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Expert Mechanism on the Rights of Indigenous Peoples

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### **Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration**

#### **Draft study by the Expert Mechanism on the Rights of Indigenous Peoples**

##### *Summary*

The Expert Mechanism on the Rights of Indigenous Peoples has prepared the present draft study pursuant to Human Rights Council resolution 33/25. It contains an analysis of constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration. The study concludes with Expert Mechanism Advice No. 17 (2024) on how States should take such measures to achieve the ends of the Declaration within the context of their human rights obligations and responsibilities.



## I. Introduction

1. Pursuant to Human Rights Council resolution 33/25, the Expert Mechanism on the Rights of Indigenous Peoples decided at its sixteenth session that its next annual study, pursuant to paragraph 2 (a) of Council resolution 33/25, would be an analysis of constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with the provision contained in article 38 of the Declaration. To that end, the Expert Mechanism held an expert meeting at the University for Peace in Costa Rica in November 2023. The study is informed by the presentations made at the meeting and by the more than 40 submissions from Indigenous Peoples, States, national human rights institutions, civil society organizations, academics and others.<sup>1</sup>

2. The focus of the present study is an analysis of constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples. It includes examples of recent initiatives, measures and developments through which States have taken legislative and other steps, in conjunction with Indigenous Peoples, to achieve the ends of the Declaration, including any challenges and barriers that were faced in the process. It also includes a review of policy decisions concerning Indigenous Peoples, in order to determine the progress made on Indigenous rights at the national level, and identification of good practices, models or approaches adopted by Member States to consult and cooperate with Indigenous Peoples to achieve the ends of the Declaration, including any challenges encountered. It concludes with specific recommendations and advice for both States and Indigenous Peoples.

## II. Legal framework

3. The United Nations Declaration on the Rights of Indigenous Peoples is an international instrument that affirms the fundamental human rights of Indigenous Peoples across the globe and the formal commitment to those human rights aspirations by the States Members of the United Nations that directly engaged in its development and subsequently voted or expressed support for the interrelated minimum standards affirmed therein. In 2007, the General Assembly adopted the Declaration, which sets forth a global consensus on the application of universal human rights in the Indigenous Peoples' context. Subsequently, in 2014, all 193 States Members of the United Nations committed to take measures to "achieve the ends" of the Declaration in the resolution they adopted on the outcome document of the World Conference on Indigenous Peoples.<sup>2</sup> The Declaration is legally significant in several ways. First, as an authoritative statement of human rights by the General Assembly, it is an expression of the content of Member States' obligations to promote and respect human rights under the Charter of the United Nations, where compliance is expected.<sup>3</sup> Similarly, the Declaration is a source of interpretation of States' obligations under the human rights treaties they have ratified. At a minimum, the Declaration assists Member States in the interpretation and understanding of their existing human rights obligations as a matter of international and domestic law in the Indigenous Peoples' context.<sup>4</sup> Second, the Declaration places a moral obligation on States to act in accordance with fundamental human rights. Third, the Declaration is a mandatory and relevant consideration in judicial review and, in accordance with the presumption of consistency, as an aid to statutory interpretation. Fourth, by

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<sup>1</sup> The presentations and the submissions will be available at <https://www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-indigenous-peoples/annual-reports>.

<sup>2</sup> General Assembly resolution 69/2, paras. 7 and 8.

<sup>3</sup> E/3616/Rev.1-E/CN.4/832/Rev.1, para. 105.

<sup>4</sup> Kristen Carpenter, Edyael Casaperalta and Danielle Lazore-Thompson, "Implementing the United Nations Declaration on the Rights of Indigenous Peoples in the United States: a call to action for inspired advocacy in Indian Country", *University of Colorado Law Review Forum*, vol. 91, No. 1 (March 2020).

developing a normative character, these provisions may be considered customary international law.

4. Established pursuant to widely ratified human rights treaties, the United Nations treaty bodies that monitor State party compliance with those instruments have frequently referred to the Declaration when interpreting relevant provisions of the treaties in the context of Indigenous Peoples. The Declaration has also contributed to the development of – and at least partially reflects – general principles of international law and customary international law. A study conducted by a multinational committee of international law experts and approved by the International Law Association concluded that the Declaration “includes several key provisions which correspond to existing State obligations under customary international law”.<sup>5</sup> Hence, it is increasingly argued that aspects of the Declaration already form part of customary international law.<sup>6</sup>

5. While the primary focus of the present study is on article 38 of the Declaration, it should also be analysed in conjunction with the interrelated provisions.<sup>7</sup>

6. Article 38 of the Declaration affirms that: “States, in consultation and cooperation with Indigenous Peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.” This general mandate is elaborated on in other provisions, with specific affirmative measures required from States in connection with the rights affirmed in the Declaration.<sup>8</sup>

7. The kind of State action required to operationalize the rights affirmed in the Declaration thus entails an ambitious programme of legal and policy reform, institutional measures and reparations for past wrongs, involving a myriad of State actors within their respective spheres of competence. The Chair of the Working Group on Indigenous Populations, the precursor to the Expert Mechanism, described that process as “belated State-building”, a process “through which Indigenous Peoples are able to join with all the other peoples that make up the State on mutually agreed upon and just terms, after many years of isolation and exclusion”.<sup>9</sup>

8. Implementing the Declaration normally requires, or can be facilitated by, the adoption of new laws or the amendment of existing legislation, as envisaged in article 38 of the Declaration, which explicitly calls for appropriate “legislative measures”. Indigenous-specific policy and regulatory frameworks are still lacking or insufficient in most States, and may therefore also be required. It is important to note that the legal and institutional transformations required by the Declaration are not usually sufficiently addressed solely by enacting specific “Indigenous laws”, as many States have done. Rather, such transformations will involve changes to broader legal structures in key areas. Article 38 highlights the central role of Member States in promoting the substance of the Declaration

<sup>5</sup> Ibid, p. 7. See also International Law Association, “Kyoto Conference (2020): implementation of the rights of Indigenous Peoples”, available at [https://www.ila-hq.org/en\\_GB/documents/ila-comm-impl-rights-ind-peoples-final-report-dec-13-2020](https://www.ila-hq.org/en_GB/documents/ila-comm-impl-rights-ind-peoples-final-report-dec-13-2020); Federico Lenzerini, “Implementation of the UNDRIP around the world: achievements and future perspectives. The outcome of the work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples”, *International Journal of Human Rights*, vol. 23, No. 1–2 (2019), pp. 56–58; and James Anaya, “The Role of international law in U.S. domestic advocacy and law reform”, presentation delivered at the Conference to Implement the United Nations Declaration on the Rights of Indigenous Peoples in the United States (15 March 2019), cited in Carpenter, Casaperalta and Lazore-Thompson, “Implementing the United Nations Declaration”.

