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Study on Indigenous Peoples' Rights in the Context of
Borders, Migration and Displacement

Indigenous peoples' rights in the context of borders, migration and displacement

Study of the Expert Mechanism on the Rights of Indigenous Peoples

Summary

The Expert Mechanism on the Rights of Indigenous Peoples carried out the present study on indigenous peoples' rights in the context of borders, migration and displacement in accordance with its mandate under Human Rights Council resolution 33/25.

The study concludes with Expert Mechanism advice No. 12 on the causes and consequences of migration and displacement of indigenous peoples within the context of States' human rights obligations.



I. Introduction

1. In accordance with its mandate under Human Rights Council resolution 33/25, at its eleventh session, held in July 2018, the Expert Mechanism on the Rights of Indigenous Peoples decided to carry out the present study on indigenous peoples' rights in the context of borders, migration and displacement, as reflected in the United Nations Declaration on the Rights of Indigenous Peoples.

2. For that purpose, the Expert Mechanism held a seminar in Chiang Mai, Thailand, on 5 and 6 November 2018. The present study was informed by presentations shared at the seminar and submissions by Member States, indigenous peoples, national human rights institutions, academics and others.¹

3. The Expert Mechanism recognizes the need to examine the issues concerning the nexus between migration and indigenous peoples. The limited work done to date on this topic, including the lack of disaggregated data on indigenous migration, limits and at the same time motivates the present study. The study is intended to constitute a step forward in the understanding of the issues and needs of indigenous peoples, as they relate to the rights in the United Nations Declaration on the Rights of Indigenous Peoples. It will explore the causes, consequences and experiences of indigenous peoples on the move, from an indigenous perspective, and will provide advice to States on how to ensure the protection of their rights of in that context.

4. Migration can mean different things for a range of indigenous peoples,² including a form of indigenous culture itself, such as that of the Sami reindeer herders. In addition to individual rights and interests, indigenous migration affects the collective rights of indigenous communities and has consequences for entire communities, for those who leave and those left behind (see E/2006/43-E/C.19/2006/11). While the Global Compact for Safe, Orderly and Regular Migration attempts to address the issue of international migration, it merely includes indigenous peoples as a vulnerable group without recognizing the specificities and consequences of their migration experience. The global compact on refugees makes no reference to indigenous refugees. The Expert Mechanism hopes that the present study will be used to take account of the needs of indigenous peoples in the context of the implementation of those compacts, and in compliance with the Declaration.

5. Colonization, both historical and ongoing, is often the backdrop to migration. In the indigenous context, colonization refers to the processes by which indigenous peoples have been and continue to be dispossessed of their lands, resources, governments and cultures. For example, since the colonization of the fifteenth century, the traditional territory of the Haudenosaunee Confederacy of North America, known to them as "Turtle Island", has been split between two States, the Canada and the United States of America, each exerting significant power over them.³ Indigenous peoples often orient themselves around features of the natural landscape, whether river, forest, mesa or tundra, that transcend the

¹ All the submissions will be available after the July session of the Expert Mechanism at www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/BordersMigrationDisplacement.aspx.

² In the context of the present study: the term "migration" refers to all movement of indigenous peoples, internal and across international borders; "migrant" refers to "any person who is outside a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence" (see "Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations", available at www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf); "displacement" is used in the context of the Guiding Principles on Internal Displacement where displacement is internal and forced (E/CN.4/1998/53/Add.2, annex) "refugee" is as defined in article 1 (A) (2) of the Convention relating to the Status of Refugees, as amended in the Protocol thereto; "borders" in the context of the present study may be either internal or international (i.e., between sovereign States). See Office of the United Nations High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights at International Borders*, available at www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.

³ www.oneidaindianation.com/the-haudenosaunee-creation-story/.

contemporary nation State. The legacy of colonization, whether imperial or settler based,⁴ sometimes turns indigenous peoples into “migrants” by drawing international borders through their homeland. Moreover, the social, economic and cultural impacts of colonization which have displaced indigenous lifeways with industrialization and globalization, including among many other things development projects that threaten their homes and livelihoods, often impel indigenous peoples to move internally as well as across international borders. In short, indigenous peoples on the move, internally and internationally, suffering displacement, discrimination, violence and even death, including in their own countries, are experiencing the consequences of colonization in myriad ways that are little understood in migration law and politics. These consequences continue to be reflected in the challenges to indigenous peoples’ presence, movement and mobility in their territories.

6. The current context of migration involving a global pushback against human rights, political instability, weak democracies and military use of power puts indigenous migrants in a particularly vulnerable situation. The negative impact of authoritarian populism on migration, as well as sovereignty and national security narratives, as a pretext against migration and migrants, facilitates and sometimes even promotes an anti-indigenous rhetoric, even in States hitherto sympathetic. A rights-based approach to migration and its positive impact of enriching societies is not part of that rhetoric.⁵ Nor is an understanding of land and kinship, movement and relationship, based on indigenous views of the world.

II. Legal framework

7. Indigenous peoples enjoy all generally applicable legal rights, including the rights guaranteed by various laws and instruments on the situation of migrants, refugees and asylum seekers. In addition, the particular situation of indigenous peoples must be understood through the Declaration, supported by the United Nations and regional human rights treaties. The provisions of the Declaration contextualize human rights as they relate to the historical, cultural and social circumstances of indigenous peoples, highlighting the collective nature of those rights and imposing obligations on States (see A/HRC/9/9, para. 86 and A/HRC/39/62). All Declaration rights are relevant in the migration context, yet implementation of those rights has been uneven to date.

8. Article 7 of the Declaration provides that “indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person” and “indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.” Those article 7 rights apply in several categories relating to the present study, namely threats to the life and security of indigenous peoples in their home countries; whether they are safe during travel and passage; and their wellbeing in receiving countries, which would include treatment by border patrol and immigration officials.

9. Article 7 is particularly significant given the recent expansive interpretation by the Human Rights Committee of the right to life, as contained in article 6 of the International Covenant on Civil and Political Rights. The Committee considered that States have a duty to address not only the general conditions that may give rise to a direct threat to life (such as threats and killings of indigenous human rights defenders and refoulement of aliens) but also conditions that may prevent individuals from enjoying their right to life in dignity. Such conditions include degradation of the environment caused by pollution and climate change, deprivation of land, territories and resources of indigenous peoples, access to food, water, health care and shelter and other issues, which have a direct effect on the lives of

⁴ www.tandfonline.com/doi/full/10.1080/14623520601056240.

⁵ See Carlos Yescas, *Indigenous Routes: A Framework for Understanding Indigenous Migration* (International Organization for Migration (IOM), 2008).

indigenous peoples, including in the context of migration.⁶ The Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families affirms that, “Every child, at all times, has a fundamental right to liberty and freedom from immigration detention ... the detention of any child because of their or their parents’ migration status constitutes a child rights violation and contravenes the principle of the best interests of the child ... children should never be detained for reasons related to their or their parents’ migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.”⁷

10. The right to self-determination (see articles 3, 4 and 5 of the Declaration) is recognized as a foundational right upon which all other rights of indigenous peoples are dependent (see A/HRC/12/34). It relates to indigenous peoples’ right to control their own destinies, to live within and participate equally in the constitution and development of “governing institutional orders”.⁸ The right of self-determination is recognized also in article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. According to the Human Rights Committee, article 1 is interrelated with other provisions of the Covenant and rules of international law.⁹

11. Beyond State boundaries, indigenous peoples have the right to maintain and develop relationships with members of their community, as well as other communities within or outside their respective country (Declaration, art. 36). That right includes the right of indigenous peoples to trade in goods and services across borders (see E/C.19/2015/9, para. 3). Realizing that right presupposes some form of mobility, an intrinsic part of the lives and cultures of some indigenous peoples. Declaration rights linked to the right to self-determination and of particular relevance in the context of borders, migration and displacement include: the recognition of the right to land, not to be forcibly removed from their lands or territories, not relocated without their free, prior and informed consent (arts. 10, 25, 26, 27, 30 and 32); the right to a nationality (art. 6); the right to freedom from discrimination, to human rights and to fundamental freedoms as individuals and peoples (arts. 1 and 2); the right to enjoy economic, social, cultural and labour rights (arts. 17, 20, 21, 23 and 44); the right not to be subjected to forced assimilation or destruction of their culture (art. 8); the right to participate in decision-making and to have their free, prior and informed consent and conservation and protection of their environment (arts. 10, 11, 19, 28, 29 and 32); the right to protection of and access to historical and cultural sites (arts. 11 and 12), the right to determine their own identity (art. 33) and the right to restitution and compensation (art. 28).

