I am pleased to have the opportunity today to address the Expert Mechanism on the Rights of Indigenous Peoples in my role as Special Rapporteur on the rights of indigenous peoples, and in a spirit of cooperation and coordination between UN mechanisms to protect the human rights of indigenous peoples. The current study is an important follow up to the Final Report of UN Rapporteur Dr. Miguel Alfonso Martinez[[1]](#footnote-1) and previous UN Seminars on Treaties, Agreements and Other Constructive Arrangements held in 2003,[[2]](#footnote-2) 2006,[[3]](#footnote-3) and 2012.[[4]](#footnote-4)

The UN Declaration on the Rights of Indigenous Peoples preamble provides that treaties, agreements and other constructive arrangements are “the basis for a strengthened partnership between indigenous peoples and States.”[[5]](#footnote-5) Examples include the hundreds of treaties signed with tribes in the United States, the specific and comprehensive claim negotiations with the First Nations of Canada as well as the Treaty of Waitangi between New Zealand and the Maori people. Peace accords, reconciliation initiatives, and constitutional recognition are also important tools for strengthened partnerships between indigenous peoples and States, and for protection of the rights of indigenous peoples. Peace accords are formed to end conflicts within states and may confer rights upon indigenous peoples, as we have seen in Guatemala and Colombia[[6]](#footnote-6). States must engage in ongoing intercultural dialogue to effectively implement and enforce treaties, agreements, constructive arrangements, peace accords, reconciliation initiatives and constitutional recognition in domestic legal regimes.

Historical treaties and nation-to-nation agreements between States and indigenous peoples retain the force of law and should not be diminished through judicial interpretations that conflict with international standards such as the UN Declaration on the Rights of Indigenous Peoples, the American Declaration on the Rights of Indigenous Peoples and the Vienna Convention on the Law of Treaties. Treaties and agreements with indigenous peoples’ or legal arrangements that impact their rights must be observed, interpreted and enforced, as my predecessor Vicky Tauli Corpuz noted, “in accordance with their original spirit and intent and as understood by indigenous peoples, in the light of international human rights law pertaining to indigenous peoples, and in a way that strengthens their right to self-determination.”[[7]](#footnote-7) As States develop and interpret such legal schemes and constructive arrangements that impact indigenous peoples’ rights, it is imperative that they do so with the free, prior, and informed consent of the impacted peoples.

Many existing treaties, agreements, constructive arrangements, peace accords and reconciliation initiatives are not effectively implemented because they were drafted without the participation or free, prior and informed consent of indigenous peoples.[[8]](#footnote-8) Even those agreements between States and indigenous peoples that can be said to have been entered into willingly by all parties involved, often are not fully implemented, or are narrowly interpreted by States.[[9]](#footnote-9) In many cases, the implementation of treaties and agreements has been defined unilaterally by States, leaving measures that are inconvenient or unpopular with States unimplemented. These state-imposed grants of “autonomy” tend to be fragmented and place barriers in the path to self-determination and true cooperation. In other cases, States and indigenous peoples have, over time, developed divergent views of what treaties mean in practice. In some States, the non-implementation of peace agreements has produced, among other consequences: the loss of control of land and resources for indigenous communities, increased violence due to the presence of paramilitary groups, illicit groups and settlers, the erosion of the power of traditional indigenous authorities, violence against indigenous women, and internal displacements.

Where States have enacted legislation to formally recognize indigenous peoples’ autonomy, self-government or land and resource rights, there is often a lack of effective mechanisms for monitoring and enforcement, leaving indigenous peoples no better off than before their rights were legally recognized.[[10]](#footnote-10) States must make good faith efforts to create legislation with the participation of indigenous peoples that guarantees their rights, and then follow those efforts up with effective enforcement mechanisms.

Where rights to lands and resources are not fully realized and legally recognized, indigenous peoples are left economically disadvantaged and financially dependent on state support to fund their institutions. In some cases, States have delegated allocation of funds for indigenous peoples to local authorities, who place conditions on their receipt. In other situations, States have taken advantage of their power to set up constructive arrangements that require indigenous peoples to surrender one right – such as land extinguishment[[11]](#footnote-11)- to ensure another. This is a significant hurdle to constructive dialogue. Conditioning funds or rights is a tool of assimilation that can dismantle trust between indigenous peoples and States.[[12]](#footnote-12) True cooperation cannot be realized where a people remain subject to exploitation.[[13]](#footnote-13)State efforts to reduce power imbalances, in dialogue with indigenous peoples, will bring greater legitimacy to their negotiations. In order to do so, States must ensure that indigenous peoples “have the financial, technical and other assistance they need” to participate in meaningful consultation “without using such assistance to leverage or influence indigenous positions.”[[14]](#footnote-14) State institutions responsible for the design, implementation, and monitoring of agreements must be established in consultation with indigenous peoples and must be effective, accountable, culturally sensitive and inclusive.[[15]](#footnote-15) Barriers to enforcement of indigenous rights through *de jure* and *de facto* discrimination must be identified and removed.