<sup>6</sup> E/2009/43-E/C.19/2009/14, annex, para. 10.

<sup>7</sup> The interrelated provisions include those in articles 4, 5, 8 (2), 11 (2), 12 (2), 13 (2), 14 (3), 15 (2), 16 (2), 17 (2), 18, 19, 21 (2), 22 (2), 23, 24, 25, 26 (3), 27, 28 (2), 29 (2) and (3), 30 (2), 31 (2), 32 (2) and (3), 34, 35 and 36 (2) of the Declaration.

<sup>8</sup> A/HRC/9/9, para. 45.

<sup>9</sup> Erica-Irene A. Daes, “Some considerations on the rights of Indigenous Peoples to self-determination”, *Transnational Law & Contemporary Problems*, vol. 3, No. 1 (1993), available at [https://heinonline.org/HOL/Page?handle=hein.journals/tlcp3&div=7&g\\_sent=1&casa\\_token=&collection=journals](https://heinonline.org/HOL/Page?handle=hein.journals/tlcp3&div=7&g_sent=1&casa_token=&collection=journals).

and its connection to existing obligations to which they have committed under other international human rights instruments.<sup>10</sup>

9. Such transformations are required, inter alia, in relation to the provisions of the Declaration regarding the rights of Indigenous Peoples to self-determination (art. 3), to autonomy or self-government in matters relating to their internal and local affairs (art. 4) and to maintain and strengthen their distinct political, legal, economic, social and cultural institutions (art. 5), including in the administration of justice (arts. 34 and 35). Indigenous systems of autonomy or self-government have a number of implications for broader State governance that have not been fully acknowledged in most countries, where Indigenous autonomy or self-government still operate without proper legal guarantees. The same is true for Indigenous Peoples' rights over their lands, territories and natural resources, which are affirmed in articles 26 to 28 and related provisions of the Declaration. While these rights are recognized in many countries, their realization implies legal and administrative transformations, particularly regarding property and natural resources law and administration.<sup>11</sup>

10. Some scholars who favour implementation of the Declaration stress that it contains several provisions that correspond to existing State obligations under customary international law and that it could itself become customary law. Taking an alternative approach and seeking to move beyond the binding/non-binding dilemma, scholars have also underscored the need to focus on and assert existing rights rather than dispute the legal nature of the instrument. There is general agreement that the Declaration brings together the whole spectrum of human rights that is already enshrined in various treaties and international jurisprudence relating to Indigenous Peoples.<sup>12</sup>

### **III. Analysis of constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration**

11. Legal recognition and judicial action are potential preconditions for operationalizing the rights of Indigenous Peoples under the Declaration at the national and local levels. In 2006, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people noted that the legislative processes and constitutional reforms introduced in many countries between 1994 and 2004 in recognition of Indigenous Peoples and their rights had not necessarily led to actual changes in the daily lives of Indigenous Peoples. Indeed, an implementation gap continued to exist between legislation and day-to-day reality.<sup>13</sup>

12. Nevertheless, at the national level, there are examples of Indigenous Peoples' rights being gradually recognized at both the legislative and judicial levels, opening avenues for their effective implementation.

#### **A. Measures taken by States on constitutional reforms to achieve the ends of the Declaration**

13. For the past 15 years, the United Nations Declaration on the Rights of Indigenous Peoples has influenced the drafting of constitutions and statutes at the national and subnational levels and contributed to the progressive development of international and domestic laws and policies with regard to Indigenous Peoples. The principles underpinning the Declaration are reflected in the constitutions of Ecuador, Kenya and the Plurinational

<sup>10</sup> See [A/HRC/9/9](#).

<sup>11</sup> *Ibid.*, para. 51.

<sup>12</sup> Presentation by Victor Toledo at the expert meeting, November 2023.

<sup>13</sup> [E/CN.4/2006/78](#), para. 5.

State of Bolivia, drafted in 2008, 2010 and 2009, respectively. Importantly, in its article 11, 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.<sup>14</sup>

14. Article 69 of the Constitution of the Russian Federation (1993) is consistent with the provisions of the Declaration (including articles 1, 2, 6 and 7) concerning the implementation of human rights and fundamental freedoms, equality with others and citizenship rights. The 2020 constitutional reform strengthened that article by adding a provision on the protection of the cultural identity of all peoples and guaranteeing preservation of their ethnic, cultural and linguistic diversity.<sup>15</sup> The provisions in articles 5, 8, 11, 12, 15 and 31, among others, of the Declaration relating to Indigenous Peoples' rights to maintain and develop various aspects of their culture are reflected in article 72 of the Constitution, which guarantees the protection of the natural environment and the traditional way of life of small-numbered ethnic communities. That provision is specifically referenced in the federal law guaranteeing the rights of small-numbered Indigenous Peoples in the Russian Federation, which supports the distinctive social, economic and cultural development of Indigenous Peoples and establishes a legal framework for the protection of their natural environment, traditional way of life and livelihoods.<sup>16</sup>

15. Article 2 of the Constitution of Mexico City, one of the most advanced local constitutions recognizing Indigenous Peoples' rights, identifies the federal entity as an intercultural territory, with a plurilingual, pluri-ethnic and pluricultural composition based on its native peoples and neighbourhoods and its resident Indigenous communities.<sup>17</sup> Article 57 recognizes, guarantees and protects the collective and individual rights of Indigenous Peoples and their members. It indicates that compliance with the Declaration and other international legal instruments to which Mexico is a party is mandatory in Mexico City.<sup>18</sup> The Federal Constitution of Mexico states, in its article 2, that the nation has a pluricultural composition. However, recognition of the rights of Indigenous Peoples at the local level is uneven.<sup>19</sup>

16. In Canada, the implementing legislation for the Declaration explicitly instructs courts on how to interpret existing legislation. This interpretive function, combined with the basic common law presumption of conformity with customary international law and the principles of the rule of law and constitutionalism more broadly provides this legislation with what has been described as quasi-constitutional effects.<sup>20</sup> By explicitly rejecting "all forms of colonialism" including those "doctrines, policies and practices" that advocate any form of racial or cultural superiority, this legislation can have a meaningful impact on the development of constitutional jurisprudence. It provides the judiciary with an invaluable tool to maintain the relationship between justice and jurisprudence.<sup>21</sup>

17. In Australia, in a referendum held in 2023, the proposal to recognize Aboriginal and Torres Strait Islander peoples in the Constitution and to establish a body to advise Parliament on Indigenous issues was rejected.<sup>22</sup> Progress on federal implementation of the other reform requested in the Uluru Statement from the Heart – a Makarrata commission to supervise a

<sup>14</sup> A/HRC/EMRIP/2023/3, para. 28.

