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United Nations Declaration on the Rights of Indigenous Peoples

**Ten years of the implementation of the United Nations
Declaration on the Rights of Indigenous Peoples: good
practices and lessons learned – 2007-2017**

**Preliminary draft Report of the EMRIP for discussion at its 10th
session – circulated for consultation only**

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I. Introduction

1. In September 2016, the Human Rights Council amended and expanded the mandate of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) in resolution 33/25. In this resolution, the Council decided that the Expert Mechanism shall, 2. "... (b) Identify, disseminate and promote good practices and lessons learned regarding the efforts to achieve the ends of the Declaration, including through reports to the Human Rights Council on this matter..."

2. This is the first report to be adopted in the context of this request contained in the resolution. It is intended to highlight the main legal and policy trends in the last 10 years in the application of the United Nations Declaration on the Rights of Indigenous Peoples ("the Declaration") across the UN, regional and national human rights systems and contribute to its further implementation. It is not intended to be a comprehensive study on good practices, many of which are also reflected in the thematic studies of the Expert Mechanism.

II. Summary

3. The Declaration is the most far-reaching comprehensive instrument concerning indigenous peoples, elaborated and approved as a result of a process of nearly three decades of active engagement of indigenous leaders within the United Nations (UN) system. Since its adoption, by the General Assembly, on 13 September 2007, it has been overwhelmingly recognized as reflecting a global consensus on the rights of indigenous peoples, individually and collectively. The question remains as to the extent to which it is being implemented.

4. The Declaration informs the work of a variety of different actors, such as States, indigenous peoples and the different UN agencies, the World Bank, and procedures within the UN system. For the past 10 years, the Declaration has influenced the drafting of constitutions and statutes at the national and subnational¹ levels and contributed to the progressive development of international and domestic laws and policies as it applies to indigenous peoples. The Declaration is reflected in the Constitutions of Ecuador and Bolivia, which were drafted, in 2008 and 2009, respectively, after the Declaration's approval. Both of these constitutions recognize their States as plurinational. Importantly, the Constitution of Ecuador recognizes that the human rights established in international instruments, including not only treaties, but also the Declaration, are directly applicable and enforceable (Article 11.3).

5. Despite the advance of formal recognition, indigenous peoples still report numerous and growing violations of their human rights. In many examples, indigenous peoples are denied: political recognition by states and international actors; protection of their lands, territories resources and environment, particularly from development activities; consultation and free prior and informed consent (FPIC) between indigenous peoples, states, and others, regarding activities that affect them; and the protection of their cultures, including their languages, religion, and way of life. Indigenous women and disabled persons face particular challenges.

¹ For example, Mexico City Constitution.

6. In light of these ongoing challenges, much more can be done to avail of the true potential of this Declaration, through enhanced implementation of its provisions. The Declaration reaffirms and clarifies international human rights standards to ensure respect for indigenous peoples' right to self-determination, cultural rights, languages, land rights, natural resources, environmental protection, consultation and FPIC. Thus, recommendations and observations to States, seeking the implementation of Declaration rights, by UN agencies, treaty bodies, the UN Permanent Forum on Indigenous Issues ("UNPFII"), special procedures of the Human Rights Council, such as the UN Special Rapporteurs², working groups, and the Universal Periodic Review Mechanism ("UPR"), should be implemented.

7. An overview of such recommendations, as well as good practices, will serve as the basis of an analysis of the status of implementation of the Declaration today and also serve to inform the implementation of EMRIP's new mandate as to the choice of thematic studies, definition of priorities for country engagement, and other undertakings toward achieving the ends of the Declaration through the promotion, protection and fulfilment of the rights of indigenous peoples.

8. While the Declaration is not a legally binding treaty, many of the rights contained therein are already guaranteed by major international human rights instruments and have been given significant normative strength, including through the work of the treaty bodies, regional and national courts.

III. International bodies implementing the Declaration

A. United Nations Treaty Bodies apply the Declaration

9. The Declaration has strengthened the work of the UN human rights treaty bodies to pay particular attention to the situation of indigenous peoples in the monitoring of human rights treaties. The ten treaty bodies (CERD, CRC, CESCR, CEDAW, HRCttee, CRPD, CAT, CMW, CED, SPD)³ deal, to a greater or lesser extent, with indigenous rights. Indigenous peoples can claim their rights in all human rights treaties but some treaties also have explicit reference to their rights. Nonetheless, the access to such bodies is still very restricted, as most indigenous peoples in the world are not aware of their existence and, in many countries, they are even unaware of the Declaration and national legislation that protects their rights. Access to justice is a significant issue for the enjoyment of human rights by indigenous peoples and demands stronger communication and information initiatives from the various actors.

10. Under the reporting procedures of the treaties, the CERD has made the highest number of recommendations in the last ten years (470), followed by the CRC (232), the CESCR (172), the CEDAW (143), the HRCttee (74), the CRPD (29), the CAT (23), and CMW (2)

² Including the Special Rapporteurs on the rights of indigenous peoples, environment, human rights defenders, people with disabilities.

