup> In this case and others, the Inter-American system ascribes the same set of rights to tribal peoples as indigenous peoples, including special measures of protection for communal property rights.<sup>9</sup>

## **SELF – IDENTIFICATION OF INDIGENOUS PEOPLES**

15. Indigenous peoples themselves have the right to define who is indigenous. International instruments and bodies<sup>10</sup> rely on the collective self-identification of indigenous peoples as the primary criteria for recognition. The American Declaration on the Rights of Indigenous Peoples (ADRIP) (2015) Article 1.2 states that “Self-identification as indigenous peoples will be a fundamental criterion for determining to whom this Declaration applies. States shall respect the right to such self-identification as indigenous, whether individually or collectively, in keeping with the practices and institutions of each indigenous people.”

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<sup>6</sup> See ILO 169 Article 1.

<sup>7</sup> I/A Court H.R., *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 28, 2007. Series C No. 172, para. 79 (Saramaka).

<sup>8</sup> *Id.*, para. 84.

<sup>9</sup> IACHR, *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System* OEA/Ser.L/V/II. Doc. 56/09 (2009) para. 34; *See also* I/A Court H.R., *Moiwana Village v Suriname*, Judgment of June 15th, 2005, Series C No. 124, paras 85 and 132-135; *See also* Saramaka, *supra* note 7, paras 80-84.

<sup>10</sup> EMRIP report, *supra* note 4, para. 75.

16. The IACHR has stressed that “the criterion of self-identification is the principal one for determining the condition of indigenous people, both individually and collectively.”<sup>11</sup> The Inter-American Court elaborated in the case of *Case of the Xákmok Kásek Indigenous Community v. Paraguay*<sup>12</sup>:

First, the Court emphasizes that it is not for the Court or the State to determine the Community’s name or ethnic identity. As the State itself recognizes, it “cannot [...] unilaterally assign or deny names of [the] indigenous communities, because this action corresponds to the Community concerned.” The identification of the Community, from its name to its membership, is a social and historical fact that is part of its autonomy. This has been the Court’s criterion in similar situations.<sup>13</sup> Therefore, the Court and the State must restrict themselves to respecting the corresponding decision made by the Community; in other words, the way in which it identifies itself.

17. Other international bodies apply similar criteria.<sup>14</sup> The UNDRIP was adopted without a definition of indigenous peoples, relying instead on self-identification. Under Article 33.1: “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.” Furthermore, ILO 169 Article 1.2 establishes that “self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups” which are indigenous.

18. Self-identification is an exercise of indigenous peoples right to self-determination as expressed in Article 3 of ADRIP<sup>15</sup> and Article 3 of the UNDRIP. Recognition as

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<sup>11</sup> IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, para. 216.

<sup>12</sup> I/A Court H.R., *Merits, Reparations and Costs*. Judgment of August 24, 2010, Series C No. 214, para. 37 (Xákmok).

<sup>13</sup> Saramaka, *supra* note 7, para. 164.

<sup>14</sup> See African Commission on Human and Peoples’ Rights v. Republic of Kenya, ACtHPR, Application No. 006/2012 (2017) which refers to self-identification as part of the criteria that generally reflects “the current normative standards to identify indigenous populations in international law.” paras. 107-108. See also para. 157 “The African Commission, therefore, accepts that self-identification for Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.” See also Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Implementation of General Assembly Resolution 60/251, U.N. Commission on Human Rights, UN Doc. E/CN.4/2002/97, (2002) at para. 100 arguing that self-identification is a key criterion for determining who is indeed indigenous.

<sup>15</sup> Article III. Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.

indigenous peoples is also a foundation right from which other rights flow including rights to lands, territories and resources, rights to culture, the right to self-determination and free, prior and informed consent.<sup>16</sup>

## **THE DUTY OF STATES TO RECOGNIZE INDIGENOUS PEOPLES**

19. States have a duty to recognize indigenous peoples as distinct peoples who possess collective rights,<sup>17</sup> especially in relation to self-determination as protected under the ADRIP and UNDRIP. Indigenous peoples have inherent rights to exist regardless of formal state recognition<sup>18</sup> or the terminology used by States to describe them (campesinos, peasants, natives, Indians, indigenous). Accordingly, it is incumbent on States to provide explicit and formal recognition of indigenous peoples in domestic law through constitutional, statutory and/or judicial action. With respect to constitutional acknowledgement, the United Nations has underscored that constitutional language should be construed broadly in favour of recognizing indigenous rights.<sup>19</sup>

20. The ADRIP Article 8 affirms the rights of indigenous peoples and individuals to “belong to one or more indigenous peoples, in accordance with the identity, traditions, customs, and systems of belonging of each people. No discrimination of any kind may arise from the exercise of such a right.” Article 2 provides that States must recognize and respect the multicultural character of indigenous peoples. The UNDRIP has similar provisions<sup>20</sup> and United Nations treaty bodies have highlighted the importance of recognizing indigenous peoples’ identity and criticized States for failing to recognize indigenous peoples’ identity.<sup>21</sup>

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<sup>16</sup> EMRIP report, *supra* note 4, para. 17.

