

Report to EMRIP second report on efforts to achieve the ends of the Declaration on the Rights of Indigenous Peoples (UNDRIP) Recognition, reparations and reconciliation, February 28, 2019

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In the past 10 years Indigenous Peoples have made great efforts at implementing the Declaration on the Rights of Indigenous Peoples. Many Indigenous Peoples have identified flawed or non-existent processes for recognition, reparation and reconciliation as obstacles to our progress.

First, many States that have signed the Declaration say that they have no Indigenous Peoples when scientists say there are in fact Peoples pre-existing the modern State still living with that State. Beyond this fundamental conflict with science, States that have acceded to the UN Charter should be held accountable to the obligations of UN Charter to support all Peoples' self-determination. As all Peoples have self-determination and the Declaration embraces self-identification of Indigenous Peoples, States must, to fulfill their Charter obligations, support the right of Indigenous Peoples to self-identify as Indigenous Peoples, even where the States declares that there are no Indigenous Peoples.

Second, many States have corrupt institutions and say that they have Indigenous Peoples but they only recognize, reconcile with, or make reparations to Indigenous Peoples whose development agendas can be coerced or manipulated by the State to reflect the State's short-term interest. So States will recognize one Indigenous People and not another based on arbitrary or corrupt criteria or processes. Often the State then exploits the 'recognized' Indigenous People through misrepresentations of development plans or outright fraud or threat of violence and thus does not actually follow through with promised reconciliation or reparations. Alternatively, the State may not recognize or reconcile with an Indigenous People until the People recognize the State-sponsored leadership of the Indigenous People that will support the State's development agenda. States may also un-recognize formerly recognized Indigenous Peoples or leaderships of recognized Indigenous Peoples because of development conflicts.

Corruption causes this subterfuge of lack of ‘recognition’ of Indigenous Peoples.

So we cannot even begin on basic recognition, reconciliation, or reparations processes because State corruption makes the development objectives of the Indigenous People the only determinant of whether the State will work at all toward these unifying processes. This cyclical injustice against Indigenous Peoples means Indigenous Peoples often don’t have access to our resources to assert that we have rights and that we are who we are, thus we are not able to formally title our lands, resources, and heritage. Development aggression authorized by the State is thus a major obstacle to recognition, reconciliation, and reparations.

The legal empowerment of Indigenous Peoples is needed to share our knowledge of good governance. Because we are denied access to our resources to assert our rights to development, the world loses access to Indigenous Peoples’ knowledge. For survival of humanity, recognize Indigenous Peoples and reconcile with us, making reparations that will allow us to develop our institutions for sharing Indigenous Peoples’ knowledge.

Meanwhile, some Indigenous Peoples have been able to enhance their survival at least as Minorities.

### **Surviving without recognition**

The Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights and the UN Special Rapporteur on minority issues, concluded that the relevant factors to consider when determining whether a community is indigenous include ‘the priority in time with respect to the occupation and use of a specific territory; a voluntary perception of cultural distinctiveness, which may include aspects of language, social organisation, and religion and spiritual values; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist. It further stated that these criteria generally reflect the current normative standards to identify indigenous populations in international law, and deemed it appropriate, by virtue of Articles

60 and 61 of the [UN] Charter, to draw inspiration from other human rights instruments to apply these criteria to the case before it.<sup>i</sup>

We direct EMRIP to consider the African Commission on Human and Peoples' Rights' Working Group on Indigenous Populations/Communities as a model for other law-recognizing regions to follow, as it relied on DRIP and UN understanding of Indigenous Peoples' characteristics. We ask EMRIP to consider the situation of UN Members who operate outside such regional jurisdictions to be in breach of commitments made to upholding the UN Charter and provide emergency assistance to immediately support States' accession to such regional courts. Consider the African Court to be a model for reconciliation steps as well as for methods of reducing opportunities for corruption. Mechanisms should be put in place to hold such courts free of corruption.

DINIPS calls attention to the African Court's reliance on the recent words of the UN Special Rapporteur on minority issues defining characteristics of indigenous peoples as: a) priority in time with respect to the occupation and use of a specific territory; b) perpetuation of cultural distinctiveness, including aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; c) self-identification, and recognition by other groups or State authorities, as a distinct group; and d) experience of subjugation, marginalisation, dispossession, exclusion or discrimination.<sup>ii</sup>

We need judicial bodies and multilateral State organizations to help primitive states understand the humanness of Indigenous Peoples as first and foremost 'Peoples' as defined in the UN Charter. As Peoples impacted by climate change, we expect the understanding of Indigenous People to not penalize Indigenous Peoples for degradation and loss of access to traditional territories.