³ The Human Rights Committee monitors the International Covenant on Civil and Political Rights (HRCttee); the Committee on the Elimination of all Forms of Racial Discrimination monitors the International Convention by that name (CERD); the Committee against Torture monitors the Convention by that name (CAT); the Committee on the Elimination of Discrimination Against Women monitors the Convention of that name; the Committee on the Rights of Persons with Disabilities monitors the Convention of that name; the Committee on Enforced Disappearances monitors the Convention of that name; the Committee on Economic, Social and Cultural Rights monitors the Covenant of that name; and the Committee on the Rights of the Child monitors the Convention of that name.

and CED (1)⁴. The number of recommendations made by the treaty bodies relates, inter alia, to: the extent to which indigenous rights are specifically mentioned in the treaties or drawn from other articles; the number of States that have ratified the treaty and have indigenous peoples and the extent to which indigenous peoples feed into the treaty body process.

11. It is no surprise that the CERD, which specifically deals with the elimination of racial discrimination and has adopted General Recommendations (interpretative guidance tools) on Indigenous Peoples and Special Measures, expounds much on this issue in the context of reporting. It advises States to implement recommendations of the UN Special Rapporteur on the Rights of Indigenous Peoples (“Special Rapporteur”), to endorse the provisions of the Declaration, and to ratify the ILO Indigenous and Tribal Peoples Convention (No. 169) (“ILO Convention No. 169”), thus contributing to the cross-fertilization of international law. CRC and CESCR make similar recommendations.

12. Treaty bodies often address indigenous people’s rights under general non-discrimination articles or articles specific to their rights, including the HRCtee, under article 27 of the International Covenant on Civil and Political Rights, or the CRC, under article 30 of the Convention on the Rights of the Child, both of which deal with minority rights with the latter making a specific reference to indigenous children. The treaty bodies deal with a whole range of civil, political, economic, social and cultural rights as they relate to indigenous peoples. Recurring themes include: concerns on self-identification; access to justice; lack of consultation and FPIC, including indigenous women, and often with respect to large-scale projects; failure to safeguard the environment; access to and protection of lands, territories, and resources. An interesting developing issue is the recommendation for States to ensure respect by companies (even when acting outside the State⁵) of the rights of indigenous peoples.

13. In the last 10 years, the HRCtee has continued to contribute to a comprehensive body of jurisprudence on indigenous rights, under its individual communications procedure, of the Optional Protocol. It has dealt with a large number of communications dealing with indigenous people’s rights, in particular under article 27, which relates to the rights of persons belonging to minorities to enjoy their culture, to profess and practise their religion, or to use their language but also under article 26 (non-discrimination), and article 19 (freedom of expression). A case in point is that of *Poma Poma v. Peru* (No. 1457/2006)⁶ where the Committee found a violation of the author’s right to enjoy her own culture together with the other members of her group, following the diversion of water from the Aymara pasture land. The Committee found there had been no FPIC given for the project and no independent study on the impact of the construction of water wells. The State was required to provide the author with an effective remedy and reparation measures commensurate with the harm sustained.

14. The treaty bodies have continued to draft General Comments on issues relating to indigenous rights, some of which draw from the Declaration. In General Comment No. 21

⁴ The CED has also considered indigenous issues under its Urgent Action procedure, including the cases of an indigenous leader of the “Yaqi nation”, and the leader of the Organización campesina de los pueblos indígenas de Ayutla (OCPIA). The SPD also brings up indigenous issues in its reports following monitoring visits to places of detention.

⁵ For example CERD recommended Norway to take legislative measures to prevent companies registered in the State Party from carrying out activities that negatively affect the enjoyment of human rights of indigenous peoples outside Norway, and hold such companies accountable. It also referred to “the Ruggi principles”, The UN Guiding Principles on Business and Human Rights (A/HRC/17/31)

⁶ <http://juris.ohchr.org/Search/Details/1495>

(2009)⁷ on the right of everyone to take part in cultural life, the CESCR explicitly draws upon the Declaration and includes a section devoted to indigenous peoples' cultural rights. In General Comment No. 23⁸, on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, the same Committee made explicit reference to numerous articles of the Declaration⁹ in particular those dealing with the rights to consultation and FPIC, land and resources, education, health, remedies, protection of the environment, and cultural heritage. In its General Comment No. 11 (2009)¹⁰ on indigenous children, the CRC urges States to adopt a "rights-based approach to indigenous children based on the Convention and other relevant international standards, such as ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples".¹¹ The Sub-Committee on the Prevention of Torture made a statement on indigenous justice, drawing from language in the Declaration as well as ILO Convention No. 169. It recognizes that indigenous peoples have the right to maintain and strengthen their own legal institutions as well as the right not to be subjected to forced assimilation or destruction of their culture.

15. Under its Early Warning procedure,¹² the CERD has considered several situations of indigenous peoples. By way of example, it considered the Aru indigenous peoples (Indonesia¹³) in relation to the granting of a permit for sugar cane plantations and of the indigenous Shor peoples (Russian Federation¹⁴) in relation to the destruction of the village of Kazas and possible destruction of the village of Chuvashka by mining activities. In May 2017, the CERD sent a letter under this procedure to the United States of America concerning allegations about the potentially discriminatory impact of the construction of a wall along the border of the USA and Mexico on the Kikapoo, Ysleta del Sur Pueblo, and Lipan Apache indigenous communities.¹⁵

16. Recommendations from treaty bodies are ineffective if not implemented. While tracking follow-up to recommendations is a complicated task, the treaty bodies can track the implementation of some of their concerns through their follow-up procedures. For example, under the follow-up to the reporting procedure, the HRCtee gave Finland an "A" grade (satisfactory implementation) for the measures taken to facilitate education for all Sami children in their own language in the territory of the State party.

