The Law Society of England and Wales

Leigh Day

Amicus Curiae

The Law Society of England and Wales

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Reference: *formulación de excepción previa*

Claim Number (*expediente*): 11001032400020190026200

Petitioner: Yefferson Mauricio Dueñas Gómez

Respondents: Ministerio del Interior, Ministerio de Ambiente y Desarrollo Sostenible y Ministerio de Cultura

Introduction

1. The Law Society of England and Wales (the **"Law Society")** is the professional body representing more than 180,000 solicitors in England and Wales. The Law Society was established by Royal Charter (the "Charter of the Society") in 1845 and has consultative status with the Economic and Social Council of the United Nations since 2014. Its activities are established by statute: the Solicitors Act 1974, the Courts and Legal Services Act 1990, the Access to Justice Act 1999, and the Legal Services Act 2007 ("LSA 2007").

2. The Law Society has a public interest mandate as established in Section 51 of the LSA 2007 which stipulates that its activities include (e) "the promotion of the protection by law of human rights and fundamental freedoms" and (f) "the promotion of relations between the approved regulator and relevant national or international bodies, governments or the legal professions of other jurisdictions". The Law Society's main concerns, in this regard, include upholding the independence of the legal profession, the rule of law, and human rights throughout the world.

3. Leigh Day is a law firm – member of the Law Society - based in London and Manchester, which specialises in international human rights and environmental law. Its International Department represents individuals and communities from across the world in cases against British corporations and government entities in relation to harm caused overseas. The firm has acted in many ground-breaking legal cases which have set precedents that are referred to in jurisdictions around the world.

4. The Law Society and Leigh Day have taken an interest in the above referenced legal challenge to Decree 1500 of 2018 (the "**Decree**") issued by the Colombian Government. The stated purpose of the Decree is to redefine the delimitation of the ancestral territory of the Arhuaco, Kohui, Wiwa and Kankuamo peoples of the Sierra Nevada de Santa Marta **(the "Indigenous Communities")**, which encompasses, among other things, the system of sacred spaces known as the '*Linea Negra – Sheshiza*'. Article 3 of the Decree lays down a series of principles which form the basis of the protection to be afforded to these indigenous territories. Articles 5 to 11 of the Decree refer to the delimitation of the territories and the protection of the rights of the Indigenous Communities in relation to the same.

5. The Law Society and Leigh Day understand that the Decree represents the culmination of a lengthy process of negotiation between the Colombian Government and the legitimate traditional authorities of the Indigenous Communities, conducted pursuant to Constitutional Court Auto No.189 of 2013 **("Auto 189")**. It is our understanding that the aim of this process and the subsequent issuance of the Decree was to ensure that the territorial and cultural rights of the Indigenous Communities would be appropriately protected in the future.

6. We note that the present attempt to annul the Decree raises certain legal questions concerning the rights of indigenous peoples. These matters are not only governed by the Colombian Constitution, as well as relevant legislation, case-law, and regulations,

but also by international legal instruments that have been further developed by the jurisprudence of international bodies, most notably the Inter-American Court of Human Rights (the "**IACtHR**").

7. The Law Society and Leigh Day wish to submit this short amicus curiae brief to highlight the relevant principles of international human rights law that are legally binding on Colombia (unless otherwise indicated) and that may be taken into account by the Consejo de Estado when considering legal arguments raised by the Petitioner in this case. This intervention does not seek to opine on the merits of the parties' arguments in the case. Neither does it address issues arising in the action which are dependent to a significant degree on considerations of a purely factual or domestic legal nature.

