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

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

Draft study of the Expert Mechanism on the Rights of Indigenous Peoples

Summary

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

The draft study, which concludes with Expert Mechanism advice No. 13 on the right to land of indigenous peoples (see annex), will be considered at the thirteenth session of the Expert Mechanism, to be held in June 2020, and will be finalized for submission to the Human Rights Council at its forty-fifth session, to be held from 14 September to 2 October 2020.

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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 draft study has benefited from the presentations made at the seminar and 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 draft 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 a 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 study does not expound on the procedural aspects of land rights, a topic that has been dealt with in previous studies.[3]

3. The level of protection of land rights varies across the regions, with some States having established sophisticated, albeit often overly onerous and 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 discriminate and 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.[4] 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.[5]

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

4. 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

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

[2] A/HRC/39/17.

[3] A/HRC/15/35, A/HRC/18/42, A/HRC/21/55 and A/HRC/39/62 (arts. 10, 11, 19, 28, 29 and 32).

[4] See the following targets of Sustainable Development Goals 1 and 2: ensure equal rights to economic resources (target 1.4); ensure sustainable food production systems and implement resilient agricultural practices (target 2.4); and maintain the genetic diversity of seeds and promote the fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge (target 2.5).

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

transgenerational and thus carry an obligation of stewardship for the benefit of present and future members of the community and the basis of their continued existence as a people.[6] 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.[7]

2. Respect for customs, traditions and land tenure systems

5. Indigenous peoples have their own customs, traditions and land tenure systems, which should be respected (Declaration, art. 26). 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 the traditions of the indigenous peoples, but on a calculation of how much land would be required to maintain the communities' economic and cultural viability.[8] 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,[9] the Solomon Islands and Vanuatu, among others.

3. Collective rights

6. Indigenous land rights are collective rights, as expressed in the preamble and article 1 of the Declaration and as reflected in customary land tenure systems. The articles of the Declaration relating to land rights refer to "indigenous peoples" as opposed to "individuals" and reflect the collective right to self-determination.[10] Respect for indigenous peoples' customary land tenure systems and, in particular, the collective ownership of lands, territories and resources 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.[11] 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.[12] 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.[13]

4. Usufruct rights and ownership rights

7. Land tenure can mean that holders have usufruct rights (right to use and benefit from the land, for example for hunting, reindeer, cattle and goat herding and fishing), ownership rights or variations of both. During the *travaux préparatoires* of the Declaration, indigenous peoples' organizations demonstrated that they had different land tenure needs. It was especially important for nomadic people to secure access to pastures and rangelands for their herds and subsistence activities, including hunting and fishing. Indigenous peoples in Africa traditionally recognize such grazing lands and rangelands, including corridors of passage. For more sedentary peoples, it was important to secure recognition to the lands, territories and resources with which they had a historical connection.[14]

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[6] E/CN/.4/1995/WG.15/4.

[7] Submission by several organizations from Morocco.

[8] A/HRC/30/41/Add.1.

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

[10] A/HRC/39/62.

[11] 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.

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

[13] Submission by Greenland and Denmark.

[14] Claire Charters, "Indigenous peoples' rights to lands, territories, and resources in the UNDRIP: Articles 10, 25, 26 and 27", in *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Jessie Hoffman and Marc Weller, eds. (Oxford, Oxford University Press, 2018).

8. Across all regions, ownership of indigenous land remains mostly in the hands of the State. Some States, like 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]

9. Indigenous peoples often have usufruct rights and are considered beneficiaries[17] rather than owners of land. Many indigenous peoples, such as the Sami in Finland, Norway and Sweden, find this unsatisfactory.[18] 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,[19] the Sami Parliament has stated that there are still no legislative provisions "enshrining the right of the Sami to land, water and natural resources".[20] 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.[21]

10. Securing access to land remains a priority for nomadic tribes today, given their mobility.[22] 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, in other words the large majority of indigenous peoples in Africa, communal land ownership on a priority basis. In contrast, for other indigenous peoples, like the Badjos (nomads of the sea), forced localization on land could have an impact on their survival as a people.[23]

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 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.[24] The right to develop a particular way of life and traditional economic activities connected to the land (Declaration, art. 27), 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.[25] The Committee on Economic, Social and Cultural Rights has stated that the strong communal dimension of indigenous peoples' cultural life is

[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] See, e.g., the Sabah Land Ordinance of 1939 (Malaysia).

