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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

Treaties, agreements and other constructive arrangements, including peace accords and reconciliation initiatives, and their constitutional recognition

Study of the Expert Mechanism on the Rights of Indigenous Peoples

Summary

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

The study includes Expert Mechanism advice No. 15 on treaties, agreements and other constructive arrangements, including peace accords and reconciliation initiatives, and their constitutional recognition, presented in an annex.

I. Introduction

1. Pursuant to Human Rights Council resolution 33/25, the Expert Mechanism on the Rights of Indigenous Peoples decided, at its fourteenth session in July 2021, to prepare a study on how treaties, agreements and other constructive arrangements, as referred to in article 37 of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), as well as in peace accords and reconciliation initiatives and in constitutional recognition, are being recognized, observed, enforced, honoured and respected. For that purpose, the Expert Mechanism held a virtual seminar on 29 November and 1 and 2 December 2021. The present study has benefited from the presentations made at the seminar and from the submissions of States, indigenous peoples, national human rights institutions, academics and others.[1] The Expert Mechanism regrets that it received only two contributions from Member States to its 2021 call for input, a response that is clearly insufficient to reflect the diversity of views and experiences of States.

2. The subject of the present study has been discussed at the international level since the early 1970s and was addressed in the final report of the Special Rapporteur, Miguel Alfonso Martínez, on treaties, agreements and other constructive arrangements between States and indigenous populations,[2] as well as at three United Nations Expert seminars held in 2003, 2006 and 2012,[3] as recommended in the report of the Special Rapporteur. The present study seeks to contribute to the further understanding of the rights affirmed in article 37 of the Declaration and the corresponding obligations of States. The study attempts to identify the principles and conditions, including broader gaps and challenges, in the realization and exercise of the right of indigenous peoples to conclude treaties, agreements and other constructive arrangements with States and to have them respected and enforced.

3. The present study in no way attempts to either repeat the work of the Special Rapporteur or to diminish the important work accomplished in his final report and at the three subsequent United Nations seminars. The study will focus on examples of more current agreements, some of which are not be classified as treaties of an international character. Some of the critical words of the Special Rapporteur are still relevant today, especially following the adoption of the Declaration, and parts of his report have been particularly useful in the writing of the study,

4. The Special Rapporteur concluded more than two decades ago that there is an almost unanimous opinion among indigenous peoples that existing State mechanisms, either administrative or judicial, are unable to satisfy their aspirations and hopes for redress, a still prevailing opinion, as evidenced by the information provided to the Expert Mechanism.[4] It should also be noted that many of his recommendations have yet to be implemented.

II. Legal framework

5. Establishing improved relationships between indigenous peoples and States, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,[5] was a main goal behind the adoption of the Declaration. The objective of a renewed relationship is reflected, specifically, in article 37 of the Declaration and in its fifteenth, eighteenth and twenty-fourth preambular paragraphs. In adopting the Declaration, the General Assembly solemnly proclaimed it as a standard of achievement to be pursued in a

[1] The presentations and the submissions are available at https://www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-indigenous-peoples/treaties-agreements-and-other-constructive-arrangements-between-indigenous-peoples-and-states.

[2] See E/CN.4/Sub.2/1999/20.

[3] See the compilation of conclusions and recommendations from the United Nations seminars on treaties, agreements and other constructive arrangements, available at https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Session7/A.HRC.EMRIP.2014.CRP.1.pdf.

[4] E/CN.4/Sub.2/1999/20, para. 261.

[5] United Nations Declaration on the Rights of Indigenous Peoples, eighteenth preambular para.

spirit of partnership and mutual respect.[6] Article 37 of the Declaration must be read in conjunction with other rights set out in the Declaration, including the rights to self-determination, free, prior and informed consent and to lands, territories and natural resources.

6. The Declaration stresses that its recognition of the rights of indigenous peoples enhances harmonious and cooperative relations between the State and indigenous peoples and affirms that treaties, agreements and other constructive arrangements are the basis for a strengthened partnership between indigenous peoples and States.[7] Under article 37, indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such arrangements.

7. Building on those principles, the American Declaration on the Rights of Indigenous Peoples guarantees the right of indigenous peoples to the recognition and enforcement of treaties, in terms that restate article 37 of the United Nations Declaration on the Rights of Indigenous Peoples, adding that this shall be done "in accordance with their true spirit and intent in good faith". Furthermore, it affirms that States shall give due consideration to the understanding of the indigenous peoples regarding treaties, agreements and other constructive arrangements, and contemplates the intervention of a competent body, including regional and international bodies, to resolve disputes.[8]

8. The process of negotiation inherent in treaty-making is the most suitable way not only of securing an effective indigenous contribution towards the eventual recognition or restitution of their rights and freedoms but also of establishing much needed practical mechanisms to facilitate the realization and implementation of their ancestral rights and those enshrined in national and international texts.[9] The Supreme Court of Canada has stated that "treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and to define Aboriginal rights guaranteed by section 35 of the Constitution Act".[10]

9. The Declaration states that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples may be matters of international concern, interest, responsibility and character.[11] This clearly applies to treaties and other legal instruments concluded by the European settlers and their successors with indigenous nations, which continue to be instruments with international status in the light of international law, as affirmed by the Special Rapporteur in his final report.[12] He also addressed this topic, describing the process of "'domestication' of the 'indigenous question'" as "the process by which the entire *problematique* was removed from the sphere of international law and placed squarely under the exclusive competence of the internal jurisdiction of the non-indigenous States".[13]

10. Similarly, as noted by a former Special Rapporteur on the rights of indigenous peoples, "the doctrine of sovereignty traditionally has shielded states from scrutiny over matters that are deemed to be within the realm of their domestic concern".[14] Nevertheless, in the development of the international human rights regime since the adoption of the Charter of the United Nations, this shield has been weakened, in particular owing to the fact that indigenous claims have been put forward as collective rights.[15]

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[6] Ibid., twenty-fourth preambular para.

[7] Ibid., fifteenth and eighteenth preambular paras.

[8] American Declaration on the Rights of Indigenous Peoples (AG/RES.2888 (XLVI-O/16), article XXIV.

[9] E/CN.4/Sub.2/1999/20, para. 263, and A/HRC/39/62, para. 5.

[10] Supreme Court of Canada, *Haida Nation v. British Columbia* (Minister of Forests) [2004] SCR. 511, para. 20, see https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do.

[11] United Nations Declaration on the Rights of Indigenous Peoples, fourteenth preambular para.

[12] E/CN.4/Sub.2/1999/20, paras. 270–272.

[13] Ibid., para. 192.

[14] S. James Anaya, "Indigenous peoples and international law issues", in *The Challenge of Non-State Actors: Proceedings of the 92nd Annual Meeting of American Society of International Law*, vol. 92, (April 1998), p. 97.

[15] Ibid.

11. International human rights law has developed norms relevant to indigenous peoples to reverse the historical discrimination against them under international law.[16] The adoption of the Declaration has strengthened the internationalization of indigenous peoples' issues, not only because it is the most comprehensive international instrument on the rights of indigenous peoples but also as a result of the 20-year negotiation process on its development between Member States and indigenous peoples. The unprecedented participation and influence of indigenous peoples gave greater legitimacy to the Declaration. The attention to treaties, agreements and other constructive arrangements by treaty bodies and special procedures has been increasing and has progressively enriched the interpretation of article 37 of the Declaration.[17]

12. The recognition of the Kalaallit (Greenlanders) as a people in international law in the Greenland Self-Government Act is a remarkable step in the protection of the rights of indigenous peoples.[18] This achievement should serve as a model to be pursued by other States.

A. Right to self-determination

13. The Declaration affirms that indigenous peoples are equal to all other peoples,[19] entitled to all rights established under applicable international law, including the right to self-determination, as affirmed in its article 3 as well as in the American Declaration on the Rights of Indigenous Peoples. This right has been invoked by indigenous peoples as the normative basis of their relationship with the State.[20] In particular, articles 3, 5, 9 and 33 of the Declaration provide a framework for recognizing the rights of indigenous peoples to negotiate as distinct peoples and as legitimate parties entitled to enter agreements under international law.