12. Some of those rights will have particular relevance for cross-border¹⁰ migration. While all Declaration rights relate to all indigenous peoples, indigenous elders, women, youth, children and persons with disabilities are indicated as warranting particular attention in the implementation of Declaration rights, including guarantees against all forms of violence and discrimination (art. 22).

⁶ See Human Rights Committee, general comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life.

⁷ See joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families / No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, paras. 5, 6 and 10.

⁸ S. James Anaya, “The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era” in Claire Charters and Rodolfo Stavenhagen (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009).

⁹ See Human Rights Committee general comment No. 12 (1984) on the right to self-determination, para. 2.

¹⁰ I.e., crossing State borders, from one State to another.

13. Other relevant rights under the United Nations human rights treaties include the cross-cutting right of equality and non-discrimination, and article 12 of the International Covenant on Civil and Political Rights on the right to liberty of movement is an indispensable condition for the free development of a person. The rights for those lawfully in a State to freedom of movement within the whole territory of the State and to freedom to choose one's residency, are particularly relevant for indigenous peoples. Subject to certain restrictions, the right to choose one's residency includes protection against all forms of forced internal displacement. That right also includes the freedom to leave a country and the right not to be "arbitrarily deprived" of entering one's own country, which has a particular importance for indigenous refugees seeking voluntary repatriation. It also implies the prohibition of enforced population transfers or mass expulsions to other countries.¹¹ Article 7 of the International Covenant on Civil and Political Rights and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment both prohibit the return of anyone to a State where there are substantial grounds to believe that they will be subjected to torture, cruel, inhuman, degrading treatment or punishment, irrespective of the person's legal status or whether the person is a refugee.

14. Article 27 of the International Covenant on Civil and Political Rights recognizes the right of minorities to enjoy their own culture or to profess and practise their own religion and to use their own language in community with the other members of their group. The Committee has linked that right to the right to internal self-determination, to political participation (art. 25 of the Covenant) and to other rights in the Declaration, observing that article 27 "enshrines an inalienable right to indigenous peoples to freely determine their political status and freely pursue their economic, social and cultural development".¹² Article 27 confers rights on indigenous peoples who "exist" in a State: they do not need to be nationals, citizens or permanent residents and it is not dependent upon their recognition by the State. Thus, indigenous migrant workers or even visitors in a State cannot be denied the exercise of the rights under article 27. Those rights are also recognized in the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the American Declaration on the Rights of Indigenous Peoples.¹³

15. Another relevant instrument on migration is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, including articles 64 to 71, which relate to the promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families. There are also the Guiding Principles on Internal Displacement for the protection from displacement, during displacement and on humanitarian assistance, return, resettlement and reintegration (see E/CN.4/1998/53/Add.2, annex). The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context and the Committee on Economic, Social and Cultural Rights have jurisprudence and recommendations on forced evictions, the right to housing and States' obligations thereto and also obligations prior to during and after evictions and remedies for forced evictions.¹⁴

16. Other instruments relevant to cross-border migration of indigenous peoples is the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization, in article 32, concerning the need for Governments to facilitate cooperation between indigenous peoples across borders, and article 16, on relocation. Under the auspices of the United Nations Framework Convention on Climate Change, the Cancun

¹¹ See Human Rights Committee, general comment No. 27 (1999) on freedom of movement.

¹² See *Sanila-Aikio v. Finland* (CCPR/C/124/D/2668/2015), para. 6.8.

¹³ See IOM, *Legal Aspects of Assisting Venezuelan Indigenous Migrants in Brazil* (Brasilia, 2019), pp. 91–93.

¹⁴ A/HRC/4/18; United Nations Human Settlements Programme, *Assessing the Impact of Eviction: Handbook* (2014); <https://unhabitat.org/books/assessing-the-impact-of-eviction-handbook/>; Basic Principles and Guidelines on Development-Based Evictions and Displacement, Special Rapporteur on the Right to Adequate Housing (2007), available at www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf.

outcome agreement (FCCC/CP/2010/7/Add.1) provides a framework for State recognition of climate change-induced migration, displacement and relocation.

III. Reasons and factors behind the migration of indigenous peoples

A. Traditional migratory patterns

17. For many indigenous peoples, including the Sami reindeer herders in the Nordic countries and the Amazigh across North Africa, migrating is a way of life: an expression of their identity, culture and livelihood. These indigenous ways of life, which far pre-date modern nation States, often transcend the world view and territorial lines of settled communities.

18. These and other longstanding indigenous migration patterns may be associated with subsistence hunting, fishing and gathering practices and animal husbandry, in which humans and herds travel together to feeding, breeding and birthing grounds; and religious or ceremonial cycles requiring individuals to be present at certain sites for ritual practices. Examples are nomadic and semi-nomadic pastoralists such as the Maasai, who live in Kenya along the border with the United Republic of Tanzania, and the Kickapoo of the Mexico and the United States. Sometimes State practices try to restrict such movement, by fencing off traditional lands in Kenya, restricting the seasonal migration of livestock and pastoral communities and constricting the natural ecosystems of wildlife (see A/HRC/4/32/Add.3). Nomadic traditions have also been eroded by discriminatory educational and social policies causing the removal of indigenous children from their families and placement in residential schools, including in Canada, Finland, Norway and the Soviet Union.¹⁵

19. A small group of indigenous peoples continue to migrate by sea. The Badjaos, a sea-faring indigenous people, are unique as the only people living in canoes with a belief system and way of life literally on the sea around Indonesia, the Philippines and Malaysia. Attempts to relocate these peoples on land in an attempt to diversify their economy risk destroying their identity and way of life.¹⁶

B. Socioeconomic factors

20. Indigenous peoples also migrate owing to poverty, to try to ensure the survival of their communities and improve their lives. Given the appalling conditions in which many indigenous peoples live (they make up 5 per cent of the world's population but account for 15 per cent of the poorest),¹⁷ their decision to move internally or internationally is hardly surprising and the element of choice is debatable. Indigenous peoples in developing States are particularly disadvantaged: they experience disproportionate rates of poverty and marginalization and are "left behind" in development efforts.¹⁸ Lack of land, employment opportunities, precarious economic conditions, lack of services and educational opportunities, poverty and an increase in the dependency ratio all are a manifestation, a cause and a consequence of human rights violations and may lead to internal and cross-border migration, including by many youth. This causal factor mostly results in migration from rural to urban areas. For example, the move of indigenous peoples from the Lao People's Democratic Republic to Thailand, or migration to El Alto, the second largest city

¹⁵ Human Rights and Equal Opportunity Commission, "Bringing them home: report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families" (1997); United Nations Children's Fund (UNICEF) submission; CERD/C/CAN/CO/21-23.

¹⁶ Zacot submission.

¹⁷ www.un.org/en/events/indigenousday/.

¹⁸ Australia submission; World Bank, "Understanding Poverty, Indigenous Peoples", available at www.worldbank.org/en/topic/indigenouspeoples#1.

in the Plurinational State of Bolivia, established by the migration of the Aymara (76 per cent) and Quechua (9 per cent) peoples.

