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增进和保护所有人权、公民、政治、经济、社会 和文化权利，包括发展权

土著人民人权和基本自由情况特别报告员 S. 詹姆斯·安纳亚的报告*

增编

关于秘鲁亚马孙地区土著人民的境况和 6 月 5 日及随后几天在巴瓜省和乌特库巴姆巴省发生事件的意见**

摘要

土著人民人权和基本自由情况特别报告员 S. 詹姆斯·安纳亚表达了关于亚马孙地区土著人民的境况，尤其是关于 2009 年 6 月 5 日在亚马孙区的巴瓜省和乌特库巴姆巴省发生的冲突以及随后几天发生的事件的意见。这些冲突和事件导致数人死亡和受伤。这些意见是特别报告员与秘鲁政府及其他相关各方交流信息，以及 2009 年 6 月 17 日至 19 日访问秘鲁的产物。访问的目的在于观察、了解和分析巴瓜市周围地区以及巴瓜省和乌特库巴姆巴省的形势，以及导致这种形势的事件。特别报告员认为，秘鲁政府邀请他访问该国及在他访问期间给予的合作显示了善意和开放的态度。

特别报告员在访问期间加深了对形势的了解，并与政府代表、土著组织成员和土著人民以及巴瓜及其他地区民间社会开展了建设性对话。特别报告员在访问之后，还继续从不同来源接收有关 6 月 5 日事件之后事态发展的大量信息。特别

* 迟交。

** 本报告摘要以所有正式语文分发。报告本身载入摘要附件，仅以原文和英文分发。

报告员提出若干结论和建议，以便制定措施，在土著人民权利国际标准框架下寻找建设性解决办法。他建议设立一个特别的独立委员会，查明 2009 年 6 月 5 日及随后几天发生的事件，委员会由所涉所有各方予以信任的不同机构及土著代表组成。他还建议国际社会成员参与特别委员会的工作。特别报告员还就开展适当协商程序以及审查对土著领导人的刑事起诉提出具体建议。特别报告员的一般性评论包括：缺乏一个针对土著人民合法协商权和保护其对土地和领地所有权的适当机制，这一因素导致土著人民认为他们没有捍卫自身权利的充分选择。

Annex

Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya

Observations on the situation of the indigenous peoples of the Amazon region and the events of 5 June and the following days in Bagua and Utcubamba provinces, Peru

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Observations on the situation of the indigenous peoples of the Amazon region and the events of 5 June and the following days in Bagua and Utcubamba provinces, Peru*

I. Introduction

1. This report presents the observations of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Professor S. James Anaya, on the situation of the indigenous peoples of the Amazon region, particularly in relation to the clashes of 5 June 2009 and the events of the days immediately following in Bagua and Utcubamba provinces, Amazonas department, which led to a number of deaths and injuries. These observations are based on an exchange of information with the Government of Peru and other interested parties and on a visit to Peru from 17 to 19 June 2009. The purpose of the visit was to observe, understand and analyse the situation that had arisen in the area round the city of Bagua and in Bagua and Utcubamba provinces and the events that gave rise to this situation.

2. On 10 June 2009, the Special Rapporteur issued a press release in response to the fighting that occurred on 5 June and the following days, expressing his condolences to the victims and their families and making an “urgent appeal to all concerned to avoid further violence”. The Special Rapporteur also urged the State authorities “to implement measures already in place, as well as adopt all additional measures necessary, in accordance with international human rights norms, to protect the human rights and fundamental freedoms of the affected indigenous peoples”. Furthermore, the Special Rapporteur stressed to the “indigenous individuals and peoples involved that their claims and protests should always be carried out in a peaceful manner and with respect for the human rights of others”. Lastly, the Special Rapporteur expressed “his willingness to visit the country to review the situation and contribute to the search for a solution to the conflicts in the region, within the terms of his mandate by the United Nations Human Rights Council, to promote respect for the human rights of indigenous peoples”.

3. In a note verbale dated 12 June 2009, the Government of Peru extended an invitation to the Special Rapporteur to visit the country and analyse the situation facing it. The Special Rapporteur also received requests for him to visit the country from indigenous groups and the Special Multi-Party Committee set up by Congress to consider the problems of indigenous peoples and recommend a solution (“the Multi-Party Committee”). The Multi-Party Committee decided on 9 June 2009 to invite the Special Rapporteur “in order that he may contribute to the search for a solution to the conflicts ... with the indigenous people of the Peruvian Amazon region”.

4. During his visit, from 17 to 19 June, the Special Rapporteur held meetings with, among others, the Vice-President of Congress, members of the Multi-Party Committee, members of the Constitutional Committee of Congress, the Minister for Foreign Affairs, the Minister of Justice, the Minister of International Trade and Tourism, the Minister of the Interior, the Minister of Defence, the Prime Minister, the Attorney General and officials attached to those ministries. The Special Rapporteur also held a meeting with the Ombudswoman (Defensora del Pueblo) and officials from her Office; he also met members of indigenous organizations and peoples and civil society in the region of Bagua, where he

* Dated and originally circulated in unedited form on 20 July 2009.

was able to interview a number of people who were present at the clashes on 5 June. The Special Rapporteur received, and continues to receive, extensive information from various sources about the events that occurred.