In this year when Indigenous Peoples are celebrating our languages on an international stage, we call EMRIP to recognize that Indigenous Peoples' languages are sites of oppression and attack and also ways we seek to self-identify. Our languages are essential to modes of production and economic development as well as important ways of understanding our laws and institutions.

Likewise Member State recognition of our ownership of our own languages are important parts of reconciliation and reparations.

The well-documented Ogiek case illustrates the strategy of too many UN Members globally who refuse to recognize Indigenous Peoples as the distinct pre-existing marginalized Peoples that we are so they can justify taking our territories and access to them. While it is notable that the State supported and acceded to the Court's jurisdiction, the world monitors implementation because the Court cannot sanction the State. The State has not ratified ILO169 or developed specific legislation supporting Indigenous Peoples.

In this case, the UN Member argued that the Indigenous People were assimilated into neighboring cultures. This is a common strategy for States claiming Indigenous Peoples' resources by forcing social, economic, or political assimilation through oppression and then blaming Indigenous Peoples for the effects of oppression. The African region, however, provided protections in its African Commission on Human and Peoples' Rights that expressly embraces the rights of all **Peoples** regardless of the maneuvering of the State to avoid collective human rights responsibilities.

Another common strategy in this case was the Member States' claims about religious issues. Religious arguments are often used to demonize, dehumanize, or delegitimize Indigenous Peoples as humans with equal rights to non-indigenous.

We ask EMRIP to consider the African Court's judgement on this case (para 167), that the Member State's religious concerns, placed in the national security context as is a popular strategy among oppressor States, must be 'necessary and reasonable' as judged by other regional members, not as unilaterally determined by the State. This is important for other regions to consider as a standard, so States cannot unilaterally and arbitrarily deem Indigenous Peoples' traditional subsistence a threat to national development or security.

We need more such judicial recourse to protect other Indigenous Peoples from States criminalizing our economic self-determination and traditional practices without review from other States. In the

context of sustainable development is notable that the Court ignored the conservation subterfuge and recognized the Ogiek People's right to life as superseding. Again, multilateral organizations may have an interest in promoting this parity as it will create a more level field for international commerce if States' criminalization of Indigenous Peoples' subsistence practices were reviewed in such a binding manner by other States. We hope regional and other international monitoring can ensure Ogiek leadership in decision-making for the State's Task Force to implement the Court's decision.

Recognition, reconciliation, and reparations might be complete integration with reserved seats for each Indigenous People in national legislature and high judicial courts, the highest executive seat of the State being rotated among Indigenous Peoples. Or it might be complete autonomy or segregation for Indigenous Peoples and/or whatever else Indigenous Peoples choose on a case-by-case basis. What is crucial is that Indigenous Peoples lead the way in decision-making about what is recognition, reconciliation, and reparations.

We observe that the Plurinational State of Bolivia has reserved seats for Indigenous Peoples with a ruling indigenous political party and has made exemplary progress toward implementation of the Declaration while Indigenous Peoples of Bolivia are still free to say at home and at the UN that there are still improvements the State needs to make.

Thus multilateral committees of Indigenous Peoples' governments and newcomer colonial governments with historical information about the Indigenous People is the appropriate instrument for supporting Indigenous People's right to negotiate for access to our resources. It is counterintuitive for human rights-respecting States and international organizations to support the occupying colonial power with the exclusive juridical jurisdiction to resolve disputes between itself and the occupied power of Indigenous Peoples, especially where the occupying power entered and remained in wars of aggression. These States have already demonstrated they will kill to get what they want and need more monitoring than others, especially in this era when humanity faces the threat of extermination.

It will also help Indigenous Peoples if the UN Membership recognizes that it is the rule of law that is too big to fail, not security council members. When UN Membership calls all of its members to accountability regardless of their access to nuclear power, Indigenous Peoples will be more likely to live peacefully with a colonial power that must recognize the rule of law in order to trade.