21. Underlying discrimination against and inequality of indigenous peoples also plays a role in the structural factors which can lead to migration, such as inequality in access to health, education, housing, employment and land. In Guatemala, for every quetzal invested in the non-indigenous population, the State invests only 45 cents in indigenous peoples, despite the fact that the indigenous population is 41 per cent.¹⁹

22. The movement of indigenous peoples internally and across international borders is supported by the Declaration, in particular articles 3, 4 and 5 on self-determination and article 36 on the right to maintain their cultural ties with their communities and to trade in goods and services across borders. Articles 12 and 27 of the International Covenant on Civil and Political Rights, on the right to movement within the State and indigenous peoples' right to enjoy their own culture, religion, and language, in community with the other members of their group, read in conjunction with the right to self-determination in article 1, also reinforce the view that the specificities of indigenous peoples' way of life and culture often require some level of mobility, for which there may be multiple reasons.

C. Causes of forced displacement and migration

1. Non-recognition

23. Some States fail to recognize indigenous peoples at all, which results in the inadequacy of legal protections for them and their lands and acts as both a cause and consequence of displacement. Even in some countries that refer to indigenous peoples by other names, including the "hill people" in Thailand, "tribes" or "ethnic minorities" in India and Bangladesh or "small numbered people" in the Russian Federation, the absence of recognition as indigenous peoples obscures and weakens their rights, favouring migration.

24. Non-recognition of indigenous land rights, including occupation and titling, is an underlying cause for dispossession, displacement and migration.²⁰ The failure to recognize indigenous peoples' rights to traditional lands can also lead to a lack of basic services such as in the Negev, in Israel, where the Bedouin live in "unrecognized villages" lacking services (see A/HRC/18/35/Add.1). Even in States where community rights are recognized in the Constitution, unless those rights are protected by enabling laws, the rights to live and practise a livelihood in the forest can be quickly eroded when land becomes a commodity. In the Russian Federation, some indigenous peoples fear that a law on "The Far East hectare", allocating one hectare of land to all citizens, may deprive them of their land.²¹ In Brazil, despite the recognition in the 1988 Federal Constitution of the right to traditional land, demarcations are pending and indigenous peoples are still confined in reservations, such as the Guarani-Kaiowá people in Mato Grosso do Sul.

2. Commercial activities and land policies

25. Today, commercial activities, including energy projects, megaprojects for the production of food for export, fracking and the extraction of minerals, gases, oil and water can negatively impact indigenous peoples' land, compelling them to migrate.²² The expansion of large-scale activities, such as the cultivation of sugar cane and palm oil, extensive livestock breeding, metal and non-metallic mining and hydroelectric have all been identified as contributing to displacement.²³ Indigenous peoples in Malaysia and Indonesia have lost forestlands to palm oil plantations,²⁴ and in Ethiopia infrastructure development was said to threaten to displacing an estimated 1.5 million pastoralists, such as

¹⁹ Guatemala submission.

²⁰ Expert Mechanism on the Rights of Indigenous Peoples, advice No. 2 (A/HRC/18/42, annex).

²¹ Yakukia submission.

²² UNICEF Australia.

²³ Guatemala submission.

²⁴ Asia Indigenous Peoples Pact submission.

the Gambela peoples.²⁵ Biofuel plantation expansion is estimated to displace some 60 million indigenous peoples in Asia.²⁶

26. When it comes to development projects on indigenous peoples' land, some of the most challenging aspects relate to inadequate procedures and/or legislation to obtain their free, prior and informed consent, to provide appropriate compensation and to ensure benefit-sharing (see A/HRC/39/62). Sometimes actions contesting projects are successful, as in 2016, when Panama withdrew the Barro Blanco hydroelectric project following human rights complaints under the Clean Development Mechanism²⁷ with allegations of displacement and impacts on the traditional lands and cultural sites of the Ngäbe peoples (see A/HRC/36/46).

27. The extractive industries play a large part in alienating lands and limiting access to traditional territories (see A/HRC/24/41/Add.3). They may also affect the ecosystem and environment through flooding, toxic pollution, contaminating water sources and weakening flora and fauna that indigenous peoples eat or use for medicine.²⁸ There is evidence in Asia of the extractive industry having changed the livelihood of indigenous peoples in whole regions. In North Africa, the Amazigh have been pushed off their traditional lands because of land grabbing and exploitation of natural resources.²⁹ The gas pipeline running from the Bay of Bengal in Rakhine State is reported to have contributed to the displacement of the Rohingya.³⁰

28. The building of dams has also led to internal displacement and cross-border migration. The Sardar Sarovar Dam over the Narmada River in India, inaugurated in 2017 despite strong protests, resulted in at least 200,000 people being displaced: around 57.6 per cent of those were Adivasi peoples.³¹ In Borneo, 10,000 indigenous persons were displaced in 2011 by the Bakun Dam, which flooded 700 km² of land.³² Following the collapse of a dam in the Lao People's Democratic Republic in July 2018, 6,000 indigenous people were affected. The Mursi and Bodi riparian peoples, living in the Omo valley in Ethiopia, were considered to be the most threatened of the 200,000 peoples by dam development on the river.³³ In Brazil, mining waste threatens the life of indigenous communities.³⁴

29. Development projects are often accompanied by violence, unrest and political and social turmoil, leading to migration. An increase in violence and threats against indigenous peoples, while protecting their land, has resulted in migration. In the Philippines, the Higaonon were removed by force from their lands for palm oil cultivation (see A/HRC/24/41/Add.4, paras. 135–137).

3. Conservation and tourism development

30. Indigenous peoples, including those with legally registered traditional lands, are often displaced because of policies designed to promote conservation and the creation of national parks.³⁵ In the Democratic Republic of the Congo, the Batwa of Kahuzi-Biega in South Kivu were brutally evicted without compensation in the 1970s, after which it became

²⁵ Elliot Fratkin, "Ethiopia's pastoralist policies: development, displacement and resettlement", *Nomadic Peoples*, vol. 18, No. 1 (2014).

²⁶ Asia Indigenous Peoples Pact, "Overview of the State of Indigenous Peoples in Asia" (2014).

²⁷ Under the Mechanism, emission-reduction projects in developing countries can earn emission reduction credits.

²⁸ Documentation and Information Network for Indigenous Peoples' Sustainability submission.

²⁹ Congrès Mondial Amazigh submission.

³⁰ Expert Mechanism seminar, Chiang Mai, Thailand, November 2018 (see para. 2).

³¹ Asia Indigenous Peoples Pact submission.

³² Ibid.

³³ Fratkin, "Ethiopia's pastoralist policies".

³⁴ www.vice.com/en_us/article/jpn84x/how-a-mining-disaster-devastated-an-indigenous-group-in-brazil and www.reuters.com/article/us-vale-sa-disaster-indigenous/indigenous-village-faces-existential-threat-from-brazil-dam-burst-idUSKCN1PO002.

³⁵ International Institute for Environment and Development, Harry Jonas, Jael Makagon and Dilys Roe, discussion paper, "Conservation standards: from rights to responsibilities" (2016), available at <http://pubs.iied.org/14666IIED>.

a United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Site. They have yet to receive justice.³⁶

31. In Thailand, the Government requested the listing of the Kaeng Krachen National Park as a World Heritage park in 2013 without consulting the local indigenous Karen peoples. The Karen have experienced forced evictions, destruction of housing and crops, arrests and enforced disappearances (see A/71/229). On 12 June 2018, the Supreme Administrative Court, in its final verdict in Red administrative case No. OS 4/2561, determined that the acts of the government officials involved in the demolition and burning of lands were unlawful.

