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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Human rights bodies and mechanisms

Right to land under the United Nations Declaration on the Rights of Indigenous Peoples: a human rights focus

Study of the Expert Mechanism on the Rights of Indigenous Peoples

Summary

The Expert Mechanism on the Rights of Indigenous Peoples carried out the present study pursuant to Human Rights Council resolution 33/25.

The study concludes with Expert Mechanism advice No. 13 on the right to land of indigenous peoples (see annex).



I. Introduction

1. Pursuant to Human Rights Council resolution 33/25, the Expert Mechanism on the Rights of Indigenous Peoples decided, at its twelfth session, held in July 2019, to prepare a study on the land rights of indigenous peoples. For this purpose, the Expert Mechanism held a seminar in Pretoria on 30 September and 1 October 2019. The present study has benefited from the presentations made at the seminar and from the submissions of Member States, indigenous peoples, national human rights institutions, academics and others.¹ The United Nations Declaration on the Rights of Indigenous Peoples is the only international human rights legal instrument with a specific focus on the all-encompassing significance of lands, territories and resources for indigenous peoples. It draws on human rights instruments and the Indigenous and Tribal Peoples Convention, 1989 (No. 169), of the International Labour Organization (ILO), articles 13, 14 and 16 of which are similar to articles 25, 26 and 10 of the Declaration.

2. The explicit recognition in the Declaration of indigenous peoples' right to their lands, territories and resources seeks to address a long history of illegal and unjust dispossession, which continues today. The present study seeks to contribute to an understanding of the rights contained in the Declaration (arts. 25–28), the obligations of States arising therefrom and the practice of States in implementing those rights. It was undertaken against the backdrop of a rise in conflict on indigenous lands due to destruction, encroachment and land-grabbing, and a commensurate rise in the criminalization and harassment of, and violence against, defenders of indigenous lands.² The increased militarization of indigenous lands in several regions, as recognized and expanded upon in the Expert Mechanism's study on migration and displacement, also severely hampers indigenous peoples' enjoyment of their land.³ The present study does not expand on the procedural aspects of land rights, a topic that has been dealt with in previous studies.⁴

3. The level of protection of land rights varies across the regions, with some States having established sophisticated, albeit often overly complex, means of granting land tenure to indigenous peoples, while others have failed to recognize indigenous peoples at all, let alone their right to land. Yet other States continue to persecute indigenous peoples. The implementation gap remains wide and failure to recognize land rights contributes to ongoing violence in many regions. The pursuit of the Sustainable Development Goals, several of which relate to land rights, gives States an opportunity to secure indigenous peoples' control over their lands, territories and resources.⁵ The international focus on climate change and climate justice is also an opportunity to recognize the critical role that indigenous peoples play in the protection of the environment and the maintenance of biodiversity.⁶

4. The coronavirus disease (COVID-19) crisis, beginning in early 2020, has highlighted the stark inequalities between indigenous peoples and others, in all areas of their lives, including in the context of land.⁷ The lack of secure land rights, which includes a lack of respect for indigenous boundaries and governance, has made it very difficult for indigenous peoples to protect their communities from the disease. In addition, there have been reports of illegal incursions onto indigenous lands by loggers and miners, including in the Amazon region, and fears for the safety of indigenous peoples in voluntary isolation and in initial contact, who are particularly at risk from COVID-19.

¹ The presentations and the submissions are available at www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Call.aspx.

² See A/HRC/39/17, submission by the Asia-Pacific Forum on Women, Law and Development and submission by the International Work Group for Indigenous Affairs.

³ A/HRC/EMRIP/2019/2/Rev.1.

⁴ A/HRC/15/35, A/HRC/18/42, A/HRC/21/55 and A/HRC/39/62.

⁵ Sustainable Development Goals 1 and 2: target 1.4, target 2.4, and target 2.5.

⁶ The Paris Agreement (art. 7), the United Nations Framework Convention on Climate Change and the Local Communities and Indigenous Peoples Platform.

⁷ Future studies of the Expert Mechanism will focus on the COVID-19 crisis as it affects indigenous peoples. See www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx and www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx.

II. Significance of land rights for indigenous peoples and link between land rights and other rights

A. Significance of land rights for indigenous peoples

1. Land is not a commodity

5. For indigenous peoples, land is not only, or even primarily, an economic asset. It is the defining element of their identity and culture and their relationship to their ancestors and future generations. Access to lands, territories and resources is obtained through community membership, not the free market. For indigenous peoples, land rights are often intergenerational and thus carry an obligation of stewardship for the benefit of present and future members and as the basis for their continued existence as a people.⁸ Under Amazigh law, for example, land is considered not only a source of production, but also a form of shelter, a place of security and a source of a sense of belonging and identity.⁹

2. Respect for customs, traditions and land tenure systems

6. Indigenous peoples have their own customs, traditions and land tenure systems, which should be respected. The institution of individual, as opposed to collective, land rights and the vesting of power over lands customarily owned by indigenous peoples in the State undermine these systems. When customary law is not incorporated into titling procedures, the land rights of indigenous peoples are not fully protected. In Paraguay, although a land title has been granted to indigenous peoples, this was not done on the basis of historical use or tradition, but on a calculation of how much land would be required to maintain the communities' economic and cultural viability.¹⁰ Even in States where the majority of land is held under customary tenure, restrictions on land title transfers to corporations or individuals are circumvented, as reported in Papua New Guinea, Samoa,¹¹ the Solomon Islands and Vanuatu, among others.

3. Collective rights

7. Indigenous peoples have the right to enjoy, as a collective and as individuals, all of the human rights and fundamental freedoms guaranteed in international human rights instruments, equally with all other peoples and individuals. Respect for indigenous peoples' self-determination and their customary land tenure systems necessitates recognition of their collective ownership of lands, territories and resources. Recognition of both individual and collective land rights is critical in States such as the United States of America, where indigenous lands are held collectively, as is the case for tribal reservations, and individually, as is the case for allotments, and indigenous peoples struggle to retain both types of land tenure. Collective rights, in particular, are at the heart of international and regional jurisprudence, as expressed by the Inter-American Court of Human Rights in the *Kaliña and Lokono Peoples* case and by the African Commission on Human and Peoples' Rights in the *Endorois* case.¹² The Congo is the only State in Africa to date to have enacted legislation that categorically recognizes indigenous peoples, including their collective land tenure system.¹³ Greenland, a self-governing territory within Denmark, follows its Inuit tradition by having no private ownership of land: land is a communal good that can never be bought or sold.¹⁴

⁸ E/CN.4/1995/WG.15/4.

⁹ Submission by several organizations from Morocco.

¹⁰ A/HRC/30/41/Add.1.

¹¹ A/HRC/WG.6/25/PNG/3. See also www.culturalsurvival.org/sites/default/files/media/uprsamoafinal.pdf.

¹² Inter-American Court of Human Rights, *Case of the Kaliña and Lokono Peoples v. Suriname*, judgment, 25 November 2015; and African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, decision No. 276/2003, 4 February 2010.

¹³ The Congo, Law No. 5-2011, arts. 31–32. See also the submission by Soyata.

¹⁴ Submission by Greenland and Denmark.