5. The Special Rapporteur is grateful for the invitation and the support of the Government of Peru and for the cooperation he received in carrying out his visit, which he considers a gesture of goodwill and openness on the part of the Peruvian Government. He also expresses his sincere gratitude to all the organizations and individuals for information provided on this delicate and sensitive situation. The Special Rapporteur's visit to Peru forms an important part of his mandate, established by the Human Rights Council, to receive and exchange "information and communications from all relevant sources, including Governments, indigenous people and their communities and organizations, on alleged violations of their human rights and fundamental freedoms", and to "formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people".¹

6. The following observations and recommendations by the Special Rapporteur have the aim of contributing to finding constructive solutions to the current situation, in the light of the relevant international standards.

7. In a note dated 14 July 2009, the Special Rapporteur submitted a first version of these observations on the situation to the Government, which issued comments on his observations in a note dated 16 July 2009. The Special Rapporteur expresses his gratitude to the Government for having provided additional information and comments, which have been taken into account for the definitive version of the observations set out in this document.

II. Background

8. The events that occurred in Bagua and Utcubamba provinces in June 2009 took place in the context of growing tensions, which largely centred on the enactment by the Executive of various legislative decrees called into question by indigenous organizations and representatives. Between March and June 2008, the Government enacted 101 legislative decrees on the basis of Congressional Act No. 29157, which delegated legislative faculties to the Executive for the adoption of measures relating to the Government's development policy and the implementation of the Trade Promotion Agreement (known as the Free Trade Agreement) between Peru and the United States of America. Indigenous organizations, particularly the Interethnic Association of Peruvian Amazonia (AIDSEP) objected to 38 of these legislative decrees, and subsequently to 11, both because of their content and because there had been no direct consultations with the indigenous peoples before the legislation was enacted.

9. The 11 decrees to which the indigenous organizations objected were the following: No. 994 (promotion of private investment in irrigation projects to extend the area of agricultural land); No. 995 (amendments to the Agricultural Bank (Relaunch) Act); No. 1015 (integration of the administrative procedures for peasant and indigenous communities in mountain and forest areas with those of the coastal regions in order to improve their commercial production and agricultural competitiveness); No. 1020 (promotion of agricultural products and consolidation of land ownership for credit); No. 1060 (regulation of the National Agricultural Innovation System); No. 1064 (establishment of a legal regime

¹ Human Rights Council resolution 6/12 of 28 September 2007, para. 1 (b) and (c).

for agricultural land use); No. 1080 (amending the General Seed Act); No. 1081 (establishment of the national water resource system); No. 1083 (promotion of the use and conservation of water resources); No. 1089 (establishment of the extraordinary temporary regime for the formalization of ownership of rural plots of land); and No. 1090 (adoption of the Forest and Forest Wildlife Act). Legislative Decrees Nos. 1081 and 1083 were superseded by the Water Resources Act No. 29338, of 31 March 2009, but the others remain in force. It was claimed that the 11 decrees were facilitating increasing commercial activity and the privatization and exploitation of lands and natural resources that threatened the rights of indigenous people over their own lands and resources.

10. Moreover, the constitutionality of some of the decrees and/or their compatibility with the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), which has been ratified by Peru, has been called into question by various parties, including the Office of the Ombudswoman,² the Multi-Party Committee,³ the sub-working group of the Congressional Agriculture Committee set up to consider legislative decrees relating to the agricultural sector,⁴ Constitutional Committee of Congress⁵ and a number of non-governmental organizations.⁶ The decree that came in for the most criticism was No. 1015, amended by No. 1073, which, it was claimed, facilitated the sale of indigenous communal lands by reducing the quorum required for agreement on the expropriation of land from two thirds to half the votes of community members meeting collectively. Particular concern was also expressed about Legislative Decrees Nos. 1064 and 1090, which, it was claimed, facilitated changes in the use of land.

11. In August 2008, a number of indigenous groups, under the leadership of AIDSEP, embarked on direct action, blocking main roads and taking over oil installations in protest against the legislative decrees referred to above. They demanded the repeal of the decrees, compliance with ILO Convention No. 169 and action on their other demands.

² On 13 May 2008, the Office of the Ombudswoman instituted proceedings before the Constitutional Court on the grounds that Decree No. 1015 was unconstitutional. The Office also brought an action of unconstitutionality before the Constitutional Court on 4 June 2009 against Legislative Decree No. 1064, claiming a breach of the Constitution of the Republic and of ILO Convention No. 169.

³ On 19 December 2008, the Multi-Party Committee issued a report on legislative decrees recommending that “Legislative Decrees Nos. 994, 1064, 1020, 1080, 1081, 1089, 1090, 1083, 1060 and 995 should be repealed as being contrary to the constitutional rights of the peasant and indigenous communities [as in the Constitution and Peru’s commitments under ILO Convention No. 169].” It also recommended that the Council of Ministers should “engage in prior, free and informed consultation, as provided for in [ILO Convention No. 169]”. Report on legislative decrees relating to indigenous peoples adopted by the Executive on the basis of Act No. 21957, Recommendations 1.1 and 2.5.

⁴ In December 2008, the sub-working group of the Congressional Agriculture Committee set up to consider legislative decrees relating to the agricultural sector issued a report concluding that Legislative Decrees Nos. 1064 and 1090, among others, were unconstitutional.