States must work with Indigenous Peoples to create, support, and develop institutions responsive to, led by, and driven by Indigenous Peoples to support reciprocal relations between and among Indigenous Peoples and the Member States.

### **Corruption**

We must register gratitude at the apparent lack of corruption of the African Court. We ask EMRIP to consider the act of the judge on the African Court having ties to the State presenting in this case in stepping back from the case in accordance with the Articles without incident. In other regions corruption influences courts or influences the States to not accept judgements of courts so that Indigenous Peoples cannot even hope for such remedies as the Ogiek have begun to access through a court ruling. Asia and Oceania have no regional court at all. The lack of judicial recourse to human rights violations encourages the corruption that leads States to violate Indigenous Peoples human rights with impunity and disastrous results impacting us all globally, as we see with climate change.

We recognize that when colonial powers appropriate Indigenous Peoples' territories and resources and represent it as their own this is state-sponsored embezzlement and human rights-respecting States should not trade with them.

State 'government bodies which oversee the land sector are one of the public entities most plagued by service-level bribery.' With 34 per cent of people globally plagued by corruption in land authorities. 'The enormous prevalence of bribery in the land sector creates a high informal cost for those trying to register or transfer land.<sup>iii</sup> This is a great obstacle to recognition of Indigenous Peoples' rights to peace, reconciliation, and reparations. When Indigenous Peoples cannot secure land title in an increasingly formalized world, conflict ensues.

It is counterproductive for the UN to advertise its Charter promoting self-determination of all Peoples, and the DRIP promoting self-identification of Indigenous Peoples and then do what a State tells it to do in preventing Indigenous Peoples' representatives from accessing the UN at all, or preventing the phrase 'Indigenous People' from being uttered in questions during the Voluntary National Review of the High Level Political Forum as the UN has done for UN Members, or other such UN censorship simply because they are self-identifying as Indigenous Peoples and/or submitting data and information that the State fears. If the UN cannot stand up for its Charter and the UDHR, as interpreted by the DRIP, it is the best model for failures to implement the DRIP.

Political corruption is rampant but hard for Indigenous Peoples to demonstrate except to show the motivations and results. State or corporate developers can effectively hide or bribe their way out of accountability where there are no measures for far-reaching international sanctions. Indigenous Peoples are particularly vulnerable to manipulations from illicit flows of our wealth to and development financed from secrecy jurisdictions. Illicit enrichment of State elites can result in violent oppression of Indigenous Peoples and harm to Indigenous Human Rights Defenders who might otherwise successfully advance reconciliation and reparations actions that would highlight corruption.

Public Private Partnerships must be closely monitored by international human rights bodies and organizations to ensure they do not become the determiners of the outcome of recognition, reconciliation, and reparations efforts and processes. Indigenous Peoples must be safe to present our plans to formalize title to land and practices for livelihood and protections of heritage, including Indigenous Peoples' languages. Privatization must be avoided and not justified by seemingly environmental goals, as in the case of the Ogiek. The African Court's advice that measures must be 'necessary and reasonable' as judged by other regional members, not as unilaterally determined by the State. This means that all aspects of PPPs must be transparent and every step of their involvement in development, even SDG 2.3, must be driven by Indigenous Peoples and open review to all human rights bodies.

This also silences the State argument that it was not possible to obtain the Free Prior and Informed Consent of the Indigenous People but that the national interest required the execution of the project without human rights adherence. Each of these utilitarian arguments and every step of the development must be reviewable, transparent and accessible to all human rights bodies.

We see such corruption also where there are processes that genuinely report the human rights conditions or sustainability status and recommend productive remedies. In these cases the State does not admit the data, or silences the information-givers and Indigenous Human Rights Defenders. Then these processes, for example, the Voluntary National Review of the High Level Political Forum, have no real power to implement the remedies recommended in the context of sustainable development, which is crucial to Indigenous Peoples. Human rights bodies must value member state claims based on actual merit, not on prejudice for colonial power and against Indigenous Peoples.

Note that in the Ogiek case that it is the Commission that is the plaintiff against the State, the defendant. This positioning in itself reduces opportunities for corruption as it does not pit a single Indigenous People or a single member of an Indigenous People against a State and thus its commercial and military might.