8. Across all regions, ownership of indigenous land remains mostly in the hands of the State. Some States, such as Kenya, Morocco and the United States of America, hold land in trust for the benefit of existing and future generations of indigenous peoples. However, the supervision exercised by the Ministry of the Interior of Morocco over the collective lands of the Amazigh is highly contested by Amazigh tribes and demonstrations involving tens of thousands of people take place regularly.¹⁵ The trust land system in Kenya has proved inadequate to protect the rights of the Endorois, according to the African Commission on Human and Peoples' Rights.¹⁶ In the United States of America, many Native American tribes may have long-standing treaty-guaranteed reservations held in trust for them by the Secretary of the Interior. Additionally, they may apply to the federal Government to take land into trust pursuant to the Indian Reorganization Act of 1965. While, importantly, this process restores a mix of federal and tribal jurisdiction for environmental, tax, and public safety purposes, it has recently been limited by the Supreme Court.¹⁷

9. Indigenous peoples often have usufruct rights and are considered beneficiaries¹⁸ rather than owners of land. Many indigenous peoples, such as the Sami in Finland, Norway and Sweden, find this unsatisfactory.¹⁹ While the Government of Finland has indicated that several pieces of legislation contribute to guaranteeing the right of the Sami to use State-owned land for hunting, reindeer herding and fishing,²⁰ the Sami Parliament has stated that there are still no legislative provisions "enshrining the right of the Sami to land, water and natural resources".²¹ In Norway, following the decision of the Supreme Court in *Stjernøy Reindeer Grazing District v. Finnmarkseiendommen*, it appears that it will be difficult to establish the continuity, intensity and sufficient exclusivity of use necessary to establish ownership, as opposed to usufruct, rights to land. This contrasts with the situation in Canada, where the Supreme Court decided, in *Tsilhqot'in Nation v. British Columbia*, that it was not necessary to demonstrate continuous intensive occupation and use for ownership rights to be granted. In Brazil, indigenous peoples' exclusive usufruct rights over their lands and natural resources, currently guaranteed by the Constitution, are reportedly under threat due to draft law No. 191/20 on the exploration of natural resources on indigenous lands.²²

10. Securing access to land remains a priority for nomadic tribes today, given their mobility.²³ In its Policy Framework for Pastoralism in Africa, the African Union recognizes mobility as a fundamental right of pastoralists (as does the 2010 pastoral code of the Niger), as well as the need to grant pastoralists – the large majority of indigenous peoples in Africa – communal land ownership on a priority basis. In contrast, for other indigenous peoples, such as the Badjos (nomads of the sea), forced localization on land could have an impact on their survival as a people.²⁴ Other indigenous peoples, such as the Karen peoples in Thailand, and the Batwa in the Democratic Republic of the Congo, have been evicted from their lands, placing them in a particularly precarious position.²⁵

B. Land rights and other rights

11. The protection of lands, territories and natural resources is necessary to guarantee other rights of indigenous peoples, including the rights to life, culture, dignity, health, water and food. The right to land also implies that indigenous peoples have a right to adequate

¹⁵ Submission by several organizations from Morocco.

¹⁶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*.

¹⁷ In *Carcieri v. Salazar*: 555 US 379 (2009).

¹⁸ See, for example, the Sabah Land Ordinance of 1939 (Malaysia).

¹⁹ A/HRC/33/42/Add.3. See also CERD/C/SWE/CO/22-23.

²⁰ Submission by Finland.

²¹ Submission by the Sami Parliament.

²² See <http://apib.info/2020/02/12/statement-in-condemnation-of-draft-law-no-19120-on-the-exploration-of-natural-resources-on-indigenous-lands/?lang=en> and submission by Brazil.

²³ A/HRC/EMRIP/2019/2/Rev.1.

²⁴ Submission by F.R. Zacot.

²⁵ See www.forestpeoples.org/sites/default/files/documents/KKNCE_Thailand_FINAL-v2.pdf and <https://minorityrights.org/2019/07/02/drc-admissibility-decision-african-commission-on-human-and-peoples-rights-on-eviction-of-indigenous-people-from-ancestral-lands-represents-beacon-of-h/>.

living conditions, as expressed by the Inter-American Court of Human Rights, which has recognized that the Yakye Axa people's dispossession and lack of access to traditional land has directly denied them access to such conditions.²⁶ The right to develop a particular way of life and traditional economic activities connected to the land has also been recognized by the Human Rights Committee, which has underscored that protection of this right is directed towards ensuring the survival and continued development of the cultural identity of indigenous peoples.²⁷ The Committee on Economic, Social and Cultural Rights has stated that the strong communal dimension of indigenous peoples' cultural life is indispensable to their existence and includes the right to the lands, territories and resources, which they have traditionally owned, occupied or otherwise used or acquired.²⁸

12. Both the Inter-American Court of Human Rights and the Human Rights Committee recognize that the right to life is not limited to the protection against loss of life but that States must take positive measures to safeguard life and physical integrity. In *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, the Court found that dispossession had led to the death of 13 individuals and that the State was responsible for those deaths.²⁹ In the words of the Human Rights Committee, the duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.³⁰ States have an obligation to address such general conditions as "deprivation of indigenous peoples' land, territories and resources" and "degradation of the environment".³¹ The link between the right to land and the right to life is particularly strong in the case of indigenous peoples living in isolation or in initial contact, due to their special vulnerabilities which derive from their small populations, immunological fragility and full dependence on their ecosystems for their survival.³² The Inter-American Court of Human Rights has also considered the rights to a healthy environment, cultural identity, food and water as autonomous rights, as well as their implications and particularities regarding indigenous peoples.³³

13. States cannot ignore the disproportionate negative effects of climate change on indigenous peoples' ways of life and must recognize indigenous peoples' close connection with the environment. The Human Rights Committee has expressed the view that people who flee the effects of climate change and natural disasters should not be returned to their country of origin if essential human rights would be at risk on return.³⁴ The Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment has highlighted that States have additional obligations with respect to members of certain groups especially vulnerable to environmental harm, in particular women, children and indigenous peoples.³⁵

III. Legal framework

14. The Declaration expresses and reflects legal commitments under the Charter of the United Nations, as well as treaties, judicial decisions, principles and customary international law.³⁶ Indigenous peoples' rights and responsibilities vis-à-vis land predate the

²⁶ Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v. Paraguay*, judgment, 17 June 2005.

²⁷ Human Rights Committee, general comment No. 23 (1994) on the rights of minorities.

²⁸ Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009) on the right of everyone to take part in cultural life.

²⁹ See also Joel E. Correia, "Adjudication and its aftereffects in three Inter-American Court cases brought against Paraguay: indigenous land rights", *Erasumus Law Review*, No. 1 (April 2018), pp. 43–56.

³⁰ Human Rights Committee, general comment No. 36 (2019) on the right to life.

³¹ Ibid.

³² Second submission by the Coordinator of Indigenous Organizations of the Amazon River Basin.

³³ *Indigenous communities of the Lhaka Honhat Association (Our Land) v. Argentina*, judgment of 6 February 2020; and the submission by the International Work Group for Indigenous Affairs.

³⁴ Human Rights Committee, *Teitiota v. New Zealand*.

³⁵ A/HRC/25/53, para. 69.

³⁶ See A/HRC/36/56.

Declaration. They are often expressed in indigenous peoples' own laws, customs and traditions, as in the Yurok Tribe Constitution.³⁷ Additionally, indigenous peoples' land rights existed in domestic frameworks, such as in the Constitution of Mexico, and in the regional human rights instruments, and have been interpreted into the United Nations human rights treaties, long before the adoption of the Declaration. All the rights in the Declaration are indivisible, interdependent and grounded in the overarching right to self-determination. The articles on land rights were the most important articles for indigenous peoples during the negotiation of the Declaration and remain a work in progress.³⁸

A. Article 25

15. This article highlights the importance of indigenous peoples' spiritual attachment to their lands and their right to pursue practices and traditions associated with that spiritual relationship. It recognizes their responsibility to ensure that future generations too can maintain such a relationship. As expressed by the Inter-American Court of Human Rights in *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, "for indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations".

16. The phrase "spiritual relationship" must be interpreted broadly. For indigenous peoples, the spiritual relationship to the land is an inseparable part of every activity on the land. It pertains not only to spiritual ceremonies but also to a wide range of other activities such as hunting, fishing, herding and gathering plants, medicines and foods that have a spiritual dimension and are inextricably part of the spiritual relationship to the land.