17. States also often provide good follow-up to adverse findings under the individual communications procedures of the treaty bodies. For example, in the HRCtee case of *L.N.P v Argentina* (1610/2007)¹⁶, Argentina paid compensation (53,000 USD), a monthly

⁷ E/C.12/GC/21

⁸ E/C.12/GC/24

⁹ Articles 10, 14, 19, 24, 26, 28, 29, 31, 32,

¹⁰ CRC/C/GC/11

¹¹ See also CEDAW general recommendation No. 33 on women's access to justice, containing a number of references to indigenous women (CEDAW/C/GC/33). CRPD is currently drafting a general comment on Article 6 on women with disabilities including a few references to indigenous women.

¹² In 1994, CERD decided to establish early warning and urgent procedures as part of its regular agenda. Early warning measures are to be directed at preventing existing problems from escalating into conflicts and urgent procedures to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention.

¹³ <http://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/Indonesia28092015.pdf>

¹⁴ <http://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/Letters/RussianFederation->

¹⁵ http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_ALE_USA_8210_E.pdf

¹⁶ Adopted on 18 July 2011, <http://hrlibrary.umn.edu/undocs/1610-2007.html>

life pension, and provided a property and a scholarship to an indigenous girl, who was raped and subjected to discrimination on the basis of her gender and ethnicity. The State also initiated compulsory training to prevent gender discrimination and violence against women. At its 109th session, the Committee considered the implementation of this friendly settlement satisfactory.¹⁷

18. Many opportunities remain for the treaty bodies to be informed by the Declaration, a point recognised by the World Conference on Indigenous Peoples in 2014, which called upon the treaty bodies to consider the Declaration in accordance with their respective mandates.¹⁸

B. The Universal Periodic Review procedure applies the Declaration

19. Under the UPR procedure of the Human Rights Council, which reviews the human rights records of all UN member States, 991 recommendations on indigenous peoples have been made during its first two cycles¹⁹. The third cycle initiated in May 2017²⁰ has added a considerable number of recommendations regarding indigenous peoples' rights, including the first recommendation making reference to the situation of indigenous peoples in voluntary isolation, received by Ecuador²¹. Some countries have received numerous recommendations including: Australia (98); Canada (91); Chile (59); New Zealand (53); and Paraguay (45). These recommendations cover a broad span of rights under the Declaration and have made recommendations in support of indigenous peoples to: preserve their languages, lands and culture; reduce the negative impact on them from mining; adopt laws prohibiting discrimination against them; and to guarantee the right to life and safety of human rights defenders.

20. Many recommendations also request States to adhere to the Declaration, and to implement the recommendations and decisions of the treaty bodies and regional mechanisms. Explicitly including the Declaration in the list of standards on which the UPR is based, as proposed by the EMRIP in 2013²², would further enhance the implementation of the Declaration in this procedure. Under EMRIP'S expanded mandate, it will have a role in providing Member States, upon their request, with assistance and advice for the implementation of recommendations made under UPR and by treaty bodies, special procedures or other relevant mechanisms.²³ It is to be hoped that States will take advantage of this new mandate to better implement Declaration rights.

21. Greater effort which is now being made to ensure that recommendations are "SMART" (Specific, Measureable, Achievable, Relevant and Time bound) is a positive step forward in the protection of indigenous peoples' rights and should assist implementation of recommendations. Under the UPR procedure, States either "accept" or "take note" of the recommendations made. Implementation is effected through domestic measures, including the adoption of legislation or policies, which requires political and financial prioritization.

¹⁷ A/69/40

¹⁸ A/RES/69/2, paragraph 29

¹⁹ https://www.upr-info.org/database/statistics/index_issues.php?fk_issue=26&cycle=

²⁰ Algeria, Bahrain, Brazil, Ecuador, Finland, India, Indonesia, Morocco, Netherlands, Philippines, Poland, South Africa, Tunisia, United Kingdom. See more at: <https://www.upr-info.org/en/session/Session-27---May-2017#sthash.9VEeve9k.dpuf>

²¹ see: <http://cdes.org.ec/web/llamado-de-atencion-de-onu-y-organizaciones-sociales-sobre-el-derecho-a-la-vida-de-los-pueblos-aislados/>

²² A/hrc/24/49

²³ A/HRC/RES/33/25

22. States may have mechanisms, through which indigenous peoples can participate, when planning their budgets and some do so through specific national action plans, such as Paraguay. National Human Rights Institutions also play a key role in this regard.