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

[19] Submission by Finland.

[20] Submission by the Sami Parliament.

[21] 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.

[22] A/HRC/EMRIP/2019/2/Rev.1.

[23] Submission by Zacot.

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

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

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.[26]

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.[27] 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.[28] Thus, States have an obligation to address such general conditions as "deprivation of indigenous peoples' land, territories and resources" and "degradation of the environment".[29]

13. States cannot ignore the negative effects of climate change on indigenous peoples' ways of life and must recognize indigenous peoples' close connection with the environment.[30] 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.[31] 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.[32]

III. Legal framework

14. Land rights predate the Declaration. In international and domestic frameworks, they existed in the regional human rights instruments (American Convention on Human Rights, art. 21, and African Charter on Human and Peoples' Rights, art. 14), 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.[33]

A. Article 25

15. Article 25 of the Declaration reads: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

16. The 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

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

[27] 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.

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

[29] Ibid.

[30] For example, pursuant to article 7 of the Paris Agreement, adaptation action should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems.

[31] Human Rights Committee, *Teitiota v. New Zealand*.

[32] A/HRC/25/53, para. 69.

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

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". During the process of drafting the Declaration, the words "and material" after "spiritual" were deleted to reflect some States' reluctance to accede to provisions that might give indigenous peoples the right to acquire, as a result of their spiritual connection, physical possession of lands, territories and resources currently possessed or owned by third parties.[34]

17. 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.

18. 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".[35] 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.

19. 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 principles of the ILO Indigenous and Tribal Peoples Convention.[36] 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 (the area between high and low water marks) in the Northern Territory could be claimed and recognized as Aboriginal land.[37]

B. Article 26

1. Article 26 (1)

20. Article 26 (1) of the Declaration reads: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."

21. 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

[34] Ibid., p. 411.

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

[36] 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".

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

voluntary or involuntary. It could include lands gained after relocation, settlement of a modern treaty or by purchase.

22. Article 26 (1) enshrines a general right according to which indigenous peoples do not need to demonstrate possession, as they do in article 26 (2) (see paras. 25–32 below), in order to have rights to lands, territories and resources and restitution or compensation for loss of them. This has been clearly stated by the inter-American and African courts on human rights. 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.[38]

Despite the fact that Kenya is not a signatory to the Declaration, the African Court on Human and Peoples' Rights and the African Commission specifically drew inspiration from the Declaration.

23. 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.[39] 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.[40] This is the practice in Alaska, United States, where Alaska Natives have been assigned 10.7 per cent of the land area, including subsurface rights.[41]

24. 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".[42]

2. Article 26 (2)

25. Article 26 (2) of the Declaration reads: "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."

26. Since 1997, the Committee on the Elimination of Racial Discrimination has used similar wording when referring to indigenous peoples' right to own, develop, control and use

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

[39] A/HRC/24/41, para. 9.

[40] Ibid.

[41] Katja Göcke, "Recognition and enforcement of indigenous peoples' land rights in Alaska, the northern regions of Canada, Greenland and Siberia and the Russian Far East", *Yearbook of Polar Law Online*, vol. 4, No. 1 (2012), pp. 279–304.

[42] 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.

their communal lands, territories and resources according to customary laws and traditional land tenure systems and to participate in the exploitation, management and conservation of the associated natural resources. [43] The regional human rights bodies have, in the *Sawhoyamaxa* and *Endorois* cases, interpreted regional instruments in light of the rights enshrined in the Declaration.[44] 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".[45] 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".

27. 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 had "special resonance and relevance in the context of this case, reflecting, as I think it does, the growing consensus and the general principles of international law on indigenous peoples and their lands and resources". He also 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.

28. Other national courts too have recognized traditional ownership as a legitimate form of land tenure. In 2014, the Supreme Court of Canada concluded that there was sufficient evidence of the Tsilhqot'in Nation's customary ownership and control of at least large parts of its traditional territory for the Nation's rights to be recognized and protected as a contemporary form of land title.[46] In 2011, in the *Nordmaling* case, the Supreme Court of Sweden considered the rights of Sami reindeer herders "on the basis of customary rights" rather than according to the traditional State law of "immemorial prescription".[47] 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.[48]

29. As to the length of time during which possession is required for a State to have an obligation to legally recognize indigenous peoples' rights under article 26 of the Declaration, the Inter-American Court of Human Rights considered, in the *Mayagna (Sumo) Awas Tingni* case, that traditional, ancestral patterns of use and occupation were enough to give rise to that obligation. Proof of continuous possession over an extended length of time dating back to the moment of sovereignty transfer was not necessary. The fact that the Awas Tingni people had not possessed the lands in question consistently and through a sedentary lifestyle did not prevent their claim to title. Similarly, for the Supreme Court of Canada it was not necessary, in the *Tsilhqot'in* case, to demonstrate continuous, intensive land occupation and use, such as for village sites. For this historically nomadic people, such requirements would have

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

[44] 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*.