32. The Maasai pastoralists in the Loliondo Game Controlled Area have experienced land conflicts, evictions and violence over the past few decades, resulting from conservation and tourist development. In 2017, forcible evictions from legally registered traditional lands are alleged to have continued.³⁷ While the evictions were supposed to have been halted in November 2017, their future remains uncertain.³⁸

33. In Mexico, the Reserva de la Biosfera del Alto Golfo de California y Delta del Río Colorado (Upper Gulf of California and Colorado River Delta Biosphere Reserve), established in 1993, which subsequently became a UNESCO World Heritage Site, has negatively affected the Cucapá peoples' rights to access natural resources such as fishing.³⁹

34. Some State policies on conservation help to avoid migration, such as that for the Ramsar site (from the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)) in Brazil, which protects the waters and wetlands of a number of indigenous lands and involved indigenous peoples.⁴⁰ An initiative known as "mosaic" led to better coordination for the protection of indigenous land in North of Pará and West of Amapá states.⁴¹

35. Some indigenous peoples have successfully asserted their rights, as in the case of *Roy Sesana and Others v. the Attorney General*, in Botswana. In 2006, the High Court held that the indigenous people evicted from the Central Kalahari Game Reserve had been deprived of the lawful possession of their land. While that case was subsequently upheld by the Court of Appeal, there have been concerns that the decision has been enforced in only a very limited way (see A/HRC/24/41/Add.4, paras. 17–20).

36. Sometimes the World Bank has withdrawn funding, as in the Water Tower Protection and Climate Change Mitigation and Adaptation Programme in Kenya, after the Bank concluded in its report that the Kenya Forest Service had neglected the customary rights of the Sengwer and had applied a policy of evictions. Despite that and the withdrawal of funding from the European Union, it is reported that forced evictions continue and that the majority of the Sengwer now live in unsanitary and overcrowded conditions.⁴²

4. Militarization and conflict

37. Displacement often results from militarization and conflict. Examples include the migration of indigenous peoples from Myanmar to Thailand and from Central America

³⁶ Sixty-first ordinary session of the African Commission on Human and Peoples' Rights, intersession activity report, November 2017.

³⁷ Edward Porokwa, "Tanzania", in *The Indigenous World 2018*, Pamela Jacquelin-Andersen (ed.), (International Work Group for Indigenous Affairs, Copenhagen, 2018) pp. 486 and 487.

³⁸ A/HRC/15/37/Add.1; A/HRC/24/41/Add.4, paras. 152 and 153; Porokwa, "Tanzania", in *The Indigenous World 2018*, pp. 486 and 487.

³⁹ Mexico submission.

⁴⁰ www.mma.gov.br/informma/item/14770-noticia-acom-2018-05-2997.html.

⁴¹ www.institutoiepe.org.br/2013/01/governo-reconhece-primeiro-mosaico-que-inclui-terras-indigenas/.

⁴² A/HRC/31/59/Add.1; Amnesty International, "Families torn apart: forced eviction of indigenous people in Embobut Forest, Kenya", 15 May 2018, available at www.amnesty.org/download/Documents/AFR3283402018ENGLISH.PDF.

across the Mexico/United States border,⁴³ from Colombia (the Awá people) to Ecuador (see CERD/C/ECU/CO/23-24) and displacement within Colombia.

38. The rise in armed groups in North Africa in recent years has forced the Amazigh, who used to move freely around Algeria, Burkina-Faso, Libya, Mali, Mauritania, Niger and Tunisia, to flee from their usual migratory routes. So too has the closure of international borders between Algeria, Libya and Morocco.⁴⁴ In Guatemala, violence, extortion, threats, and the presence of organized crime all contribute to displacement.

39. The Chittagong Hill Tracts region of Bangladesh continues to be one of the most militarized areas in the world, following the settlement of non-indigenous peoples on indigenous lands and ensuing conflict.⁴⁵ Similarly, militarization, in north-east India with the imposition of the Armed Forces (Special Powers) Act 1958 and in the Cordillera and Mindanao regions of the Philippines has caused migration and displacement of indigenous peoples within and across national borders. Intercommunity conflicts over political power and territorial boundaries, caused by non-recognition of indigenous land (see A/HRC/39/17/Add.2) are factors cited in Chiapas, Mexico for the displacement of 5,000 indigenous peoples (mostly women and many pregnant) in November 2017, causing a humanitarian crisis. Such conflict is often exploited by other parties, including armed groups, political parties and representatives of churches.

40. Indigenous peoples also flee from claims of involvement in militant groups and criminalization of human rights defenders. For example, attacks based on unfounded suspicions that the Lumads in the Philippines were involved with militant groups (see A/HRC/39/17). There are reports of the Afar and Kunama peoples having been targeted in Eritrea, forcing several thousand to flee to Ethiopia.⁴⁶ The commission of inquiry on human rights in Eritrea claimed reasonable grounds to believe that Eritrean officials have intentionally and severely deprived Eritrean Kunama and Afar of fundamental rights contrary to international law on ethnic grounds, sufficient to establish that they committed the crime of persecution, a crime against humanity under the Rome Statute.⁴⁷

41. In the aftermath of conflict, indigenous peoples are not necessarily included in peace agreements, their lands are not protected, and displacement is a consequence. Colombia is an exception where an ethnic chapter was included in the peace agreement, recognizing the disproportionate impact of the internal armed conflict on Afro-Colombian and indigenous peoples and the need to include them in the construction of peace.⁴⁸ Also, the presence of indigenous peoples in border areas is not necessarily a factor in the determination of boundaries by tribunals, including the Eritrea-Yemen Arbitral Tribunal and the Eritrea-Ethiopia Boundary Commission. Arbitrators chosen for the tribunals are not likely to be familiar with the rights of indigenous peoples in border areas.⁴⁹

5. Climate change and natural disasters

42. The sudden and slow-onset effects of climate change are undeniable causes of migration.⁵⁰ “Environmental degradation, as a result of slow-onset processes, can disproportionately affect indigenous peoples, who often rely directly on their environment to meet their basic needs, thereby threatening the effective enjoyment of their rights to food, water and health among others.”⁵¹ Persistent drought, flooding, desertification,

⁴³ www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StatementonIPstopped_at_the_borderJune2018.pdf.

⁴⁴ Congrès Mondial Amazigh submission.

⁴⁵ Asia Indigenous Peoples Pact submission.

⁴⁶ See A/HRC/29/41. See also A/HRC/29/CRP.1.

⁴⁷ See A/HRC/32/47. See also A/HRC/32/CRP.1.

⁴⁸ www.ohchr.org/Documents/Issues/Defenders/StatementVisitColombia3Dec2018_EN.pdf.

⁴⁹ See Jonas, “Conservation Standards”.

⁵⁰ www.ohchr.org/Documents/Issues/ClimateChange/Key_Messages_HR_CC_Migration.pdf; A/HRC/37/35; A/HRC/27/66.

⁵¹ https://www.ohchr.org/Documents/Issues/Migration/OHCHR_slow_onset_of_Climate_Change_EN.pdf

concentrated pollution of freshwater, increased seismic or volcanic activity, storm impacts, erosion and submersion reducing fisheries and productive hunting lands, changing rain patterns, wildfires, coastal erosion and sea level rise and disease all contribute to forcing indigenous peoples to leave their lands.⁵²

43. The disappearance of Lake Poopó in the Plurinational State of Bolivia is an example, where the Uru peoples' culture was based on the lake⁵³ and, in Alaska, Kivalina Island is falling into the sea.⁵⁴ Indigenous peoples have been evacuated from Lake St. Martin in Canada owing to flooding concerns and are being settled on higher ground. A class action from those indigenous peoples resulted in compensation of \$90 million (see A/HRC/24/41/Add.4, paras. 47–52). In Papua New Guinea, indigenous peoples relocated from their disappearing Carteret Islands to the mainland of Bougainville Province; in the Arctic, climate change is having an impact on reindeer herding, food security and livelihoods; melting ice is opening up the seas for more traffic and, in Africa, adverse climate conditions are driving pastoralists to seek pastureland in non-traditional areas, entailing permanent moves of herds south from Burkina Faso to Côte d'Ivoire, Ghana, Togo and Benin.⁵⁵ It is reported that, in the Russian Arctic, an indigenous child and more than 2,300 reindeer died in 2016, leading to the evacuation of indigenous peoples, in an outbreak of anthrax believed to have been triggered by climate change.⁵⁶ In India, the Adivasis people, who are forest dwellers (almost 2 million in number) were evicted by order of the Supreme Court as part of the efforts of India to protect the environment.⁵⁷ In Panama, the people of Gardi Sugdub (approximately 1,000), organized their own relocation under the Peninsula Principles on Climate Displacement within States to the Panamanian mainland. Rising sea levels and severe climate change-related events were the motivation.⁵⁸