14. Consistent with their right to self-determination, indigenous peoples have always had the inherent power to make binding agreements between themselves and other polities.[21] As advised by the Expert Mechanism, treaties, as evidence of the right to self-determination and the relationship they represent, are the basis for a strengthened partnership, consistent with the Declaration.[22]

B. Free prior and informed consent

15. International instruments recognize the right of indigenous peoples to participate in decision-making in matters affecting their rights[23] and that decisions related to their interests should be taken with their free, prior and informed consent.[24] Free, prior and informed consent has also been reaffirmed by several United Nations treaty bodies, which have significantly contributed to the normative understanding of indigenous peoples' rights to

[16] S. James Anaya, *International Human Rights and Indigenous Peoples* (Aspen, United States of America, 2010); Claire Charters, "Multi-sourced equivalent norms and the legitimacy of indigenous peoples' rights under international law", in *Multi-Sourced Equivalent Norms in International Law*, Tomer Broude and Yuval Shany (eds.), *Studies in International Law* (Oxford, Hart Publishing, 2011).

[17] See, for example, A/HRC/39/17/Add.3, para. 17; CCPR/C/BGD/CO/1, para. 12; CERD/C/NZL/CO/21-22, paras. 13–15; and CERD/C/AUS/CO/18-20, para. 20.

[18] Act on Greenland Self-Government, Act No. 473 of 12 June 2009, see https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=110442&p_lang=en.

[19] United Nations Declaration on the Rights of Indigenous Peoples, second preambular para.

[20] A/HRC/48/75, para. 3.

[21] A/HRC/39/62, paras. 4–5.

[22] A/HRC/18/42, annex, para. 34.

[23] United Nations Declaration on the Rights of Indigenous Peoples, art. 18.

[24] Ibid., arts. 10, 11, 19, 28, 29 and 32; International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169); Committee on the Elimination of Racial Discrimination, general recommendation No. 23 (1997), para. 4 (d); A/HRC/18/42; and A/HRC/EMRIP/2010/2, para. 8.

participate in decision-making processes.[25] In particular, the Committee on the Elimination of Racial Discrimination, in seeking to dismantle conceptual structures that dispossessed and disempowered indigenous peoples, pointed specifically at "consent" as a human rights norm.[26]

16. Consent is as a key principle that enables indigenous peoples to exercise their right to self-determination, whereby indigenous peoples are considered to engage with and are entitled to give or withhold consent to proposals that affect them.[27] The Expert Mechanism has also noted that several treaties between States and indigenous peoples have affirmed the principles of indigenous peoples' consent as underpinning the treaty relationship between States and indigenous peoples.[28]

17. The principle of free, prior and informed consent provides States with the necessary guidelines for engaging in the process of dialogue and negotiation and it is not a free-standing device of legitimation. This principle, within the human rights framework, does not consider consent to be simply a "yes" to a predetermined decision.[29] Free, prior and informed consent should be considered as a minimum standard in all phases of treaty- or agreement-making processes, including the design of frameworks, the negotiation, establishment and enforcement of agreements and the creation and operation of conflict resolution mechanisms. It should also be applied as the operative principle in the case of grievances and reparations.[30]

III. Types of treaties, agreements and other constructive arrangements between indigenous peoples and States

18. Indigenous peoples and States have established agreements using a wide range of instruments, which share the aim of strengthening partnerships between them in order to promote cooperative relations, build peaceful coexistence, regulate issues of common concern and establish stable, mutual relations.

19. According to the Inter-American Commission of Human Rights, the "treaties historically signed with indigenous peoples can be understood as the implicit recognition of their inherent sovereignty and the establishment of nation-to-nation, or government-to-government, political relations".[31] In Aotearoa/New Zealand, the Treaty of Waitangi serves as an important framework for the relationship between the Maori and the British Crown and represents the beginning of an ongoing dialogue between the Maori and the State.

20. In Canada, following the decision of the Supreme Court in *Calder et al. v. Attorney-General of British Columbia*, 25 modern treaties or comprehensive land claim agreements have been signed, some addressing self-government.[32] Current developments merit deeper examination, such as the legal recognition of the Declaration as a universal international human rights instrument with application in Canadian law[33] and the recent federal and

[25] See A/HRC/EMRIP/2010/2; see also CCPR/C/79/Add.109 and CCPR/C/79/Add.112; CCPR/CO/69/AUS; CCPR/CO/74/SWE; A/50/40, vol. II, annex X, sect. I, para. 9.6; CERD/C/CAN/CO/18, paras. 15 and 25; CERD/C/NZL/CO/17, para. 20; CERD/C/IDN/CO/3, para. 17; CERD/C/COD/CO/15, para. 18; CERD/C/ECU/CO/19, para. 16; CERD/C/USA/CO/6, para. 29; CERD/C/NAM/CO/12, para. 18; CERD/C/SWE/CO/18, para. 19; CCPR/C/NIC/CO/3, para. 21; CCPR/C/BWA/CO/1, para. 24; CCPR/C/CRI/CO/5, para. 5; CCPR/C/CHL/CO/5, para. 19; A/52/18, annex V; and Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009).

[26] Committee on the Elimination of Racial Discrimination, general recommendation No. 23 (1997).

[27] A/HRC/39/62, para. 25.

[28] A/HRC/18/42, annex, para. 12.

[29] A/HRC/24/41, para. 30.

[30] E/CN.4/Sub.2/1999/20, para. 263, and A/HRC/39/62, para. 45.

[31] Inter-American Commission on Human Rights, *Derecho a la libre determinación de los Pueblos Indígenas y Tribales* (OEA/Ser.L/V/II. Doc.413/21), December 2021, para. 224; see also A/HRC/21/47/Add.1, para. 19.

[32] Government of Canada, "Modern treaties", see https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231#chp4.

[33] Government of Canada, United Nations Declaration on the Rights of Indigenous Peoples Act (SC 2021, c 14), sect. 4 (a).

provincial (British Columbia) legislative frameworks to implement it.[34] The dialogue and negotiation on the treaty-making process between traditional owners and Aboriginal peoples in the State of Victoria, Australia, is another current example.[35]

21. In conflict settings, indigenous peoples have participated in negotiating peace agreements with States to end hostilities. For example, the Chittagong Hill Tracts Peace Accord in Bangladesh ended two decades of conflict, although its implementation faces serious challenges. The continued militarization of Naga territory in India serves as another example of an agreement that is being weakly implemented, revealing that peace agreements can have disappointing results, sometimes causing internal divisions instead of consolidating peace.[36] When core rights, such as self-determination, are not addressed, as was the case in the Bodo Peace agreements[37] and the San Andrés agreements between the Zapatista Army of National Liberation and the Mexican Government, trust in dialogue and in lasting resolution evaporates.[38]

22. Indigenous peoples have contributed to various peace agreements, in which they have been recognized as victims as well as peacemakers, such as in the peace agreements in Colombia[39] and Guatemala,[40] which were concluded after years of suffering by indigenous peoples, although they have not yet fully benefitted from them.

23. In Australia, the tendency has been to conduct negotiations in corporate-to-sovereign instead of sovereign-to-sovereign terms, through native title corporations, a State-constructed apparatus for native title governance and administration,[41] established to oversee, represent and exercise the rights and interests of common law native title holders.[42] It is reported that, in most cases, the native title is a practical mechanism for Australian States to recognize the land rights of indigenous peoples but not their broader claims for self-determination and sovereignty.[43]

24. In some cases, the relationship between indigenous peoples and States is regulated by legislative provisions or constitutions. In the United States of America, executive orders have often been used by State and federal officials to address key issues and to strengthen political relations with indigenous governments, based on coordination and consultation, although it has been reported that consent has not been envisaged.[44]

25. In Colombia, agreements on indigenous territories led to the adoption of decree 1397 of 1996, which created the National Commission of Indigenous Territories and the Permanent Roundtable for consultation with indigenous peoples and organizations. However, indigenous organizations have protested the non-compliance with all of the terms stipulated in the decree and have mobilized to ask for those commitments to be respected.[45] It has been reported that the Special Jurisdiction for Peace, established in the framework of the final

[34] Government of Canada, Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act, see https://www.justice.gc.ca/eng/declaration/index.html.

[35] See https://www.legislation.vic.gov.au/bills/advancing-treaty-process-aboriginal-victorians-bill-2018.

[36] Presentation of Atina Pamei Gaare at the Expert Mechanism seminar.

[37] Joint submission by several organizations from Northeast India.