Peace agreements, although they may be well intentioned, do not necessarily ensure full protection of indigenous peoples’ rights unless they are effectively implemented through ongoing, good-faith consultations. Furthermore, reconciliation initiatives seeking peace and healing between States and indigenous peoples such as the Truth and Reconciliation process in Canada, when undertaken in consultation with indigenous peoples, can help to advance the realization of rights contained in the Declaration and its spirit and intent.[[16]](#footnote-16) Constitutional recognition of indigenous peoples rights, as we have seen happen in Bolivia, Nicaragua, Colombia and Mexico, also have the potential to effectively realize the rights enshrined in the Declaration.[[17]](#footnote-17) Unfortunately, in many countries, basic legal protections have not been extended to indigenous peoples who are seeking them.[[18]](#footnote-18)

Development and implementation of agreements and treaties in a manner satisfactory to both parties can only be achieved in an environment of reciprocal cooperation. The UN Declaration provides tools for repairing relationships between States and indigenous peoples. Article 19 requires States to “consult and cooperate in good faith with indigenous peoples . . . to obtain free, prior and informed consent before . . . implementing legislative or administrative measures that may affect them.”[[19]](#footnote-19) Unfortunately, some States view consultation with indigenous peoples as a formality; a mere procedural requirement to legitimize a pre-determined outcome. Without established protocols for meaningful consultation on the meaning and implementation of treaties and other agreements, indigenous peoples may come into conflict with state governments; conflict which, in some cases, leads to violence and criminalization.[[20]](#footnote-20)

Of particular importance is the development of and respect for indigenous-led protocols setting out their own consultation processes, and governance structures[[21]](#footnote-21) to help promote the effective and culturally sensitive implementation of agreements between States and indigenous peoples. Indigenous peoples are in the best position to design consultation structures that account for their interests and are sensitive to their unique cultural needs and aspirations. There are many models to draw from including the consultation frameworks of First Nations in Canada and Belize and the autonomous protocols developed throughout Latin America.

Mutually agreeable arrangements between States and indigenous peoples are more likely to be established and maintained where indigenous peoples realize their right to self-determination and self-governance while also participating fully and equally in the political processes of States, if they so choose.[[22]](#footnote-22) I conclude by proposing the following recommendations. States are encouraged to:

* Rely on the UNDRIP as a framework for promoting intercultural dialogue and reciprocal cooperation to further the implementation of treaties, agreements, and other constructive arrangements.
* Support the development of indigenous-led consultation protocols/legislative initiatives toward achieving consensus on implementing treaties, agreements, and other constructive arrangements.
* Reduce power imbalances by ensuring that indigenous peoples have the necessary financial, technical, and other assistance to engage in consultations.
* Work individually and in concert with indigenous peoples to strengthen indigenous authorities and institutions to promote self-determination.
* Sustain indigenous women's participation during the negotiation and implementation of treaties, agreements, and other arrangements.
* Strengthen and implement indigenous rights to self-determination and autonomy and protect indigenous territories from illegal land incursion.
* Implement the relevant recommendations of the Final Report of Special Rapporteur Miguel Alfonso Martinez (1999), the three previous UN Seminars on Treaties, Agreements and Other Constructive Arrangements (2003, 2006, 2012), including the establishment of an international body to resolve treaty disputes or violations and provide culturally appropriate redress mechanisms.

Thank you. I look forward to reading your report and to continued cooperation and partnership between the EMRIP and UNSRIP.