Issues Addressed in this amicus curiae brief

8. The Petitioner in this matter presents various arguments which regard domestic issues, such as the jurisdiction and authority of certain administrative bodies with regard to regional planning and the use of natural resources. These issues will not be directly addressed in this submission, except to the extent that they engage international law principles regarding the rights of indigenous peoples. This amicus curiae brief will mostly focus on international law principles regarding the property and cultural rights of indigenous peoples, also with regard to rights of third parties - including the State's ownership of the subsoil. This amicus curiae brief will, therefore, be relevant to the Petitioner's arguments that:

    (i) Articles 5, 6, 7 and 9 of the Decree ignore the State's ownership of the subsoil and the corresponding exclusive prerogative of the State to make use and dispose of non-renewable natural resources. In particular, the description of the Indigenous Communities' sacred sites set out in Article 11 of the Decree directly alludes to the subsoil, creating "super-rights" for the Indigenous

Communities enabling them to make decisions in relation to the use of the subsoil at the expense of the Colombian population as a whole, and

(ii) Articles 5, 6, 7 and 9 of the Decree ignore the rights acquired by and the private property of third parties, and

(iii) Articles 5, 6, 7 and 9 of the Decree are null because they ignore the autonomy and powers assigned to the Departments and relevant governmental authorities to control and manage the geographical areas which include the indigenous territory. These articles of the Decree afford the communities the power to take decisions regarding the organisation and use of land within their traditional land.

9. This amicus curiae brief first sets out the relevant international legal framework and then provides a brief analysis which seeks to draw together the key legal principles that the Consejo de Estado may take into account when considering the Petitioner's arguments set out at paragraph 7 above.

Applicable International Law Framework

The Recognition of Indigenous Peoples' Distinctive Relationship with Land and the Natural Environment under International Law

10. The International Covenant on Civil and Political Rights (the "**ICCPR**"), ratified by Colombia on 19 October 1969, provides in its Article 27 that in those States where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, together with other members of their communities, to enjoy their own culture. In the case of *Indigenous Community Kichwa de Sarayaku*

Vs Ecuador, the IACtHR determined that it regarded collective rights of the indigenous community as a whole, rather than only the rights of its members.[1]

11. The right to private property is enshrined in Article 21 of the American Convention on Human Rights (the "**ACHR**"), ratified by Colombia on 28 May 1973, and has been interpreted by the IACtHR to include the communal right to property of indigenous peoples.[2]

12. In relation to indigenous peoples' property rights, Article 15 of the ILO Indigenous and Tribal Peoples Convention 1989, No. 169 (the "**ILO Covenant No. 169**"), ratified by Colombia on 7 August 1991, provides as follows:

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

13. Furthermore, Article 13 of the same Convention states the following in relation to Indigenous peoples' relationship with their lands or territories:

> *"1.In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable,*

[1] Case Indigenous Peopls Kichwa de Sarayaku Vs. Ecuador. Merits and Reparations. Judgment of 27 June 2012. Serie C No. 245, para. 231.
[2] Case of the Indigenous Community Mayagna (Sumo) Awas Tingni Vs Nicaragua. Merits, Reparations and Costs, Judgment of 31 August 2001. Serie C No. 79, para. 148.

which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2.The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use. [emphasis added]".

14. The jurisprudence of the IACtHR sets out how property rights protected under the ACHR should be applied in the context of indigenous peoples, taking into account the distinctive relationship that these groups have with land and natural resources. This relationship goes beyond questions of possession and production but rather forms the fundamental basis of their physical, cultural and spiritual existence.[3] The IACtHR has recognised that the indigenous concept of ownership and possession of property does not necessarily correspond to classic 'Western' conceptions of property, but that indigenous lands are also protected by the right to property established in Article 21 of the ACHR.

15. In the case of *Yakye Axa Indigenous Community Vs Paraguay,*[4] the indigenous community brought proceedings against the state of Paraguay in relation to historical dispossession of the community from its ancestral lands. The court held that although Paraguay recognised the right to communal property in its own legal order, it had violated Article 21 of the ACHR by failing to take the necessary domestic legal steps to ensure the indigenous community's effective use and enjoyment of their traditional lands, taking into account the community's unique and profound material and non-material relationship with the land and the natural environment.[5] The IACtHR confirmed that the term "property" under Article 21 ACHR includes:

> *"those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."*[6]

[3] Ibid., para. 149.
[4] Case Indigenous Community Yakye Axa Vs Paraguay, Merits, Reparations and Costs. Judgment of 17 June 2005. Serie C no. 125.
[5] Ibid., paras. 123-156.
[6] Ibid., para. 137.