[38] Presentation of Gilberto López y Rivas at the Expert Mechanism seminar.

[39] Government of Colombia, Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera (2016), see https://www.jep.gov.co/Marco Normativo/Normativa_v2/01 ACUERDOS/Texto-Nuevo-Acuerdo-Final.pdf?csf=1&e=0fpYA0.

[40] Submission of the International Work Group for Indigenous Affairs; see also “Guatemala. Acuerdo sobre identidad y derechos de los pueblos indígenas” (1995) (https://www.almg.org.gt/wp-content/uploads/2020/05/j-Acuerdo-Sobre-Identidad.pdf).

[41] Australia, “Registered native title bodies corporate”, Office of the Registrar of Indigenous Corporations, 22 October 2020, see https://www.oric.gov.au/top-500/2015-16/RNTBCs.

[42] Presentation of Janine Gertz at the Expert Mechanism seminar.

[43] Submission of the Castan Centre for Human Rights Law; see also Harry Hobbs and George Williams, “The Noongar settlement: Australia’s first treaty”, *Sydney Law Review*, vol. 40, No. 1 (2018), p. 27.

[44] Presentation of David Wilkins at the Expert Mechanism seminar; see also A/HRC/21/47/Add.1, paras. 67–68.

[45] A/HRC/37/3/Add.3, paras. 72–73 and 75; see also https://www.onic.org.co/comunicados-onic/2058-pueblos-y-organizaciones-indigenas-nosdeclaramos-en-alerta-y-asamblea-permanente-por-incumplimientode-acuerdos-por-parte-del-gobierno-nacional.

peace agreement, is contributing to the strengthening of indigenous peoples' institutions and the generation of conditions for living in freedom, peace and security.[46]

IV. Establishment of treaties, agreements and other constructive arrangements

26. The effective exercise of indigenous peoples' right to establish consensual agreements and to have them enforced relies on several enabling conditions, including respect for human rights and non-discrimination, good faith and the principle of free, prior and informed consent.

A. Recognition of indigenous peoples

27. The Declaration has several provisions, including articles 3, 5, 7, 9 and 33, relating to the recognition of indigenous peoples and to the recognition of the individual and collective rights that are integral to their existence as distinct peoples.[47]

28. The recognition by States of indigenous peoples as peoples with their own specific identity, institutions, culture and tradition and the right to self-determination is an enabling condition for meaningful engagement. It is also key for the exercise and implementation of the rights affirmed in the Declaration[48] and for the establishment of agreements that regulate the relationship between indigenous peoples and States,[49] although lack of recognition should not impede access to legal protection of those rights. Indigenous peoples have often pursued constitutional recognition because it is considered that, as the highest level of the domestic judicial hierarchy, it ensures more comprehensive protection. Several States have integrated the recognition of indigenous peoples and, to some degree, their rights as set out in the Declaration into their constitutions.

29. A number of States in the Americas, such as Bolivia (Plurinational State of), Brazil, Canada, Colombia, Mexico and Nicaragua, have included similar clauses in their constitutions. In some cases, however, notably in the constitutions of Guatemala and Nicaragua, although recognition of the existence, special protections and certain grounds of autonomy of indigenous peoples are affirmed, there is no mention of their right to self-determination. In other cases, specific spheres of power and jurisdiction are established, such as the indigenous territorial entities in Colombia (arts. 329–330) or the indigenous territorial constituencies in Ecuador (arts. 60, 242, 257).[50]

30. In some constitutions, indigenous peoples are referred to as a group, population or community, for example in the Constitution of the Philippines and in those of several African countries, including Gabon, Kenya and South Africa, in line with an approach that identifies indigenous peoples rather than defining them.[51] In others, only specific groups are recognized, as in the case of the scheduled tribes in India, excluding other groups, such as the Adivasi migrants in the State of Assam.[52]

31. In Africa, indigenous peoples face a major barrier owing to a prevailing belief that all Africans are indigenous peoples and that their recognition as separate or distinct may trigger conflict between ethnic groups or jeopardize the integrity of States.[53] The Democratic

[46] Presentation of Belkis Izquierdo Torres at the Expert Mechanism seminar.
[47] A/HRC/EMRIP/2019/3/Rev.1, para. 9.
[48] Ibid., para. 17.
[49] Ibid., para. 38.
[50] A/HRC/48/75, para. 44.
[51] ILO and the African Commission on Human and Peoples' Rights, *Overview Report of the Research Project by ILO and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples* (Geneva, ILO, 2009; Banjul, the Gambia, African Commission on Human and Peoples' Rights, 2009), see https://www.achpr.org/presspublic/publication?id=50.
[52] See submission of Bipasha Rosy Lakra.
[53] Presentation of Chidiebere C. Ogbonna at the Expert Mechanism seminar.

Republic of Congo is the only State in Africa that recognizes indigenous peoples in its Constitution (art. 16). In the case of *African Commission on Human and Peoples' Rights v. Republic of Kenya*, the African Court on Human and Peoples' Rights found that Kenya violated article 2 of the African Charter on Human and Peoples' Rights by failing to recognize the Ogiek population as a distinct tribe.[54] In its Constitution, Kenya recognizes the duty of the State to address the needs of members of minority or marginalized communities and members of particular ethnic, religious or cultural communities, as well as other vulnerable groups such as women and children.[55] The Constitution of Cameroon mentions indigenous populations in its preamble, while the Constitution of Burundi reserves three seats in the Senate to "people of the Twa ethnicity" (art. 185 (2)). In a case involving the San and Bakgalagadi peoples, the Hight Court of Botswana recognized that "the Applicants belong to a class of peoples that have now come to be recognized as 'indigenous peoples'".[56]

32. The Sami people have been recognized as indigenous peoples in the Finnish Constitution since 1995, although the Sami Parliament reported that there are still challenges regarding how this right should be implemented. In Australia, the demands of Aboriginal and Torres Strait Islanders to have their right to self-determination constitutionally recognized have still not been met.[57] However the Government of Australia affirms that it is committed to holding a referendum on the subject within the term of the current administration.[58]

33. It is critical to stress that when constitutions or laws recognize indigenous peoples and their rights, they are affirming rather than creating those rights, which are inherent[59] and inalienable.[60] Such recognition should also be reflected in substantive structural reforms. The fact that States do not attribute juridical personality to indigenous peoples is an obstacle for them in terms of their inclusion as part of formal agreements under the dominant legal system.[61] Similarly, despite the extensive recognition that indigenous peoples enjoy in the Mexican Constitution (art. 2), they still have the status of entities of public interest rather than of subjects of public law, a controversial aspect of law that indigenous peoples and scholars have been questioning.[62] The constitutional reform intended to change this status, promised in 2019, has not yet materialized. The recognition of juridical personality is essential for indigenous peoples to exercise their rights – above all their rights to self-determination and to land, territories and natural resources.[63] However, juridical personality should not be a prerequisite for the exercise of the rights of indigenous peoples. Furthermore, in his final report the Special Rapporteur stated that should indigenous peoples who never

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[54] *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012 (2017), Judgment of 26 May 2017, paras. 112 and 146.

[55] Constitution of Kenya, art. 21 (3), see http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010.

[56] High Court of Botswana, *Roy Sesana, Keiwa Setlhobogwa and Others v. The Attorney General*, Judgment of 13 December 2006, sect. H.1, para. 5.

[57] Submissions of Harry Hobbs and the Castan Centre for Human Rights Law.

[58] Submission of Australia.

[59] United Nations Declaration on the Rights of Indigenous Peoples, seventh preambular para.

[60] Universal Declaration of Human Rights, preamble.

[61] Inter-American Commission on Human Rights, *Derecho a la libre determinación de los Pueblos Indígenas y Tribales*, paras. 310–311. This has been reported for the United States and the Russian Federation (presentations of David Wilkins (United States) and Vladimir Kryazhkov (Russian Federation) at the Expert Mechanism seminar).