⁵ The Constitutional Committee of Congress declared Legislative Decrees Nos. 1090 and 994 to be unconstitutional on 19 May 2009.

⁶ See for example, the legal report and analysis commissioned by Oxfam on the constitutional validity of the use of the legislative powers granted by Congress to the Executive under Act No. 29157 (5 August 2008), and “Legislative decrees that violate the rights of indigenous peoples: implementation of the recommendations of the ILO Committee of Experts on compliance with Convention No. 169 in Peru”, Amazonian Centre for Anthropology and Practical Application (CAAAP), April 2009.

12. On 20 August 2008, the President of Congress, together with a number of members of Congress, signed an Act of Agreement with representatives of the indigenous Amazonian peoples, under which it was agreed to recall the full Congress in order to debate the repeal of Legislative Decrees Nos. 1015 and 1073 and to establish a multi-party committee “to consider the problems of the indigenous peoples and recommend a solution, with the participation of their representatives” (art. 2). The Agreement also undertook to “promote a bill to amend congressional rules in order to incorporate the consultation procedure set out in International Labour Organization Convention No. 169” (art. 3). On 21 September 2008, Congress issued Act No. 29261 repealing Legislative Decrees Nos. 1015 and 1073. On 26 September 2008, the Multi-Party Committee was formally established, chaired by Congresswoman Gloria Deniz Ramos Prudencio.

13. In February and March 2009, AIDESEP and other indigenous groups sent letters to the Executive and Congress expressing their concern at the failure to repeal the other legislative decrees and at the perceived failure of political will at several levels of Government to address the demands of the Amazonian peoples. On 23 March 2009, the President signed a Supreme Decree establishing the Standing Committee for Dialogue between the State and the indigenous peoples of Amazonia. AIDESEP, however, rejected the establishment of this committee, believing that it did not guarantee legitimate and adequate participation for the indigenous peoples.

14. On 8 April 2009, the leaders of about 1,350 Amazonian communities announced that, from 9 April, they would start an indefinite strike throughout Peruvian Amazonia, in protest at the alleged lack of commitment on the part of the State to address their complaints. Beginning on that date, indigenous groups travelled to various places, blocking main roads and occupying oil installations. Tensions rose and, on 9 May 2009, the Government declared a state of emergency in various districts of Cuzco, Ucayali, Loreto and Amazonas departments,⁷ which involved the suspension of various freedoms, such as freedom of movement and freedom of assembly. On 26 April, hundreds of indigenous Aguaruna and Wampis occupied the North Peruvian oil pipeline installation known as “Station 6”, belonging to the Petroperu State Oil Company, in Bagua province, Amazonas.

15. While the indigenous action was taking place, in April and May, AIDESEP and the Government, represented by the President of the Council of Ministers, exchanged a series of communications with a view to re-establishing dialogue. On 20 May 2009, a multisectoral committee, also known as a “dialogue round table”, was set up, consisting of the Office of the President of the Council of Ministers and nine other ministries and seven AIDESEP delegates.⁸ After two meetings, however, AIDESEP decided to suspend its participation in the dialogue, because, according to the indigenous leaders, the Government representatives defended the legality of the legislative decrees at the meetings. The police presence in Amazonas department was subsequently stepped up, especially at the protest sites and the road blockades.

16. On 22 May 2009, the Minister of Justice confirmed that she had instructed the procurator attached to the Office of the President of the Council of Ministers to initiate criminal proceedings with the public prosecutor’s office against the President of AIDESEP, Alberto Pizango, for allegedly encouraging rebellion, sedition and conspiracy. The charge was laid in response to a public statement by Mr. Pizango on 15 May 2009, in which he said that the peoples represented by AIDESEP were entering into a state of “insurgency”

⁷ Supreme Decree No. 027-2009-PCM.

⁸ Supreme Decree No. 031-2009-PCM.

against the Government. On 16 May 2009, Mr. Pizango made a statement before the Office of the Ombudswoman, in which he undertook to “withdraw the reference to the right to insurgency” and to “maintain and develop the protest within the law”. The charge against Mr. Pizango stood, despite what he had said in his formal statement. Then, on 2 June 2009, the Special Prosecutor for Public Order Affairs of the Ministry of the Interior filed a criminal charge against Mr. Pizango for the offences of obstruction of transport, communication and other public services (Endangering public safety and obstructing the functioning of public services) and breaches of the peace (Unlawful association). The prosecutors attached to the Ministries of the Interior and of Energy and Mines subsequently charged other indigenous leaders, including Marcial Mudarra Taki, Saul Puerta Peña, Servando Puerta Peña, Daniel Marzano Campos and Teresita Antaza Lopez with alleged offences committed in connection with their participation in the action.

17. On 4 June 2009, Congress decided to suspend the debate listed on the agenda on the repeal of Legislative Decrees Nos. 1064 and 1090. The reason given for the suspension of the debate was that Congress should wait for the results of the dialogue process within the Multisectoral Committee, even though the Committee had already ceased to function owing to the non-participation of AIDESEP.