23. As an example of implementation under the UPR process, a growing number of African States are recognizing the existence of specific ethnic groups that self-identify as indigenous peoples and are taking concrete commitments to address their situations; Gabon 2012; Namibia 2011; Uganda 2011.²⁴ In addition, the Namibian Government is currently drafting a White paper on indigenous peoples, in implementation of a UPR commitment. Some States have also taken action to improve consultation and participation with Indigenous Peoples, taken measures to try and improve violence against indigenous women and girls, and have pledged to ratify ILO Convention No. 69, following UPR recommendations.²⁵

IV. Regional mechanisms apply the Declaration

24. In the last 10 years, regional human rights bodies, such as the African and inter-American human rights systems have been active in developing and interpreting the rights of indigenous peoples, including citing the Declaration. The cases below confirm that indigenous peoples' rights to their lands, territories and resources, as well as the principle of FPIC are part of the corpus of binding human rights law. This is also demonstrated by the citation of this jurisprudence in national case law. It is disappointing that such persuasive jurisprudence remains poorly implemented.

25. The African Commission on Human and Peoples' Rights ("ACHPR") and the African Court on Human and Peoples' Rights ("the Court") are leading the way on implementing the Declaration in Africa. To that end, they have made land mark decisions on the rights of indigenous peoples, especially in relation to their cultural rights and their rights to lands, territories and resources.

26. Two leading cases from the African system on land rights are worthy of mention. In the "Endorois case"²⁶, of 2 February 2010, the ACHPR declared that the expulsion of the Endorois from their ancestral lands violated numerous human rights of the African Charter on Human and People's Rights, including the right to property, culture, disposal of wealth and natural resources. It ordered Kenya to restore the Endorois to their historic land and to compensate them. This is the first time that African indigenous peoples' rights over traditionally owned land have been legally recognised and the first ruling of an international tribunal on a violation of the right to development. In its judgement, the ACHPR drew on articles 8(2) (b), 10, 25, 26 and 27 of the Declaration as well as the "Saramaka case" from the Inter American Court on Human Rights ("IACHR") (para. ...).

27. In the "Ogiek case", of 26 May 2017²⁷, which also related to expulsions, the Court found similar violations against Kenya as in the Endorois case.²⁸ This is one of the African

²⁴ The Indigenous World 2017.

http://www.iwgia.org/iwgia_files_publications_files/0760_THE_INDIGENOUS_ORLD_2017_eb.pdf

²⁵ See for example Argentina, Chile, Finland, mid-term reports.

<http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx>

²⁶ https://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf

²⁷ <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples'%20Rights%20v.%20the%20Rpublic%20of%20Kenya..pdf>

Court's first ever cases and the first decision to consider the rights of indigenous peoples. In its judgement, the Court drew on articles 8 and 26 of the Declaration as well as the General Comment from the CESCR on the right to cultural life.²⁹ These cases should contribute to a better understanding and greater acceptance of indigenous rights in Africa and be an incentive to all States to involve indigenous peoples in the development process.

28. Under their reporting procedures, both the CERD and the CESCR have advised the Kenyan State to implement the Endorois decision and the CERD recently noted its concern in response to reports of ongoing forced evictions of the Ogiek peoples.³⁰ This interplay between the regional and international human rights bodies demonstrates the positive effect that such cooperation can have on the coherence and consistency of international human rights law for the benefit of indigenous peoples.

29. While it may be a little early to expect the Ogiek case to be implemented, it is unfortunate that, after over seven years, the Endorois case remains unimplemented. OHCHR is playing its part in trying to ensure implementation of these cases and organized a workshop in Nakuru, in August 2016, with the Senior Human Rights Adviser in Kenya to enhance dialogue between all stakeholders. The meeting discussed a co-management plan process for Lake Bogoria and adopted a road map, including key recommendations and ways forward.

30. Apart from its decisions, the African regional human rights mechanisms contribute to achieving the goals of the Declaration in other ways, including through Resolutions on climate change and World Heritage sites in Africa; participation in the World Conference on Indigenous Peoples in 2014; and active participation in reviewing the World Bank's Environmental and Social Framework.

31. The Inter-American human rights system has made important contributions to the development of international law on indigenous rights, citing the Declaration, adding value, legal analysis and further legitimizing its contents. In *Saramaka People v. Suriname*³¹, November 2007, the IACHR decided that although the Saramakas were not an indigenous community, they had certain resemblances with traditional indigenous communities and therefore enjoyed the same rights. As a consequence, they did not need a title in order to own the lands (possession was sufficient).

32. While this judgment appears to have been partially implemented³², the most crucial measures concerning new legislation, non-repetition and the granting of title do not appear to have been realized. Worryingly, it is reported that Suriname has continued to grant new concessions within the Saramaka community's territory since the judgment was rendered³³. In 2015, the CERD communicated its concern to Suriname for the lack of implementation of the most essential parts of the judgement³⁴. The IACHR continues to supervise the full implementation of its decision.

33. In *Xákmok Kásek v. Paraguay*, 24 August 2010³⁵, relating to the expulsion of an indigenous community, the IACHR found several violations of the American Convention. This case strengthens the Court's position on the existence of a right to property of

²⁸ Despite an allegation relating to the right to life the Court found no violation of Article 4 (the right to life).