[62] A/HRC/39/17/Add.2, para. 10; see also Francisco López Bárcenas and others, *Los Derechos Indígenas y la Reforma Constitucional en México*, 2nd edition (Mexico City, 2002), see https://www.franciscolopezbarcenas.org/_files/ugd/afcdf2_ea87b8b180ae45d08460d19e42ca992b.pdf; and Francisco López Bárcenas, "La diversidad negada: los derechos indígenas en la propuesta de reforma constitucional", in *Globalización, Identidad y Democracia: México y América Latina* (Mexico City, Siglo Veintiuno Editores, 2001), pp. 449–463, see https://www.franciscolopezbarcenas.org/_files/ugd/afcdf2_5f8919222959 43bb9ca650559023c099.pdf.

[63] Organization of American States, American Declaration on the Rights of Indigenous Peoples, article IX: "Juridical personality. States shall recognize fully the juridical personality of indigenous peoples, respecting indigenous forms of organization and promoting the full exercise of the rights recognized in this Declaration"; see also Inter-America Commission on Human Rights, *Indigenous and Tribal peoples' Rights Over Their Ancestral Lands and Natural Resources* (OEA/Ser.L/V/II, doc. 56/09), 2009, chap. X, paras. 372–375, see http://cidh.org/countryrep/indigenous-lands09/Chap.X.htm#.

entered into formal juridical relations, via treaties or otherwise, with non-indigenous powers wish to claim for themselves juridical status also as nations, it must be presumed until proven otherwise that they continue to enjoy such status.[64]

34. Even when their rights are recognized, indigenous peoples are often addressed paternalistically,[65] while their claims for self-determination and autonomy are viewed with suspicion.[66] A paradigm shift is essential to achieve genuine dialogue and cooperation between States and indigenous peoples, one based on recognition and partnership, which would require that States be more willing to share power. The Committee on the Elimination of Racial Discrimination recommended that New Zealand recognize the obligation to establish shared governance in compliance with the power-sharing arrangement established by Treaty of Waitangi.[67] States should see power sharing as an opportunity for inclusiveness and meaningful participation of indigenous peoples in the heart of the government rather than a threat to its integrity. As stated by the Special Rapporteur on the rights of indigenous peoples in 2019, "Treaties provide the foundation for the self-determination of indigenous peoples. Treaty enforcement should go together with the recognition of indigenous peoples as political entities with inherent powers of self-government".[68]

B. Recognition of treaties, agreements and other constructive arrangements

35. The constitutional recognition and protection of treaties, agreements and other constructive arrangements is an important legal matter. For example, in section 35 of the Constitution Act, 1982,[69] Canada recognizes and affirms existing treaty and aboriginal rights, while in section 25 it provides further protections from abrogation or derogation that may result from other rights and freedoms guaranteed in the Charter of Rights and Freedoms.[70] The interpretation of section 35 continues in courts of law,[71] and it is not clear whether other agreements, even if comprehensive, will receive the same constitutional protection and recognition as future treaties and land claims agreements that are specifically recognized in paragraph 3 of section 35.[72]

36. In Chile, a draft constitutional reform is under debate, and the expectation is that it will achieve constitutional recognition of the connection between the self-determination of indigenous peoples and their right to have their treaties respected by the State and their right to negotiate new ones.[73]

C. Imbalance of power

37. As stated by the Special Rapporteur on the rights of indigenous peoples, efforts by States to reduce power imbalances bring greater legitimacy to negotiations with indigenous peoples.[74] For example, States must ensure that indigenous peoples have the financial,

[64] E/CN.4/Sub.2/1999/20, para. 288.
[65] Inter-American Commission on Human Rights, *Derecho a la libre determinación de los Pueblos Indígenas y Tribales*, para. 97.
[66] John B. Henriksen, "The United Nations Declaration on the Rights of Indigenous Peoples: some key issues and events in the process", in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, Claire Charters and Rodolfo Stavenhagen, eds. (Copenhagen, International Work Group for Indigenous Affairs, 2009), p. 365.
[67] CERD/C/NZL/CO/21-22, paras. 12 and 13 (c).
[68] A/74/149, para. 42.
[69] See https://laws-lois.justice.gc.ca/eng/Const/page-13.html#docCont.
[70] See https://laws-lois.justice.gc.ca/eng/Const/page-12.html#h-50; see also submission by Canada.
[71] Supreme Court of Canada, *R. v. Sparrow* [1990] 1 SCR 1075; and *Calder et al. v. Attorney-General of British Columbia* [1973] SCR 313.
[72] Submission of the British Columbia Treaty Commission.
[73] Presentation of Francisco Cali Tzay' at the Expert Seminar.
[74] A/66/288, para. 88.

technical and other assistance they need to participate in meaningful consultations without using such assistance to leverage or influence indigenous positions.[75]

38. In the State of Victoria, Australia, the Advancing the Treaty Process with Aboriginal Victorians Act 2018 established a self-determination fund to support "traditional owners and Aboriginal Victorians to have equal standing with the State in treaty negotiations" (art. 36). The State government has adapted its ordinary procedures to ensure that the act will be implemented through an Aboriginal-led process developed in partnership with an Aboriginal Treaty Working Group.

39. To ensure a balance of power in negotiation processes, dialogue should begin by defining the process itself, its objectives and steps, the resources needed and the time, place and modality of the dialogue. The lack of these elements undermines the opportunity for indigenous peoples to express their positions and obliges them to insert their claims and requests within the limitations of a predetermined structure that was not consensually established.

40. In Australia, for example, the Native Title Act 1993 established statutory processes through which native title claims can be determined,[76] while the commencement of treaty discussions started later. It is reported that the pre-existence of the system of native title may undermine the bargaining power of indigenous peoples in treaty discussions, especially if the political institutions of self-government have not yet been established.[77]

41. As set out in article 18 of the Declaration, "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions". Indigenous peoples should not therefore be obliged to adopt other institutions or convert themselves into corporations in order to engage in meaningful dialogue and agreements with States.[78]

42. Indigenous peoples need to establish the institutions that will lead them, according to their structures, traditions and cultures,[79] without being forced to participate in a way that does not correspond to their own decision-making processes. Otherwise, failure to engage with legitimate representatives of indigenous peoples can undermine any consent received.[80] Meaningful participation also means that all parties involved must be included in negotiations: failure to engage all rights holders may undermine the outcome.[81]

43. Indigenous peoples have sometimes been excluded from the negotiation table, as in the reconciliation agreement between Germany and Namibia on allegations of genocide perpetrated against Herero, Nama, San and Damara peoples.[82] The Working Group of Experts on Peoples of African Descent observed that Germany had not consulted seriously with the lawful representatives of the minority and indigenous victims of that genocide to discuss reparations[83] and recommended that Germany ensure that those peoples were included in the ongoing negotiations between the two Governments.[84]

44. In some instances, national human rights institutions and institutions created to address indigenous peoples' issues[85] play a fundamental role in efforts to rebalance power

[75] A/HRC/12/34, para. 51, and A/HRC/39/62, para. 22 (c).
[76] Submission from Australia.
[77] Presentation by Janine Gertz at the Expert Mechanism seminar .
[78] A/HRC/39/62, paras. 20 (c) and 23.
[79] Ibid., para. 20 (c).
[80] Ibid., para. 23.
[81] Presentation by Atina Pamei Gaare at the Expert Mechanism seminar.
[82] Submission of the International Work Group for Indigenous Affairs.
[83] A/HRC/36/60/Add.2, para. 53, and A/HRC/WG.6/30/DEU/2, para. 29; see also Lisa Ossenbrink, "Namibia's Ovaherero, Nama slam exclusion from Germany deal", *Al Jazeera*, 1 June 2021, see https://www.aljazeera.com/news/2021/6/1/ovaherero-nama-descendants-criticise-germanys-reconciliation.
[84] A/HRC/36/60/Add.2, para. 61.
[85] Such as the National Commission on Indigenous Peoples in the Philippines and the National Institute of Indigenous Peoples in Mexico.

asymmetries and should be provided with resources to undertake this task. In conflict situations, the presence of third-party mediators may be desirable for preventing the imposition of solutions by one party on the other, compensating for asymmetry, so as to promote constructive dialogue and achieve meaningful outcomes.[86]

V. Implementation of treaties, agreements and other constructive arrangements

45. When treaties, agreements or other constructive arrangements are established, indigenous peoples and States face multiple challenges and obstacles in implementing and enforcing them effectively and fully, including interpretation of the terms of the agreement and lack of technical and financial means, political will and harmonization with other regulations.