18. The next day, 5 June 2009, the police were mobilized to remove the indigenous demonstrators who were occupying and blocking Fernando Belaúnde Terry Road in an area of Utcubamba province near the city and province of Bagua. Inhabitants of various indigenous communities of the Amazonas region had held several kilometres of this road and other strategic points for seven weeks, as part of the stoppage called by AIDESEP, obstructing traffic and hindering the delivery of food and fuel to the nearby towns and villages. In the morning of 5 June, the police started to remove the hundreds of people concentrated in the part of the road known as Curva del Diablo (Devil’s Curve), between two houses called Siempre Viva and El Reposo. Violence broke out during the removal process and a number of people were killed or injured, both police and demonstrators. Clashes between the police and indigenous persons and other civilians continued in the city of Bagua and adjoining areas the same day. Hours after the start of the fighting at Curva del Diablo, it became known that a number of police officers had been killed in another place that had been occupied by indigenous demonstrators, at Station 6 of the North Peruvian oil pipeline, under circumstances that have still not been fully clarified. Also on 5 June, the Office of the President of the Council of Ministers extended the state of emergency to cover the whole of the Amazonas department, Datem de Marañón province in Loreto department and Jaén and San Ignacio provinces in Cajamarca department.⁹

19. On 10 June 2009, Congress adopted Act No. 29376, which suspended Legislative Decrees Nos. 1090 and 1064 indefinitely. On 11 June 2009, a number of members of Congress held a vigil in protest against the political management of the legislative decrees in question and the events in Bagua. Their aim was the full repeal of these legislative decrees, since, in their view, the legal concept of “suspension” did not exist in Peru’s constitutional framework. On 11 June 2009, the full Congress decided to sanction seven members of Congress — the coordinator of the Indigenous Parliamentary Group and six of its members — for 120 days for disrupting meetings of Congress.

20. During the Special Rapporteur’s visit to Peru, on 19 June 2009, Congress, meeting in plenary, voted in favour of the definitive repeal of Legislative Decrees Nos. 1090 and 1064. This action was acknowledged and commended by the Special Rapporteur in a press release at the conclusion of his visit as a decisive step on the road to resolving through

⁹ Supreme Decree No. 035-2009-PCM.

dialogue the basic problems afflicting the indigenous peoples of Peru. The related events that occurred subsequently to the Special Rapporteur's visit are discussed in paragraphs 33 to 41 below.

III. Comments by the Special Rapporteur on information received concerning the events in Bagua

21. On 19 June 2009, the Special Rapporteur held a meeting with the Ombudswoman and received information on the investigations being conducted into the persons affected by the fighting of 5 June and the related events. The information provided at this meeting tallied with that contained in a report published by the Office of the Ombudswoman at the beginning of July 2009.¹⁰ This report confirms that 33 persons died, including 10 civilians and 23 police officers, and that 200 people were injured, including 82 civilians wounded by gunfire. The report also states that a police officer, Major Felipe Bazón Soles, has disappeared. According to the report, 83 civilians were initially detained by the State authorities in connection with the direct action and the events of 5 June, but a number of these were released without charge. The report states that criminal proceedings have been instituted against those who remained in detention and also against a large number of people — 84 in all — charged with offences allegedly relating to the demonstrations and the violent clashes.

22. Apart from the number of confirmed dead or wounded, the Special Rapporteur was given a number of different, and often contradictory, accounts during his visit of the events of 5 June and the succeeding days, including differing versions of specific actions by the police and the demonstrators. Although the Special Rapporteur understands that these events are under investigation, particular mention should be made of the detailed descriptions given by a number of persons present at the clashes on 5 June of serious abuses committed by the police, including the excessive use of force and firearms. Police officers responsible for the operation to remove demonstrators from the road, when questioned by the Special Rapporteur, denied the possibility that there might have been excessive or disproportionate use of force by the police. It is not for the Special Rapporteur, in these comments, to catalogue the abuses of which he was told, nor to resolve the contradictory accounts. What the Special Rapporteur aims to do is rather to point out that the numerous statements detailing specific acts of police abuse cannot be dismissed, just as evidence that acts of violence were perpetrated by civilians in the course of these events can also not be dismissed. In that connection, the available information on the manner in which police officers in Station 6 were seized and ultimately killed by indigenous demonstrators occupying the location should also be addressed.

23. With regard to the detention of a number of indigenous persons, the information provided by various State officials who were interviewed was that the conditions of detention were kept under constant review by prosecutors and public defenders, who provided legal assistance to the detainees and who noted no irregularities of any kind. The Special Rapporteur received information from other sources, however, alleging irregularities in detention, including failure to notify detainees of the reasons for their arrest

¹⁰ Office of the Ombudswoman, Republic of Peru "Humanitarian action taken by the Office of the Ombudswoman with regard to the events of 5 June 2009 in Utcubamba and Bagua provinces, Amazonas region, in the context of the Amazonian direct action", Report No. 006-2009-DP/ADHPD (2009).

and restrictions on the legal defence provided. Additional information received gave details and examples of a climate of persecution directed against the indigenous communities in the days following the clashes of 5 June, including searches conducted without a warrant and claims and allegations against indigenous leaders.