17. Indigenous peoples have the right to "maintain" and "strengthen" their relationship with lands, territories and resources no longer in their possession but which they owned and used in the past. Maintaining and strengthening indigenous peoples' spiritual relationship to the land may require ensuring access to the land, protecting or restoring specific features or ecologies important to indigenous customs or traditions, and preventing uses and activities that would be detrimental to those ends. The African Commission on Human and Peoples' Rights has found that "without access to their traditional land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors".³⁹ Indigenous elders, women, youth, children and persons with disabilities may have different spiritual relationships with and sacred responsibilities to the land that, in line with article 22 of the Declaration, warrant particular attention.

18. Indigenous peoples have the right to their "traditionally owned or otherwise occupied and used" lands, territories and resources. This encompasses a range of land tenure relationships reflective of the diversity of indigenous societies worldwide, including exclusive tenure, shared or co-managed harvesting and grazing rights, and rights pertaining to seasonal or irregular occupation of land. It also includes the traditional or customary law of indigenous peoples themselves and reflects the ILO Indigenous and Tribal Peoples Convention.⁴⁰ Indigenous peoples' right to maintain and strengthen their spiritual relationship extends to all resources, including waters and coastal seas. The High Court of Australia has recognized rights over the sea, including the right to fish, hunt and gather resources for personal, domestic and communal use and has recognized that land in the intertidal zone in the Northern Territory could be claimed and recognized as Aboriginal land.⁴¹

³⁷ See <https://yurok.tribal.codes/Constitution/Preamble>.

³⁸ Claire Charters, "Indigenous peoples' rights to lands, territories, and resources in the UNDRIP", p. 402.

³⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*.

⁴⁰ Article 8 of the Convention requires that "due regard" be had for the "customs or customary laws" of indigenous peoples and article 17 states that their land tenure systems "shall be respected".

⁴¹ *Northern Territory v. Arnhem Land Aboriginal Land Trust*, 30 July 2008, and *Commonwealth v. Yarmirr*, 11 October 2001.

B. Article 26

1. Article 26 (1)

19. This provision enshrines a general right that applies to lands, territories and resources that indigenous peoples have traditionally owned or traditionally occupied or used. However, it also applies to lands, territories and resources that indigenous peoples have “otherwise used or acquired”. Thus, the land rights of indigenous peoples are not limited to those territories for which there is an unbroken history of use or occupation but includes lands that indigenous peoples have come to occupy, for example as a consequence of past relocations, whether voluntary or involuntary. It could include lands gained after relocation, settlement of a modern treaty or by purchase.

20. Under article 26 (1), indigenous peoples do not need to demonstrate possession in order to have rights to lands, territories and resources, and to restitution or compensation for loss of them. In the *Endorois* case, the African Commission on Human and Peoples’ Rights stated, *inter alia*, that:

The members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights.⁴²

The African Court on Human and Peoples’ Rights and the African Commission specifically drew inspiration from the Declaration, even though Kenya has not yet expressed support for it.

21. Indigenous peoples have the right to own and use resources just as they have the right to own their lands and territories. In *Case of the Saramaka People v. Suriname*, the Inter-American Court of Human Rights held that indigenous peoples had rights to their natural resources related to their culture and found on their lands and territories and that “without them the very physical and cultural survival of such peoples is at stake”. As expressed by the Special Rapporteur on the rights of indigenous peoples, if indigenous peoples retain ownership of all the resources, including mineral and other subsurface resources, within their lands, they also have the right to extract and develop them.⁴³ Moreover, if the State claims ownership of subsurface or other resources under domestic law, indigenous peoples have the right to pursue their own initiatives for extraction and development within their territories, at least under the terms generally permitted by the State for others.⁴⁴ In one arrangement, the Alaska Native Claims Settlement Act of 1971 created indigenous “corporations”, granting to 220 village corporations title to the surface estate, and granting to 13 regional corporations title to the minerals – the subsurface estate – for development.⁴⁵

22. Prior to adoption of the Declaration, some domestic courts had already recognized the rights of indigenous peoples over traditionally owned or occupied land not in their possession. In 2003, the Constitutional Court of South Africa recognized that indigenous peoples maintained ownership of the traditional lands they had occupied prior to colonization despite changes in the legal regime. As evidence, the Court considered pre-colonial customary law. In 2002, in *Kerajaan Negeri Selangor and others v. Sagong Tasi and others*, the High Court of Selangor, a state-level court in Malaysia, recognized the existence of the land title held “based on the Orang Asli’s exclusive and continual occupation of their ancestral land since time immemorial”.⁴⁶

⁴² *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, para. 209.

⁴³ A/HRC/24/41, para. 9.

⁴⁴ *Ibid.*

⁴⁵ 43 U.S. Code 1601–1627.

⁴⁶ Derek Inman, “From the global to the local: the development of indigenous peoples’ land rights internationally and in Southeast Asia”, *Asian Journal of International Law*, vol. 6, No. 1 (2016), pp. 46–88.

2. Article 26 (2)

23. Since 1997, the Committee on the Elimination of Racial Discrimination has used similar wording to article 26 (2) when referring to indigenous peoples' right to own, develop, control and use their communal lands, territories and resources.⁴⁷ The regional human rights bodies have, in the *Sawhoyamaxa* and *Endorois* cases, interpreted regional instruments in light of the rights enshrined in the Declaration.⁴⁸ In the *Endorois* case, the African Commission on Human and Peoples' Rights concluded that "traditional possession of land by indigenous people" should be recognized and protected alongside "state-granted full property title".⁴⁹ In the *Mayagna (Sumo) Awas Tingni* case, the Inter-American Court of Human Rights stated that "property rights created by indigenous customary law norms and practices must be protected" and that "non-recognition of the equality of property rights based on indigenous tradition is contrary to the principle of non-discrimination". In *African Commission on Human and Peoples' Rights v. Kenya*, the African Court on Human and Peoples' Rights recognized the right of the Ogieks to the Mau Forest of Kenya as their ancestral home. The preservation of the Mau Forest could not justify the eviction of the Ogieks from their ancestral home. The African Court also pronounced itself on the meaning of article 26 (2) of the Declaration: "without excluding the right to property in the traditional sense, this provision places greater emphasis on the rights of possession, occupation, and use of land".

24. The Caribbean Court of Justice and the Supreme Court of Belize have invoked the Declaration when interpreting the Constitution of Belize to protect the rights of the Mayan people to their traditional lands. In 2007, the Chief Justice of the Supreme Court, in *Aurelio Cal et al. v. Attorney General of Belize*, found that article 26 of the Declaration reflected "the growing consensus and the general principles of international law on indigenous peoples and their lands and resources". He found that the Mayan communities of Conejo and Santa Cruz held customary title to their lands and ordered the Government to respect and demarcate their territory.

25. Other national courts too have recognized traditional ownership as a legitimate form of land tenure, such as the Supreme Court of Sweden in the *Nordmaling* case (2011), which considered the rights of Sami reindeer herders "on the basis of customary rights" rather than the State law of "immemorial prescription".⁵⁰ In 2009, the Supreme Court of Brazil affirmed the constitutionality of the Raposa Serra do Sol lands, demarcated 10 years previously by the State, and ordered the Government to resume its removal of all non-indigenous settlers.⁵¹

3. Article 26 (3)

26. Under this article, States should take action to give both legal recognition and protection to indigenous lands, territories and resources while respecting indigenous peoples' customs, traditions and land systems. The right is equivalent to a State-granted full property title and entitles indigenous peoples to demand official recognition and registration of property title. As indicated by the Special Rapporteur on the rights of indigenous peoples, "a starting point for any measures to identify and recognize indigenous peoples' land and resource rights should be their own customary use and tenure systems".⁵² This is often achieved through demarcation, delimitation, mapping and titling. As the Inter-American Court of Human Rights has stated, "merely abstract or juridical recognition of indigenous

⁴⁷ CERD/C/KEN/CO/5-7, para. 20 (b). Committee's general recommendation No. 23 (1997) on the rights of indigenous peoples.