²⁹ E/C.12/GC/21

³⁰ CERD/C/KEN/CO/5-7, CERD/C/KEN/CO/1-4, E/C.12/KEN/CO/2-5

³¹ http://www.worldcourts.com/iacthr/eng/decisions/2008.08.12_Saramaka_v_Suriname.pdf

³² See <https://www.escri-net.org/caselaw/2014/case-saramaka-people-v-suriname>

³³ CCPR/C/SUR/CO/3

³⁴ CERD/C/SUR/CO/13-15

³⁵ http://www.worldcourts.com/iacthr/eng/decisions/2010.08.24_Xakmok_Kasek_v_Paraguay.pdf

indigenous peoples, under certain circumstances, without official title and confirmed its jurisprudence on the relationship between land and the survival of a community when the land is used for economic, cultural, social and religious purposes. The Court also recognized a relationship between the right to life and the rights to water, education, and food, among others. Disappointingly, it would appear that the Kásek community of Paraguay was only able to re-occupy their respective historic lands by force.³⁶

34. In *Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*³⁷, following damage caused by a company (contracted with the State) conducting seismic exploration on Sarayaku lands, the IACHR found numerous violations of the American Convention. Notably, it reiterated its jurisprudence that consultations should be undertaken with good faith, through culturally adequate procedures, with the aim of reaching an agreement, and the consultation should be prior, informed, and culturally appropriate. It established that consultation is the duty of the State, and cannot be delegated to third parties. In its deliberations, the IACHR made reference to articles 15 (2), 17 (2), 19, 30 (2), 32 (2), 36 (2), and 38, of the Declaration.

35. In *Maya Leaders Alliance & others v. The Attorney General of Belize*³⁸, the Caribbean Court of Justice (CCJ) affirmed the rights of the Mayan indigenous communities over their traditional lands and also indicated that no concessions should be granted for exploitation of natural resources without the consent of the concerned indigenous peoples. In arriving at this decision, the Court made reference to articles 26, 27 and 28 of the Declaration, indicating that, although it is not binding, this Declaration is relevant for the purposes of interpreting the Constitution of Belize as it relates to indigenous rights.

V. Domestic courts apply the Declaration

36. In the last ten years, national courts have been instrumental in the application of Declaration rights, and regional and international treaties, as they relate to indigenous peoples, in particular with respect to ownership of land, territories, and natural resources. In 2007, in the case of *Aurelio Cal, et al.*³⁹ the Supreme Court of Belize invoked the Declaration when interpreting the country's Constitution to protect the right of the Mayan people to their traditional lands. The Chief Justice stated, *inter alia*, that, "I find its [the Declaration] Article 26 of special resonance and relevance in the context of this case, reflecting, as I think it does, the growing consensus and the general principles of international law on indigenous peoples and their lands and resources." He also referred to articles 42 and 46 of the Declaration to support his premise that the State has an obligation to respect the Mayan right to their lands. He ruled that the Mayan communities of Conejo and Santa Cruz held customary title to their lands and ordered the government to respect and demarcate their territory.

³⁶ The Impact of Strategic Litigation on Indigenous Peoples' Land Rights, Open Society Justice Initiative, June 2016

³⁷ https://www.escri-net.org/sites/default/files/Court%20Decision%20English_.pdf:

³⁸ 22 April 2015, http://www.elaw.org/system/files/bz.mayaleaders_0.pdf

³⁹ *Aurelio Cal, et al. v. The Attorney General of Belize et al.*, Supreme Court of Belize, Claim No.171 and No. 172 (2007). <https://www.elaw.org/es/content/belize-aurelio-cal-et-al-v-attorney-general-belize-supreme-court-belize-claims-no-171-and-17>. The CERD wrote to Belize following this case in 2008 under its Early Warning procedure - http://www.law2.arizona.edu/depts/iplp/outreach/maya_belize/documents/CERDLetterBelize070308.pdf

37. Even in draft form the Declaration has been applied. In *Roy Sesana and others v. Attorney General of Botswana*, in 2006⁴⁰, the Court used the draft Declaration to rule in favour of Basarwa (San) indigenous peoples who were being evicted from their ancestral lands without their consent and unlawfully, and the refusal to allow them to return was unconstitutional. This is the first reported case in which an African court recognized indigenous land rights.

38. Similarly, in the *IL Chamus* case, where the applicant indigenous peoples claimed a violation of their constitutional right to participate in decision-making through elections, a Kenyan High Court ruled in favour of the applicant grounding its argument in several provisions of the draft Declaration.

39. On 3 April 2014, the Supreme Court of Belize⁴¹ ruled that the permits granted to the oil company for drilling and road construction were unreasonable and unlawful. It decided that having voted in favor of the Declaration the State is clearly bound to uphold the general principles of international law contained therein. It confirmed that the government had an obligation to recognize the collective land ownership of the concerned communities and also to obtain their FPIC before awarding concessions on their territories within the meaning of article 32 (2), as defined by the Special Rapporteur⁴².

40. The Supreme Court of Chile, in 2009,⁴³ invoked indigenous peoples' rights to protection of the environment in granting a petition for protection on the grounds that a forestry company had adversely affected the wetlands of the Mapuche community. In its decision, it referred to article 29 of the Declaration to the extent that indigenous peoples have the right to conservation and protection of the environment.