24. The Special Rapporteur also received varying accounts of the Government's response and the investigations launched in the days following the events of 5 June. For example, the Special Rapporteur received information alleging that, over the following five days, the police barred access to the scene of events at the Curva de Diablo and the army base at El Milagro, which was used as a detention centre, although other sources stated that there had been free access to these sites throughout this period.

25. The Special Rapporteur was not, however, given any firm evidence or specific testimony on any deaths beyond those already confirmed. Nor has he received firm evidence of the existence of mass graves, as has been publicly claimed.

26. With regard to the concerns expressed by various parties about the location of indigenous persons who participated in the direct action, the Office of the Ombudswoman states that the presence of 1,244 indigenous persons was registered in the places where they stayed in the days following the events of 5 June before returning to their communities.¹¹ Moreover, according to the report, the Office of the Ombudswoman carried out missions to 39 indigenous communities on 11, 12 and 22 to 27 June and conducted interviews with the leaders of 16 other communities, from which it concluded that, "in all cases, the authorities reported the return of the indigenous inhabitants, with the exception of those who were hospitalized or interned in Chachapoyas Prison."¹² The report states that the 39 communities visited are located in the provinces of Bagua and Condorcanqui, from which persons involved in the protests originated, and that these provinces contained a total of 181 indigenous communities. The Office of the Ombudswoman says that "the selection of indigenous communities visited during these touring missions was made on the basis of their location and their population density. Particular attention was also paid to the communities in which the public complaints originated".¹³ In the report, the Office of the Ombudswoman does not present specific conclusions on communities that were outside the scope of its investigation and states "any claim that is made by any person whose whereabouts is unknown by their families will receive attention."¹⁴

27. There remains a concern on the part of indigenous and non-governmental organizations that there may still be a number of indigenous persons whose present circumstances are unknown. Indeed, following the publication of the report by the Office of the Ombudswoman, the disappearance of Nelvin Waum Kasem, an indigenous man from the area, was reported by his son to the Office of the Ombudswoman, which has opened an investigation into the case. Shortly after this complaint was lodged, the non-governmental organization Asociación Pro Derechos Humanos (APRODEH) also submitted to the Office of the Ombudswoman a list of 16 persons alleged to have disappeared, 10 of whom were located by the Office. In its comment on this to the Special Rapporteur, the Government maintains that APRODEH has not provided enough information to make it possible to initiate an inquiry in the six remaining cases. The Government also says that, despite its

¹¹ Ibid., p.16.

¹² Ibid., p. 24.

¹³ Ibid., p. 18.

¹⁴ Ibid.

statements on possible disappearances, AIDSEP has not put forward any specific claims. The Special Rapporteur recalls, however, that it is the duty of the State to investigate alleged disappearances and that investigations should be carried out as a matter of course.

28. In any case, despite the information that it has been possible to confirm the present circumstances of those who were present at the events of 5 June, there remains considerable uncertainty as to what led up to those events. The very fact that the events of 5 June resulted in a number of deaths and injuries, that there has been no explanation of the causes of these casualties and that it has not been possible to resolve fully the question of the whereabouts of all those present at the clashes has been a cause of the deepest concern for the Special Rapporteur. Moreover, the Special Rapporteur notes that, during his visit, the accounts he had from the relevant Government authorities that he interviewed were contradictory and lacking in consistency as to who had responsibility for the police operations instituted in the neighbourhood of Bagua on 5 June. This also needs to be clarified.

29. The Special Rapporteur notes with concern that, during his visit, a number of Government representatives, including members of the public prosecutor's office and the Ministry of the Interior, indicated that the investigations in progress were focused primarily — and more or less exclusively — on possible offences by the indigenous demonstrators and not on any possible irregularities on the part of the police and other parties during the events of 5 June and the following days. The Office of the Ombudswoman, for its part, has done no more than investigate and deal with humanitarian questions relating to the present circumstances of persons affected by the events, leaving to other State institutions the investigation into the events themselves, as stated in its report and as related to the Special Rapporteur. The Special Rapporteur takes note of the recent information provided by the Government that the public prosecutor's office would initiate "a criminal investigation into murders and injuries of civilians by officers of the national police".

30. The Special Rapporteur emphasizes the need for full and objective clarification and investigation of the facts, so that all the parties, and the public at large, may gain a clear understanding of what happened and the Government's response in the days prior to, during and following the clashes. The Special Rapporteur also notes that a clarification of the facts is essential for the establishment of a climate of trust that will enable the search for solutions to proceed with the participation of all parties. In that connection, the Special Rapporteur would point out that it will be very difficult to establish such a climate of trust unless the State first adopts conciliatory measures to overcome existing tensions.

31. As for the problems that led to the clashes, the Special Rapporteur recognizes that the Government has taken significant steps to set up a dialogue with the affected indigenous peoples, including dialogue round tables held in the course of 2008 and 2009. The Special Rapporteur sees a need, however, to deepen this consultation process and put it on a regular footing. In that regard, the Special Rapporteur notes that various institutions, particularly ILO,¹⁵ the Office of the Ombudswoman,¹⁶ the Multi-Party Committee¹⁷ and a number of

¹⁵ In February 2009, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) issued a report, in which it urged the Government "to take steps, without further delay, with the participation of the indigenous people, to establish appropriate consultation and participation mechanisms and to consult the indigenous peoples before the adoption of the measures referred to in articles 6 and 17 (2) of the Convention, and to provide information in this respect". CEACR Individual Observation, doc. No. 062009PER169 (February 2009).