⁴⁸ Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, judgment, 29 March 2006, para. 138. See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*.

⁴⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, para. 209.

⁵⁰ Defined as "where a property or right has been enjoyed for such a long time, and exercised, that no one remembers when the right came to be". www.loc.gov/law/foreign-news/article/sweden-court-recognizes-exclusive-fishing-rights-of-sami-village.

⁵¹ www.forestpeoples.org/en/location/brazil/news/2009/05/supreme-court-upholds-raposa-serra-do-sol-indigenous-area.

⁵² A/HRC/33/42/Add.3.

lands, territories, or resources, is practically meaningless if the property is not physically delimited and established”.⁵³ In the *Kaliña and Lokono Peoples* case, the Court ordered Suriname to delimit and demarcate those peoples’ traditional territory, to grant them collective title and to ensure for them the effective use and enjoyment of the territory. Similarly, the African Commission on Human and Peoples’ Rights has called for both “official recognition” of indigenous land rights and “registration of property title”.⁵⁴

27. Respect for indigenous peoples’ land systems should include respect for indigenous peoples’ customs and traditions in regulating the land. As the Special Rapporteur on the rights of indigenous peoples has noted, even if indigenous courts and informal customary mechanisms exist, they are frequently not recognized by State legal systems.⁵⁵ In Vanuatu, constitutional reforms have shifted jurisdiction over lands from the mainstream court system to the *nakamals* (customary institutions).⁵⁶ In Kenya, the National Land Commission encourages the application of traditional dispute resolution mechanisms in land conflicts.⁵⁷ In the United States of America, tribes can exercise some element of control and application of their laws on their land, but that control is often limited: the Cherokee Nation, for example, holds certain lands in “restricted fee title”, meaning that the family or individual still needs the permission of the federal Government to transfer those lands, yet there is no protection against adverse possession. In 2013, in the Bolivarian Republic of Venezuela, the Huottoja people established a special indigenous jurisdiction not only for the control and management of the territory but also for the administration of justice.⁵⁸ In New Zealand, a new bill before Parliament proposes the establishment of a dispute resolution process based on Maori practices to assist owners of Maori land to resolve disagreements and conflicts about their land.⁵⁹

C. Article 27

28. Under this article, States should establish and implement a process, in cooperation with indigenous peoples, that gives legal recognition and protection to indigenous peoples’ rights to their lands, territories and resources, whether traditionally owned, occupied or used in the past but now out of their possession or currently in their possession. This is part of the more general requirement for remedies contained in article 28 (see below). The agreement to include in the Declaration the obligation to establish procedures to recognize and adjudicate land rights was a compromise for not including a specific right to lands, territories and resources lost in the past.⁶⁰

29. As set out in article 27, the process to provide legal protection must be fair, independent, impartial, open and transparent and respect indigenous peoples’ laws, customs and ways of using land. The article does not indicate whether States should establish a specific process to resolve disputes over indigenous land rights. However, where States rely on other mechanisms, such as the courts, legitimate questions will arise about the degree to which those mechanisms are accessible to indigenous peoples, their capacity to have due regard for indigenous laws and traditions and the likelihood of achieving a timely resolution.⁶¹

⁵³ *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 143.

⁵⁴ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, para. 209.

⁵⁵ See A/HRC/42/37.

⁵⁶ Siobhan McDonnell, “Building a pathway for successful land reform in Solomon Islands” (Canberra, Australian National University, 2015), pp. 34–35.

⁵⁷ Albert Kwokwo Barume, *Land Rights of Indigenous Peoples in Africa* (Copenhagen, International Work Group for Indigenous Affairs, 2014).

⁵⁸ See <https://porlatierra.org/docs/c5650a3f50d60f9e7ca9f0aab1e9dce3.pdf>.

⁵⁹ Submission by New Zealand.

⁶⁰ Claire Charters, “Indigenous peoples’ rights to lands, territories, and resources in the UNDRIP”, p. 143.

⁶¹ Inter-American Commission on Human Rights, report No. 105/09 on the admissibility of petition 592-07 concerning the Hul’qumi’num Treaty Group, Canada (30 October 2009), para. 39.

D. Article 46

30. The general limitation on States' ability to restrict indigenous rights under article 46 (2) and (3) of the Declaration is relevant for the implementation of all the aforementioned articles in the context of rights and concessions granted to non-indigenous third parties. Any restrictions on indigenous rights must be established by law and must be necessary, proportionate, non-discriminatory, have the aim of attaining a legitimate goal in a democratic society and defined within an overall framework of respect for human rights.⁶² The Inter-American Court of Human Rights has applied similar principles, stating that the appropriate resolution of disputes between indigenous peoples and third parties must consider, on a case-by-case basis, "the legality, necessity, proportionality and fulfilment of a lawful purpose in a democratic society".⁶³ Given the significance of land rights to a range of human rights and to the survival of indigenous peoples, it would be difficult to establish valid limitations on rights that would have the effect of impairing indigenous peoples' use of their lands, territories and resources.⁶⁴

E. Article 22

31. Particular attention should be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of all the rights in the Declaration, as these groups are disproportionately affected by the failure to implement land rights. Women's vital role on and in the protection of the land is often overlooked. One of the major structural barriers impeding indigenous women's access to and control over lands, territories and resources is patriarchal laws regarding inheritance and joint ownership of family lands and resources.⁶⁵ As the Special Rapporteur on the rights of indigenous peoples has noted, land appropriation is not gender-neutral.⁶⁶ Indigenous women often face intersecting forms of discrimination and often do not have access on an equal basis with men to ownership or possession of and control over land.⁶⁷ This frequently leads to difficulties in getting loans and having control over farm products.

F. Redress⁶⁸

Article 28

32. Under this article, indigenous peoples should receive redress for violations of their land rights, including for the confiscation of lands, territories and resources and for the occupation, use or damage of lands, territories and resources without their free, prior and informed consent. It is clear from the use of the past tense that article 28 (1) applies retrospectively, despite debates on the issue during the *travaux préparatoires* on the Declaration.⁶⁹ Alternatively, the right to redress for past wrongs can be founded on the basis that indigenous peoples continue to suffer the ongoing effects of their loss. Thus, they are seeking redress for a wrong they are experiencing at present, akin to the "continuing violation" argument of the Human Rights Committee.⁷⁰

33. Remedies must be provided on the basis of "a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary

⁶² A/HRC/39/62.

⁶³ *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, para. 138.

⁶⁴ A/HRC/24/41, paras. 35–36.

⁶⁵ Submission by the Asia-Pacific Forum on Women, Law and Development.

⁶⁶ A/HRC/30/41.

⁶⁷ Committee on the Elimination of Discrimination against Women, general comment No. 34 (2016) on the rights of rural women.

⁶⁸ A/HRC/39/62.

⁶⁹ Federico Lenzerini, "International assistance, reparations and redress", *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Jessie Hohmann and Marc Weller, eds. (Oxford, Oxford University Press, 2018), p. 590.