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

[46] *Tsilhqot'in Nation v. British Columbia*.

[47] 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". See www.loc.gov/law/foreign-news/article/sweden-court-recognizes-exclusive-fishing-rights-of-sami-village.

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

weakened its title claims. In Australia, however, claims made under the Native Title Act must prove claimants' uninterrupted connection with the land since invasion/first contact. This is an onerous requirement given the country's history of dispossession and forced removal from the land and the lengthy periods of protection or compulsory racial segregation.

3. Article 26 (3)

30. Article 26 (3) of the Declaration reads: "States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."

31. 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 enshrined in this provision is considered 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".[49] 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 lands, territories, or resources, is practically meaningless if the property is not physically delimited and established".[50] 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.[51] Similarly, the African Commission on Human and Peoples' Rights has called for both "official recognition" of indigenous land rights and "registration of property title".[52]

32. 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 in many countries, they are frequently not recognized by the State legal system.[53] This despite the fact that customary practices play a key role in resolving disputes between indigenous individuals and communities, such as land disputes.[54] In Vanuatu, constitutional reforms have shifted jurisdiction over lands from the mainstream court system to the *nakamals* (customary institutions).[55] In Kenya, the National Land Commission encourages the application of traditional dispute resolution mechanisms in land conflicts.[56] In the United States, 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 lands in "restricted fee title", meaning that the Nation still needs the permission of the federal Government to transfer those lands. 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.[57]

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[49] A/HRC/33/42/Add.3.

[50] *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 143.

[51] In 2018, after that case, the Government created the Presidential Commission on Land Rights in 2018, which in turn established three main commissions: one for drafting laws on collective land rights, one for demarcating traditional territories and one for disseminating information on indigenous rights to the general population.

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

[53] A/HRC/42/37.

[54] Ibid.

[55] Siobhan McDonnell, "Building a pathway for successful land reform in Solomon Islands" (Canberra, Australian National University, 2015), pp. 34–35.

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

[57] https://porlatierra.org/docs/c5650a3f50d60f9e7ca9f0aab1e9dce3.pdf.

C. Article 27

33. Article 27 of the Declaration reads:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to 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. Indigenous peoples shall have the right to participate in this process.

34. States should establish and implement a process, in cooperation with indigenous people, 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 whether 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.[58]

35. 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.[59]

D. Article 46

36. The general limitation on States' ability to restrict indigenous rights under article 46 (2)–(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.[60] 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 fulfillment of a lawful purpose in a democratic society".[61] 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.[62]

E. Article 22

37. 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 fully implement land rights. Women's vital role on and in the protection of the land is often overlooked. As the Special Rapporteur on the rights of indigenous peoples has noted, land

[58] Claire Charters, "Indigenous peoples' rights to lands, territories, and resources in the UNDRIP", p. 143.

[59] Inter-American Court of 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.

[60] A/HRC/39/62.

[61] *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, para. 138.

[62] A/HRC/24/41, paras. 35–36.

appropriation is not gender neutral.[63] 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.[64] This often leads to difficulties in getting loans and having control over farm products. According to the Special Rapporteur:

> In indigenous communities where matriarchy and matrilineal practices exist, the loss of land will likewise undermine indigenous women's status and roles. The gendered effects of those violations become manifest in situations where indigenous women lose their traditional livelihoods, such as food gathering, agricultural production, herding, among others, while compensation and jobs following land seizure tend to benefit male members of indigenous communities.[65]

F. Redress[66]

Article 28

38. Article 28 (1) of the Declaration reads: "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent." Article 28 (2) reads: "Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."

39. 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.[67] 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.[68] 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.[69]

40. 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 law" and must fulfil the purpose of *restitutio in integrum*, which consists of "reestablishing the situation prior to the violation".[70] 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.[71]

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63 A/HRC/30/41.