¹⁶ In May 2009, the Office of the Ombudswoman published a report recommending that Congress should "adopt a framework law on the right to consultation, which would set out the essential nature

indigenous organizations and civil society,¹⁸ have recommended on a number of occasions that a process of consultation with the indigenous peoples affected should be set in motion, some of their recommendations being on specific measures to be adopted. The Special Rapporteur notes that these recommendations may constitute an important reference point in the development of a consultation process in conformity with international standards. The Special Rapporteur considers that, owing to the complexity of the basic issues and the divergence of views between the Government and the indigenous peoples affected, the consultation process would benefit from the participation of international technical advisers with experience in this field.

IV. Recommendations

32. On concluding his visit to Peru on 19 June 2009, the Special Rapporteur shared with Government representatives and the general public the following recommendations, which he would like to repeat in this report:

of the right, its guiding principles, its procedural stages and its guarantees in order to ensure that this right is properly implemented by the public sector whenever there are plans to adopt legislative and/or administrative measures that may directly affect the indigenous peoples, in accordance with Convention No. 169". Report No. 011-2009-DP/AMASPPI-PPI, *Report on the Right to Consultation of Indigenous Peoples: Opinion of the Office of the Ombudswoman on the policy set out in draft Acts Nos. 413/2006-CR, 427/2006-CR and 2016/2007-CR* (May 2009). More recently, on 16 June 2009, the Office of the Ombudswoman submitted a proposal to the Office of the President of the Council of Ministers for a dialogue and consultation mechanism "to contribute to the dialogue and restoration of trust between the State and the indigenous peoples". "Office of the Ombudswoman presents a proposal for a dialogue and consultation mechanism to the Office of the President of the Council of Ministers", press release No. 112/CI/DP/2009 (16 June 2009).

¹⁷ In May 2009, the Multi-Party Committee issued a report on prior consultation, in which it recognized "the importance of prior consultation for the indigenous peoples, as well as constituting an obligation by the Peruvian State"; and, in that context, the report "aims to strengthen the basis of prior consultation from the perspective of ILO Convention No. 169, which is endorsed by the political constitution, and using as a basis the United Nations Declaration on the Rights of Indigenous Peoples and national and international instruments referring to prior consultation". *Prior consultation: a fundamental right of the indigenous peoples and mechanism of State management for the strengthening of democracy*, the Multi-Party Committee set up to consider the problems of indigenous peoples and recommend a solution (May 2009), p. 12 (footnotes omitted).

¹⁸ On 23 March 2009, the National Confederation of Peruvian Communities affected by Mining (CONOCAMI), AIDSEP, the Confederation of Amazonian Nationalities of Peru (CONAP), the National Human Rights Coordinator, the Peace and Hope Association, the Amazonian Centre for Anthropology and Practical Application (CAAAP), CARE PERU, Law, Environment and National Resources (DAR), the Racimos de Ungurahui Working Group, Instituto del Bien Común (Oxfam America) and Services in Intercultural Communication (SERVINDI) petitioned the Peruvian State to "adopt, in consultation with the indigenous peoples, a framework participation and consultation law that will be clear and in harmony with international norms, and an indigenous peoples' framework law that will incorporate the definition of indigenous peoples used at the multisectoral committee". Appeal by indigenous organizations and civil society addressed to the Peruvian State with regard to compliance with ILO Convention No. 169, art. 2.

A. An independent commission to carry out an exhaustive, objective and impartial investigation

33. The Special Rapporteur recommends that a special, independent commission should be set up to clarify the events of 5 June 2009 and the following days, composed of various institutions that enjoy the confidence of all the parties involved and including indigenous representatives. He also recommends that representatives of the international community should participate in the work of this special commission.

34. The Special Rapporteur recognizes the decisive steps taken by the Government in the interests of resolving the basic problems of the indigenous peoples of Peru by adopting the path of dialogue and repealing Legislative Decree Nos. 1090 and 1064. He notes, however, that there remain challenges to face with regard to clarifying the circumstances that led up to the tragic events in Bagua on 5 June 2009 and seeking ways to find a peaceful solution to the underlying problems.

35. It should be stressed that the proposed special commission should, without prejudice to any investigation that should be carried out by institutions of the administration of justice, determine, in an objective, exhaustive and impartial manner, where civil, administrative and criminal responsibility lies. The Special Rapporteur accordingly urges the various bodies that administer justice to conduct their work in line with international standards on the administration of justice in a State governed by the rule of law, especially the guarantees of independence, promptness and impartiality.

36. In this connection, it is important that all the parties should be clear as to what charges have been brought, the locations in which the persons concerned are held and the jurisdiction under which the trials are held. The Special Rapporteur also emphasizes how important it is that the accused should fully enjoy all the guarantees of due process, especially the guarantees of appropriate and effective legal defence, and that they should be provided with adequate conditions of detention.

B. Review of charges against indigenous leaders

37. In order to generate trust between the parties in the interests of advancing the process of dialogue, the Special Rapporteur recommends that the competent authorities should review the legal charges and judicial proceedings against indigenous leaders and authorities, whose participation in the dialogue is indispensable.