⁷⁰ *Case of the Sawhoyamaya Indigenous Community v. Paraguay and Anton v. Algeria* (CCPR/C/88/D/1424/2005).

law” and must fulfil the purpose of *restitutio in integrum*, which consists of “reestablishing the situation prior to the violation”.⁷¹ In the *Endorois* case, the African Commission on Human and Peoples’ Rights found that the Government of Kenya had failed to provide sufficient redress for the eviction of the Endorois and to include that community in the relevant development processes.⁷²

34. Any remedy for human rights violations must be accessible, effective and timely. Any barriers to participation and presentation of evidence must be resolved. Procedures must be efficient enough to minimize risk of further harm⁷³ and must have the power to ensure compliance with the final determination.⁷⁴ The Inter-American Court of Human Rights found that both the *Sawhoyamaya* case, which lasted 13 years, and the *Xákmok Kásek* case, which lasted 11 years and concluded without a clear resolution, were handled in an unreasonable manner, given their long duration, and that an adequate legal remedy should be provided.⁷⁵ In 2018, the Court determined Brazil responsible for violating the right to judicial protection and the right to property of the Xukuru indigenous people due to a delay of over 16 years to complete the demarcation of land and to remove non-indigenous occupants. The Court considered the sentence a form of reparation in itself, decided on a payment of US\$ 1 million in compensation and the necessary measures to complete the removal of non-indigenous intruders and the prevention of new intrusions.⁷⁶

35. Where land has been lost to third parties, indigenous peoples’ rights continue so long as the spiritual and material basis for indigenous identity is supported by their unique relationship with their traditional lands, as expressed by the Inter-American Court of Human Rights in the *Yakye Axa* and *Sawhoyamaya* cases. The Court also noted that the appropriate resolution of such disputes must consider the fact that non-indigenous interests may often be appropriately addressed through financial compensation, while for indigenous peoples the relationship to the land is spiritual, fundamental to identity and survival and therefore generally irreplaceable.⁷⁷ Thus, the preferred type of redress is clearly restitution. The United Nations treaty bodies have also pointed to the need to return lands of which indigenous peoples were deprived without their free, prior and informed consent.⁷⁸

36. If actual restitution of indigenous lands is not possible, just, fair and equitable compensation must be provided. Compensation should not be limited to financial awards but also take the form of alternative similar lands, equal in quality, size and legal status or, if freely agreed upon by the indigenous peoples concerned, other forms of compensation or redress. As highlighted by the Committee on the Elimination of Racial Discrimination, compensation “should as far as possible take the form of lands and territories”.⁷⁹ Failing that just, fair and equitable monetary compensation should be provided. In *Kerajaan Negeri Selangor and others v. Sagong Tasi and others*, the High Court of Selangor concluded that Malaysia had a duty to compensate the Orang Asli community for the expropriation of their

⁷¹ *Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 151 and 181.

⁷² *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*.

⁷³ Inter-American Commission on Human Rights, report No. 40/04, case 12.053, on the merits of the petition brought by the Maya indigenous communities of the Toledo District, Belize (12 October 2004), para. 176.

⁷⁴ Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, para. 105.

⁷⁵ Joel E. Correia, “Adjudication and its aftereffects in three Inter-American Court cases brought against Paraguay: indigenous land rights”, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, judgment, 24 August 2010.

⁷⁶ *Case of the Xucuru Indigenous People and its Members v. Brazil*, judgment, 5 February 2018.

⁷⁷ *Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 146–148.

⁷⁸ Committee on the Elimination of Racial Discrimination, general recommendation No. 23 (1997) on the rights of indigenous peoples; Committee on Economic, Social and Cultural Rights, general comment No. 21; and A/HRC/4/77, para. 8.

⁷⁹ Committee on the Elimination of Racial Discrimination, general recommendation No. 23.

ancestral land.⁸⁰ States should also adopt measures allowing for the restoration of territories degraded and polluted due to development projects.⁸¹

37. In assessing what is just, fair and equitable, compensation should be commensurate with both pecuniary and non-pecuniary harm. In assessing the quantum of compensation for harm caused, the High Court of Australia upheld a significant award (\$A 2.53 million) for the economic and cultural harm suffered by the Ngaliwurru and Nungali peoples as a consequence of past acts of extinguishment in the first litigated determination of native title compensation.⁸² The sum consisted of the market value of the land, a substantial amount for interest and cultural loss, assessed in a way that respected traditional law.

38. Some States have provisions for compensation, such as article 105 of the Constitution of Norway.⁸³ In *United States v. Sioux Nation of Indians*, the United States Supreme Court held that the federal Government had violated the Treaty of Fort Laramie of 1868 when it took the sacred Black Hills without consent of the Sioux tribes.⁸⁴ The Court awarded \$17.5 million plus interest dating from 1877, however the tribes refused to accept the award, which remains in a United States Department of the Treasury account now worth over \$1 billion, and continue to seek the return of the land.

IV. State recognition of land tenure rights

39. Security of tenure for indigenous peoples is a developing issue in most States. States have established different mechanisms for recognizing and adjudicating land tenure rights and provide different forms of use and ownership. While many of these mechanisms go some way towards respecting article 27 of the Declaration, most are hampered by the complexity of the processes and the myriad rights and stakeholders involved.

A. Treaties and agreements, and reserved land

40. In some States, historic and contemporary treaties and other agreements recognizing land rights have been negotiated between the Government and indigenous peoples. Canada recognizes 70 historic treaties, and 25 comprehensive settlements affirm indigenous title to approximately 600,000 km² of land.⁸⁵ In British Columbia, a Treaty Commission facilitates treaty negotiations, and the Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia, developed jointly by the State and participating indigenous nations, and based on the Declaration, has been established.⁸⁶ The government of British Columbia recently passed the Declaration on the Rights of Indigenous Peoples Act, which sets out a process to align the laws of British Columbia with the Declaration.⁸⁷ In a landmark case in the United States of America, the Supreme Court confirmed that land defined in treaties, making up much of eastern Oklahoma, remained a Native American reservation for the purposes of federal criminal law.⁸⁸

41. However, indigenous peoples' and States' interpretations of these treaties and agreements often differ widely, as in the case of the Treaty of Waitangi, in New Zealand,

⁸⁰ Derek Inman, "From the global to the local: the development of indigenous peoples' land rights internationally and in Southeast Asia".

⁸¹ Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System* (2010), para. 216.

⁸² Australia, High Court, *Northern Territory v. Mr. A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples*, 13 March 2019. See also the submission by Australia.

⁸³ Submission by Norway.

⁸⁴ See <https://supreme.justia.com/cases/federal/us/448/371/> and www.pbs.org/newshour/show/why-the-sioux-are-refusing-1-3-billion.

⁸⁵ See www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231 and submission by Canada.

⁸⁶ Submission by Celeste Haldane.

⁸⁷ Submission by the Union of British Columbia Indian Chiefs.

⁸⁸ See www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf.

which exists in two language versions.⁸⁹ In Guatemala, agreements signed during the Peace Process in 1995 and 1996 and providing for the restitution of indigenous communal lands have not been implemented.⁹⁰

B. Constitutions, acts and bodies

42. Some States, such as Argentina, the Plurinational State of Bolivia, Brazil, Cambodia, Canada, Colombia, Ecuador, India, Mexico and Paraguay, specifically recognize the right to land and territories of indigenous peoples in their national Constitutions. These States have also developed numerous legislative acts and guidelines to implement those rights, including the recognition of the duty to not only demarcate but also protect those territories and the right of indigenous peoples to control and manage their lands and resources. For example, Colombia has developed *planes de vida* for its indigenous peoples and Brazil has developed *planos de gestão territorial* within its national environmental policy. While Ecuador has numerous laws and policies, such as the Agenda for Equal Rights of Indigenous Nationalities and Peoples, Afro-Ecuadorian People and Montubio People 2019–2021,⁹¹ it has reportedly not recognized and materially guaranteed indigenous peoples' right to land.⁹² In Paraguay, although 283,000 hectares of land were granted to indigenous communities between 2010 and 2014, many communities have no legal title to their land.⁹³