1. E/CN.4/Sub.2/1999/20. [↑](#footnote-ref-1)
2. E/CN.4/2004/111. [↑](#footnote-ref-2)
3. A/HRC/EMRIP/2010/5. [↑](#footnote-ref-3)
4. Report of the United Nations Expert Seminar on Strengthening Partnership between Indigenous Peoples and States: treaties, agreements and other constructive arrangements Geneva, 16-17 July 2012. [↑](#footnote-ref-4)
5. UNDRIP preamble. [↑](#footnote-ref-5)
6. International Working Group on Indigenous Affairs, *Report on the International Seminar, Indigenous Peoples’ Rights to Autonomy and Self-Government as a Manifestation of the Right to Self-Determination* p. 6, April 2019, https://www.iwgia.org/images/documents/Recommendations/Autonomi\_report\_UK.pdf. [↑](#footnote-ref-6)
7. Victoria Tauli Corpuz, *Report to the General Assembly* para. 43, 17 July 2019, A/74/149. [↑](#footnote-ref-7)
8. Miguel Alfonso Martinez, *Study on Treaties, Agreements and other Constructive Arrangements Between States and Indigenous Populations*, July 1997, E/CN.4/Sub.2/1999/20. [↑](#footnote-ref-8)
9. International Indian Treaty Council Intervention, *Strengthening Partnership between States and indigenous peoples: Treaties, agreements and other constructive arrangements*, 16-17 July 2012, https://www.ohchr.org/Documents/Issues/IPeoples/Seminars/Treaties/BP5.pdf [↑](#footnote-ref-9)
10. José Francisco Calí Tzay, *Expert Testimony in the case of the Maya Kaqchikel Indigenous Peoples of Sumpango and Others v. Guatemala*, Inter-American Court of Human Rights Case. No. CDH-3-2020, 24 May 2021, https://www.ohchr.org/Documents/Issues/IPeoples/SR/ExpertTestimonyCourt\_EN.pdf. [↑](#footnote-ref-10)
11. *See* Mary and Carrie Dann v. United States, IACHR, Case 11.140 Final Report 20/02 paras. 142 and 143; 11 April 2006, CERD/C/USA/DEC/1, para. 6. [↑](#footnote-ref-11)
12. Victoria Tauli Corpuz, Report to the General Assembly, 17 July 2019, [A/74/149](https://undocs.org/A/74/149). [↑](#footnote-ref-12)
13. *See* CERD general recommendation XXI on the right to self determination (describing exploitation, subjugation, and domination as obstacles to self-determination). [↑](#footnote-ref-13)
14. James Anaya, Report to the General Assembly para. 88, 10 Aug. 2011, [A/66/288](https://undocs.org/A/66/288). [↑](#footnote-ref-14)
15. International Labor Organization, *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an inclusive, sustainable and just future* 105,2019, <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_735607.pdf>; Rodolfo Stavenhagen, report to the Commission on Human Rights, para. 109, 16 Feb. 2006, [E/CN.4/2006/78](file:///C%3A%5C%5CUsers%5C%5Cshoward%5C%5CDownloads%5C%5CE%5C%5CCN.4%5C%5C2006%5C%5C78). [↑](#footnote-ref-15)
16. [www.un.org/News/Press/docs/2008/sgsm11715.doc.htm](http://www.un.org/News/Press/docs/2008/sgsm11715.doc.htm). As Ban Ki-Moon said on the occasion of the adoption of the Declaration, “The Declaration is a visionary step towards addressing the human rights of indigenous peoples. It sets out a framework on which States can build or rebuild their relationships with indigenous peoples. The result of more than two decades of negotiations, it provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote reconciliation and ensure that the past is not repeated. I encourage Member States and indigenous peoples to come together in a spirit of mutual respect and make use of the Declaration as the living document it is, so that it has a real and positive effect throughout the world.” [↑](#footnote-ref-16)
17. EMRIP, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: Recognition, Reparation and Reconciliation* para. 9, 11, 2 Sep. 2019, [A/HRC/EMRIP/2019/3/Rev.1](file:///C%3A%5CUsers%5Cshoward%5CDownloads%5CA%5CHRC%5CEMRIP%5C2019%5C3%5CRev.1) “In the Declaration, the international community sets the international standard to prevent any attempt at, continuation of or regression to assimilationist policies, doctrines or practices with regard to indigenous peoples and encourages States to promote and protect specific and differentiated rights for indigenous peoples. The full, effective and integrated implementation of the Declaration should therefore be recognized as a comprehensive framework for recognition, reparation and reconciliation. The Declaration also provides the necessary elements to approach reparation from the perspective of indigenous peoples, taking into account their cultural specificities, their spiritual connection to their lands (which are essential for their survival as distinct peoples) and their right to participate fully and effectively in decision-making. The understanding of reparation and reconciliation as legal concepts continues to evolve, and indigenous perspectives on these terms must be taken into account.” [↑](#footnote-ref-17)
18. *Id.* at para. 21, 25; https://www.iwgia.org/en/nepal. [↑](#footnote-ref-18)
19. UNDRIP, Article 19. [↑](#footnote-ref-19)
20. James Anaya, Report to the Human Rights Council, 2009, A/HRC/12/34. [↑](#footnote-ref-20)
21. Report of the Expert Mechanism on the Rights of Indigenous Peoples to the Human Rights Council, para. 28, 4 Aug. 2021,A/HRC/48/75. [↑](#footnote-ref-21)
22. UNDRIP Article 4, 5. [↑](#footnote-ref-22)