<sup>17</sup> *Id.*, para. 74.

<sup>18</sup> See ILO 169 Article 1. This Convention applies to: (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. [emphasis added]

<sup>19</sup> EMRIP report, *supra* note 4, para. 76.

<sup>20</sup> UNDRIP Article 33: “indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.” Article 9 affirms the right of indigenous peoples and individuals to “belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.”

<sup>21</sup> See CERD/C/FRA/CO/20-21, para. 11 regarding France territorial collectivities, CCPR/C/RWA/CO/4, para. 48 regarding Batwa of Rwanda and CRC/C/ZAF/CO/2, paras. 65–66 regarding the Khoisan of South Africa.



21. States are further obligated to prevent and provide redress where indigenous peoples have been deprived of their integrity as distinct peoples.<sup>22</sup> This may include the establishment of special measures of protection for indigenous peoples as set out under international law.<sup>23</sup> The Inter-American Court has interpreted Article 1(1) of the American Convention to require special measures that guarantee the full exercise of indigenous and tribal peoples' rights, particularly with regards to safeguarding their physical and cultural survival.<sup>24</sup>

22. Some States have expressed concern that the recognition of indigenous peoples' rights will deny or question the identity claims of others. The indigenous human rights framework does not grant preferential treatment to indigenous peoples<sup>25</sup> but responds to the historical injustices, colonization and discrimination faced by indigenous peoples that requires a targeted response. Unequal treatment of persons in disparate situations does not amount to discrimination, as indigenous peoples are simply asking for the same rights and protections as the rest of the population.

## CONCLUSIONS AND RECOMMENDATIONS

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<sup>22</sup> Article 8 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

<sup>23</sup> Saramaka, *supra* note 7, p. 25 FN 76 citing to Resolution on Special Protection for Indigenous Populations. Action to Combat Racism and Racial Discrimination, OEA/Ser.L/V/II.29 Doc. 41 rev. 2, March 13, 1973, where the Commission proclaimed that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of states". See also Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Ecuador, OAS/Ser.L/V/II.96 Doc.10 rev 1, April 24, 1997, Chapter IX stating that "within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival -- a right protected in a range of international instruments and conventions"; UNCERD, General Recommendation No. 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V, August 18, 1997, para. 4 calling upon States to take certain measures to recognize and ensure the rights of indigenous peoples, and ECHR, Case of Connors v. The United Kingdom, Judgment of May 27, 2004, Application no. 66746/01, para. 84 declaring that States have an obligation to take positive steps to provide for and protect the different lifestyles of minorities as a way to provide equality under the law.

<sup>24</sup> I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 79, paras. 148-149, and 151; I/A Court H.R.; Case of the Indigenous Community Sawhoyamaya v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006, Series C No. 146, paras. 118-121, and 131; and I/A Court H.R., Case of the Indigenous Community Yakye Axa v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005, Series C No. 125, paras. 124, 131, 135-137 and 154.

<sup>25</sup> Report of the Working Group of Indigenous Peoples on its fourth session, Chairman-Rapporteur Mrs. Erica-Irene Daes, UN Doc. E/CN.4/Sub.2/1985/22 of 27 August 1985, Annex III, para. 66.

23. The Rondas Campesinas fit the criteria for identification as indigenous peoples as set out by the United Nations and Inter-American system of human rights, including the fundamental criterion of self-identification which is the normative standard under international human rights law.

24. Recognition of the unique status of indigenous peoples is a necessary precursor to the exercise of other rights including self-determination, lands, territories and resources, culture, consultation, and free, prior and informed consent. Self-identification is in and of itself an exercise of the inherent right to self-determination.

25. As a best practice, States should take concrete action to provide formal legal recognition of indigenous peoples' identity through constitutional, legislative and/or judicial acts and effectively implement national laws and policies, free from discrimination. These steps are necessary to ensure the effective legal protection of indigenous peoples' rights and access to remedies for rights violations.