A. Interpretation

46. A crucial element for the implementation of agreements is a common good-faith understanding of what both parties aim to achieve and how they wish to formalize an accord.[87] Disagreement may arise between parties on the nature and scope of the agreement, on the meaning and interpretation of the words and concepts it contains, including how concepts are expressed in different languages and how they evolve according to changing circumstances and on the duration of the agreement.[88] Many indigenous peoples report these kinds of concerns, particularly about alleged cessions or transfers of sovereignty, land and rights.

47. For example, the Maori and English versions of the Treaty of Waitangi differed greatly. In the Maori-language version, the Maori retain their sovereignty, self-determination and rights to their *taonga* (treasured property), while in the English-language version, Maori are said to have ceded sovereignty to the British Crown.[89]

48. The American Declaration on the Rights of Indigenous Peoples clearly affirms that States should honour and respect treaties, agreements and other constructive arrangements "in accordance with their true spirit and intent in good faith" and that due consideration should be given to how indigenous peoples understand them. Nevertheless, in Canada and the United States, restrictive contractual and literal interpretations are often preferred by the State over the original intent of agreement as understood by indigenous peoples. The States tend to secure, through their judicial systems, an interpretation of historical treaties as cession by indigenous nations of their territorial and sovereign rights to the Crown[90] as opposed to the intention of indigenous nations to establish a relationship of coexistence in terms of friendship and kinship, built on peace and mutual support.[91] Inherent rights should by no

[86] Contributions of Civil Society Organizations and Networks of Indigenous Peoples of Bangladesh; see also Miek Boltjes, "The implementation challenge in intrastate peace processes: an analysis", in *Implementing Negotiated Agreements: The Real Challenge to Intrastate Peace*, Miek Boltjes, ed. (The Hague, T.M.C. Asser Press, 2007), p. 21.

[87] E/CN.4/Sub.2/1999/20, para. 58.

[88] See the compilation of conclusions and recommendations from the United Nations seminars on treaties, agreements and other constructive arrangements; see also submission of the International Indian Treaty Council.

[89] E/CN.4/Sub.2/1999/20, para. 280; see also Expert Mechanism advice under the country engagement mandate, New Zealand, para. 25, available at https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/RequestsUnderNewMandate.aspx.

[90] See https://www.rcaanc-cirnac.gc.ca/eng/1307460755710/1536862806124.

[91] Presentation of Chief Wilton Littlechild at the Expert Mechanism seminar; see also submissions of the Canadian Museum for Human Rights, the Treaty Relations Commission of Manitoba, the Friends of the Attawapiskat River and the Western Shoshone Defense Project; John Leonard Taylor, "Two views on the meaning of treaties six and seven", in *The Spirit of the Alberta Indian Treaties*, 3rd ed., Richard Price, ed. (Edmonton, University of Alberta Press, 1999), p. 39; and J. R. Miller, *Lethal Legacy: Current Native Controversies in Canada* (Toronto, McClelland & Stewart, 2004), p. 165.

means be dismissed.[92] The federal Government and provincial governments of Canada have been widely criticized for taking a reductionist approach to treaty interpretation.[93]

49. In interpreting treaties, it is important to "emphasize and assert indigenous peoples' own understanding of the treaties negotiated by treaty nations, as documented and evidenced by indigenous people's oral histories, traditions and the concepts expressed in their own languages"[94] in the light of international human rights law.[95] Treaties should be seen as living agreements, and their spirit and intent should be borne in mind, with due consideration given to indigenous worldviews.[96] In some cases, it is critical to respect treaties as spiritual covenants, as understood by indigenous peoples.[97]

50. When considering future agreements, issues of interpretation and meaning should be addressed preventatively. In the State of Victoria, the legislation on treaty processes acknowledges that the guiding principles may have different meanings and emphasis for different traditional owners and Aboriginal Victorians and that those variations must be considered in the application of the guiding principles.[98]

51. It has been reported that in some cases unilateral interpretation of treaties has brought about their unilateral termination.[99] In the case of the Western Shoshone Nation, the Inter-American Commission of Human Rights found that the State had violated indigenous peoples' property rights to ancestral lands,[100] and the Committee on the Elimination of Racial Discrimination issued an early warning and urgent action procedure on the case.[101] United Nations human rights treaty bodies and special procedures have urged the United States to recognize that Native American treaty rights cannot be unilaterally extinguished.[102] As affirmed in the final report of the Special Rapporteur, treaties without an expiration date are to be considered as continuing in effect until all parties decide to terminate them.[103] Recently 17 federal agencies of the Government of the United States entered into a memorandum of understanding to protect tribal treaty rights in their policymaking and regulatory processes.[104]

B. Enforcement

52. Implementation of agreements may entail structural, legislative and administrative changes, such as the creation of specific institutions or the strengthening of pre-existing ones. It also requires the allocation of a sufficient budget to implement necessary changes and finance the institutions in charge of implementing and/or monitoring the implementation of agreements. These institutions should be provided with the means to perform their tasks, a solid mandate, appropriate powers, independence and technical capacities. Failure to comply

92 E/CN.4/2006/78/Add.3, para.16.

93 Indigenous Bar Association in Canada, "Strengthening partnership between States and indigenous peoples: treaties, agreements and other constructive arrangements", Geneva, 16–17 July 2012, p. 4 (available at https://www.ohchr.org/Documents/Issues/IPeoples/Seminars/Treaties/BP16.pdf).

94 A/HRC/EMRIP/2010/5, para. 22.

95 A/74/149, para. 43; see also E/CN.4/2005/88/Add.3 and E/CN.4/2005/88/Add.3/Corr.1; A/HRC/27/52/Add.2; and A/HRC/18/35/Add.4.

96 The land is seen as a "being" or having a spirit, and therefore is in a relationship with indigenous peoples. As such, the land cannot be owned. Submission from the Friends of the Attawapiskat River; see also Leroy Little Bear, "Jagged worldviews colliding", in *Reclaiming Indigenous Voice and Vision*, Marie Battiste, ed. (Vancouver, University of British Columbia Press, 2000).

97 Submission of the Treaty Relations Commission of Manitoba.

98 Advancing the Treaty Process with Aboriginal Victorians Act 2018, art. 20 (2).

99 Submissions of the International Indian Treaty Council and the Western Shoshone Defense Project.

100 Inter-American Commission on Human Rights, *Mary and Carrie Dann v. United States* (Case 11.140, Report No. 75/02, 27 December 2002) (available at https://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm).

101 See CERD/C/USA/DEC/1.

102 CCPR/C/79/Add.50, para. 37; see also CCPR/C/USA/CO/3/Rev.1, para. 37; and A/HRC/21/47/Add.1, paras. 15 and 102.

103 E/CN.4/Sub.2/1999/20, paras. 272 and 279.

104 Submission to the fifteenth session of the Expert Mechanism by the United States, see https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf.

with these conditions may undermine the outcome of the process and weaken the credibility of the institutions involved.

53. The adoption of the Indigenous Peoples Rights Act in the Philippines as the framework for relations with indigenous peoples led to the creation of the National Commission on Indigenous Peoples. It is reported, however, that the Commission suffers from a lack of appropriate funding, technical capacity and effective power.[105] Similarly, it has been reported that the Implementation Committee for the Chittagong Hills Tracts Peace Accord in Bangladesh would face challenges in implementing its mandate, including the absence of a monitoring mechanism to oversee the Committee's decisions.[106]

54. In Colombia, indigenous peoples have reported delays in the implementation of the ethnic chapter of the peace agreement, owing, inter alia, to lack of funding and an implementation plan. In particular, there have been delays in agrarian reform and ensuring effective participation, which has affected the security situation in indigenous territories and communities, especially that of indigenous women and girls.[107]

C. Political will and good faith

55. The implementation of consensual agreements relies on political will and good faith, without jeopardizing peacemaking efforts.[108] Full and effective implementation creates peaceful and respectful coexistence.