41. In the "Independencia Aqueduct case", the Supreme Court of Mexico, in 2012,⁴⁴ ordered the State to consult with the Yaqui tribe to determine whether the construction of the Independencia aqueduct, for the purposes of carrying water from the Yaqui river to the city of Hermosillo, would cause any irreversible damage. If so, construction should be stopped. The Court relied on article 19 of the Declaration as well as the ILO Convention No. 169 and the Sarayaku decision (para...). It held that prior consultation should be culturally appropriate, informed, and conducted in good faith. This is the first time in Mexico that Inter-American standards regarding the indigenous communities' right to consultation were acknowledged by the Supreme Court. Unfortunately, enforcement of this decision has been slow.

⁴⁰ 2 January 2006. <http://www1.chr.up.ac.za/index.php/browse-by-country/botswana/1118.html>

⁴¹ The Supreme Court of Belize, A.D. 2014, Claim No. 394 of 2013: <http://www.belizejudiciary.org/web/wp-content/uploads/2014/01/Supreme-Court-Claim-No-394-of-2013-Sarstoon-Temash-Institute-for-Indigenous-Management-et-al-v-The-Attorney-General-of-Belize-et-al-.pdf>

⁴² The Court referred to, James Anaya in the "Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People", United Nations General Assembly, A/HRC/12/34, dated 15th July 2009 as para 62, 63 and 72

⁴³ Court of Appeals of Temuco. Judgment on Appeal for Protection, Case 1773-2008, dated September 16, 2009, Francisca Linconao v. Forestal Palermo, upheld that same year by the Supreme Court of Chile.

<http://www.politicaspublicas.net/panel/jp/462-2009-linconao.html>

⁴⁴ Amparo No. 631/2012, <https://www.escr-net.org/sites/default/files/Sentencia%20SCJN%20%28Acueducto%20Independencia%29.pdf> and <https://www.escr-net.org/sites/default/files/Aclaracion%20de%20sentencia%20SCJN.pdf>

42. In *Álvaro Bailable et al.*, in 2011⁴⁵, the Constitutional Court of Colombia ruled that, for development plans (in this case exploration and extractive activities of mineral resources) that have a major impact on indigenous territories, the State must not only consult, but must also obtain indigenous peoples' FPIC. In its decision, it made a reference to the State's obligations to abide by international law including the Declaration.⁴⁶

43. Several courts in Canada have cited the Declaration, including the "Batchewana case", in 2017⁴⁷, where a judge of the Ontario Court of Justice, ruled that the Crown must pay the legal fees of the defendants (from the Batchewana First Nation) in a criminal case after the government withdrew nearly eight-year-old charges against Indigenous men who were logging on Crown land. The Judge relied on the Declaration (articles 3, 8(2)(b), 26, 28, 32 and 40), which he indicated had been adopted by Canada on 10 May 2016.

44. In the *Hamilton Health Services Corp. v. H. (D)*, case before the Ontario Court of Justice (2015) the Attorney General's decision to dialogue with the parties about an aboriginal family's desire to use traditional medicine in treatment of their daughter's health condition was considered consistent with article 24 of the Declaration. Also, in *R. v. Francis-Simms*, the Ontario Court of Justice's (2017), use of restorative justice in sentencing proceedings for an aboriginal offender in a drug case was consistent with articles 5 and 11 of the Declaration.

45. The Constitutional Court of Guatemala handed down a number of judgements⁴⁸ suspending activities of hydroelectric and mining companies for lack of consultation with indigenous peoples, specifically referring to articles 32 (2) of the Declaration.

46. On 21 October 2016, the Constitutional Court of the Republic of Sakha (Yakutia)⁴⁹ in the Russian Federation, in the context of clarifying the meaning of article 42 of its Constitution, held that it should be understood as providing, "the complete set of natural collective rights of the indigenous people of Yakutia" and provides for their "territorial unity, socioeconomic, state, legal, national, cultural and linguistic identity." It states that article 42 is intended to "guarantee the preservation and rebirth" of the indigenous peoples of this Republic. It cited the Declaration as a consensus statement of inalienable rights of indigenous peoples.

VI. The Declaration in the work of the UN and the World Bank

47. Through its field offices, OHCHR continues to engage with indigenous peoples to support implementation of the Declaration. For example, OHCHR Guatemala, along with the UN Fund for Victims of Torture, provided support to indigenous women, in a landmark case in 2016. In the first case of its type (*Sepur Zarco* trial), a Guatemalan Court recognised sexual violence committed against indigenous women during the internal armed conflict in the 1980s as a crime against humanity.

⁴⁵Constitutional, Judgment T-769/09 handed down in the case of *Álvaro Bailable et al.* Constitutional Court of Colombia, Judgment Number T-129 of March 3, 2011.

<http://www.corteconstitucional.gov.co/relatoria/2011/T-129-11.htm>

⁴⁶ It did not specify any particular rights of the Declaration in the decision.