C. Appropriate consultation

38. The Special Rapporteur recommends that the existing dialogue process should be intensified. He emphasizes the need for the State of Peru to implement effectively an appropriate consultation procedure with the indigenous peoples that will be compatible with the relevant international standards, including ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples. This process should be set in motion with the participation of the country's indigenous peoples and should guide the State in the development of future projects affecting the indigenous peoples.

39. All the relevant parties should be represented in the process of dialogue, particularly the indigenous peoples, through representatives freely elected by themselves. Favourable conditions should be created for a consensus on objectives, procedures and timetables and on a mechanism for the practical implementation of agreements reached and the resolution of any questions that may arise during the process.

40. The substantive aspects of the dialogue should include the other legislative decrees that have been a cause of concern to the indigenous peoples and that could affect them, as well as other basic issues that the indigenous peoples have raised to date in various forums, including those relating to their rights to lands and territories and projects for the exploitation of natural resources.

41. The proceedings, and any agreements that are reached, must be compatible with international standards on the rights of indigenous peoples, including those contained in the United Nations Declaration on the Rights of Indigenous Peoples and the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which has been ratified by Peru. In this connection, the Special Rapporteur recommends that the Government should apply for technical assistance from ILO and other international organizations.

V. Additional comments in the light of events subsequent to the Special Rapporteur's visit

42. The Special Rapporteur cannot end this report without taking note of some important events that occurred during the weeks following his visit. In particular, the Special Rapporteur recognizes the importance of the agreement of 22 June 2009 on the establishment of the National Coordinating Group for the Development of the Amazonian Peoples, comprising 4 representatives of the Executive; the Presidents of the Regional Governments of Loreto, Ucayali, Amazonas, San Martín and Madre de Dios; and 10 representatives of the indigenous Amazonian communities, including representatives of AIDSEP.¹⁹ The National Coordinating Group has adopted important measures that are in line with the Special Rapporteur's recommendations, including the proposal to set up four working groups to investigate the events in Bagua on 5 June, analyse the legislative decrees of concern to the indigenous communities and propose new legislation, develop a consultation mechanism and propose a plan of Amazonian development that would include consideration of indigenous lands and territories.²⁰

43. In that regard, the Special Rapporteur urges the Government of Peru and other interested parties to step up action on clarifying the events in Bagua by setting up an independent commission, as recommended in paragraphs 33 to 36 above. The Special Rapporteur reiterates the importance of engaging the participation both of indigenous

¹⁹ Supreme Resolution No. 117-2009-PCM (10 June 2009).

²⁰ Agreement on the National Coordinating Group for the Development of the Amazonian Peoples (22 June 2009). The proposed working groups would address: (a) the design and composition of a commission to investigate the events in Bagua on 5 June 2009 and put forward ideas for national reconciliation to the Amazonian peoples; it should be made up of respected individuals of moral integrity; (b) discussion and proposals on a solution concerning the decrees of concern to the Amazonian indigenous populations and agreed proposals on new laws to be submitted to the Government, with particular emphasis on the existing Forest and Forest Wildlife Act; (c) prior consultation with the indigenous Amazonian peoples on defining the consultation mechanisms for the application of ILO Convention No. 169, enabling the opinions and points of view of the indigenous Amazonian peoples to be collected (the consultation process should have the support of the regional governments and central Government to facilitate the process); (d) National Proposal for Amazonian Development, on the basis of the progress made by the National Group for Dialogue with the Indigenous Amazonian Communities, established in 2001 and updated in line with current regional and national circumstances.

peoples and of international representatives in this process and calls on the State and the relevant international organizations to seek to establish and consolidate a mechanism for technical assistance and international monitoring of the process. The Special Rapporteur will continue to monitor progress in the investigation process.

44. The Special Rapporteur notes that Congress has prepared a bill on the regularization of the consultation process.²¹ He considers that the bill which should be in conformity with the relevant international standards, should be discussed with the indigenous peoples. The Special Rapporteur appreciates the contribution made in this connection by the Office of the Ombudswoman in its report on the indigenous peoples' right to consultation.²² The Special Rapporteur urges the Government to act in accordance with ILO Convention No. 169 and assume "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" (art. 2, para. 1). The Special Rapporteur also recalls that, in accordance with article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, consultations with the indigenous peoples must be held in good faith, through their own representative institutions, in order to obtain their free, prior and informed consent.

45. The Special Rapporteur also recognizes that the Government has adopted measures aimed at reconciliation and the establishment of a climate of trust between the parties, including the repeal of Legislative Decrees Nos. 1090 and 1064 on 19 June 2009 and the lifting of the state of emergency in the Amazonian provinces of Amazonas, Ucayali, Loreto and Cuzco on 23 June 2009.²³ In that connection, the Special Rapporteur calls on all parties to maintain their efforts to achieve reconciliation and mutual understanding and to avoid discrediting, minimizing or dismissing the legitimate concerns of the interested parties. The Special Rapporteur considers that the measures to adopt in the interests of reconciliation should include public expressions of condolence and sympathy to the families of all the victims, both by indigenous peoples and organizations and by the relevant State institutions.