44. The Declaration provides for indigenous peoples' right to their land, territories and resources and conservation and protection of their environment (see E/C.19/2018/9 and A/71/229) (arts. 25–27, 29, 30 and 32), obliging States to give legal recognition and protection to those lands, an important factor in preventing migration.⁵⁹ It also forbids the forced removal of indigenous peoples irrespective of motive and demands that relocation may only be undertaken with the free, prior and informed consent of the indigenous peoples concerned (art. 10). As indicated by the Special Rapporteur, displacement from large-scale development projects violates indigenous people's rights (see A/HRC/39/17). The United Nations treaty bodies and regional bodies have also elucidated the issue of free, prior and informed consent (see A/HRC/39/62). Thus, efforts by States to remove indigenous peoples from their land without their consent could amount to breaches of the Declaration and, more broadly, international law. Apart from displacement, the negative effects of commercial activities (toxic pollution, water contamination, environmental damage and climate change) which contribute to migration may also undermine indigenous peoples' right to life with dignity (art. 7 of the Declaration and art. 6 of the International Covenant on Civil and Political Rights). Their right to life and other attendant rights may also be directly threatened owing to militarization, conflict and criminalization of human rights defenders.

⁵² Documentation and Information Network for Indigenous Peoples' Sustainability, Mexico, and Guatemala submissions.

⁵³ www.earthisland.org/journal/index.php/articles/entry/bolivias_disappearing_lake/.

⁵⁴ www.dw.com/en/climate-change-a-village-falls-into-the-sea/a-18717942.

⁵⁵ United Nations Office for West Africa and the Sahel (UNOWAS) study, "Pastoralism and security in West Africa and the Sahel: towards peaceful coexistence" (Dakar, UNOWAS, 2018), pp. 24 and 25.

⁵⁶ www.theguardian.com/world/2016/aug/01/anthrax-outbreak-climate-change-arctic-circle-russia.

⁵⁷ www.thisisplace.org/i/?id=4c301717-3e7f-4dca-95fe-02a0441cea74&fbclid=IwAR3ITbUcI9qkz4hkrQwtUG76Lm3mQUAy6McWqjFegqKia5JsmYzfuavgYKo.

⁵⁸ Displacement Solutions "The Peninsula Principles in action: climate change and displacement in the Autonomous Region of Guyanala, Panama", mission report (July 2014).

⁵⁹ The Expert Mechanism's next study in 2020 will be on the right to land under the Declaration.

IV. Challenges following migration

A. Loss of cultures, languages, lands and livelihoods

45. One of the greatest challenges to both internal and cross-border migration is the uprooting of indigenous peoples from their land and the consequent loss of indigenous knowledge, the deep spiritual connection that they have with the land and their livelihoods, languages and cultures. Migration can also lead to significant health problems, including mental health and suicide, as well as drug dependency and alcohol abuse (see A/HRC/30/57). The migration of indigenous peoples also has a negative impact on the lands themselves, upon which they have lived in harmony, protecting their biological diversity, and been dependent for their livelihoods. Such uprooting also weakens their systems of self-governance and their right to self-determination and to practise their culture and language in community with other members of their group.

46. The lack of birth registration or citizenship documentation among indigenous peoples contributes to their vulnerability when migrating. It limits their access to basic public services, including health and education, and can be an obstacle to their freedom of movement, such as travel through traditional territory (see A/HRC/24/41/Add.3). There are reports of: Amazigh and Tuareg having been denied Libyan nationality; Amazigh being refused passports in Algeria;⁶⁰ and the loss of nationality of the Bidoon in Kuwait.⁶¹ The Warao and Pemon peoples arriving from the Bolivarian Republic of Venezuela in Brazil lacking identity documents complicates the process of legalizing their entry status as migrants, residents or refugees.⁶² The analysis of the migration of indigenous peoples is difficult owing to the absence of disaggregated data, an issue identified as a challenge in assessing the implementation of the Sustainable Development Goals.⁶³

B. Political rights

47. The migration of indigenous peoples may also have an effect on their voting rights and thus their political participation. In Kenya, the existing political system divides many communities, including the Endorois and Sengwer, into different administrative and electoral units. This diminishes their effective representation in parliament and participation in local decision-making, as they may not have the numbers to vote for leaders from their communities (see A/HRC/4/32/Add.3).

C. Challenges from rural to urban settings⁶⁴

48. Across the regions, indigenous peoples experience particular challenges in the move from rural to urban areas. Since 1996, the proportion of Aboriginal and Torres Strait Islander people living in urban areas has increased from 73 per cent to 79 per cent.⁶⁵ More

⁶⁰ Congrès Mondial Amazigh submission.

⁶¹ The National Project to Resolve the Kuwaiti Bidoon Case submission.

⁶² IOM, *Legal Aspects of Assisting Venezuelan Indigenous Migrants in Brazil*.

⁶³ Guatemala submission.

⁶⁴ <https://unhabitat.org/books/urban-indigenous-peoples-and-migration-a-review-of-policies-programmes-and-practices/>.

⁶⁵ Australian Bureau of Statistics, 2071.0 – Census of population and housing: reflecting Australia – stories from the Census, 2016 – Aboriginal and Torres Strait Islander Population, 2016, 31 October 2017, available at www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20Article~12.

than half of the Sami population in Finland lives in urban areas outside the Sami homeland.⁶⁶

49. While many indigenous peoples leave rural environments as a response to, inter alia, failed services, their needs are not always better met in urban areas. Their arrival often puts a strain on already stretched urban infrastructure and established communities. Indigenous workers too often do not have decent working conditions, standards of health, housing, transport or education and often experience labour exploitation and discrimination, including being refused rental property and access to bars and restaurants. Causal factors include: a lack of concern, politically and legally, over their situation; discrimination; their invisibility in the urban context; and a lack of understanding of the singularity of indigenous migration, usually moving in groups rather than individually.

50. The lack of intercultural support in urban settings can contribute to a loss of identity. In some states in the United States, urban centres for indigenous people were set up to maintain cultural ties. One group of the Triqui peoples, which moved from their home state of Oaxaca to Mexico City, established a community, purchased land and asserted collective self-determination in their new location: a situation formally acknowledged by the City of Mexico.

D. Specific challenges from cross-border migration

1. At the border

51. For all migrants (indigenous and non-indigenous), border crossings are often locations of arbitrary arrest and detention, abuse, arbitrary and collective expulsion, racial profiling, extortion, kidnapping, drug trafficking, human trafficking, death, lack of access to adequate health services, food, water or shelter and an absence of due process rights or respect for rights (see A/HRC/39/17/Add.2). Detention may itself result in other cumulative forms of ill-treatment, including lack of interpretation, separation of children from parents, poor conditions, inedible food, verbal abuse, physical assaults and being stripped naked. If perpetrated at the hands of State agents or without the protection of the State, such treatment may amount to violations of their rights.

52. Recent reports⁶⁷ indicate that there is a lack of understanding of the specific needs and rights of indigenous peoples at border crossings. In terms of language, there is often an assumption that indigenous peoples crossing international borders speak the language of the State of departure or most recent entry, as at the Mexico/United States border, where it is reported that indigenous peoples were provided with Spanish interpreters, although they spoke only indigenous languages. This contributed to misunderstandings and reports of deaths (cause unreported) in border detention.⁶⁸

53. Indigenous peoples also suffer disproportionately from discrimination such as the impact of border walls, as a deterrent to migration, on indigenous peoples, as on the Mexico/United States border.⁶⁹ The fear of discrimination and lack of identity documentation also has an effect on the identification of indigenous groups at the border, affecting their inclusion in humanitarian responses.⁷⁰

54. Reports of the involvement of federal police in incidents of violence with impunity against indigenous peoples creates distrust among indigenous peoples of border authorities (see A/HRC/33/42/Add.1). The criminalization of irregular migration is also a challenge, as

⁶⁶ [https://lacris.ulapland.fi/fi/publications/safeguarding-cultural-rights-of-smi-children-and-youth-in-finland-with-special-emphasis-on-the-linguistic-part-of-cultural-identity--current-challenges\(556f7f3e-08b1-480f-85de-fca0c62b990f\).html](https://lacris.ulapland.fi/fi/publications/safeguarding-cultural-rights-of-smi-children-and-youth-in-finland-with-special-emphasis-on-the-linguistic-part-of-cultural-identity--current-challenges(556f7f3e-08b1-480f-85de-fca0c62b990f).html).