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

65 A/HRC/30/41.

66 A/HRC/39/62.

67 Ibid. See also Principle 11 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law and Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 8.

68 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.

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

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

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

41. 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 harm[72] and must have the power to ensure compliance with the final determination.[73] The Inter-American Court of Human Rights has commented on the duration of land claims. It has found that both the *Sawhoyamaxa* 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.[74] 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.[75]

42. 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 *Sawhoyamaxa* 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.[76] Thus, the preferred type of redress to be provided 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.[77]

43. Where restitution is not possible, just, fair and equitable compensation should 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".[78] 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 ancestral land.[79] States should also adopt measures allowing for the restoration of territories degraded and polluted due to development projects.[80]

44. 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

[72] 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.

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

[74] 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.

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

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

[77] 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.

[78] Committee on the Elimination of Racial Discrimination, general recommendation No. 23.

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

[80] 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.

compensation.[81] The sum consisted of the market value of the land, a substantial amount for interest and cultural loss. The judges in the case acknowledged the difficulty of putting a financial value to the essentially spiritual nature of Aboriginal connection to land and the corresponding gravity of the harms suffered and sought to enumerate just compensation for non-economic loss in a way that respected traditional law and its importance.

45. Some States have provisions for compensation. For example, article 105 of the Constitution of Norway stipulates that "if the welfare of the State requires that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Treasury". This includes expropriation.[82] Other States, like Canada, offer only financial compensation for privatized lands. This is criticized, as it puts the burden on indigenous peoples to negotiate the repurchase of lands. Similar complications arose with respect to third-party rights in the implementation of judgments in the *Yakye Axa* and *Sawhoyamaxa* cases.[83]

IV. State recognition of land tenure rights

46. 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

47. In some States, like Canada, New Zealand and the United States, historic and contemporary treaties and other agreements have been negotiated between the Government and indigenous peoples, on the basis of which indigenous peoples can claim land rights. In Canada, 26 comprehensive settlements have been concluded affirming indigenous title to approximately 600,000 km² of land.[84] In British Columbia specifically, the Treaty Commission was established to facilitate treaty negotiations. Consequently, between 1992 and 2019 three treaties were concluded with seven indigenous nations through the British Columbia treaty negotiations framework. On 4 September 2019, 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, was established.[85]

48. However, indigenous peoples' and States' interpretation of these treaties and agreements often differ widely, as in the case of the Treaty of Waitangi, which exists in two language versions.[86] Processes are often slow, onerous and costly. Agreements are not always implemented and indigenous land may not be protected pending resolution of land claims. 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.[87]

B. Constitutions, acts and bodies

49. Some States, like Argentina, Bolivia (Plurinational State of), Brazil, Cambodia, Colombia, Ecuador, Mexico and Paraguay, specifically recognize the right to land and

[81] 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.

[82] Submission by Norway.

[83] See also Committee on Economic, Social and Cultural Rights, general comment No. 21.

[84] www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231.

[85] Submission by Celeste Haldane.

[86] 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.

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

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, it has reportedly not recognized and materially guaranteed indigenous peoples' right to land due to the lack of a specific public policy.[88] In Paraguay, a similar situation exists: although 283,000 hectares of land were granted to indigenous communities between 2010 and 2014, many communities have no legal title to their land.[89]

50. Other States recognize indigenous peoples and their right to land through legislation: for example, the Philippines does so through the 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. 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.[90] 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 in respect of 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.[91] In Mexico, agrarian courts have been set up to administer agrarian justice; however, the Special Rapporteur on the rights of indigenous peoples has expressed the view that the system does not meet the needs of indigenous peoples and recommended its comprehensive reform.[92] A process of constitutional and legal reform is reportedly under way in the State.[93]

51. 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.[94] Thus, the mere recovery of lands is not sufficient to enable indigenous peoples to overcome generations of marginalization and discrimination. In India, 3,863,025 of the 4,400,000 land claims brought under the Recognition of Forest Rights Act of 2006 have been processed.[95] 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. Moreover, traditional territories that have not been legally recognized as being owned by the Mapuche, for example through historically legally acknowledged title, are excluded.[96]

52. 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.[97] Native title can be exclusive or non-exclusive. It exists as a bundle of rights and interests that can include the right to access, use, occupy and enjoy "traditional country"; to participate in decisions about how others use traditional lands and waters; to make decisions about the

[88] Submission by Ecuador.