Such a positioning of the entire regional human rights commission against some States not reconciling with Indigenous Peoples may reduce incidences of kleptocracies, enriching an elite by selling off stolen resources at bargain prices, undercutting sustainable competitors. Because some States are recognizing, reconciling with, and making reparations to Indigenous Peoples and some are not, there is not a level economic playing field.

For example, when they take an animal, they kill the whole animal and take a part of it, like the horn. Then they leave the rest to rot, not allowing the animal nation to reproduce. This is the corruption that is called embezzlement. As they take our animals and entire ecosystems and even the global climate macrosystem, when they pollute it, they embezzle. But they do this same thing to us Indigenous Peoples, killing us, parceling out pieces of us, taking the culture here, the language here, our ancestors remains here, the technology here, the genetic resources here, the knowledge there



and leaving us, our spirits and children abandoned and rotting with their poisons in our ecosystems and thus our bodies with no recourse. This is corruption because they are stealing. But it is also human rights violation because we are human.

### **Recommendations**

Prevent extinction of human Peoples. Support Indigenous Peoples' need for safety to reproduce and redevelop our culture and our Peoples.

As 'indigenous' is a scientific word, we would encourage the UN to develop some education programs, perhaps with UNESCO or the appropriate agency, for States denying reality to cognitively comprehend the fact that Indigenous Peoples exist with states physically occupying the Indigenous People's territory. These are scientifically demonstrable facts but too often State leadership lack capacity to comprehend the facts.

Perhaps the Declaration can best be put into practice by developing an effective international treaty organization with mandatory accession to an uncorrupted court that holds States accountable for human rights violations. We see in the African Union an emerging model for such a treaty organization. Such a global treaty organization would call States to demonstrate how they had worked peacefully and effectively with Indigenous Peoples to resolve problems instead of calling the treaty organization to censor, silence, or expel those representatives of marginalized Peoples who identify problems.

An effective international treaty organization would support targeted Indigenous Peoples by encouraging the targeted Indigenous Peoples' participation in international processes to identify opportunities for improvement while supporting the primitive state that was not making human rights progress with a team of human rights-respecting States. Such a treaty organization would allow utterance of 'Indigenous Peoples' in the context of sustainable development as Indigenous Peoples have the best sustainability records in the world.

This team of human-rights respecting States could share their best practices for having national tribunals that enabled the targeted Indigenous Peoples to raise their issues in their own continent and

allowing the primitive state or neighboring states to propose effective remedies to the stated problems. By negotiating for the Indigenous Peoples' FPIC to the remedy for the presented problem, the progressing state could become part of the solution instead of the problem. The targeted Indigenous People jointly implementing a FPIC-negotiated remedy would be less likely to want to participate internationally. However, if they did participate internationally they may be more likely to present the former primitive state as a progressing state or the neighboring state as a stabilizing state in a tumultuous region. States could be celebrated in international processes rather than condemned if they were actually communicating with Indigenous Peoples.

We need formal groups of Member States and Indigenous Peoples' governments volunteering for a GA-level AdHoc DRIP implementation committees in the area of international trade, international science and art, international security, etc. Such focused States groups could model recognition, reconciliation, reparations processes and support other states who obviously don't understand where to begin the process.

Such an organization could support decolonization of all Peoples, perhaps with support of the Trusteeship system in light of the urgency of climate change to protect Indigenous Peoples, our territories and gifts, including Indigenous Peoples' languages. Like the African Commission, this would clearly protect the collective rights of all Peoples, regardless of the maneuvering of the State to avoid responsibilities.

While some Member States are revising history and science to obscure the existence of Indigenous Peoples, we need more than ever an international committee preserving our history from our perspective, even in our language, to prove we ever existed.

States or State multilateral alliances to support primitive States should support Indigenous Peoples' legal advocacy for recognition to tenure rights that are considered legitimate but are not accurately formalized by the occupying power's law.

States and multi-State organizations should promote more transparent and effective land certification and registration systems

Promote trade group of States who have ratified and/or implemented ILO169 and the Declaration on the Rights of Indigenous Peoples. This will reduce problems of ‘recognition’ by putting international entities, international courts, and international law at the center of economic transactions impacting Indigenous Peoples.

Media should broadcast Indigenous Peoples’ perception of corruption and issues relevant to recognition, reconciliation, and reparations.