⁶⁷ IOM, *Legal Aspects of Assisting Venezuelan Indigenous Migrants in Brazil*.

⁶⁸ www.theguardian.com/us-news/2018/dec/17/guatemalan-girl-jakelin-caal-maquin-death-crossing-us-border.

⁶⁹ https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_ALE_USA_8210_E.pdf.

⁷⁰ Office of the United Nations High Commissioner for Refugees (UNHCR) submission.

is the repatriation of bodies following death while crossing borders: in Arizona, a tribal nation addresses this internally by using tribal funds.

55. Cross-border attacks affect indigenous peoples in Kenya, where the Gabra peoples living near the Ethiopian border have suffered such attacks by cattle rustlers linked to armed groups. The Burji, Munyayaya and the Orma in Garissa have indicated similar complaints (see A/HRC/4/32/Add.3).

2. After crossing the border

56. The legal status of indigenous peoples once they cross an international border has an impact on their protection. They may be stateless or at risk of statelessness, compounding their vulnerability,⁷¹ as in the Mekong region, where many indigenous peoples have no identity documentation. States that are not signatories to the Convention relating to the Status of Refugees, such as Thailand, leave many indigenous peoples, who could benefit from refugee protection, in limbo.

57. Some indigenous refugees remain in camps or shelters for years. As at September 2018, there were 97,345 refugees (mainly Karen and Karenni) from Myanmar living in nine refugee camps in Thailand.⁷² Humanitarian aid to these camps has declined, with all the attendant consequences – psychiatric problems, rape cases and drug abuse – and migrants cannot return. Other indigenous peoples, such as the Pemon (approximately 800), recently fled the Bolivarian Republic of Venezuela to live with their relatives on the Brazilian side of the border. The latter were not prepared and are now facing challenges regarding their ability to support their growing community.

58. Indigenous migrant workers are often in a vulnerable situation, as recognized by the Committee on Migrant Workers (see CMW/C/BOL/CO/1). There are reports of insufficient legal protection of indigenous agricultural workers and domestic workers, many of whom are women and girls, undocumented, from Central America in Mexico, who report poor labour conditions, sexual abuse, social exclusion and lack of access to public resources owing to their indigenous status (see E/C.19/2012/6; A/HRC/39/17/Add.2; A/HRC/11/7/Add.2). Indigenous peoples settled near the border in the Plurinational State of Bolivia and Paraguay, mostly agricultural workers, who regularly cross the border for work, suffer threats, forced labour and debt servitude (see CMW/C/PRY/CO/1). In Costa Rica, indigenous migrant workers are particularly vulnerable to legal and social exclusion, in particular those with temporary jobs on coffee plantations and migrant women working as domestic workers (see CERD/C/CRI/CO/19-22).

3. Challenges living across borders

59. For indigenous peoples separated by and living across international borders, many challenges exist. Indigenous peoples' ability to maintain their culture and traditional practices is often compromised.⁷³ Challenges include access to their lands, water, traditional hunting grounds and sites of symbolic importance; and the separation of peoples and difficulty in maintaining cultural and linguistic ties. Other problems relate to the transit of cultural plants and traditional cultural regalia, such as ceremonial eagle feathers, gourds and rattles: such transfers across a border are often challenged by lack of understanding and laws on the subject. Indigenous peoples in voluntary isolation in the Amazon are in a particularly vulnerable situation when crossing borders (as a way of life or because of threats) owing to their very isolation, as well as the fact that they are not necessarily bound by States' recognition of land demarcation.

⁷¹ More information about statelessness and the appropriate responses to statelessness: www.refworld.org/statelessness.html (UNHCR).

⁷² www.unhcr.org/th/en; International Work Group for Indigenous Affairs, "Indigenous World 2018 report", pp. 306–314.

⁷³ Shin Imai and Kathryn Gunn, "Indigenous belonging: membership and identity in the UNDRIP: articles 9, 33, 35, and 36" (2018).

60. Difficulties in receiving permits or visas to attend religious ceremonies or visit relatives have arisen for the Tohono O’odham, living between the United States and the State of Sonora in Mexico. Others report onerous reporting requirements to move through their traditional territory, including in the Akwesasne reserve between the United States and Canada, where First Nations are required to report to border services at the border station after they objected to border guards carrying firearms (see A/HRC/27/52/Add.2). There have also been reports of the imposition of visas on the Amazigh to move between Libya and Morocco for reasons of alleged terrorism.⁷⁴

61. The closure of international borders exacerbates problems, as for the Amazigh following the closure of the borders between Algeria and Libya and Algeria and Morocco, resulting in the separation of and inability to visit family across the borders, to sell cattle and buy medicines.⁷⁵

62. Sometimes where indigenous peoples live along international borders, State interest in controlling migration is itself a cause of increased police and military presence on indigenous lands. Indigenous peoples experience pressure from States to host law enforcement and immigration authorities on their lands; are often subjected to harassment and the demand for identification in their own communities, closure of access gates to reach indigenous lands across the border and detention and violence at the hands of authorities.⁷⁶ On the other hand, indigenous land can play a significant role in “protecting” national territories on the border, in particular where State authorities are lacking: this burden is often overlooked by the State and others.

4. Specific challenges across internal borders

63. Additional problems occur for indigenous peoples in federal States. In British Columbia, Canada, the Kaska Nation spans four jurisdictions (three provinces and the federal jurisdiction) impeding their movement, in particular when it comes to traditional hunting and harvesting and their ability to self-govern. In Tarahumara in Mexico, the division across different municipalities creates conflict between indigenous peoples in two different municipalities.⁷⁷ In the Russian Federation, the political, economic and cultural rights of the Karelians in the Republic of Karelia are stipulated in the Karelian Constitution and laws, while Karelians living in the Tverskaya region have only a right to cultural autonomy. Vepsian people living in two regions of the Russian Federation can obtain pension benefits, while others in a third region are denied that opportunity.

E. Unique agreements

64. Some States and indigenous peoples establish innovative means of resolving some challenges mentioned above. The Jay Treaty of 1794, in North America, recognizes special rights to cross the Canadian/United States border for Haudenosaunee and others. The Kickapoo peoples, who live in the Mexico and the United States, remain unique in their recognition by the Government of the United States as a binational indigenous community that is secured relatively free passage across the Mexico/United States border.

65. The Pascua Yaqui Tribe of Arizona, United States, was the first tribal nation to develop and issue an enhanced tribal identification card: other tribes, such as the Kootenai Tribe of Idaho, are now following suit. The tribe itself operates the federal programme. In 2017, Canada announced measures to address some Canada/United States border-crossing

⁷⁴ Congrès Mondial Amazigh submission.

⁷⁵ Ibid.

⁷⁶ www.hcn.org/articles/indian-country-news-on-the-tohono-oodham-mexico-border-colonial-violence-goes-unpunished; www.usatoday.com/story/tohono-oodham-nation-arizona-tribe/582487001/; www.hcn.org/issues/50.5/tribal-affairs-how-the-u-s-mexico-border-has-split-the-tohono-oodham.