<sup>15</sup> Submission from Regional Association of Indigenous Small-Numbered Peoples of the North of Krasnoyarsk Territory, Union of Indigenous Peoples "SOYUZ" and Siberian Federal University.

<sup>16</sup> Presentation by Vasilii Nemechkin, Mordovia State University, at the expert meeting, November 2023. See also submission from Russian Federation (in Russian); and United Nations, Department of Economic and Social Affairs, *State of the world's Indigenous Peoples, 4th Volume: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (2019).

<sup>17</sup> Submission from Comisión de Derechos Humanos de la Ciudad de México (in Spanish).

<sup>18</sup> See

[https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Session12/Notadecoopera\\_ración\\_técnica\\_MRIP\\_CiudaddeMexico.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Session12/Notadecoopera_ración_técnica_MRIP_CiudaddeMexico.pdf) (in Spanish).

<sup>19</sup> Submission from the Colectivo Jamut Booó (in Spanish).

<sup>20</sup> Presentation by Joshua Nichols, McGill University, at the expert meeting, November 2023.

<sup>21</sup> Canada, United Nations Declaration on the Rights of Indigenous Peoples Act [S.C. 2021, chapter 14], available at <https://laws-lois.justice.gc.ca/eng/acts/U-2.2/page-1.html>.

<sup>22</sup> Submission from Maat for Peace, Development and Human Rights Association.

process of agreement-making between governments and First Nations and truth-telling about First Nations' history – is reportedly currently in limbo. Indigenous organizations have recommended enshrining the provisions of the Declaration within Australian law, either in a federal human rights act or in stand-alone legislation. In addition, in 2023, the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs recommended developing a national action plan, in consultation with Aboriginal and Torres Strait Islander peoples, to outline the approach to implementing the Declaration in Australia.<sup>23</sup>

18. In India, while no specific measures have been taken on constitutional reform to implement the Declaration, existing constitutional provisions, including administrative provisions similar to those in the Declaration, safeguard the rights of Indigenous Peoples. However, there are significant regional disparities in the implementation of those provisions. The rights of Indigenous Peoples who reside in states or autonomous district councils recognized under the Sixth Schedule of the Indian Constitution are better upheld than those residing in states without such constitutional mechanisms. In states administered under the Fifth Schedule of the Indian Constitution, governors – the constitutional heads at the state level – have reportedly failed to exercise their constitutional power in ensuring the protection and promotion of the rights and welfare of Indigenous Peoples.<sup>24</sup>

## **B. Other legislative measures taken by States to achieve the ends of the Declaration**

19. As indicated above, implementing the Declaration normally requires, or can be facilitated by, the adoption of new laws or the amendment of existing legislation and regulatory frameworks, as envisaged in article 38 of the Declaration, which calls for appropriate “legislative measures”. Nevertheless, there are laws that have been adopted or amended that are not in accordance with the provisions of the Declaration.

20. In Ecuador, while the Constitution of 2008 provides that Ecuador is a plurinational and intercultural State, the requirement that legislation and public policies should be aligned with the Constitution and international law has not been respected. The existing legal framework is not consistent with the 21 collective rights of Indigenous Peoples recognized in article 57 of the Constitution, and Indigenous Peoples' organizations have challenged the constitutionality of several laws.<sup>25</sup> There is a need to develop, in cooperation with Indigenous Peoples, a plan of action, including a monitoring mechanism, for the implementation of the Declaration.<sup>26</sup>

21. The Act on Greenland Self-Government, adopted in 2009, recognizes the right of the people of Greenland to self-determination. The Act is therefore based on an agreement between the governments of Greenland and Denmark as equal partners.<sup>27</sup> The Act establishes that independence for Greenland should be concluded by the parliament of Greenland and then endorsed by means of a referendum. The subsequent consent of the Parliament of Denmark is also required. In 2016, the parliament of Greenland established a constitutional commission and a draft constitution was presented to the parliament in April 2023. Following his 2023 visit, the Special Rapporteur on the rights of Indigenous Peoples encouraged Greenland to promote wide-ranging, inclusive and meaningful consultations with the full participation of Inuit people in the process towards full independence, including the three main Inuit groups, the Kalaallit, the Iivit and the Inughuit.<sup>28</sup>

22. The Government of the Congo has had a legislative framework for the protection of Indigenous Peoples' rights since 2011, when it adopted Law No. 5-2011 on the promotion and protection of the rights of Indigenous Peoples. That law sets out a sound legal foundation

<sup>23</sup> Submission from Law Council of Australia.

<sup>24</sup> Presentation by Virginius Xaxa at the expert meeting, November 2023.

<sup>25</sup> [A/HRC/42/37/Add.1](#), paras. 16 and 17.

<sup>26</sup> Presentation by Mariana Yumbay Yallico at the expert meeting, November 2023 (in Spanish).

<sup>27</sup> Submission from Denmark.

<sup>28</sup> [A/HRC/54/31/Add.1](#), paras. 34 and 35.

for Indigenous Peoples to claim their rights, protect their culture and livelihood, gain access to basic social services and protect their civil and political rights.<sup>29</sup>

23. In the Democratic Republic of the Congo, Law No. 22/030 on the protection and promotion of the rights of Indigenous Pygmy Peoples was adopted in 2022. The explanatory memorandum indicates that, in addition to the constitutional provisions imposing duties on public authorities to ensure the equality of all citizens by eliminating all forms of discrimination, the Government is also required to bring its laws into accordance with the specific international instruments relating to the promotion of the rights of Indigenous Peoples.<sup>30</sup>

24. Despite the fact that the Amazigh language is recognized as an official language in the Constitution of Morocco, the legislation provided for in the Constitution to define the modalities of its integration into education and public life has not yet been promulgated. As a result, several laws and regulations still exclude the protection of the Amazigh language in many priority areas.<sup>31</sup>

25. In Costa Rica, over the years representatives of Indigenous Peoples have submitted various proposals for legal reform that would protect Indigenous territories and recognize and protect Indigenous Peoples' self-government authorities. None of the proposals has been successful. Within the framework of the universal periodic review, there has been recognition of the centrality of the issue of Indigenous governance. The Special Rapporteur on the rights of Indigenous Peoples also recognized that point and urged Costa Rica to enact the Autonomous Development of Indigenous Peoples Bill. Nevertheless, the bill was shelved in 2018.<sup>32</sup>