56. In the study on the assessment of the implementation status of the Chittagong Hill Tracts Peace Accord submitted to the Permanent Forum of Indigenous Issues[109] highlighted the impact of political will in the implementation of the agreements, finding that resistance to its implementation was centred on opposition to the realization of indigenous peoples' rights to self-determination, autonomy, land and natural resources.[110] These conclusions also emerged from the observations of successive Special Rapporteurs on the rights of indigenous peoples,[111] as well as from universal periodic review processes.[112]

57. During the finalization of the present study, the Expert Mechanism received allegations of attempts to repeal the Regulation Act of 1900, which would undermine the legal grounds for the implementation of the Chittagong Hill Tracts Peace Accord and the rights of the Jumma peoples in that region of Bangladesh.[113] The risks entailed by the lack of constitutional recognition of the Accord have been raised on several occasions.[114]

58. The Expert Mechanism is also aware of situations in which the constitutional recognition of treaties has not ensured their proper application. In Canada, despite the treaty between the Mi'kmaq and the Crown on the right to fish, hunt and gather and the reaffirmation of this right in the 1999 Marshall decision of the Supreme Court,[115] the

[105] Presentation of Minnie Degawan at the Expert Mechanism seminar.

[106] Submissions of civil society organizations and networks of indigenous peoples of Bangladesh, the Parbatya Chattagram Jana Samhati Samiti and the International Work Group for Indigenous Affairs; see also Devasish Roy, "Lessons from the implementation of the Chittagong Hill Tracts Accord", 2021 (available at https://www.iwgia.org/en/news/4541-lessons-from-the-implementation-of-the-chittagong-hill-tracts-accord.html).

[107] Submission to the fifteenth session of the Expert Mechanism by Indigenous Peoples Rights International.

[108] E/CN.4/Sub.2/1999/20, paras. 277, 295 and 296.

[109] See E/C.19/2011/6.

[110] Ibid., paras. 45–46.

[111] A/74/149, para. 47; and A/HRC/9/9/Add.1, paras. 50–56.

[112] See A/HRC/39/12, A/HRC/24/12 and A/HRC/11/18.

[113] See https://hillvoice.net/cht-regulation-1900-must-be-enforced-statements-of-27-eminent-citizens/.

[114] A/HRC/48/75, para. 37; A/HRC/9/9/Add.1, para. 50; E/C.19/2011/6; E/C.19/2014/4; and CCPR/C/BGD/CO/1, para. 12.

[115] Supreme Court of Canada, *R. v. Marshall* [1999] 3 SCR 456.

Mi'kmaq are still struggling to realize their treaty rights and suffer from intimidation and harassment by non-indigenous people when attempting to exercise them.[116]

D. Cultural unpreparedness

59. Implementation is also linked to the need for a cultural framework that favours a thoroughgoing understanding of the rights of indigenous peoples and the importance of the commitment made by entering into an agreement. This means creating a shared and stable environment in which indigenous rights and viewpoints are widely understood so that they can be fully and consistently implemented.[117] Human rights education is a fundamental tool for reaching this goal, and State officials, in particular, must be trained to comprehend and apply these rights in performance of their duties. Initiatives such the "treaty education kit" for school curricula, developed by the Treaty Relations Commission of Manitoba, can contribute to a common understanding and a culture that respects treaties.[118]

VI. Conflict resolution mechanisms

60. The creation and strengthening of specific mechanisms contribute to the achievement of respected and enforced treaties, agreements and other constructive arrangements between indigenous peoples and States. Breaches of agreements create conflicts and may lead to human rights violations and the breakdown of hard-won partnerships. They must be appropriately addressed through competent mechanisms to handle and resolve conflict and redress and remedy grievances. A commitment by States to redress the historical and ongoing dispossession perpetrated against indigenous peoples is an essential element of a new relationship with them. These mechanisms should look at past, present and persistent violations with a human rights-based approach and a thorough comprehension of historical processes.

61. The Declaration provides a framework on how to implement processes that can redress violations of treaties, agreements and other constructive arrangements, as outlined in studies and reports of the Expert Mechanism[119] and the three United Nations expert seminars.[120] Article 40 of the Declaration sets out the right of indigenous peoples to prompt decisions through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for infringements of their individual and collective rights. Such decisions should give due consideration to international human rights and the customs, traditions, rules and legal systems of the indigenous peoples concerned.

62. Similarly, referring to the recognition and adjudication of the rights of indigenous peoples to their lands, territories and resources, article 27 Declaration points out the obligation of States to establish and implement, in conjunction with and with the participation of indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems.

63. Article 28 of the Declaration affirms the right of indigenous peoples to seek redress for violations of their right to land, territories and resources in case of confiscation, dispossession, occupation, use or damage without their free, prior and informed consent. Means for redressing such violations can include restitution or, if that is not possible, just, fair and equitable compensation. Unless otherwise freely agreed upon by the peoples

[116] Sarah Ritchie, "Federal enforcement in N.S. fisheries dispute 'political': Mi'kmaw lawyer", *Global News*, 20 September 2021 (available at https://globalnews.ca/news/8204388/liberals-fishery-dispute-mikmaw-lawyer/).

[117] A/74/149, para. 81 (g).

[118] Submission of the Treaty Relations Commission of Manitoba.

[119] See A/HRC/39/62; A/HRC/45/38; and A/HRC/48/51.

[120] See the compilation of conclusions and recommendations from the United Nations seminars on treaties, agreements and other constructive arrangements.

concerned, compensation should take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

64. Articles 27, 28 and 40 underline two important points: (a) the right of indigenous peoples to have violations of their rights addressed and redressed through adequate processes; and (b) their right to participate in these processes, in compliance with the principle of free, prior and informed consent.

65. Entities in charge of addressing negotiations and solving disputes and conflicts should enjoy independence guaranteed by constitutional or other legislation and should have adequate funding and means to perform their work properly and efficiently. They must be empowered with explicit and broad mandates and their decisions should be binding and enforced. Such bodies should be set up in collaboration with indigenous peoples, with meaningful inclusion of indigenous approaches to dispute-resolution and indigenous laws. Their composition should guarantee pluralism and equal representation of indigenous peoples. Any power asymmetry between indigenous peoples and States within these bodies and in the enforcement of their decisions would undermine any sense of a "joint problem-solving" approach. Such bodies should operate with deep and comprehensive knowledge and understanding of international human rights law and the rights of indigenous peoples.

A. Non-adversarial mechanisms

66. Conflict resolution mechanisms for addressing treaty-related issues between indigenous peoples and States should have a non-adversarial character. The Waitangi Tribunal is a permanent commission of inquiry set up to determine whether the actions, inactions or omissions of the Crown have breached the principles of the Treaty of Waitangi.[121] The rights enshrined in the Declaration have become increasingly relevant in interpreting these principles.[122] However, as observed by the Expert Mechanism, the interpretation of the Treaty by the Tribunal and the Courts is not made on its entirety and is not strictly in accordance with the te reo Maori text.[123]

67. The Waitangi Tribunal hearings, which are less formal and conducted in a manner that partially aligns with *tikanga* Maori dispute resolution approaches, produce recommendations, which are generally non-binding and frequently ignored by the Crown.[124], The Tribunal is reportedly under-resourced and faces a significant number of complaints, and thus slow in enquiring, reporting and making recommendations on cases.[125] Many of these challenges have previously been considered by United Nations human rights treaty bodies[126] and by the Expert Mechanism, which advised the State to consider enhancing the role of the Tribunal to include: binding rather than recommendatory decisions; the power to assess policies against the Treaty; and the provision of additional human and financial resources.[127]

68. In the State of Victoria, Australia, the legislation for defining treaty-making processes establishes a treaty authority, whose functions include providing for the resolution of disputes in treaty negotiations and establishing a dispute resolution process.[128] The content of the treaty negotiation framework, which the Aboriginal Representative Body and the State would work on together, includes a mechanism for treaty enforcement.[129]

69. The British Columbia Treaty Commission, in Canada, an independent body, underpinned by legislation that ensures its longevity and continuity, was established in collaboration with indigenous peoples. Although it does not have an explicit mandate to

[121] See https://waitangitribunal.govt.nz/treaty-of-waitangi/.
[122] Waitangi Tribunal, *Whaia te Mana Motuhake: report on the Māori Community Development Act Claim* (Lower Hutt, New Zealand, Legislation Direct, 2015).
[123] Expert Mechanism advice, New Zealand, para. 25.
[124] A/HRC/18/35/Add.4, para. 27.
[125] Expert Mechanism advice, New Zealand, para. 25.
[126] See E/C.12/NZL/CO/4 and CERD/C/NZL/CO/21-22.
[127] Expert Mechanism advice, New Zealand, para. 27.
[128] Advancing the Treaty Process with Aboriginal Victorians Act 2018, part 7.
[129] Ibid., part 5, sect. 31 (1) (e) and (f).

oversee treaty implementation and engage in conflict-resolution, it has, at the request of parties, increased its involvement in facilitating constructive dialogue between the State and indigenous nations using problem-solving approaches.[130] Additionally, the Declaration on the Rights of Indigenous Peoples Act Action Plan in British Columbia,[131] which was developed collaboratively with indigenous peoples, provides another example of a concrete approach to addressing current and future problems in a concerted manner.