16. The IACtHR referred to ILO Covenant No. 169 to interpret the scope of the right to property established in Article 21 ACHR, as applied to indigenous communities and their lands and held that:

> *"Applying said criteria [from ILO Convention No.169], this Court has underlined that the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations"*[7]

17. In the case of *Sawhoyamaxa Indigenous Community Vs Paraguay*, which regarded a similar reclamation of ancestral lands by an indigenous community, the IACtHR established that:

> *"This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons"*[8]

18. In that same case, the IACtHR elaborated further on the nature of indigenous peoples' unique relationship with their traditional lands and highlighted that such a relationship was also expressed through the use of natural resources and spiritual and ceremonial activities:

> *"the Court takes into consideration that the spiritual and material basis for indigenous identity is mainly supported by their unique relationship with their traditional lands. As long as said relationship exists, the right to claim lands is enforceable, otherwise, it will lapse. Said relationship may be expressed in different ways, depending on the particular indigenous people involved and the*

[7] Ibid., paras. 131.
[8] Case Indigenous Community Sawhoyamaxa Vs. Paraguay. Merits, Reparations and Costs. Judgment of 29 March 2006. Serie C No. 146, para. 120.

specific circumstances surrounding it, and it may include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture".[9]

19. Similarly, in its General Comment No. 23, the UN Human Rights Committee confirmed that Article 27 of the ICCPR encompasses the right of minority groups to enjoy their culture, which may consist in a way of life closely associated with land and the use of its resources. The Committee noted that this might apply particularly in the case of members of indigenous communities, stating that:

"With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them".[10]

20. In the case of *Angela Poma Poma Vs Peru,*[11] a case concerning the diversion by state authorities of water affecting a member of an indigenous community, the UN Human Rights Committee reiterated the cultural significance of, and right to use, natural resources and added that *"the protection of these rights is directed to ensure the survival and continued development of cultural identity, thus enriching the fabric of society as a whole".*[12]

21. In that case, the UN Human Rights Committee established that no adequate consultation regarding the diversion of water had taken place and that the claimant was "*unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock*", so that "*the State's action has*

[9] Ibid, para 131.

[10] UN Human Rights Committee, General Comment No. 23, U.N.Doc. CCPR/C/21/Rev.1/Add. 5, 26 April 1994, para. 7.
[11] UN Human Rights Committee, Comm. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006.
[12] Ibid., para. 7.2.

substantively compromised the way of life and culture of the author, as a member of her community". The Committee established a violation of Article 27 ICCPR.[13]

22. In addition, Colombia ratified the International Covenant on Economic, Social and Cultural Rights (the "**ESCR**") on 29 October 1969. Regarding the use of natural resources by indigenous communities, as well as their right to have a say over the management of such resources, the UN Committee on Economic, Social, and Cultural Rights - in its General Comment No. 15 on the right to water[14] - established that:

> *"Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not 'be deprived of its means of subsistence', States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples".*[15]

23. That same Committee also pointed out that:

> *"Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that:*
>
> *(d) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water"*[16]

24. The IACtHR has also emphasised the importance of the use and management of natural resources, including water, by indigenous communities for their cultural and physical survival. In the *Case of the indigenous community Yakye Axa Vs Paraguay,*[17] the IACtHR established that the State, in guaranteeing and protecting the right to life, has an obligation to "generat[e] minimum living conditions that are compatible with