26. Canada has advanced implementation of the Declaration through legislation. In 2019, the Canadian province of British Columbia passed its Declaration on the Rights of Indigenous Peoples Act.<sup>33</sup> In 2021, similar legislation came into force at the federal level.<sup>34</sup> Both Acts provide road maps for government and Indigenous Peoples to work together to implement the Declaration. The federal Act requires Canada to harmonize its legislation, including the Indian Act, with the rights set out in the Declaration. Indigenous Peoples have raised concerns about omissions in the Act, such as the lack of reference to the creation of an independent Indigenous human rights commission.<sup>35</sup> Others have pointed out that the main weakness of the federal Act is the absence of formal structures and processes – and an appropriate budget – for monitoring implementation and ensuring accountability and meaningful Indigenous consultation and cooperation.<sup>36</sup>

27. While New Zealand recognizes the rights affirmed in the Declaration, it reportedly views many of the rights as merely aspirational, thereby questioning the legal status and effect of the Declaration. The Government continues to resist the idea that changes may be required to the laws and constitutional frameworks of New Zealand in order to ensure consistency with the Declaration. There is no recognition of the Declaration, and therefore no positive obligation for its implementation in New Zealand legislation or its constitutional arrangements.<sup>37</sup>

28. In Bangladesh, Parliament passed the fifteenth amendment to the National Constitution of Bangladesh in 2011. During the amendment process, demands from Indigenous Peoples' organizations and leaders on constitutional recognition of Indigenous

<sup>29</sup> A/HRC/45/34/Add.1, para. 8.

<sup>30</sup> Submission from Action Communautaire pour la Promotion des Défavorisés Batwa (ACPROD-BATWA) (in French).

<sup>31</sup> Submission from Tijani El Hamzaoui (in French).

<sup>32</sup> A/HRC/51/28/Add.1, para. 28.

<sup>33</sup> British Columbia, Declaration on the Rights of Indigenous Peoples Act [SBC 2019] chap. 44, available at <https://canlii.ca/t/544c3>.

<sup>34</sup> Canada, United Nations Declaration on the Rights of Indigenous Peoples Act [S.C. 2021, chap. 14].

<sup>35</sup> Presentation by Marie Belleau at the expert meeting, November 2023. See also the submission from Inuit Tapiriit Kanatami and Métis National Council.

<sup>36</sup> Submission from Coalition for the Human Rights of Indigenous Peoples. See also submission from Assembly of First Nations.

<sup>37</sup> Submission from New Zealand Human Rights Commission, November 2023.

Peoples, their languages and cultures, control over their land, territory and natural resources, and constitutional guarantee of the Chittagong Hill Tracts Accord of 1997, were allegedly disregarded.

29. In Cambodia, Indigenous Peoples have reportedly participated actively in the process of amending the Law on Forestry and the Law on Protected Areas. They have expressed their concerns about whether both laws are in line with the Declaration and other international standards and on implementation.<sup>38</sup>

30. In Indonesia, the Indigenous People known as “sea nomads” are indirectly recognized and protected in Indonesian Law No. 27 of 2007 on management of coastal zones and small islands. However, this regulation has been criticized for contradicting other national legislation that does not provide Indigenous Peoples with sufficient protection. For example, the 2014 amendment to this law, although deeming that the control of the coastal area is under the jurisdiction of Indigenous Peoples, also clarifies that this applies only when it takes into account national interests and is in accordance with legislation.<sup>39</sup>

31. In West Papua, in Indonesia, the 2021 special autonomy law was reportedly discussed without consulting or obtaining the free, prior and informed consent of the West Papua Indigenous Peoples.<sup>40</sup>

32. In India, apart from constitutional provisions, some pieces of national legislation, such as the Provisions of the Panchayats (Extension to Scheduled Areas) Act, 1996, align with the Declaration. That Act provides for the restoration of the traditional system of governance, rights to land and the right to pursue development in the interest of the community. In addition, the Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006, aims to redress historical injustice done to Indigenous Peoples and other forest dwellers through State control of forests since colonial rule. The Act is aimed at restoring their lands, which were appropriated in colonial and post-colonial India. However, implementation of those two acts has been inadequate and provisions aimed at securing the interests of Indigenous Peoples and others have been diluted through amendments or changes in the rules for implementation of the acts.<sup>41</sup>

33. In January 2024, the Special Rapporteur on the rights of Indigenous Peoples warned that the amendments to the forestry and wildlife law in Peru could legalize and encourage the dispossession of Indigenous Peoples from their lands and threaten their physical and cultural survival. He recalled that Peru has obligations under international law with regard to enacting laws that affect Indigenous Peoples, including article 19 of the Declaration.<sup>42</sup>

34. In Guatemala, no legislative or institutional measures have been based concerning or inspired by the Declaration. Despite several draft laws being brought before Congress aimed at implementing the rights of Indigenous Peoples, the absence of political will on the part of several political parties, coupled with persistent racism and racial discrimination, have reportedly resulted in the draft laws not being adopted.<sup>43</sup>

35. France does not recognize the status of Indigenous Peoples and their collective human rights, invoking the constitutional principles of the indivisibility of the Republic and the equality of all citizens. While measures adopted by France in this area are rare, several recent legislative, regulatory and case law developments in French Guiana are noteworthy. In 2016, provisions of European and international law on access to genetic resources were transposed into domestic legislation, protecting communities of inhabitants that derived their means of subsistence from the natural environment.<sup>44</sup>

<sup>38</sup> Submission from Cambodia Indigenous Peoples Alliance.

<sup>39</sup> Submission from Apintlaw.

<sup>40</sup> Submission from West Papua Interest Association.

<sup>41</sup> Presentation by Virginius Xaxa at the expert meeting, November 2023.

<sup>42</sup> See <https://www.ohchr.org/en/press-releases/2024/02/peru-changes-forestry-law-will-threaten-survival-indigenous-peoples-un>.

<sup>43</sup> Submission from International Indian Treaty Council (in Spanish).

<sup>44</sup> Submission from Clinique de droit international de l'Université Paris II Panthéon-Assas (in French).