70. Similarly, the Treaty Relations Commission of Manitoba[132] offers dispute-resolution in a non-adversarial and non-confrontational way, relying mainly on the approach of First Nations peoples to dispute-resolution, as well as their expertise in treaty issues. Despite its mandate to facilitate and maintain positive intergovernmental relations and cooperation between the State and indigenous peoples, it has been reported that the Commission is not fully operational and is not always fully utilized by the treaty partners.[133]

71. In Canada, at the national level, there are no comprehensive mechanisms with the competence and mandate to oversee the implementation of, and conflict-resolution on, treaties, agreements and other constructive arrangements. Instead there is a political orientation based on reconciliation,[134] coupled with a litigation directive that governs the federal response when court cases are initiated by indigenous peoples.[135] An indigenous-led Transitional Committee has been formed to establish a National Council for Reconciliation, which aims to ensure the accountability of the Government of Canada for reconciling the relationship with indigenous peoples.[136]

72. The Act on Greenland Self-Government establishes a hybrid mechanism for dispute-resolution, which consists of an ad hoc board composed of "two members nominated by the Danish Government, two members nominated by Naalakkersuisut, and three judges of the Supreme Court nominated by its President", the latter making a decision only if the members of the two Governments do not reach an agreement (art. 19).

B. Role of the courts

73. Due to the lack of competent bodies to resolve treaty disputes, State legal systems are often utilized to address disputes, creating new challenges. The adversarial nature of Court proceedings entails long and costly procedures, often not affordable for indigenous peoples, while damages continue to accumulate as litigation is ongoing. The scarcity of lawyers and judges with expertise in treaties and in indigenous peoples' rights, culture, history and laws represent a huge obstacle in ensuring indigenous peoples' access to justice.[137]

74. In many cases, courts are called upon to interpret the meaning and scope of treaties, including implementation and infringements. In Aotearoa/New Zealand, the incorporation of the Treaty of Waitangi in legislation has sometimes brought about significant results, and the courts have progressively interpreted its principles.[138] In a recent ruling involving environmental protection before mining, the Supreme Court found that the Treaty had not been adequately considered when environmental permits were granted and that a broad and generous approach to its principles was required.[139]

[130] Submission of the British Columbia Treaty Commission.
[131] See https://engage.gov.bc.ca/app/uploads/sites/121/2022/03/declaration_act_action_plan.pdf.
[132] See www.trcm.ca.
[133] Submission of the Treaty Relations Commission of Manitoba.
[134] See https://www.rcaanc-cirnac.gc.ca/eng/1400782178444/1529183710887.
[135] See https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html.
[136] Submission of the British Columbia Treaty Commission; see also https://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2022/01/indigenous-led-transitional-committee-formed-to-establish-a-national-council-for-reconciliation.html.
[137] Submission of the Treaty Relations Commission of Manitoba.
[138] Presentation of Claire Charters at the Expert Mechanism seminar.
[139] Courts of New Zealand, *Trans-Tasman Resources Limited v. The Taranaki-Whanganui Conservation Board* [2021] NZSC 127; Robin Martin and Craig Ashworth, "Taranaki ironsands mining appeal fails at Supreme Court", *Radio New Zealand*, 30 September 2021; and Tara Shaskey, "Both sides claim

75. Changes made to the Indian Act in 1951 gave indigenous peoples in Canada access to courts, resulting in a series of Supreme Court rulings on cases dealing with Aboriginal rights and title as well as treaty rights, including the Calder,[140] Delgamuukw[141] and Tsilhqot'in nation[142] cases. Through a series of rulings, the Supreme Court has developed a set of rules for treaty interpretation, including the equal standing of oral and written evidence and the inclusion of indigenous peoples' perspectives on rights and title, although they have not always resulted in interpretations of treaties that reflect indigenous peoples' understanding of their spirt and intent.[143]

76. Courts are also responsible for determining when treaties have been infringed and whether such infringement is justified in accordance with the tests established by the Supreme Court of Canada in the Sparrow and Badger cases.[144] However, it is worth emphasizing that the notion of "infringement", as consistently relied upon by the Supreme Court, is inconsistent with article 40 of the Declaration, which affirms the right of indigenous peoples to effective remedies for all infringements.

C. International mechanism

77. As pointed out in the final report of the Special Rapporteur, and continuing to be highly relevant, States express reticence to take contentious issues related to treaties, agreements and constructive arrangements involving indigenous peoples into the international realm. However, consideration should be given to open discussion and decision-making in international forums, once domestic jurisdiction is exhausted. This is especially relevant for treaties and constructive arrangements with international status.[145]

78. The Special Rapporteur called for more discussion of the establishment of an international body, highlighting that "the non-existence, malfunctioning, anti-indigenous discriminatory approach or ineffectiveness of those national institutions will provide more valid arguments for international options. This may be one of the strongest possible arguments for the establishment (or strengthening) of proper, effective internal channels for the implementation/observance of indigenous rights and conflict resolution of indigenous-related issues.[146] Although the establishment of international mechanisms has been suggested at the United Nations expert seminars following the final report of the Special Rapporteur, along with the invitation to regional bodies to engage and make recommendations on treaty-disputes,[147] little progress has been made.

79. Article XXIV of the American Declaration on the Rights of Indigenous Peoples affirms that when disputes in relation to treaties, agreements and other constructive arrangements cannot be resolved between the parties they should be submitted to competent bodies, including regional and international bodies, by the States or indigenous peoples concerned.

victory in Supreme Court ruling quashing South Taranaki seabed mining consents", *Stuff*, 30 September 2012, see https://www.stuff.co.nz/business/126525818/both-sides-claim-victory-in-supreme-court-ruling-quashing-south-taranaki-seabed-mining-consents.

140 Supreme Court of Canada, *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313).

141 Supreme Court of Canada, *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

142 Supreme Court of Canada *Tsilhqot'in Nation v. British Columbia* [2014] SCC 44.

143 Submission of the Treaty Relations Commission of Manitoba; see also on interpretation of treaties, Supreme Court of Canada, *R. v. Marshall* [1999]; *R. v. Van der Peet* [1996]; *The First Nation of Nacho Nyak Dun v. Yukon (Government of)* [2017] SCC 58.

144 Supreme Court of Canada, *R. v. Sparrow* [1990]; and Peter W. Hogg and Roy W. Millen, "Re: treaties and the sharing of sovereignty in Canada", legal opinion requested by the British Columbia Treaty Commission, 18 April 2017; see also https://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2022/01/indigenous-led-transitional-committee-formed-to-establish-a-national-council-for-reconciliation.html.

145 E/CN.4/Sub.2/1999/20, paras. 312–314.

146 Ibid., para. 317.

147 See the compilation of conclusions and recommendations from the United Nations seminars on treaties, agreements and other constructive arrangements.

80. The internationalization of agreements may help foster implementation, as shown in the case of the 2016 Peace Agreement in Colombia, which was adopted as a special agreement according to common article 3 of the Geneva Conventions of 1949. The signing of the agreement under international law strengthened guarantees of its implementation and ensured continuity of the transitional justice process despite political changes.[148]

81. Opening up issues related to treaties, agreements and other constructive arrangements to international scrutiny, including United Nations human rights treaty bodies, may raise awareness of their relevance, build trust, help redress asymmetries and encourage consistent application of a human rights-based approach, contributing to respectful and healthy relationships between States and indigenous peoples.

82. Consideration of the creation of an international mechanism to focus on the implementation of treaties, agreements and other constructive arrangements in addition to the existing United Nations bodies should not be lost. In the outcome document of the Alta conference, indigenous peoples recommended that the General Assembly call for the establishment of an international mechanism to provide oversight, redress, restitution and the implementation of treaties, agreements and other constructive arrangements between indigenous peoples or nations and States, predecessor and successor States.[149] Since then, no other recommendations have been made for its establishment.