43. Other States recognize indigenous peoples' land rights through legislation: for example the Philippines, in its Indigenous Peoples' Rights Act of 1997, and the Russian Federation, through its law on the territories traditionally used by the indigenous peoples of the North, Siberia and the Far East of the country.⁹⁴ The latter law, however, applies only to peoples numbering fewer than 50,000 individuals. Moreover, to date, while territories have been protected by regional governments, no single protected territory has been created at the federal level.⁹⁵ Additionally, it is reported that their legal status is not guaranteed and is not recognized by the federal Government, including by the Ministry for Natural Resources, which issues resource use licences to businesses, such as extractive industries and logging and fishing companies.⁹⁶ In Malaysia, in response to the findings in *Kerajaan Negeri Selangor and others v. Sagong Tasi and others*, the State amended the Land Code by designating title to indigenous peoples in perpetuity, albeit only 1,000 hectares per title. Moreover, such designations can be revoked by the State, collective ownership is not recognized and traditional modes of conveying lands from one generation to the next have been eliminated.⁹⁷ In Mexico, a process of constitutional and legal reform is reportedly under way to address deficiencies in the agrarian justice system.⁹⁸ In Bangladesh, a Land Commission was set up to settle disputes as part of the Chittagong Hill Tracts peace agreement in 1997, however it has reportedly been unable to resolve any disputes, due to a lack of human and financial resources and the absence of rules to supplement the Chittagong Hill Tracts Land Dispute Resolution Commission Act.⁹⁹

44. In South Africa, while the Government has recognized and returned lands belonging to indigenous peoples under section 25 (7) of the Constitution and under the Restitution of Land Rights Act of 1994, it has reportedly failed to provide adequate support to communities who have returned to their lands.¹⁰⁰ In India, 3,863,025 of the 4,400,000 land

⁸⁹ Jacinta Ruru, Paul Scott and Duncan Webb, *The New Zealand Legal System: Structures and Processes*, 6th ed. (Wellington, LexisNexis New Zealand Limited, 2016), p. 223.

⁹⁰ Jeremy Armon, Rachel Sieder and Richard Wilson, eds., "Negotiating rights: the Guatemalan Peace Process", *Accord*, vol. 2 (1997).

⁹¹ Submission by Ecuador.

⁹² Submission by the national human rights institution of Ecuador.

⁹³ A/HRC/WG.6/24/PRY/1.

⁹⁴ Submission by the Russian Federation.

⁹⁵ A/HRC/WG.6/30/RUS/2, CCPR/C/RUS/CO/7 and CERD/C/RUS/CO/23-24.

⁹⁶ Submission by the International Work Group for Indigenous Affairs.

⁹⁷ Amnesty International, *"The Forest is Our Heartbeat": The Struggle to Defend Indigenous Land in Malaysia* (London, 2018).

⁹⁸ Submission by Mexico and A/HRC/39/17/Add.2.

⁹⁹ Submission by the Asia Indigenous Peoples Pact.

¹⁰⁰ See www.culturalsurvival.org/sites/default/files/media/southafrica.pdf.

claims brought under the Recognition of Forest Rights Act of 2006 have been processed.¹⁰¹ That said, only 5.28 million hectares of land have been recognized as communally owned and, on 13 February 2019, the Supreme Court ruled that around 1 million households whose land claims had been rejected were to be evicted. That order was subsequently suspended. In Chile, the Mapuche people have successfully claimed nearly 125,000 hectares under the Indigenous Lands and Waters Fund, all of which, however, have been acquired at market value. Yet in instances where the Mapuche lack legal title, their traditional territories are excluded.¹⁰²

45. In Australia, since the 1992 High Court decision in *Mabo and others v. Queensland*, the Native Title Act governs the recognition of native title rights. Native title has been determined to exist over approximately 38.2 per cent of the Australian land mass.¹⁰³ The Aboriginal Land Rights Act 1983 gives the New South Wales Aboriginal Land Council the mandate to provide for the development of land rights for indigenous peoples in New South Wales, in conjunction with a network of local Aboriginal land councils.¹⁰⁴ Australia reports that the focus for some Aboriginal and Torres Strait Islander peoples is now shifting from resolving claims to the question of how best to use their land for social, cultural and economic development.¹⁰⁵ In 2016, the President of the United States of America established Bears Ears National Monument, a 1.35 million acre parcel that is “profoundly sacred” to several Native American tribes. A commission of five tribes was set up to guide federal agencies on management of the land, an act seen as an innovative furthering of indigenous peoples’ self-determination and cultural rights.¹⁰⁶ The fate of the monument is now uncertain, as the Administration of the current President seeks to reduce its size by 85 per cent,¹⁰⁷ over the objections of the tribes, who have filed a lawsuit.¹⁰⁸

C. Demarcation and delimitation of land

46. States engage in the demarcation and delimitation of indigenous land and the recognition of collective ownership through legalization and plans. Costa Rica, for example, has the National Plan for Recovery of the Indigenous Territories of Costa Rica 2016–2022,¹⁰⁹ and in Guyana initiatives such as the Amerindian Land Titling Project have been launched following consultations on a 2006 law guaranteeing Amerindian land rights.¹¹⁰

47. Several States in South America, such as the Plurinational State of Bolivia, Brazil, Colombia, Ecuador and Peru, have developed legal, administrative and policy measures for the special protection of indigenous peoples in voluntary isolation or in initial contact, although adequate implementation is still lacking.¹¹¹ For example, in Brazil, there is a constitutional duty to demarcate lands traditionally occupied by indigenous peoples in accordance with their traditions and forms of social organization (Constitution, art. 231). One success story is that of the Javari Valley, an area of over 8,544,448 hectares and the second-largest in Brazil to have been demarcated, with the greatest concentration of isolated peoples in the world.¹¹² However, despite good examples in the South American region, concerning regressive steps are now taking place particularly in Brazil, putting the survival of indigenous peoples in isolation and in initial contact in serious risk.¹¹³

¹⁰¹ A/HRC/WG.6/27/IND/1, para. 104.

¹⁰² David Nathaniel Berger, ed., *The Indigenous World 2019* (Copenhagen, International Work Group for Indigenous Affairs, 2019), pp. 151–152.

¹⁰³ Submission by Australia.

¹⁰⁴ Submission by the New South Wales Aboriginal Land Council.

¹⁰⁵ Submission by Australia.

¹⁰⁶ See <https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument>.

¹⁰⁷ See <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/>.

¹⁰⁸ Native American Rights Fund, see www.narf.org/cases/bears-ears/.

¹⁰⁹ A/HRC/WG.6/33/CRI/1, para. 37.

¹¹⁰ www.guyanareddfund.org/images/stories/Signed%20ALT%20Project%20Document.pdf.

¹¹¹ Second submission by the Coordinator of Indigenous Organizations of the Amazon River Basin.

¹¹² Submission by Beto Marubo.

¹¹³ Second submission by the Coordinator of Indigenous Organizations of the Amazon River Basin.