⁴⁷ *R. v. Sayers*: See <http://www.supremeadvocacy.ca/wp-content/uploads/2017/02/R-v-Sayers-Robinson-Swanson-Robinson-2017-OCJ-web.pdf>

⁴⁸ *Apelacion De Sentencia De Amparo – Expedientes 457-2012 and 4958-2012*

⁴⁹ Decision No 4-II of the Constitutional Court of the Republic of Sakha (Yakutia), Russian Federation <https://ks.sakha.gov.ru/uploads/ckfinder/userfiles/files/Постановление%20№%204-2016.pdf>

48. As well as the EMRIP, the other two UN mechanisms supporting indigenous peoples – the UNPFII, the Special Rapporteur – provide important guidance and recommendations to all stakeholders in the implementation of the Declaration. The coordination between them is a good example of a coherent approach to the implementation of indigenous rights. This includes the participation of the Special Rapporteur in the sessions of the mechanisms, allowing for parallel meetings with indigenous peoples representatives and others, joint statements and coordination meetings. Even closer collaboration will be required as the EMRIP develops its new mandate. Partnerships with National Human Rights Institutions, which have become increasingly important in helping to achieve the aims of the Declaration, should be further encouraged in this context.

49. In 2014, member States at the UN World Conference reaffirmed their support to the Declaration. The outcome document contains many commitments, two of which are of particular significance. One commitment culminated in the General Assembly Consultation Process Aiming to Enhance the Participation of Indigenous Peoples' Representatives in UN Meetings on Issues Affecting Them. These consultations are ongoing and have so far produced a draft resolution, which is currently before the General Assembly. Such participation has already gleaned benefits, including the appointment of indigenous co-facilitators in the World Conference.

50. The second significant commitment made by states relates to the preparation of national action plans to implement the Declaration. To date only a small number of States appear to have established such plans e.g. Bolivia, Canada, El Salvador (tbc), Mexico, Paraguay, and Peru (tbc)⁵⁰. It is relevant to note that the Paraguayan national action plan also makes reference to the protection of indigenous peoples in voluntary isolation, an issue upon which the UN published guidelines in 2012 reflecting Declaration rights. Without action plans, it is difficult to see how States can comprehensively realize the full set of Declaration rights. It is noted however that a number of States develop policies with and for indigenous peoples through specialized bodies.

51. A further element to come out of the World Conference was a request for the development of a UN system-wide action plan on indigenous peoples to develop a coherent approach to achieving the ends of the Declaration. Together with OHCHR and UNDP, the ILO launched in 2011 the UN Indigenous Peoples' Partnership (UNPFII), which presently also includes UNICEF, UNFPA and UNESCO. An action plan was introduced to indigenous peoples and member states at the 15th session of the UNPFII in May 2016. Since then a media and awareness raising campaign as well as a mapping of guidelines, policies, and manuals relating to indigenous issues across the UN system has taken place. The ILO 2015 strategy for action concerning indigenous and tribal peoples commits the ILO to contribute actively to this system wide action plan.

⁵⁰ A/HRC/33/58. El Salvador 2015: <http://www.presidencia.gob.sv/inicia-elaboracion-del-plan-de-accion-nacional-para-cumplir-compromisos-con-los-pueblos-indigenas/>
<http://www.laprensalibre.cr/Noticias/detalle/34325/337/el-salvador-anuncia-plan-de-accion-para-cumplir-derechos-de-pueblos-indigenas/>; Paraguay 2016: <http://www.stp.gov.py/v1/pueblos-indigenas-seran-beneficiados-con-implementacion-de-planes-de-accion-nacionales/>; Bolivia 2017: <http://www.fondoindigena.org/drupal/es/node/710>; Panamá; Propuesta de plan de desarrollo: http://www.pa.undp.org/content/dam/panama/docs/documentos/undp_pa_final_plan_desarrollo_pueblos_indigenas.pdf.
 Política Nacional para a transversalização del enfoque intercultural
http://poblacionafroperuana.cultura.pe/sites/default/files/politica_nacional_de_transversalizacion_del_enfoque_intercultural.pdf

52. The ILO has continued to promote the ratification and effective implementation of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), which remains the only international treaty open to ratification specifically dedicated to indigenous peoples' rights. Since 2007, three additional countries have ratified the Convention (Spain, Nepal and Nicaragua).

53. The engagement of indigenous peoples in negotiations for the 2030 Agenda for Sustainable Development and the Paris Agreement on Climate Change was a step in the right direction to help adhere to the Declaration. Unlike the MDGs, the current goals make explicit reference to indigenous peoples' development concerns and are founded on principles of universality, human rights, equality and environmental sustainability - core priorities for indigenous peoples. However, some of the main priorities for indigenous peoples are not reflected in the 2030 Agenda, such as the principle of FPIC, the right to self-determined development, legal recognition of indigenous peoples and their individual and collective rights.

54. On 4 August 2016, after extensive consultations, the World Bank's Board of Directors approved a new set of Environmental and Social Safeguards ("ESSs"), including a specific Environmental and Social Safeguard No.7 (ESS7) on Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities in order to ensure that Bank-funded development projects do not harm indigenous peoples and the environment. It will be launched in 2018 to replace the existing Operational Policy 4.10 on indigenous peoples that requires borrowing countries to ensure any World Bank-funded project does not harm indigenous peoples' rights. For the first time, the issue of FPIC was included in a Bank supported document. It would appear that last year the World Bank granted a waiver of Operational Policy 4.10 to Tanzania with respect to the SAGCOT corridor project, prompting strong condemnations from the Special Rapporteur, the African Commission and Indigenous peoples. It is to be hoped that no further waivers will be granted in the future.