[148] Submission of the International Work Group for Indigenous Affairs, see also César Rojas Orozco, "Estatus jurídico internacional del acuerdo de paz colombiano", *Revista Estudios de Derecho*, vol. 75, No. 165 (2018), pp. 131–149, see https://revistas.udea.edu.co/index.php/red/article/view/334760/20790563.

[149] Global Indigenous Preparatory Conference for the United Nations High-level Plenary Meeting of the General Assembly to be known as the World Conference on Indigenous Peoples, June 2013, Alta Outcome Document , theme 2 (2), see https://www.un.org/esa/socdev/unpfii/documents/wc/AdoptedAlta_outcomedoc_EN.pdf.

Annex

Advice No. 15 on treaties, agreements and other constructive arrangements, including peace accords and reconciliation initiatives, and their constitutional recognition

1. States should fully recognize indigenous peoples as peoples entitled to self-determination as affirmed by the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), as grounded in articles 1 of the Charter of the United Nations, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and as reaffirmed in several international and regional human rights instruments and by treaty bodies and special procedures mandates. Preferably, this recognition should be affirmed in State constitutions to guarantee the highest level of domestic protection and provide continuity and immunity against instability, political change and/or regression of rights, including in domestic legislation and policies.

2. States should, in conjunction with indigenous peoples, incorporate an implementation framework of the Declaration into domestic law. States should consider the Declaration as the minimum standard for achieving indigenous peoples' enjoyment of their rights, which does not preclude more ambitious initiatives.

3. States should take steps to advance and achieve the realization of the right of indigenous peoples to have recognized, observed and enforced treaties, agreements and other constructive arrangements concluded with them or their successors, as set out in article 37 of the United Nations Declaration on the Rights of Indigenous Peoples and article XXIV of the American Declaration on the Rights of Indigenous Peoples. They should honour and respect them in good faith, according to their spirit and intent and avoid taking unilateral initiatives that could undermine the status of these agreements and the rights affirmed therein. Implementation of such agreements is fundamental for the enjoyment by indigenous peoples of their right to self-determination.

4. States should take the necessary measures to build real and genuine partnerships with indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith, through the establishment, on equal standing, of treaties, agreements and other constructive arrangements.

5. Where the dominant legal framework does not include indigenous legal systems, States should recognize the legal personality of indigenous peoples so that agreements reached with them can be formalized in a manner that ensures indigenous peoples' juridical personality and equal footing in the negotiation, conclusion, implementation and enforcement of such agreements.

6. In agreement-making processes, States should engage in meaningful dialogue, considering indigenous peoples as partners instead of beneficiaries, and define together, by mutual consent and equal participation, the negotiation framework and terms of the agreement, including monitoring, implementation and conflict-resolution mechanisms.

7. In directing efforts to establish agreements with indigenous peoples, States should consider the possibility of engaging in accordance with the traditional legal system, customs and practices of indigenous peoples, even if they lie outside the legal framework of the State. This should be done with respect for their practices of establishing relations and should in no way be used to delegitimize agreements concluded on those bases.

8. In all phases of agreement-making, establishing, monitoring, implementing and conflict-resolution, respect for the full body of human rights of indigenous peoples must be placed at the centre.

9. In negotiating agreements with indigenous peoples, States should be aware of imbalances of power and respect the time and conditions necessary for indigenous peoples to define and strengthen their own internal decision-making institutions, without interference or attempts to influence their composition or positions.

10. States should ensure that indigenous peoples have the resources and capacity to effectively engage in a negotiation process and should allocate sufficient resources to allow them to fully participate, prepare themselves and contract experts, if they so wish, without using such assistance as leverage to control their positions.

11. Negotiation and consent-based processes must comply with the principle of free, prior and informed consent, as articulated in the Declaration and progressively interpreted by regional and international human rights systems.

12. If required by indigenous peoples, States should accept the role of third-party mediators at the negotiation table. These parties should be independent and their involvement, composition and mandate should be defined and agreed to by indigenous peoples. States should ensure that mediating parties have the means to undertake their task and have sufficient expertise and knowledge of indigenous peoples' rights and context, as well as international human rights law.

13. When treaties, agreements and other constructive arrangements between States and indigenous peoples have been concluded in a colonial context, successor States should take over these obligations, as stated in article 37 of the Declaration. They should honour, implement and enforce them and avoid taking unilateral initiatives, such as extinguishment, aimed at undermining the enjoyment of the rights agreed upon in those instruments.

14. States should assume and implement treaties, agreements and other constructive arrangements in accordance with their spirit and intent, as understood by indigenous peoples concerned and with the flexibility required of a living agreement that has a long history and continues to apply in changing contexts. Agreements should always be interpretated in the manner most favourable to indigenous peoples and consistent with the rights enshrined in the Declaration.

15. States should establish monitoring and implementation mechanisms, in partnership with indigenous peoples, to guarantee the effective execution of agreements and should ensure the independence, economic sustainability and technical capacity of such mechanisms, as well as mandates with sufficient capacity. To achieve that goal, adequate funding must be ensured, without undermining the independence of the institutions involved, and with employment of well-trained and well-qualified officials working with a human rights-based and indigenous peoples' rights-based approach. Indigenous peoples who are parties to the agreement must be represented in these institutions in equal measure and at all levels.

16. States should ensure that there is institutional capacity and political will within the organs of the State to understand the meaning of treaties, agreement and other constructive arrangements with indigenous peoples and to enforce them in their respective areas. This should include seeking constructive solutions if conflicting protocols jeopardize the implementation of an agreement.

17. States should establish appropriate arbitrator mechanisms, in partnership with indigenous peoples, to address claims about violations of agreements, resolve disputes and redress and remedy grievances. These mechanisms should be independent and impartial and their decisions should be binding and enforceable. Indigenous approaches to dispute resolution and indigenous laws should be included in the methods of conflict resolution. Conflict resolution mechanisms must be guided by international human rights law, including the rights of indigenous peoples.

18. States should provide adequate and continuous capacity-building training in human rights law, the rights of indigenous peoples, treaty-making processes and indigenous cultures, traditions and perspectives to those mechanisms and institutions designed to establish, monitor and implement agreements as well as to those in charge of resolving related disputes.

19. States should promote, in all facets of society, understanding of: the historical processes related to indigenous peoples, colonization and their repercussions; the historical and persistent discrimination faced by indigenous peoples; and the meaning and importance of agreements and the rights of indigenous peoples. Initiatives aimed at achieving those objectives may include the integration or reinforcement of those subjects in school programmes and social campaigns.

20. Indigenous peoples should never be stigmatized, criminalized or attacked by State authorities or officials for exercising their rights as set forth in consensual agreements concluded with States or for protesting against violations of those rights. States should clearly recognize the legitimacy of those claims and reaffirm respect for the freedom of expression as a pillar of a healthy, plural and democratic civic space.

21. Access to justice should be ensured for indigenous peoples without restriction or discrimination. The duration of judicial procedures should be reasonable and justified. Before any possible treaty violation, especially if it entails possible damages, the precautionary principle should be applied so as not to allow the violation to worsen and the damage to become permanent.

22. Judicial resolutions on treaty disputes should be respected and enforced, including immediate cessation of the infringing action and effective reparation in line with article 28 of the Declaration.

23. Indigenous peoples are encouraged to consider treaties, agreements or other constructive arrangements as a means of building and strengthening relationships with States in a manner that is better suited to their objectives and according to their own decision-making organizations.

24. A mandate for a special rapporteur on the implementation of indigenous peoples' treaties, agreements and constructive arrangements should be created.

25. United Nations agencies and mechanisms should, in their regular work and duties, support the implementation of concluded treaties, agreements and constructive arrangements.

26. When treaties are considered to be of international concern, indigenous peoples should have access to international bodies for dispute resolution, including existing United Nations treaty bodies.

27. The recommendations issued by the Special Rapporteur Miguel Alfonso Martínez and those made at the three United Nations expert seminars should be followed up and implemented, including the recommendations for the establishment of an international mechanism to handle disputes related to treaties, agreements and constructive arrangements and for the establishment of an international section or body to register and publish all treaties concluded between indigenous peoples and States, giving due attention to securing access to indigenous oral versions of those instruments.