[89] A/HRC/WG.6/24/PRY/1.

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

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

[92] A/HRC/39/17/Add.2.

[93] Submission by Mexico.

[94] www.culturalsurvival.org/sites/default/files/media/southafrica.pdf.

[95] A/HRC/WG.6/27/IND/1, para. 104.

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

[97] Submission by Australia.

future use of lands and waters; and to hunt and gather food, perform ceremonies and collect bush medicines. Areas where settlers displaced local indigenous groups are generally underrecognized.[98] On 17 October 2019, the Native Title Legislation Amendment Bill 2019 was introduced into the Australian Parliament with a view to improving native title claims resolution, agreement-making, indigenous decision-making and dispute resolution processes.

53. 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.[99]

C. Demarcation and delimitation of land

54. 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,[100] and in Guyana initiatives like the Amerindian Land Titling Project have been launched following consultations on the Amerindian Act 2006, which guarantees Amerindian land rights.[101]

55. 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). While there are indigenous lands still pending demarcation, a 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. The Valley includes the lands of seven indigenous peoples, some of whom are in voluntary isolation. The process of demarcation has highlighted the difficulty of ensuring the correct profile of the government team charged with engaging with the indigenous peoples and the effective participation of indigenous peoples that share territories with indigenous peoples in voluntary isolation, as well as the challenges presented by the large size of their territory. After demarcation, there was a noticeable reduction in violence between indigenous and non-indigenous peoples. Brazil has developed significant policies and guidelines for the territorial and physical protection of indigenous peoples of recent contact and living in voluntary isolation. The need to ensure protection of the land rights of indigenous peoples in voluntary isolation on the Brazil-Peru border and of those residing in the Amazon and the Gran Chaco has also been recognized. However, the dismantling of government institutions and discontinuity in policies to demarcate and protect indigenous lands, in particular the lands of peoples in volunteer isolation, as well as increased deforestation, fires, illegal mining activities and intrusion, have led civil society organizations in Brazil to bring the situation, which is viewed as one of possible genocide, to the Human Rights Council and the International Criminal Court.[102]

56. 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.[103] 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

98 *The Indigenous World 2019*, pp. 236–238.

99 Submission by Australia.

100 A/HRC/WG.6/33/CRI/1, para. 37.

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

102 https://brasil.elpais.com/brasil/2020-02-27/organizacoes-alertam-onu-sobre-o-crescente-risco-para-os-indios-isolados-do-brasil.html and www.theguardian.com/world/2019/nov/27/jair-bolsonaro-international-criminal-court-indigenous-rights.

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

land certificate, equivalent to the village land certificate, on the basis of their unique lifestyle and minority status.[104]

57. 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 has been demarcated. In the Plurinational State of Bolivia, the Tacana's claim under the Tierra Comunitaria de Origen framework, under Law No. 1715, after two decades has not yet resulted in the consolidation of their territory.[105] In Argentina, 13 years after the adoption of Act No. 26160, only 57 per cent of the surveys planned have been initiated.[106] In Cambodia, although 684 title certificates have been provided to 24 indigenous peoples, the requirement to have the "agreement of their neighbours" is contributing to a stalled process.[107] 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, with voluminous requirements.[108]

58. 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 the collective titling of indigenous lands, the ongoing presence of cattle ranchers, loggers and drug traffickers has resulted in constant tension and conflict, putting indigenous communities at risk.[109]

D. Land claims tribunals

59. 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 Finnmark's inhabitants and particularly as a foundation for Sami culture, reindeer husbandry, the use of uncultivated land, business activities and society.[110] Trough the Finnmark Act, Norway recognized that the Sami people had acquired collective and individual rights in Finnmark through the long-term use of land and resources. However, the Act has been criticized for failing to recognize a distinctive Sami right to the management and ownership of their traditional lands, territories and resources, as land rights are based on length of use regardless of indigenous identity and the Act fails to recognize Sami customary laws.[111]

60. The Waitangi Tribunal in New Zealand has been recognized by the Special Rapporteur on the rights of indigenous peoples as being, despite evident shortcomings, one of the most important examples in the world of an effort to address historical and ongoing grievances of indigenous peoples, and settlements already achieved have provided significant benefits in several cases.[112] Although the Tribunal cannot issue binding rulings, its decisions are "accorded considerable weight and respect by the ordinary Courts".[113]