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[13] Ibid., para. 7.7.
[14] UN Committee ESCR, General Comment No. 15, U.N. Doc. E/C.12/2002/11, 20 January 2003.
[15] Ibid., para. 7.
[16] Ibid., para. 16(d).
[17] Case Indigenous Community Yakye Axa Vs Paraguay, Merits, Reparations and Costs. Judgment 17 June 2005. Serie C no. 125.

the dignity of the human person and of not creating conditions that hinder or impede it", adding that "the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority".[18]

25. In that case, the indigenous community lacked access (and title) to their ancestral lands, as well as access to natural resources. The IACtHR cited the UN Committee on Economic, Social, and Cultural Rights, as follows:

> *"[I]n indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this regard, the Committee considers that [...] denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health".*[19]

26. The IACtHR also established that:

> *"Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, said Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water".*[20]

27. The IACtHR concluded that, in that case, the State had violated the communal property right of the indigenous community and that that had

[18] Ibid., para. 163.
[19] Ibid., para. 166; UN Committee ESCR, UN. Doc. E/C.12/2000/4, para. 27.
[20] Ibid., para. 167.

> *"a negative effect on the right of the members of the Community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses".*[21]

28. As the case-law of the IACtHR referred to above shows, as well as the General Comments of the UN Committee on Economic, Social, and Cultural Rights, the Colombian State is under an international legal obligation to provide indigenous communities with access to – and use of - natural resources in their lands, as well as ensuring that they have a say in the administration and management of the same. A failure to ensure such access and participation in management in practice, as well as any adoption of domestic legislation or regulations that would allow for such a failure to exist, would violate Colombia's international legal obligations under the ACHR, ICCPR, and ICESCR.

29. In the case of the indigenous community *Garifuna Triunfo de La Cruz Vs Honduras,*[22] the IACtHR found that Honduras had violated the indigenous community's right to property under Article 21 of the ACHR by failing to guarantee the community the effective use and enjoyment of their communal property right over their ancestral lands. In relation to the State's duty to guarantee the adequate protection of the collective property rights of the indigenous community, the IACtHR found that:

> *"This connection between land and natural resources which have been traditionally used by indigenous and tribal peoples and which are necessary for their physical and cultural survival, as well as the development and continuity of their cosmovision, must be protected under Article 21 of the ACHR to guarantee that they can continue living their traditional way of life and that their cultural identity, social structure, economic system, customs, beliefs, and distinctive traditions are respected, guaranteed and protected by States."*[23]

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[21] Ibid., para. 168.
[22] Case Community Garífuna Triunfo de la Cruz and its members Vs. Honduras. Merits, Reparations and Costs. Judgment 8 October 2015. Serie C No. 305.
[23] Ibid., para. 102.

30. With regard to the importance of the right to communal property and the cultural identity of indigenous peoples, the IACtHR has identified sacred sites as worthy of particular protection by virtue of their special significance in indigenous culture. In the case of the *Indigenous People Kichwa de Sarayaku Vs Ecuador*, sacred sites pertaining to the indigenous community were destroyed by a company involved in oil exploration activities. In its judgment, the IACtHR referred to the importance that sites of symbolic value had for the cultural identity of the Sarayaku people and their worldview, and the "*profound impact*" that can be caused to the social and spiritual relationships between members of the community and the natural world by the harming or destruction of such sites.[24]

31. In addition, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage - ratified by Colombia on 19 March 2008 – creates a binding legal obligation on the Colombian State, set out in Article 15 of that Convention, to:

> *"Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage,* ***and to involve them actively in its management****."* [emphasis added].

32. This means that the Colombian State has an international legal obligation to ensure that indigenous peoples' right to communal property and right to cultural identity is respected and guaranteed, including by ensuring that such peoples have access to sacred sites that are of cultural and spiritual significance to them and are involved in the management thereof.

[24] Caso Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador. Fondo y Reparaciones. Sentencia de 27 de junio de 2012. Serie C No. 245, para 219.