VII. New Regional Instruments and Agreements on Indigenous Rights reinforce Declaration rights

55. The Declaration has contributed to the elaboration of regional agreements on indigenous rights. In 2016, the Organization of American States' approved the American Declaration on the Rights of Indigenous Peoples. Importantly, this Declaration recognizes the fundamental rights of indigenous peoples to self-determination, to their ancestral territories, and to consultation and FPIC, it also recognizes the principle of non-forced contact to those indigenous peoples living in isolation. However, there is concern that in some respects it may lower the bar in the protection of indigenous rights and setback the jurisprudence of the Inter-American system.

56. On 13th January 2017, the governments of Finland, Norway and Sweden came to an agreement on the language in the Draft Nordic Sámi Convention. This Draft Convention includes joint Nordic approaches in safeguarding and strengthening Sámi right to self-determination, including rights to lands and resources, Sámi traditional livelihoods, language, culture and education and it confirms that the Sámi people should have their own representative political bodies, the Sámi Parliaments. The Sámi Parliaments have been represented in the negotiations on the Draft Convention, but they have not yet given their consent to the Draft Convention. One of the issues that remains unclear is whether the Draft Convention broadens the definition of Sámi persons eligible to vote in Sámi Parliament elections so much that it also will include non-indigenous persons. Assuming all three countries' Sami Parliaments and national legislative assemblies consent to the agreement, it will come into force in Autumn 2019. This Convention may be of interest to

indigenous peoples worldwide, especially where indigenous people are scattered across several countries, like for instance the Maya (living in Mexico, Guatemala and in Belize).

VIII. Human Rights Defenders risk their lives to achieve respect for the Declaration

57. Of great concern, is the rise in the number of indigenous people who die every year while attempting to defend their rights under the Declaration. An illustrative case is that of Berta Caceres, leader of the Lenca people of Honduras, who was killed in 2016 allegedly in connection with her involvement and opposition to the Agua Zarca hydroelectric project. Her daughter Bertha Zuñiga, was also targeted in an armed attack, in June 2017. Out of 281 human rights defenders killed in 25 countries in 2016, almost half were defending their land, environment and indigenous rights⁵¹. This is an enormous increase compared to the 185 documented killings of human rights defenders in 2015 and 130 in 2014. The UNPFII expressed its concern on this issue in May of this year and the EMRIP has made a proposal to the Human Rights Council to prepare a thematic study on this issue.

58. These figures do not include the number of indigenous people who are subjected to daily violent attacks and threats, enforced disappearances, illegal surveillance, travel bans, and the increasing trend of criminalizing indigenous activists and organizations and movements often engendered by conflicts over investment projects in indigenous territories. The criminal persecution of indigenous rights defenders is a trend reflected in cases such as the prosecution of defenders of the Mapuche people under antiterrorist laws in Chile for which the State of Chile was held liable by the IACHR in 2014⁵².

X. Recommendations

- As States have the principal responsibility for adopting legislative measures and public policies to implement the rights recognized in the Declaration (article 42), they should adopt measures to achieve this aim, including through the implementation of recommendations and decisions of all human rights bodies referred to above. In this respect, States and indigenous peoples may wish to take advantage of EMRIPS expanded mandate and seek its assistance with respect to implementation.
- States should follow-up on the outcome document of the World Conference, in particular on: 1. The Consultative Process aimed at enhancing the participation of Indigenous Peoples' in UN meetings and 2. Preparation of national action plans to implement the Declaration, which should cover all the articles in the Declaration, take into account the findings and recommendations of international human rights mechanisms, and the participation of all sectors of indigenous people's society.
- The work of all UN bodies, including the Special Rapporteur on Indigenous Peoples, the UNPFII, treaty bodies, and the Human Rights Council, in monitoring and promoting the rights recognized in the Declaration should be strengthened, in line with article 42 of the Declaration. Further coordination of these mechanisms should assist the implementation gap.

⁵¹ Frontline Defenders Report and statement 10th anniversary

⁵² http://www.worldcourts.com/iacthr/eng/decisions/2014.05.29_Norin_Catriman_v_Chile.pdf

- The treaty bodies should follow the recommendation of the World Conference to consider the Declaration in accordance with their respective mandates. For example, treaty bodies may cross-reference their recommends to contribute to the coherence and consistency on indigenous issues. In this regard, the CEDAW may consider drafting a General Recommendation on Indigenous Women and Girls, against whom violence is recognised as a global phenomenon.
- The UPR procedure should adopt the proposal of the EMRIP in 2013 and explicitly include the Declaration in the list of standards on which the UPR is based.
- All UN Country Offices should recognize indigenous peoples' rights, in line with the Declaration/ILO Convention No. 169 and ensure their inclusion and participation in the review of UNDAF and/or work plans.
- Given some weaknesses identified in the American Declaration on the Rights of Indigenous Peoples, it should be read in conjunction with other international instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples and the ILO's Convention No. 169.
- Implementation of the SDGs should be culturally sensitive, involve full participation of indigenous peoples and fully respect the Declaration. The treaty bodies may consider requesting disaggregated data and statistics that could be used to measure progress relating to indigenous peoples across the SDGs.