36. In 2021, Ukraine adopted a law on Indigenous Peoples. However, it does not fully ensure the rights of Indigenous Peoples as affirmed in the Declaration, in particular the right to self-determination. While that issue could allegedly be resolved by making changes to the Constitution of Ukraine, owing to the current armed conflict, there are no legal mechanisms for making such a decision.<sup>45</sup>

37. In Brazil, the adoption of Law No. 14.701 in 2023 introduced several provisions that contravene some of the articles of the Declaration, including the right to use, develop and control Indigenous territories and the right to prior, free and informed consent. That law also contravenes the provisions of the Constitution of Brazil concerning Indigenous rights and alters the established procedure for the demarcation of Indigenous lands, imposing the doctrine of the temporal framework, which requires Indigenous Peoples to have been in possession of their lands or to have had claims in process when the 1988 Constitution was enacted, with no consideration given to how or why they were removed from their lands.<sup>46</sup>

### C. Policy measures taken by States to achieve the ends of the Declaration

38. There are obvious links between legislation, constitutions and public policies for the implementation of the Declaration. However, at the State level, the Declaration has often been defined as an aspirational document rather than an international human rights instrument that has the legal effect of altering policy.<sup>47</sup>

39. In Australia, the National Indigenous Australians Agency was established in 2019 to lead and coordinate Commonwealth policy development, programme design, implementation and service delivery for Aboriginal and Torres Strait Islander peoples.

40. In New Zealand, the Iwi Chairs Forum has twice worked with the Government to assist in developing a national plan of action to implement the Declaration. The first draft of the plan, worked on in 2019 following a visit from the Expert Mechanism, was shelved for more than 12 months without public release. In 2021, there was rigorous engagement within a Government, Iwi and Human Rights Commission tripartite governance group, which informed the draft plan, but it was again halted towards the end of 2022.<sup>48</sup>

41. In Malaysia, the Government has developed a number of general and targeted policies pertaining to Orang Asli, the Indigenous Peoples of Malaysia. The policies concern health, education in their own language, protection from economic exploitation, improvement of their economic and social conditions, protection against all forms of violence against women and just and fair redress to mitigate the adverse environmental, economic, social and cultural impacts they have faced.<sup>49</sup>

42. In the Russian Federation, the State ethnic policy in place until 2025 emphasizes the State's obligation to guarantee the rights of small-numbered Indigenous Peoples, including support for their economic, social and cultural development and protection of their ancestral habitat and traditional way of life.<sup>50</sup> As part of its efforts to implement the development strategy for the Arctic zone of the Russian Federation and for ensuring national security until 2035, the Ministry of Health has approved an action plan for the development of telemedicine and remote forms of medical assistance that covers the migration routes of Indigenous Peoples, in fulfilment of articles 21 and 23 of the Declaration.<sup>51</sup>

43. In Guatemala, pursuant to Governmental Agreement No. 390-2002, the Presidential Commission on Discrimination and Racism against Indigenous Peoples (CODISRA) was

<sup>45</sup> Submission from Crimean Tatar Resource Center.

<sup>46</sup> Submission from Indigenous Missionary Council (Conselho Indigenista Missionário).

<sup>47</sup> Presentation by Victor Toledo at the expert meeting, November 2023.

<sup>48</sup> Presentation by Kim Hamilton, National Iwi Chairs Forum, at the expert meeting, November 2023.

<sup>49</sup> Submission from Malaysia.

<sup>50</sup> Presentation by Vasilii Nemechkin at the expert meeting, November 2023. See also submission from Regional Association of Indigenous Small-Numbered Peoples of the North of Krasnoyarsk Territory, Union of Indigenous Peoples "SOYUZ" and Siberian Federal University.

<sup>51</sup> Submission from Regional Association of Indigenous Small-Numbered Peoples of the North of Krasnoyarsk Territory, Union of Indigenous Peoples "SOYUZ" and Siberian Federal University.

established. It is tasked with formulating and monitoring policies and State actions to respect the rights of Indigenous Peoples. Subsequently, in 2006, the Government adopted a policy for coexistence and the elimination of racism and racial discrimination. However, as at 2024, neither initiative had reportedly resulted in any substantive progress. In 2021, the Indigenous Peoples thematic subcommittee of the Cabinet Committee for Social Development proposed a policy on Indigenous Peoples and interculturality, which has yet to be approved.<sup>52</sup>

44. The policies that have been developed in Mexico City appear to be inadequate when it comes to guaranteeing the rights of Indigenous Peoples, given that they continue to face discrimination. That is particularly the case with regard to their economic, social, cultural and environmental rights, such as the right to housing and the right to consultation. It is noteworthy that Indigenous Peoples were not fully and effectively consulted concerning development plans or strategic plans, and the authorities appear to be far from implementing the norms related to free, prior and informed consent.<sup>53</sup>

45. In the United States of America, government agencies have adopted policies requiring consultation and coordination with Tribal Nations when federal government actions have an impact on their interests. Several federal statutory laws establish the right to consultation, but the current legal framework does not consistently meet the requirement for free, prior and informed consent.<sup>54</sup> In November 2022, an executive memorandum was issued concerning government-wide guidance on the recognition and inclusion of Indigenous knowledge in federal research, policy and decision-making.<sup>55</sup> In addition to a number of executive level directives concerning national monuments to Indigenous Peoples, the executive branch has also made a commitment to work in partnership with tribes to restore wild salmon, expand clean energy production, increase resilience and provide energy stability in the Columbia River Basin.<sup>56</sup> The agreement is intended to cover a ten-year period of work between Tribal Governments and state and federal government representatives.

46. Furthermore, in the United States, Joint Secretarial Order No. 4303 (2021) of the Departments of the Interior and Agriculture requires agencies to enter co-stewardship and co-management agreements with Indian tribes for the management of former tribal lands, water and territories by federal agencies. It also directs those agencies to obtain Indigenous knowledge and to apply it in agency planning and decision-making with respect to those lands, water bodies, habitats, natural resources and ecosystems. Since 2021, many land and water management agencies have developed new policies to implement the Order and a growing number of agency agreements have been established with Tribes under the Order.

47. In the specific context of Alaska and the 228 federally recognized tribes in the state, on 1 February 2024, the Department of the Interior extended the jurisdiction of Alaska tribes over land allotments transferred to individual Alaska Native villages, unless such allotments are owned by a non-tribal member or are “geographically removed from the tribal community”. As a result, “tribes in Alaska can exercise tribal jurisdiction over [Alaska Native Allotment Act] Allotments where (a) their tribal members own the Allotment and continue to maintain a political relationship with the tribe and (b) the ... Allotment is in close geographic proximity to the tribal community”.<sup>57</sup>

48. In Canada in 2022, the Declaration Act Secretariat of the province of British Columbia released guidance entitled “[Interim Approach to Implementing the Requirements of Section 3 of the Declaration on the Rights of Indigenous Peoples Act](#)”. This innovative guidance provides every provincial ministry and sector of government with clear, transparent processes for how they are to work with Indigenous Peoples in pursuing alignment with the Declaration

<sup>52</sup> Submission from Procurador de los Derechos Humanos de Guatemala (in Spanish).