Educate representatives on Human Rights Committee reviewing States progress toward fulfilling existing treaties (CCPR, CERD, CAT, CEDAW, CRPD, CED, CMW, CESCRC and CRC) with EMRIP's report and other relevant UN work on Indigenous Peoples' Recognition, Reconciliation, and Reparations.

Streamline input from Indigenous Peoples with relevant agencies (UNESCO, ILO, ITU, IDO, WHO, UNDP, FAO, IFAD, FCCC,CSD, CSocD)and IASG and SWAP to enable Indigenous Peoples' full participation in UN processes as too many Indigenous Peoples are not represented by UN Member States. Ensure Indigenous Peoples discriminated against by the occupying States are still able to participate in the UN processes to raise relevant issues by other States self-identifying their interest in raising Indigenous Peoples’ issues at international processes. This may aid Indigenous Peoples’ survival until the State finally recognizes the rule of law and engages in recognition, reconciliation, and reparations processes.

Member states need to be encouraged to accept more Indigenous Peoples’ guidance on appropriate uses of Indigenous Peoples’ territories. Too many member states are concluding that seasonal use does not represent continued use of territories without understanding that Indigenous Peoples have traditionally made sacrifices to contribute to ecosystem services such as erosion, pest control, pure water measures with seasonal use that have kept the ecosystem intact. Member States then develop ‘pristine’ environments that Indigenous Peoples have developed since time immemorial, often geoengineering it and then perhaps offering a one-time payment for loss of seasonal use in perpetuity. This payment is then help up as a model for good practices. Recognize

the Loss of seasons to climate change Seasonal use is year-round respect and must be considered part of Indigenous Peoples' permanent developed area.

We ask EMRIP for ideas on this: It is only a good practice if Indigenous Peoples say that it is a good practice. Current intimidation from some UN Members is causing misrepresentative land mapping that we need assistance in correcting.

We direct EMRIP to encourage regional and international bodies to hold Member States accountable for forced assimilation and promote reparations for these assimilations and other insults by supporting Indigenous Peoples' autonomous cultural development.

Universally and multilaterally support Indigenous Peoples' leadership in decision-making for State Mechanism to implement Indigenous Peoples' laws, State laws promoting human rights of Indigenous Peoples, human rights recommendations and legal decision in accordance with the State's international human rights obligations.

Require States to demonstrate the provenance of materials, goods, services, resources, and territories for more openness for accountability available to Indigenous Peoples from States.

We direct EMRIP to explore ways UN Members can better uphold their obligations to recognize and reconcile with Indigenous Peoples, enabling full participation in society, economy, policies, and culture, regardless of religion.

Promote human rights exceptions to secrecy jurisdictions and non-extradition States, especially in the context of Indigenous Peoples' human rights violations and investigations.

Promote full recognition of rights to medicinal remedies, patterns of building and cultural advantages, recognizing Indigenous Peoples' continued contributions to what is good.

Honor us by supporting implementation of Indigenous Peoples' decisions.

Invite colonial powers to step back and observe reality, listen to wind, feel the sun, taste the water and hear Indigenous Peoples' wisdom so they can recognize what is real. Stop using Indigenous

Peoples' wisdom to pursue the illusion of power and money recognize Indigenous Peoples ourselves.

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<sup>i</sup> African Commission on Human and Peoples' Rights. *African Commission on Human and Peoples' Rights v. Republic of Kenya* (Afr. Ct. H.P.R.) (2017). <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf>

<sup>ii</sup> Daes, E.-I. A., & United Nations. (1996). Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people.". Geneva: United Nations. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G96/129/80/PDF/G9612980.pdf?OpenElement>

<sup>iii</sup> 'Finding Common Ground. Tackling corruption in land and natural resources tenure', workshop, International Anti-Corruption Conference 2010. Bangkok, Thailand. [http://14iacc.org/wp-content/uploads/ws2.1MikaTorhonen\\_LR.pdf](http://14iacc.org/wp-content/uploads/ws2.1MikaTorhonen_LR.pdf)

Peter Bofin, Mari-Lise du Preez, André Standing and Aled Williams, REDD Integrity. Addressing governance and corruption challenges in schemes for Reducing Emissions from Deforestation and Forest Degradation (REDD) (Bergen, Norway: U4 and Chr. Michelsen Institute, 2011).