⁷⁷ Mexico submission.

issues for First Nations, including the recruitment of more indigenous border officers, and enhanced training on indigenous cultures for Border Services Agency staff.⁷⁸

66. In the Nordic countries, borders divide the ancestral lands of the Sami. Finland, Norway and Sweden and the Sami are negotiating a Nordic Sami convention. It has been described as the “most ambitious initiative to address cross-border issues and an example of how this recognition may both co-exist with and pose a challenge to preconceived notions of State sovereignty.”⁷⁹ Other bilateral treaties exist, such as that between Sweden and Norway, which allows indigenous Sami reindeer-herders from Sweden to use lands in Norway and vice versa.

67. The Inuit Circumpolar Council is another example of how indigenous peoples have successfully worked together to build connections across international boundaries for cultural exchanges and political coordination.⁸⁰ The Nenets district and the Republic of Komi in the Russian Federation signed an agreement ensuring equal treatment for nomadic reindeer herders in both neighbouring territories.

68. The Torres Strait Treaty allows for freedom of movement without passport or visa (albeit with strict permit conditions) between Australia and Papua New Guinea communities for traditional activities, to protect the traditional way of life of Torres Strait Islanders and the coastal people of Papua New Guinea.⁸¹

69. The decision of the Economic Community of West African States (ECOWAS) on the International Transhumance Certificate provides for pastoral rights and obligations throughout the ECOWAS zone.⁸² The objective of the agreement is to allow animals free passage across the borders of all the member States; however, obstacles to its implementation remain.⁸³ The Nouakchott Declaration is an agreement of the six countries of the Sahel (Burkina Faso, Chad, Mali, Mauritania, Niger and Senegal) that affirms the importance of pastoralism as a right of pastoralist peoples.⁸⁴

F. Focus on indigenous peoples in vulnerable situations

70. Women, children, persons with disabilities and lesbian, gay, bisexual, transgender and intersex persons experience migration, often disproportionately, compounded by multiple and intersecting forms of discrimination, based on different facets of identity, gender, age and ethnicity.

71. The lack of data disaggregated by gender, age and other relevant factors, and of systems to collect data on the prevalence of disabilities among indigenous children and young people and on specific violations of their human rights, is a serious constraint in assessing their challenges, including in the migration context.⁸⁵ It is likely that the barriers faced by indigenous persons with disabilities, as expressed by the Committee on the Rights of Persons with Disabilities, increases in the context of migration. For example, the Committee expressed its concern at the law in Thailand which excludes non-Thai persons with disabilities from benefiting from services and entitlements. Also, many children and adults with disabilities are not registered, owing to the widespread stigma of being identified as a person with a disability (see CRPD/C/THA/CO/1). Access to basic services such as nutrition, health and education, is likely to become more difficult in the context of

⁷⁸ Report on First Nation border crossing issues, 31 August 2017.

⁷⁹ Imai and Gunn, “Indigenous Belonging”.

⁸⁰ Ibid.

⁸¹ Australia submission.

⁸² ECOWAS decision A/DEC.5/10/98. The ECOWAS 15 member States have a total pastoral population numbering in the tens of millions.

⁸³ Danjuma D. Jise, ECOWAS draft paper, “The ECOWAS Protocol relating to the regulation on transhumance between ECOWAS member States 1998/2003: challenges of implementation”.

⁸⁴ The Nouakchott Declaration on Pastoralism: mobilizing jointly an ambitious effort to ensure pastoralism without borders. Agreement concluded on 29 October 2013.

⁸⁵ European Parliament, “The situation of indigenous children with disabilities”, 18 December 2017; CRPD/C/BRA/CO/1; CRPD/C/KEN/CO/1.

migration, and disabled persons are more likely to experience violence, abuse and exploitation.⁸⁶

72. Gender discrimination puts indigenous women in vulnerable situations, in particular during migration. Their experience differs from that of their male counterparts, including with respect to their roles and responsibilities.⁸⁷ They are affected disproportionately by violations of their rights and suffer exploitation and abuse, including sexual and gender-based violence.⁸⁸

73. One of the most insidious problems for indigenous women and girls is the high risk of human trafficking, forced labour and sexual exploitation, including for the Miskito women in Nicaragua and Honduras (see A/HRC/30/41). One of the contributory factors to human trafficking is the lack of birth registration or citizenship documentation and consequential statelessness in some countries. This also limits women and children's access to basic public services, including health and education. A lack of resources for anti-trafficking measures contributes to this phenomenon (see CEDAW/C/HND/CO/7-8).

74. Border regions appear to constitute one of the areas of highest risk of trafficking for sexual purposes. The tri-border area of the Amazon, where Colombia, Brazil and Peru meet, has long been recognized as a serious concern by various social actors, regional institutions and national authorities. Commercial sexual exploitation of children is present in at least three economic sectors in the tri-border region: travel and tourism, the mining sector and drug trafficking. At border crossings, indigenous women are reportedly subjected to harassment, extortion and rape by State officials. There are reports in Nicaragua and Honduras that indigenous women who cross national borders every day to work their lands or to gather medicinal plants are routinely exposed to sexual violence (see A/HRC/30/41).

75. During armed conflict, sexual and gender-based violence, including rape and forced pregnancy, is used as a weapon to weaken the resolve of indigenous communities in militarized disputes over land and resources (E/2012/43-E/C.19/2012/13). Indigenous children are recruited to participate in armed conflict (E/2016/43-E/C.19/2016/11).

76. Some of the causes of migration only affect women and relate to discrimination within their own communities, as with the Maasai, in Kenya, where the inheritance of land runs along patriarchal lines. As the removal of land devalues indigenous women's status, this policy has fuelled indigenous women's migration to the cities. A further example of inter-community discrimination relates to the experience of a trans woman in a caravan of indigenous peoples fleeing Nicaragua, who affirmed that she had to leave her tribal community by the age of 12 or face dangerous consequences at the hands of her own tribal government.⁸⁹

77. In other countries, such as Thailand and Bangladesh, indigenous women's status can be undermined when they no longer have access to forests upon which they depend for their livelihoods, as in the production of medicines. If access to the forest is removed, women's status in the community changes, encouraging migration and resulting in the loss of traditional knowledge.⁹⁰ Other issues, such as domestic violence, marriage breakdown and early death of spouses drive the migration of women.

78. Indigenous women face particular challenges in the move from rural to urban settings. They are in a more vulnerable situation, no longer protected by traditional law, and without trust in the police, due to bias, and experience misconduct and abuse,⁹¹ leaving them vulnerable to trafficking, forced labour and prostitution (E/2004/43-E/C.19/2004/23). In Canada, there is an increased risk that indigenous women will be subjected to sexual violence, and they are three times more likely to be killed than non-indigenous women.

⁸⁶ UNICEF submission.

⁸⁷ Minority Rights Group International, Expert Mechanism seminar, Thailand, November 2018.

⁸⁸ UNHCR submission.

⁸⁹ <https://transgenderlawcenter.org/archives/13983>.

⁹⁰ Minority Rights Group International, Expert Mechanism seminar, Thailand, November 2018.

⁹¹ *Ibid.*

Indigenous women are overrepresented in prostitution, as in Vancouver, where 80 per cent of prostitutes are indigenous women.⁹² Indigenous children face specific challenges as well, including in enjoyment of their rights to education, health and culture, and disproportionately experience extreme poverty, mortality, sexual exploitation, displacement, incarceration and separation from their parents (E/2004/43-E/C.19/2004/23).

⁹² Ibid.

Annex

Expert Mechanism advice No. 12 on the causes and consequences of migration and displacement of indigenous peoples within the context of States' human rights obligations

1. The Expert Mechanism provides the following advice regarding the causes and consequences of migration and displacement of indigenous peoples within the context of States' human rights obligations. Recommendations by other bodies such as the Permanent Forum, on Indigenous Issues,¹ the Global Migration Group² and the Special Rapporteur on the Rights of Indigenous Peoples, as well as the Representative of the Secretary-General on Internally Displaced Persons and the United Nations treaty bodies and other human rights mechanisms, are all relevant to the topic and should be taken note of by all parties, including in the context of the implementation, follow-up and review of the Global Compact for Safe, Orderly and Regular Migration.