<sup>53</sup> Submissions from Comisión de Derechos Humanos de la Ciudad de México and Mexico (both in Spanish).

<sup>54</sup> Submission from Tribal Justice Clinic, University of Arizona.

<sup>55</sup> See <https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf>.

<sup>56</sup> See <https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/14/fact-sheet-biden-harris-administration-announces-10-year-partnership-with-tribes-and-states-to-restore-wild-salmon-expand-clean-energy-production-increase-resilience-and-provide-energy-stability-i/>.

<sup>57</sup> See <https://www.doi.gov/sites/default/files/documents/2024-02/m37079-partial-wd-m36975-and-clarification-trbl-jurisdiction-over-ak-native-allotments-2124.pdf>.

when developing and reforming provincial laws, policies and practices, as required by section 3 of the Declaration Act.<sup>58</sup>

49. In French Guiana, the agreement signed in 2017 between the State and Indigenous Peoples' organizations mentions the retrocession of 400,000 hectares of land to the Indigenous Peoples of Guiana. However, no land transfers have taken place since then and the land tenure system currently in force in French Guiana is far from ensuring the long-term use of land by Indigenous Peoples.<sup>59</sup>

#### **D. Constructive arrangements and agreements on legislative and executive policies developed by States to achieve the ends of the Declaration**

50. The Declaration stresses that recognition of the rights of Indigenous Peoples enhances harmonious and cooperative relations between the State and Indigenous Peoples and affirms that treaties, agreements and other constructive arrangements are the basis for strengthened partnership between Indigenous Peoples and States. Under article 37 of the Declaration, Indigenous Peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such arrangements. Those agreements apply, among other things, to legislative and executive policies developed by States to implement the Declaration.

51. In Canada, one element in the 2019 British Columbia Declaration on the Rights of Indigenous Peoples Act that does not exist in the federal version adopted in 2021 is the provision for the making and entering into agreements on joint decision-making in relation to the exercise of a statutory power of decision. As at November 2023, there were only two such agreements in place, both of which concern mining activity. That is a model that could be replicated. However, it operates only in decision-making spaces where there is a statutory requirement. It could potentially be expanded into the statutory lawmaking process in the future.

52. Like many government actions in the Philippines, policies that are intended to advance full implementation of the Declaration have reportedly emerged because Indigenous Peoples have asserted and claimed their rights. These policies and mechanisms can be considered constructive arrangements between the State and Indigenous Peoples.<sup>60</sup> Similarly, several provisions of the Chittagong Hill Tracts Accord of 1997 in Bangladesh are consistent with the Declaration and guarantee the fundamental rights of Indigenous Peoples in that region.

53. Significantly, the Inuit-Crown Partnership Agreement<sup>61</sup> emerged in 2017 between the Inuit and the Government of Canada. The Agreement has had many results, including the co-development principles for collaborative efforts between Inuit and federal partners, including the Inuit-Crown Partnership Committee<sup>62</sup> and co-development pursuant to the Inuit Nunangat Policy.<sup>63</sup> The principles guide various areas such as legislation, policies, programmes and services. Inuit-Crown co-development follows a distinctions-based approach, considering the unique circumstances of Inuit enrolled in four Inuit Treaty Organizations across Arctic Canada. These organizations represent Inuit in their relationship with the Crown.

<sup>58</sup> Submission from Declaration Act Secretariat, British Columbia, Canada.

<sup>59</sup> Submission from Clinique de droit international de l'Université Paris II Panthéon-Assas (in French).

<sup>60</sup> Presentation by Minnie Degawan at the expert meeting, November 2023.

<sup>61</sup> See <https://www.pm.gc.ca/en/news/statements/2017/02/09/inuit-nunangat-declaration-inuit-crown-partnership>.

<sup>62</sup> See <https://www.itk.ca/inuit-crown-co-development-principles/>.

<sup>63</sup> See <https://www.itk.ca/inuit-nunangat-policy/>.

## E. Measures taken to interpret and implement international, regional and national jurisprudence and judicial decisions

54. At the regional level, between 2007 and 2023, the Caribbean Court of Justice has issued one judgment and the Inter-American Court of Human Rights has issued a total of 15 judgments applying the United Nations Declaration on the Rights of Indigenous Peoples. The judgments address issues such as collective rights, the right to land and territory, prior consultation, cultural identity, participation, media and access to justice, among other Indigenous Peoples' rights recognized in the Declaration. The Declaration is already part of the body of law of inter-American and Caribbean jurisprudence on Indigenous matters. The increasing application of the Declaration demonstrates that it is considered a relevant legal norm for the interpretation and adjudication of the rights of Indigenous Peoples in the region.<sup>64</sup>

55. In *Kichwa Indigenous People of Sarayaku v. Ecuador*, concerning damage caused by a company contracted by the State to conduct seismic exploration on Sarayaku lands, the Inter-American Court of Human Rights found numerous violations of the American Convention on Human Rights. In its deliberations, the Court included reference to article 38 of the Declaration.<sup>65</sup> Nevertheless, despite that judgment and the observations and recommendations of United Nations human rights bodies, the necessary steps have not yet been taken to ensure the collective right of Indigenous Peoples to free, prior and informed consent that is enshrined in the Constitution of Ecuador.<sup>66</sup> In its 2023 ruling in the case of *Maya Q'eqchi' Indigenous community of Agua Caliente v. Guatemala*, the Inter-American Court found that the State had violated the rights of Indigenous Peoples by permitting a nickel mine on their land.<sup>67</sup>

56. Since 2017, when the African Court on Human and Peoples' Rights ordered Kenya to take all necessary measures within a reasonable time period to address the violations found in the case of the Ogiek people, the Government of Kenya has formed a working group to review the implementation of the judgment, but it did not include any representatives of the Ogiek in the group or consult the Ogiek on its work. In 2022, the African Court ordered the Government to return ancestral lands to the Ogiek people. It appears that execution of the court decision by the State remains outstanding and uncertain.<sup>68</sup>

57. Several national courts, including those of Belize, Botswana, Canada, Chile, Colombia, Guatemala, Kenya, Mexico and the Russian Federation, have cited the Declaration in their decisions on cases involving Indigenous Peoples or have issued rulings aligned with the provisions of the Declaration.<sup>69</sup>

58. Between 2007 and 2023, 791 judgments from constitutional courts and supreme courts in Latin America applied the Declaration. Up to November 2023, the States with the most judgments were Mexico, with 165 judgments addressing the rights to land, justice, consultation and education, Colombia, with 150 judgments on land, consultation, autonomy and justice, and the Plurinational State of Bolivia, with 145 judgments regarding justice, autonomy, consultation and land. The 791 judgments demonstrate that the constitutional courts and supreme courts in the region are applying the Declaration in the adjudication of rights in favour of Indigenous Peoples. States such as Mexico, Colombia and the Plurinational State of Bolivia lead this jurisprudential trend of applying the Declaration in their constitutional processes, advancing the justiciability of rights such as those to land and territory, prior consultation, autonomy and access to justice.<sup>70</sup> The records of the Mexico City

<sup>64</sup> Presentation by Victor Toledo at the expert meeting, November 2023.