[104] Submission by Elifuraha Laltaika.
[105] Submission by Red Eclesial Panamazónica.
[106] Submission by the Ombudsman of Argentina.
[107] A/HRC/WG.6/32/KHM/1, para. 57. See also *The Indigenous World 2019*, p. 252.
[108] A/HRC/WG.6/27/PHL/1, paras. 83–86.
[109] A/HRC/33/42/Add.2 and A/HRC/39/17.
[110] Submission by Norway.
[111] A/HRC/WG.6/33/NOR/2 and A/HRC/33/42/Add.3.
[112] A/HRC/18/35/Add.4, para. 67.
[113] Janine Hayward and Nicola Wheen, eds., *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Wellington, Bridget Williams Books, 2015).

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

61. In situations where the adjudication processes referred to in article 27 of the Declaration do not exist, are ineffective or are nothing more than an alternative or supplementary process, 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.[114] 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.[115] 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".[116]

62. In Sweden, in September–October 2019, the Supreme Court granted a Sami association that organized reindeer herding the sole right to manage small-game hunting on land owned by the State.[117] In Norway, the Supreme Court has decided, pursuant to the Reindeer Husbandry Act of 2007, that in assessing whether property rights have been established due regard must be taken of Sami traditions.[118] In Finland, Sami defendants who challenged the Fishing Act (Act No. 379/2015) by fishing in their seas without a licence were acquitted by the District Court on 6 March 2019. The Court referred to articles 8, 14, 20, 26, 34, 40 and 43 of the Declaration. In January 2020, a Peruvian court 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.[119]

63. 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 a draft law on the rights of indigenous peoples has been before Parliament since 2014 and a new land law is under discussion, indigenous peoples are considered to be like other communities, which contributes to conflict over land and other resources.[120]

64. 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.[121] 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' rights, in particular under international law and the Declaration, and not all are specialized in land rights or in the collective rights of indigenous peoples. While there are few indigenous judges,[122] there are often onerous burdens of proof[123] 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 (see para. 28 above) has also resulted in attempts to restrict the ability of public lawyers to defend indigenous peoples' right to land

[114] Submission by the International Coalition for Papua.

[115] A/HRC/36/56.

[116] www.nzlii.org/nz/cases/NZCA/2003/117.html.

[117] Ulf Mörkenstam. "Organised hypocrisy? The implementation of the international indigenous rights regime in Sweden", *International Journal of Human Rights* (June 2019).

[118] 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.

[119] www.reuters.com/article/us-peru-indigenous/peruvian-indigenous-group-wins-suit-to-block-oil-exploration-in-amazonian-region-idUSKBN1ZL2V7?fbclid=IwAR3veaz7WaAiX-d1wILo5Z6RwgvNLW6Oy6idEJJEDFd7zTYEDzCDg0BDapU.

[120] 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.

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

[122] Submission by Institut de l'environnement et des ressources naturelles.

[123] 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.

(see opinion No. 001/2017 of the Federal Attorney General, later suspended by a Supreme Court decision in a case brought by the Xokleng indigenous community).[124]

65. Taking cases to court may also involve a risk to indigenous peoples and their defenders. Many suffer reprisals, intimidation, harrassment and arrest.[125] Unsuccessful litigation takes its toil on indigenous peoples across the regions, both emotionally and financially: often there is no legal aid and the costs are prohibitive. This was recognized by the Inter-American Commission on Human Rights in a case against Canada.[126] And even if a case is won in court, there may be a failure to implement the judgment.

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

[125] A/HRC/39/62 and A/HRC/39/17.

[126] 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]

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, and should include the abolition of all laws adopted during periods of colonization that have resulted in indigenous peoples being dispossessed of their lands.

5. States should ensure that indigenous peoples who have retained ownership of the resources on their lands and territories have the right to extract and develop them on the same basis as other landowners.

6. States should apply the rights in the Declaration to reform their national 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 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).

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

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

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 or other appropriate redress (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. 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.

15. States should ensure particular attention to protecting the land rights of indigenous peoples in voluntary isolation, who have different needs to other indigenous peoples.

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

17. 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.[4]

18. 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.

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

20. Indigenous peoples should build their own capacity within their communities 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 indigenous rights.

21. States and international financial institutions should continue to cooperate and assist one another in transferring knowledge and promoting investments that allow for the demarcation and protection of indigenous lands.[5]

[3] See also A/HRC/39/62.
[4] A/HRC/39/17.
[5] Submission by Germany.