48. A promising good practice is that provided by the Toledo Maya Land Rights Commission in Belize, which has drafted a Mayan customary land tenure policy, a consultation framework, a public awareness strategy to prevent illegal incursions on and misappropriations of Mayan lands, a demarcation and auto-delimitation strategy and dispute resolution framework in collaboration with representatives of the Mayan people.¹¹⁴ In the United Republic of Tanzania, pastoralists may be awarded land certificates after having formed a “village”, which is the only legally recognized autonomous entity on land matters. However, until recently, hunter-gatherers, as a numerical minority wherever they live, could not constitute the number required by law to form a village. In a historical development, in November 2011 the Hadzabe hunter-gatherer people were granted a collective community land certificate, equivalent to the village land certificate, on the basis of their unique lifestyle and minority status.¹¹⁵ In the Philippines, since 2001, with the support of non-governmental organizations, at least ten land titles had been granted and nearly 250,000 hectares of traditional lands had been mapped and surveyed, and by 2015, 145 indigenous communities were using participatory three-dimensional modelling to map their territories.¹¹⁶

49. Demarcation processes have many challenges. They are invariably slow. In the Bolivarian Republic of Venezuela, as at 2016, despite the demarcation of property affecting approximately 101,000 people in 683 indigenous communities covering over 3.2 million hectares, only 12.4 per cent of indigenous lands had been demarcated. In the Plurinational State of Bolivia, the claim of the Tacana under the Tierra Comunitaria de Origen framework, under Law No. 1715, after two decades has not yet resulted in the consolidation of their territory.¹¹⁷ In Argentina, 13 years after the adoption of Act No. 26160, only 57 per cent of the surveys planned have been initiated.¹¹⁸ In Cambodia, although 684 title certificates have been provided to 24 indigenous peoples, the requirement to have the “agreement of their neighbours”, its tedious nature and the expense is contributing to a stalled process.¹¹⁹ In the Philippines, despite laws and programmes designed to complete the titling of all indigenous ancestral lands, the titling process is reportedly ineffectual and has been described as slow and cumbersome, expensive and with voluminous requirements.¹²⁰ In Indonesia, in the absence of a national mechanism, indigenous peoples set up the Indigenous Territory Registration Body in 2011, which registered 703 maps representing indigenous territories that cover 8.3 million hectares. However, there has been no significant policy response from the ministries and agencies receiving these maps.¹²¹ Several indigenous peoples in the United States of America have their own land-titling abilities and have taken responsibility for such work from the federal Government, leading to greater efficiency.¹²²

50. Other challenges to demarcation exist across the regions including: the failure to recognize the inherent rights of indigenous peoples to their lands, territories and resources; overlapping titles; lack of knowledge about the titling process; illegal occupation by small farmers; onerous legal requirements; limited financial and human resources; the high cost of conducting ground surveys; and disputes. In Honduras, while the demarcation process in the region of La Moskitia has resulted in collective titling, the ongoing presence of cattle ranchers, loggers and drug traffickers has resulted in constant tension and conflict, putting indigenous communities at risk.¹²³

¹¹⁴ A/HRC/WG.6/31/BLZ/1, paras. 98 and 100–102.

¹¹⁵ Submission by Elifuraha Laltaika.

¹¹⁶ Submission by the Asia Indigenous Peoples Pact.

¹¹⁷ Submission by Red Eclesial Panamazónica.

¹¹⁸ Submission by the Ombudsman of Argentina.

¹¹⁹ A/HRC/WG.6/32/KHM/1, para. 57. See also *The Indigenous World 2019*, p. 252, and the submission by the Asia-Pacific Forum on Women, Law and Development.

¹²⁰ A/HRC/WG.6/27/PHL/1, paras. 83–86; submission by the Asia-Pacific Forum on Women, Law and Development; and submission by the national human rights institution of the Philippines.

¹²¹ Submission by the Asia Indigenous Peoples Pact.

¹²² See <https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/04/Carpenter-Riley-71-Stan.-L.-Rev.-791.pdf>.

¹²³ A/HRC/33/42/Add.2 and A/HRC/39/17.

D. Land claims tribunals

51. The Uncultivated Land Tribunal for Finnmark and the Finnmark Commission were set up in Norway under the Finnmark Act of 2005, with the purpose of facilitating the management of land and natural resources for the benefit of the inhabitants of Finnmark and as a foundation for Sami culture.¹²⁴ While the Finnmark Act recognized that the Sami people had acquired collective and individual rights in Finnmark through the long-term use of land and resources, it has been criticized for failing to recognize distinctive Sami customary laws and rights.¹²⁵

52. The Waitangi Tribunal in New Zealand has been recognized by the Special Rapporteur on the rights of indigenous peoples as being one of the most important examples in the world of an effort to address historical and ongoing grievances of indigenous peoples.¹²⁶ Although the Tribunal cannot issue binding rulings, and has other shortcomings, its decisions are “accorded considerable weight and respect by the ordinary courts”.¹²⁷ In the United States of America, the historic Indian Claims Commission left a mixed legacy because of its decision to award only monetary restitution rather than the restoration of actual lands. In Canada, the Specific Claims Tribunal was developed jointly by the Government and the Assembly of First Nations to address historic grievances, with binding rulings, as part of the Specific Claims Policy.¹²⁸

E. Enforcement and adjudication of legal title, including through the national courts

53. In the absence of effective adjudication processes under article 27 of the Declaration, some indigenous peoples refer their request for title to the national courts. In Indonesia, in three landmark Constitutional Court rulings, indigenous peoples’ collective rights to their territories have been recognized.¹²⁹ In Botswana, in 2006, the draft Declaration was cited to rule in favour of the Basarwa (San) peoples, who had been evicted from their ancestral lands.¹³⁰ In New Zealand, in *Ngati Apa v. Attorney-General*, the Court of Appeal ruled that the onus of proof of extinguishment of customary title was on the Crown, and that the intent to extinguish would have to be “clear and plain”.¹³¹

54. In Sweden, the Supreme Court granted a Sami association the sole right to manage small-game hunting on land owned by the State.¹³² In Norway, the Supreme Court decided, pursuant to the Reindeer Husbandry Act of 2007, that the assessment of property rights must take into account Sami traditions.¹³³ In Finland, Sami defendants who challenged the Fishing Act, by fishing in their seas without a licence, were acquitted, as the Court determined that they were fishing according to their customary law. The judicial decision referenced articles 8, 14, 20, 26, 34, 40 and 43 of the Declaration. In January 2020, a court in Peru requested the State to establish a strict protection zone around a region of the Amazon near the border with Brazil to protect indigenous people in voluntary isolation against encroachment by oil companies.¹³⁴

¹²⁴ Submission by Norway.

¹²⁵ A/HRC/WG.6/33/NOR/2 and A/HRC/33/42/Add.3.

¹²⁶ A/HRC/18/35/Add.4, para. 67.

¹²⁷ Janine Hayward and Nicola Wheen, eds., *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Wellington, Bridget Williams Books, 2015).

¹²⁸ Submission by Canada.

¹²⁹ Submission by the International Coalition for Papua.

¹³⁰ A/HRC/36/56.

¹³¹ www.nzlii.org/nz/cases/NZCA/2003/117.html.

¹³² Ulf Mörkenstam, “Organised hypocrisy? The implementation of the international indigenous rights regime in Sweden”, *International Journal of Human Rights* (June 2019).

¹³³ Norway, Supreme Court, decisions No. HR-2016-2030-A of 28 September 2016 and No. HR-2018-456-P of 9 March 2018. Submission by Norway.

¹³⁴ Sentence No. -2019-1°JCM-CSJLO-JAVT of the Corte Superior de Justicia de Loreto, available at <https://drive.google.com/file/d/1AVTl6jVrw3Mkx5T3BuNTMI5fvRJhgZ9J/view>.