Indigenous Property Rights and the Rights of Third Parties

33. The potential tension between indigenous land rights on the one hand and the rights of third parties on the other was addressed by the IACtHR in, for example, the case of the *Indigenous Community Sawhoyamaxa Vs Paraguay*, where it stated that it:

> *"cannot to [sic] decide that Sawhoyamaxa Community's property rights to traditional lands prevail over the right to property of private owners or vice versa, since the Court is not a domestic judicial authority with jurisdiction to decide disputes among private parties. This power is vested exclusively in the Paraguayan State".*[25]

34. In the case of *Indigenous Community Yakye Axa Vs Paraguay,* the IACtHR held that, where a conflict arises between indigenous and private property rights, States must assess on a case by case basis the restrictions that would result from recognising one right over another. In making that assessment:

> *"States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.*
>
> *Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members."*[26]

35. In that same case, the IACtHR went on to explain that:

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[25] Case Indigenous Community Sawhoyamaxa Vs. Paraguay. Merits, Reparations and Costs. Judgment 29 March 2006. Serie C No. 146, para. 136.

[26] Case Indigenous Community Yakye Axa Vs Paraguay, Merits, Reparations and Costs. Judgment 17 June 2005. Serie C no. 125, paras. 146-147.

> *"restriction of the right of private individuals to private property might be necessary to "attain the collective objective of preserving cultural identities in a democratic and pluralist society, in the sense given to this by the American Convention; and it could be proportional, if fair compensation is paid to those affected pursuant to Article 21(2) of the Convention."*[27]

36. The abovementioned case-law shows that, in each case, indigenous rights will need to be balanced with rights of third parties. However, rights to communal property and cultural identity of indigenous peoples – which, for example, include having access to natural resources and sacred sites - would be violated if they are restricted in an impermissible manner.

The State Duty to Guarantee and Protect Indigenous Rights and Indigenous Peoples' Right to Self-Administration under International Law

37. The scope of the duty of the State to take certain measures to ensure the rights of indigenous peoples, as well as the participation of such peoples in decisions of the State regarding legislative and administrative measures which affect them, is laid down in several Articles of the ILO Covenant No. 169. For example, Article 2(1) of the ILO Convention No. 169 provides that:

> *"governments shall have responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity."*

38. Article 4 of that same Convention establishes the duty of the State to ensure that specific measures are adopted for the protection of indigenous rights:

> *"special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labor, cultures and environment of the people concerned."*

[27] Ibid., para. 148.

39. Article 6 of the ILO Covenant No. 169 establishes that indigenous participation in the development of administrative and legislative measures which affect them should be carried out through their own representative institutions and that governments shall:

> *"(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;*
>
> *(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them"*

40. In addition, Article 7 of the ILO Covenant No. 169 provides that:

> *"1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.*
>
> *4.Governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit".*

41. In relation to the rights of indigenous people to use lands not exclusively occupied by them, but to which they have traditionally had access (including for traditional activities), Article 14 of the ILO Covenant No. 169 provides that:

> *"The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases 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".*

42. The abovementioned Articles show that the Colombian State has an international legal obligation to take certain measures – with the participation of indigenous peoples themselves - to protect the rights of such peoples in their territories, but also in lands

to which they historically have had access for their subsistence and traditional activities, as well as to preserve the environment in such lands.

Analysis

43. In accordance with the international legal framework set out above, when considering the arguments set out by the Petitioner, the Consejo de Estado may take into account the following principles:

(i) International law recognises that indigenous peoples enjoy a unique relationship with land and the natural environment, particularly sacred sites of cultural significance and natural resources. Under international law, apart from collective property rights over ancestral lands, indigenous peoples are entitled to have the full extent of their cultural and spiritual relationship with land and natural resources reflected in domestic law. This covers the total environment of the areas which the peoples concerned occupy or otherwise use.