2. States are encouraged to recognize past and ongoing injustices and develop new and innovative solutions to the challenges mentioned above, working with indigenous peoples, and with one another, to identify and address the rights of indigenous peoples in those contexts. All such measures must be undertaken in accordance with indigenous peoples' rights of participation and the norm of free, prior and informed consent. Regional and international organizations should improve indigenous participation and dialogue.

3. States should take measures, in the context of the present study, to implement the United Nations Declaration on the Rights of Indigenous Peoples and the regional and United Nations human rights treaties and to avoid the violation of indigenous peoples' rights. These include both individual rights to life, physical and mental integrity, liberty and security of person and collective rights to self-determination, non-discrimination, land, language and culture. States should ratify all relevant treaties, taking into account the uneven protection of those crossing borders owing to treaties unratified by some States.

4. States should recognize the rights of indigenous peoples: to maintain relationships with members of their community, including across borders and to enjoy and practise their culture, language and religion in community with one another; to a nationality; to their lands, territories and resources; to consultation and free, prior and informed consent; to life (including a dignified life) and liberty and security; to economic, social and cultural rights and labour rights; to freedom of movement; and to freedom from torture or to cruel, inhuman or degrading treatment or punishment (see para. 11 of the study).

5. Each State should review its national framework to ensure that it protects and promotes indigenous peoples' rights in relation to migration, including the decriminalization of irregular migration. States should ensure that neither their laws nor the abuse of their laws are used to criminalize the work of indigenous human rights defenders and that allegations of abuse are promptly, independently and thoroughly investigated and perpetrators prosecuted.

6. States should ensure that indigenous peoples' right to freedom of movement across their traditional territories internally and across international borders is fully realized, by facilitating their voluntary migration, in collaboration with indigenous peoples, whether it is to maintain relationships or engage in their livelihoods, including trade. They are also encouraged to take the necessary measures to ensure that indigenous peoples can maintain their traditional way of life, thus avoiding relocation.

7. States should recognize indigenous peoples as such to ensure that all their rights in the Declaration are fully realized, in particular their right to land, the legal security of which

¹ www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/07/IDWIP-Key-messages-and-recs-.pdf.

² www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf.

is fundamental to reduce conflict, including intercommunity conflict, as well as strengthen indigenous territorial governance. States should also support the resolution of overlapping claims between indigenous peoples created by their relocation, forced or otherwise, by means of financial and other resources, such as dispute resolution services. States should ensure remedies, reparations and compensation for past and ongoing displacement and relocation of indigenous peoples.

8. States should ensure that the rights of indigenous peoples are respected when carrying out commercial, development, climate change mitigation and conservation projects, including their right to consultation and free, prior and informed consent, and should adopt the recommendations as advised in the study on that theme (A/HRC/39/62), and the provision of restitution and compensation as contained in the Declaration. They should involve indigenous peoples in their strategies on climate change in order to take advantage of their traditional knowledge, valuable for ecosystem conservation.

9. Indigenous peoples should be made aware of their rights under international human rights law, including the Declaration, and options for taking cases domestically, regionally and internationally.

10. States should collect and analyse disaggregated data on indigenous peoples, in cooperation/agreement with indigenous peoples, including on the basis of sex, age, disability and all those crossing borders (internal and international) in order to develop policies and programmes.

11. States should pursue policies that promote the self-determination of indigenous peoples, avoid assimilationist policies and have an intercultural focus, to ensure that those who have migrated from their ancestral lands, including from rural to urban environments, are able to maintain a link to their indigenous culture and identity. This could include indigenous peoples' centres in urban areas to address their needs and provide assistance, including support mechanisms for voluntary return to their original communities. The active and full participation of indigenous peoples through their own representative institutions is crucial in developing, designing and implementing policies that affect them.

12. States should ensure that indigenous peoples have adequate living conditions, as well as essential and culturally appropriate social services, including relevant services for vulnerable groups and those fleeing conflict, ensuring that their needs are recognized and their suffering not compounded.

13. States should guarantee greater investment and development opportunities in rural areas for indigenous peoples, with a focus on traditional occupations, with full respect for indigenous peoples' own development concepts.

14. States should use the Sustainable Development Goal process to develop new State policies and practices to implement the Goals relating to migration.

15. States should integrate indigenous issues across the international development sector and consider how resources in the sector can assist developing States in addressing the displacement, relocation and resettlement of indigenous peoples.³

16. States should work with indigenous peoples to adopt measures to better identify indigenous people at the borders (internal and international) and address the specificities of their needs in terms of interpretation, due process, culturally adapted services and collective decision-making, taking into account the particular needs of vulnerable groups (women, children, persons with disabilities and lesbian, gay, bisexual, transgender and intersex persons, as well as recently contacted and indigenous peoples in voluntary isolation, while respecting their preferences.

³ *Case Studies on Leaving No One Behind: A Companion Volume to the Development Co-operation Report 2018*, available at www.oecd-ilibrary.org/development/case-studies-on-leaving-no-one-behind_9789264309333-en; Australia submission.

17. States should adopt the necessary safeguards to avoid discrimination and abuse on account of their indigenous status by receiving governments, host communities and other actors.

18. States should establish a presumption against immigration detention, including ending the immigration detention of children and families.⁴ States should immediately identify and reunite children and families who are currently separated because of migration or law enforcement policies.

19. States should ensure that government officials, border and customs agents and the police receive training in indigenous rights, including the Declaration, to ensure that they understand the significance of cultural objects, including religious regalia, plants and medicines for ceremonies, and facilitate their transit across borders for use by indigenous peoples. Such training could take place with local indigenous peoples and could result in cooperative agreements and guidelines for handling sensitive materials in immigration and customs processes.

20. States are encouraged to eliminate challenges and obstacles to self-government and self-determination created by internal State boundaries, such as multiple and differing jurisdictions, through treaties, agreements and other constructive arrangements. States should ensure that differences among provincial or municipal jurisdictions do not create conditions of inequality, deprivation and discrimination among indigenous peoples.

21. States and United Nations organizations and agencies involved in the voluntary return of indigenous peoples should be aware of and design their programmes of return in accordance with the specificities of indigenous peoples' collective decision-making practices and with the rights in the Declaration and, where relevant, the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, annex). They should ensure that they understand what voluntary return means for indigenous peoples, as opposed to individuals, and establish the basic requirements of what is considered safe voluntary return for indigenous peoples with regard to conditions in the country of origin. This may include: the restitution of land and how this is to be addressed to specifically comply with indigenous peoples' rights; reconciliation taking indigenous culture and traditions into account, with the involvement of indigenous peoples in peace processes; and issues relating to inclusion and ways of addressing marginalization.

22. States should recognize that migration across borders is a regional and a global issue and should be addressed at those levels, including by engagement by regional groups such as the Association of Southeast Asian Nations, or regional human rights commissions, as well as through the process of review provided for in the Global Compact, taking into account international law and the Declaration.

23. States are encouraged to enter into bilateral and regional agreements, including in situations of cross-border conflict or where international borders have been closed, to address cross-border issues, such as indigenous identity cards (recognized by States across borders).

24. States affected by cross-border migration are encouraged to remind one another that departure from their obligations under the Declaration and other international human rights instruments contributes to migration. Affected States should also engage and work together to find diplomatic solutions to protect indigenous rights domestically and in the migration context.

25. States should ensure that particular attention and assistance is provided to indigenous peoples in vulnerable situations in the light of the high risk of violence, disappearance, human and drug trafficking and sexual and labour exploitation.

26. States should ensure that all allegations of violence by government officials, such as border guards, the military and police, including against members of vulnerable groups, in particular in situations of conflict, are prosecuted.

⁴ OHCHR, "Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations", in implementation of the Global Compact.

27. States and indigenous peoples should promote the development of formal or informal associations and networks of indigenous women working to increase their own well-being and social capital.