46. With regard to the review of the charges against indigenous leaders as a preliminary measure to establish trust, the Special Rapporteur welcomes the fact that, on 26 June 2009, the judge of Lima Criminal Court No. 27 referred back to the public prosecutor's office the charges against the President of AIDESEP, Alberto Pizango, and four other AIDESEP leaders, because it did not specify the offence with which each of them was charged. He is, however, concerned that, according to the information he has received, the police entered the headquarters of the Regional Organization of the Indigenous Peoples of the North of Peru (ORPIAN), which forms part of AIDESEP, on 23 June, looking for leaders of the organization and arresting one person. The Special Rapporteur also notes with concern that criminal charges seemingly continue to be laid against indigenous leaders for alleged offences relating to their participation in the protests of indigenous peoples, as evidenced by the detention orders for a number of indigenous leaders issued in the week of 6 July. These orders clearly threaten the process of dialogue initiated in accordance with the agreement of 22 June 2009 mentioned above.

47. The Special Rapporteur repeats his recommendation that criminal charges against indigenous persons and leaders should be reviewed and urges the Government to take great

²¹ Draft Acts Nos. 419/2006-CR, 427-2006-CR and 1616/2006.

²² Report No. 001-2009, Office of the Ombudswoman, Department of the Environment, Public Services and Indigenous Peoples.

²³ Supreme Decree No. 035-2009-PCM, which supersedes Supreme Decree No. 027-2009-PCM.

care in justifying the criminal charges that it lays in the future, in view of the special circumstances in which the alleged offences occurred and the need to establish proper conditions for dialogue.

48. In that connection, the Special Rapporteur would like to emphasize that, although he recognizes the need to maintain public order and investigate and punish those responsible for offences and/or human rights violations, resorting to the use of the criminal courts should not be the normal approach to dealing with social conflict and protest, unless it is the last available resource (*ultima ratio*) and should be strictly restricted to the principle of “an imperative public interest that is necessary for the functioning of a democratic society”.²⁴ At the same time, the Special Rapporteur reiterates that indigenous persons and peoples should always ensure that their statements and demonstrations always take a peaceful form and respect the human rights of others.

49. Such considerations may be of particular importance in situations involving protests by indigenous peoples, in view of the fact that traditional channels for complaint, through the representative democratic process, do not always adequately address the concerns of indigenous peoples or take account of their frequent marginalization from the political scene in the country at large.

50. The Special Rapporteur notes generally that the lack of a mechanism for indigenous peoples to claim their legitimate rights to be consulted or to protect their land and territorial rights could contribute to a feeling on the part of the indigenous peoples that they have no adequate means to defend their rights and, as a result, opt for social protest, which, in some cases, may result in actions that are against the law. He also notes that one side effect of the criminalization of protest, in cases where it is not justified, is the creation of a dynamic that could generate a lack of trust between the indigenous peoples and the State authorities, to the detriment of coexistence and democratic legitimacy.

VI. Concluding observations

51. The Special Rapporteur emphasizes the importance of ensuring that the process of resolving this situation is conducted within the framework of full respect for human rights and fundamental freedoms, in a manner that will contribute to strengthening government by the rule of law and democracy in Peru. The Special Rapporteur recognizes the legitimate aim of the State to promote sustainable development for the benefit of society in general but stresses the need to reconcile that aim with full respect for the rights of indigenous peoples, in accordance with the State’s commitments under international law and its own constitutional framework. In addition to ratifying ILO Convention No. 169, Peru played a leading role in drawing up and promoting the adoption by the General Assembly of the United Nations Declaration on the Rights of Indigenous Peoples.

52. In cooperation with the country’s indigenous peoples, Peru has an excellent opportunity to establish good practices on the international scale by translating its clear will to comply with its international commitments into the domestic application of the criteria and principles enshrined in international instruments, most particularly with regard to prior and informed consultation with indigenous peoples through their representative institutions on any measure that such peoples consider may affect their rights.

²⁴ See Inter-American Commission on Human Rights, Annual report of the Special Rapporteur for Freedom of Expression 2002, chapter IV, vol. III, Organization of American States (OAS)/Ser.L/V/II. 117, Doc. 5 Rev.1, para. 35.

53. The indigenous peoples of Peru, for their part, have an opportunity to show their openness to promoting a dialogue in good faith to facilitate coexistence with other sectors of the country and the establishment of rules that will be helpful in advancing the common good.

54. The Special Rapporteur also notes that a clear strategic engagement is required on permanent mechanisms for dialogue and conflict resolution, which would include, among others, mechanisms relating to territorial rights and other outstanding claims, in the interests of preventing acts of violence and avoiding any repetition of the unfortunate events that occurred in Bagua.

55. The Special Rapporteur offers these observations and recommendations in the hope that they may serve to promote a rapprochement between the parties, mutual understanding and a resolution of the situation. He also confirms his availability to continue working with all parties, within the framework of his mandate to promote full respect and protection for the human rights of indigenous people.

56. The Special Rapporteur reiterates his availability and his interest in making another visit to Peru in order to follow up on his observations and also to consider the general situation of the human rights and fundamental freedoms of the indigenous peoples of Peru, within his mandate from the Human Rights Council.

57. Lastly, the Special Rapporteur respectfully requests that this report should be widely disseminated among the relevant officials of the Government of Peru, the country's indigenous peoples and the general public.