(ii) In considering the manner in which indigenous peoples' territorial rights are reflected in domestic law, states are required to account for the fact that the unique features of indigenous land rights cannot necessarily be shoehorned into 'western' civil law conceptions of property rights. Legislators must, therefore, ensure that domestic law is sufficiently flexible to accommodate the unique and distinctive relationship that indigenous peoples have with their natural environment and which has been afforded special protection under international law.

(iii) The property rights of indigenous people can supersede those of third parties, where the restriction on third party rights is necessary to attain the objective of the physical or cultural survival of an indigenous community in a

democratic and pluralist society. Furthermore, in certain cases the State has a duty to impose measures to safeguard the rights of the indigenous peoples to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

(iv) In circumstances where the subsoil is owned by the State, under international law indigenous peoples are nevertheless entitled to have the full extent of their cultural and spiritual relationship with the land, including the subsoil, respected and recognised in domestic law. This may include having access to, and being able to benefit from, natural resources such as water.

Application of the International Legal Framework to the Relevant Provisions of the Decree

44. As regards the specific challenges that the Petitioner has made to Articles 5, 6, 7 and 9 of the Decree as set out under paragraph 7 above, the Law Society and Leigh Day make the following observations in line with the international legal principles set out above:

(i) Article 5 of the Decree provides for the delimitation of the traditional territories of the Indigenous Communities. This is consistent with the State's obligation under international law to delimit the territories of indigenous peoples.

(ii) Article 6 of the Decree refers to the recognition of the Indigenous Communities' rights in relation to their territory and the environment, and their participation in decision-making concerning the use, administration and conservation of natural resources having regard to the Indigenous Communities' particular practices and culture. This is consistent with the State's international legal obligation to prioritise the material, spiritual and cultural wellbeing of the Indigenous Communities – including through special

measures if required, and to ensure their participation in administrative or legislative measures.

(iii) Article 7 protects the Indigenous Communities' right to access sacred sites within the indigenous territories. This is consistent with the special protection afforded to indigenous sacred sites under international law due to their particular cultural significance, as well as the recognition that in appropriate cases it may be necessary for the State to impose measures to safeguard the right of the indigenous peoples to use lands not exclusively occupied by them, but to which they have traditionally had access for their traditional activities. To the extent that the Indigenous Communities' access rights conflict with third-party property rights, the access rights may be prioritised where the measures enabling such access meet the requirements for limitation of a property right and will ensure the protection of the Indigenous Communities' physical existence and cultural identity. The Indigenous Communities are entitled to have the full extent of their relationship with sacred sites and natural resources respected and reflected in domestic law.

(iv) Article 9 provides that measures, actions and plans within the indigenous territory should take into account the spiritual and environmental value of the territory. This is consistent with the State's international law duty to recognise indigenous peoples' unique relationship with land and the natural environment and to have the full extent of their cultural and spiritual relationship with land and natural resources reflected in domestic law. It also reflects the State's obligation to ensure that the material, spiritual and cultural wellbeing of the Indigenous Communities is prioritised in plans for the overall economic development of the areas they inhabit.

Conclusion

45. The Decree, as issued by the Colombian government, is in accordance with its international obligations (at least with regard to the matters raised by the Petitioner). Any amendment or nullification of that Decree, as proposed by the Petitioner, would expose Colombia to legal challenges, international legal responsibility for violations of its treaty obligations under the ACHR, ICCPR, ICESCR, and UNESCO Convention on Safeguarding Intangible Cultural Property.

46. As a result of any such legal challenge, the Colombian State could not only be ordered to pay reparation to the claimants, but also to amend the relevant domestic regulation or legislation. This could mean that Colombia would be under an obligation to reinstate the Decree that is currently in force.

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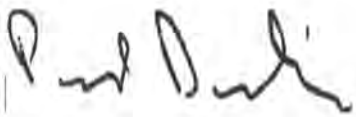

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