55. The challenges brought forward in these and other such cases are many, depending on the State and the level of recognition of indigenous peoples and their land rights. In the Democratic Republic of the Congo, while draft laws on the rights of indigenous peoples have been before Parliament since 2014, indigenous peoples are considered to be like other communities, contributing to conflict over land and other resources.¹³⁵

56. In some States, indigenous peoples have difficulty accessing the court system and sometimes do not have the level of social and political organization necessary to take cases to court.¹³⁶ Court procedures are often complex, the independence of the judiciary is not always guaranteed and legal professionals, including those representing indigenous peoples, are often unaware of indigenous peoples' land rights. While there are few indigenous judges,¹³⁷ there are often onerous burdens of proof¹³⁸ and sometimes inconsistencies between federal and state courts. Even positive decisions may be accompanied by negative effects on indigenous peoples. In Brazil, the recognition of indigenous land rights in Raposa Serra do Sol resulted in attempts to restrict the ability of public lawyers to defend indigenous peoples' right to land (see opinion No. 001/2017 of the Federal Attorney General, later suspended by a Supreme Court decision in the Xokleng indigenous community case).¹³⁹

57. Taking cases to court may also involve a risk to indigenous peoples and their defenders. Many suffer reprisals, intimidation, harassment and arrest.¹⁴⁰ Litigation takes a toll on indigenous peoples across the regions, both emotionally and financially. Often there is no legal aid and the costs are prohibitive, as noted by the Inter-American Commission on Human Rights in a case against Canada.¹⁴¹ And even if a case is won in court, there may be a failure to implement the judgment, as in the Ogiek case in Kenya.

¹³⁵ Submission by Institut de l'environnement et des ressources naturelles. See also CEDAW/C/COD/CO/8, CCPR/C/COD/CO/4 and www.iwgia.org/en/democratic-republic-of-congo/3500-iw2019-drc.

¹³⁶ Submission by the International Coalition for Papua. See also A/HRC/42/37 and A/72/186, para. 57.

¹³⁷ Submission by Institut de l'environnement et des ressources naturelles.

¹³⁸ Guyana, High Court, *Thomas and Arau Village Council v. Attorney General of Guyana and another*, unreported decision dated 30 April 2009, in Amy Strecker, "Indigenous land rights and Caribbean reparations discourse", *Leiden Journal of International Law*, vol. 30, No. 3 (September 2017), p. 639.

¹³⁹ See <https://cimi.org.br/wp-content/uploads/2020/02/aco1100-decisao-parecer001.pdf> and <http://portal.stf.jus.br/processos/detalhe.asp?incidente=11818>.

¹⁴⁰ A/HRC/39/62 and A/HRC/39/17.

¹⁴¹ Inter-American Commission on Human Rights, report No. 105/09 on the admissibility of petition 592-07 concerning the Hul'qumi'num Treaty Group, Canada (30 October 2009), para. 37.

Annex

Advice No. 13 on the right to land of indigenous peoples

1. States should recognize indigenous peoples as indigenous peoples. They should also recognize indigenous peoples' right to their lands, territories and resources in line with the United Nations Declaration on the Rights of Indigenous Peoples and the development of this right as expressed by regional and international human rights bodies. Moreover, States have an obligation to implement other attendant rights, including the rights to life and to live in dignity.
2. States should implement the advice provided in other studies of the Expert Mechanism on the Rights of Indigenous Peoples relating to land rights, in particular the study on free, prior and informed consent and the studies on the participation of indigenous peoples.¹ States should also implement international, regional and national decisions on indigenous peoples' rights.
3. States should ensure that, through consultation with indigenous peoples, the type of land tenure (ownership, usufruct or variations of both) granted to them conforms with the needs, way of life, customs, traditions and land tenure systems of the indigenous peoples concerned and is respected and ensured.
4. States should establish, in consultation with indigenous peoples, the legislative and administrative measures and appropriate and effective mechanisms necessary to facilitate the ownership, use and titling of indigenous lands, territories and resources, including lands that indigenous peoples have come to occupy because of past relocations. This should be done with respect for indigenous peoples' customs, traditions and land systems, including recognition of indigenous peoples' own land tenure as a source of property and land rights. This may require measures for inter-State dialogues in instances where indigenous peoples reside across borders. States should abolish all laws, including those adopted during periods of colonization, that purport to legitimize, or have the effect of facilitating, the dispossession of indigenous peoples' lands.
5. States should ensure that indigenous peoples that have retained ownership of the resources on their lands and territories have the right to extract and develop them, at least on the same basis as other landowners have the right to extract and develop resources from their lands.
6. States should apply the rights in the Declaration to reform their national, regional and local laws in such a way as to recognize indigenous peoples' own customs, traditions and land tenure systems, in particular their collective ownership of lands, territories and resources.
7. States should ensure that indigenous peoples have the right to maintain and strengthen their spiritual relationship with the lands, territories and resources, including the waters and seas, in their possession and no longer in their possession but which they owned or used in the past.
8. States should use indigenous peoples' own traditional dispute mechanisms, such as arbitration, when possible rather than litigate through the courts.
9. States should ensure effective access for indigenous peoples to relevant judicial procedures.
10. States should ensure that indigenous women have access on an equal basis with indigenous men to ownership and/or use of and control over their lands, territories and resources, including by revoking or amending discriminatory laws, policies and regulations,

¹ A/HRC/15/35, A/HRC/18/42, A/HRC/21/55 and A/HRC/39/62.

by protecting them against discrimination and dispossession,² and by supporting them, where necessary, in the management of their lands.

11. States should establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, having due regard for indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used (Declaration, art. 27).

12. States should ensure that indigenous peoples who have unwillingly lost possession of their lands, or whose lands have been confiscated, taken, occupied or damaged without their free, prior and informed consent, are entitled to restitution and if restitution is not possible other appropriate redress bearing in mind that compensation should not be limited to financial awards but should also take the form of alternative similar lands (Declaration, art. 28).³

13. States should ensure that companies assume responsibility for effectively and immediately cleaning up lands, territories and resources polluted by their development activities, in collaboration and coordination with affected indigenous peoples.

14. Multinational companies should be aware of the presence of indigenous peoples, in all countries in which they carry out activities, and respect their rights, in particular their land rights, in accordance with international principles.⁴

15. States should take measures to ensure the representation of indigenous peoples in all aspects of public life, beyond those forums that deal exclusively with indigenous issues, including in the executive, in the parliament and in the judiciary, as well as in regional and international bodies.

16. States should ensure urgent and particular attention to protecting the land rights of indigenous peoples in voluntary isolation and respecting the principle of no contact. Additional positive protection measures should also be applied, including the establishment of buffer areas, control of access and surveillance, and contingency plans, including health plans, for cases of accidental or forced contact.⁵

17. States should ensure that all those working on indigenous issues in the State, including legislators, and State officials, including regional or local enforcement officials and members of the judiciary, are familiar with the rights of indigenous peoples.

18. States should take measures, including those recommended by the Special Rapporteur on the rights of indigenous peoples, to end violence against and persecution of defenders of indigenous land and provide redress for harm suffered.⁶

19. Indigenous peoples should consider building public awareness about their land rights to prevent illegal incursions on or the misappropriation of indigenous land. They should also consider collaborating with and offering training to the media on indigenous land rights, particularly when engaging in strategic litigation. Such measures should be supported by State institutions.

20. Indigenous peoples should consider how to enhance political support for the implementation of their land rights.

21. Indigenous peoples should build their own capacity on their rights under the Declaration and on how to enforce them at the national, regional and international levels through, for example, the indigenous fellowship programme of the Office of the United Nations High Commissioner for Human Rights and by seeking grants from the United Nations Voluntary Fund for Indigenous Peoples to attend international events on

² Committee on the Elimination of Discrimination against Women, general recommendation No. 34 (2016) on the rights of rural women.

³ See also A/HRC/39/62.

⁴ See www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf.

⁵ See www.refworld.org/es/pdfid/5a95c4fb4.pdf.

⁶ See A/HRC/39/17.

indigenous rights. States should also provide support to ensure that full access to such opportunities is viable.

22. States and international financial institutions should continue to cooperate in promoting investments that allow for the demarcation and protection of indigenous lands.⁷

23. States and indigenous peoples should consider and implement innovative agreements for co-management of lands in cases where transfer of title is not desirable or possible.

⁷ Submission by Germany.