<sup>65</sup> Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, 27 June 2012.

<sup>66</sup> [A/HRC/42/37/Add.1](#), para. 37.

<sup>67</sup> Inter-American Court of Human Rights, *Maya Q'eqchi' Indigenous community of Agua Caliente v. Guatemala*, Judgment, 16 May 2023.

<sup>68</sup> Submission from Elizka Relief Foundation.

<sup>69</sup> See [A/HRC/36/56](#).

<sup>70</sup> Presentation by Victor Toledo at the expert meeting, November 2023. See also submission from Mexico (in Spanish).

Human Rights Commission indicate that in 2023, the Supreme Court invalidated laws and reforms based on lack of respect for the requirement to consult in some 18 cases.<sup>71</sup>

59. At the national level, the Supreme Court of Belize, the Constitutional Court of Colombia and the Constitutional Court of Peru have used the Declaration in some of their decisions.<sup>72</sup> A 2007 landmark decision of the Supreme Court Belize recognized that Maya customary land rights constitute property under the Constitution and ordered that Belize recognize and demarcate the collective title of the Maya, while also ceasing any acts that affect or interfere with the use and value of the land. Importantly, in its decision, the Court stated that the Declaration embodies general principles of international law relating to Indigenous Peoples and their lands and resources. The Maya people are now engaged in a long-term struggle to realize the rights set out in the judicial decision, a process that has required them to return to court,<sup>73</sup> and to raise awareness during international Indigenous rights forums.<sup>74</sup>

60. In Guatemala, the Constitutional Court issued a ruling in 2016 on the right to intercultural bilingual education of Indigenous Peoples and to guarantee access to bilingual education in 13 schools in the municipality of Santa Catarina Ixtahuacán, Sololá. However, the State's efforts to comply with the judgment have reportedly not resulted in a guarantee that bilingual education will be provided in the schools listed in the judgment.<sup>75</sup>

61. In Colombia, the Constitutional Court has ruled that the structural failures in the State's response to preventing and remedying the disproportionate impacts of the armed conflict on Indigenous Peoples resulted in an unconstitutional state of affairs.<sup>76</sup>

62. In Brazil in 2023, the Supreme Court upheld Indigenous Peoples' rights to their traditional lands and rejected a legal argument promoted by some businesses to exploit natural resources on traditional Indigenous lands. The argument put forward was that Indigenous Peoples should not receive title to their ancestral territories if they had not been physically present on them in 1988, when the current Constitution was adopted. The Supreme Court rejected that argument as it went against the constitutional rights of Indigenous Peoples to their ancestral lands.<sup>77</sup>

63. In Nepal, national courts have acknowledged the Declaration in their decisions. For instance, in a case concerning the rights of the Baram community, the Government of Nepal was ordered to formulate the necessary laws to implement the Constitutional provisions regarding a protected, special and autonomous region for that community in the Gorkha district of Nepal. However, there is no specific judicial decision that requests full implementation of the Declaration.<sup>78</sup>

64. In New Zealand, the courts have recognized that the Treaty of Waitangi is "of the greatest constitutional importance to New Zealand".<sup>79</sup> The courts of New Zealand, including the Supreme Court, have drawn on the Declaration in their interpretation of the Treaty of Waitangi and in support of Māori rights in a range of areas. In 2022, the Supreme Court, in *Ellis v. R*, concluded that the current place of tikanga (Māori customary law), as a part of the fabric of the law of New Zealand, through legislative and common law recognition, is a manifestation of article 2 of the Treaty. It also highlighted the commitment of New Zealand

<sup>71</sup> Submission from Comisión de Derechos Humanos de la Ciudad de México. See also submission from Mexico (both in Spanish).

<sup>72</sup> Felipe Gómez Isa, "The UNDRIP: an increasingly robust legal parameter", *The International Journal of Human Rights*, vol. 23, No. 1–2 (2019).

<sup>73</sup> Maya Leaders Alliance, "Maya villages sue Government of Belize for failing to protect Indigenous lands", Cultural Survival, press release, 6 April 2016.

<sup>74</sup> Cultural Survival, "Maya Leaders Alliance advocates at United Nations urging respect for rule of law in Belize", 8 May 2018.

<sup>75</sup> Submission from Procurador de los Derechos Humanos de Guatemala (in Spanish).

<sup>76</sup> See <https://www.corteconstitucional.gov.co/relatoria/autos/2017/a266-17.htm> (in Spanish).

<sup>77</sup> Submission from Maat for Peace, Development and Human Rights Association.

<sup>78</sup> Submission from Lawyers' Association for Human Rights of Nepalese Indigenous Peoples.

<sup>79</sup> *New Zealand Māori Council v. Attorney-General* [1994] 1 NZLR 513 (PC) at 516.

to the Declaration, citing a provision on Indigenous Peoples' rights to maintain and develop their institutions, customs, traditions and juridical systems.<sup>80</sup>

65. In Sweden, disagreements persist concerning the management of hunting and fishing rights in reindeer herding areas. Political attempts to resolve this issue have proven unsuccessful. The Swedish reindeer herding industry strategically identified a pivotal case and rallied collective support. While the Supreme Court actively invoked the Declaration in the case, it also made an interesting observation about the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization. Despite the fact that Sweden has not ratified that Convention, the Supreme Court acknowledged the relevant articles therein as expressions of general principles under international law.<sup>81</sup>

66. In a landmark decision in 2021, the Supreme Court of Norway ruled that Norway had violated the human rights of the Sami People in a wind farm project on the Fosen peninsula. Nevertheless, the Government's failure to implement the ruling sparked protests and activism by Indigenous and local youth. More than a year after the court ruling, the Government conceded to the existence of a human rights infringement.<sup>82</sup>

67. In 2019, the Constitutional Court of the Russian Federation reaffirmed that communities of small-numbered Indigenous Peoples were entitled to distribute resources independently among themselves using their own procedures. That enabled them to transfer hunting quotas to the community members who are certified hunters.<sup>83</sup>

68. In 2023, in the United States of America, the Supreme Court ruled in the *Arizona v. Navajo* case that the State did not have a legal requirement to take affirmative steps to establish or protect the water rights of the Navajo Nation from use and diminishment by competing water development.<sup>84</sup>

69. In Canada, there are notable cases relating to Indigenous rights and the Declaration. In 2014, in *Tsilhqot'in Nation v. British Columbia*, the Supreme Court held that Aboriginal title provides the Tsilhqot'in Nation with the right to determine, subject to inherent limits, the uses to which the land is put and to enjoy its economic fruits. However, to date, the provincial and federal governments have reportedly failed to amend their laws to provide space for the Tsilhqot'in Nation to explicitly exercise the legal jurisdiction associated with these rights.<sup>85</sup> In 2022, the Quebec Court of Appeal made a groundbreaking ruling in which it found that the inherent right to self-government of First Nations, Inuit and Métis is recognized and affirmed by section 35 of the Constitution Act (1982) and includes jurisdiction over child and family services. That was the first time a Canadian court had recognized that Indigenous Peoples have a constitutionally protected right to self-government.<sup>86</sup> In February 2024, the Supreme Court upheld the constitutionality of the Act respecting First Nations, Inuit and Métis children, youth and families. That landmark decision affirms that the federal legislation of Canada can implement the provisions of the Declaration.<sup>87</sup>

<sup>80</sup> Submission from New Zealand Human Rights Commission, November 2023. See also Supreme Court of New Zealand, *Ellis v. R*, Judgment, 7 October 2022.

<sup>81</sup> Swedish Supreme Court decision T 853-18. Presentation by Eirik Larsen at the expert meeting, November 2023. See also submission from Saami Council.

<sup>82</sup> Norwegian Supreme Court decision HR-2021-1975-S. Presentation by Eirik Larsen at the expert meeting, November 2023. See also submission from Saami Council.

<sup>83</sup> Submission from Regional Association of Indigenous Small-Numbered Peoples of the North of Krasnoyarsk Territory, Union of Indigenous Peoples "SOYUZ" and Siberian Federal University.

<sup>84</sup> Submission from Tribal Justice Clinic, University of Arizona. See also *Arizona v. Navajo Nation*, 599 U.S. 555 (2023).

<sup>85</sup> Submission from Tsilhqot'in Nation.

<sup>86</sup> Submission from British Columbia Treaty Commission.

<sup>87</sup> See <https://www.scc-csc.ca/case-dossier/cb/2024/40061-eng.aspx#:~:text=The%20essential%20matter%20addressed%20by,of%20reconciliation%20with%20Indigenous%20peoples.>

## **F. Mechanisms for monitoring implementation at the national and regional levels**

70. As the Expert Mechanism has underscored previously, in realizing article 38 of the Declaration, there is a need for States to establish monitoring bodies that can build political momentum towards the advancement of the rights of Indigenous Peoples across society.<sup>88</sup> The Special Rapporteur on the rights of Indigenous Peoples has recommended that States, together with Indigenous Peoples, carry out strategic planning and develop monitoring mechanisms and indicators to identify practical steps for the implementation of the human rights standards set out in the Declaration and for its effective implementation.<sup>89</sup> Legislation on national action plans can provide a road map for effective implementation.

71. In New Zealand, when developing the national plan of action to implement the Declaration, Indigenous Peoples examined several elements, in accordance with the advisory note of the Expert Mechanism following its country engagement in 2019.<sup>90</sup> One element was how the Treaty of Waitangi, the 2016 report of the Independent Working Group on Constitutional Transformation and the standards contained in the Declaration were being applied to government work programmes. Another element was consideration of the positive impact for the Government, whanau (extended family or community of related families who live together), hapu (division of a Māori people or community), iwi (Māori community or people) and Māori of improved investment in Māori development and outcomes. A third was how to measure the success of the plan.<sup>91</sup>

72. In Canada, the 2021 federal Declaration Act required the Government to table an action plan and to publish annual progress reports. The action plan was issued in June 2023, after the Government had engaged in a series of consultations with First Nations, Métis and Inuit representatives. It includes 181 measures for implementing the Declaration, including monitoring its implementation and reviewing and amending the plan. However, Indigenous Peoples in Canada, including groups of Indigenous women, have expressed the view that insufficient time was provided for consultations, that the action plan lacks detailed implementation measures and that it does not call for certain specific legislative or policy amendments.<sup>92</sup> Indigenous Peoples indicate that one of the lessons learned from the process is that more collaboration will be required in the reporting process.<sup>93</sup>

## **G. Measures taken to implement recommendations from existing national inquiries and commissions**

73. Truth and reconciliation commissions have emerged as a key mechanism to address past wrongs and to prevent future violations. They are vital processes in that they raise awareness and encourage stocktaking regarding violations of the rights of Indigenous Peoples.<sup>94</sup> In cases where States have initiated or concluded national inquiries, truth commissions and other processes or mechanisms for reconciliation, a fundamental step is the analysis of actions to respond to the final reports, conclusions and recommendations that may yield constructive examples of implementation.

74. A key example of commissions established to specifically address the rights of Indigenous Peoples is the Truth and Reconciliation Commission of Canada, a process that was established jointly by Indigenous Peoples and governments. Indigenous Peoples

<sup>88</sup> [A/HRC/EMRIP/2023/3](#).

<sup>89</sup> [A/HRC/27/52](#), para. 63.

<sup>90</sup> See <https://www.ohchr.org/en/hrc-subidiaries/expert-mechanism-on-indigenous-peoples/country-engagement>.

<sup>91</sup> Presentation by Kim Hamilton at the expert meeting, November 2023.

<sup>92</sup> [A/HRC/54/31/Add.2](#), paras. 10 and 11. See also submissions from Manitoba Keewatinowi Okimakanak, Inc., Ontario Native Women's Association and Native Women's Association of Canada.

<sup>93</sup> Presentation by Gordon Christie, University of British Columbia, at the expert meeting, November 2023.

<sup>94</sup> [A/HRC/EMRIP/2019/3/Rev.1](#), para. 46.

participated fully from the outset. In June 2015, the Commission announced the release of its summary report which included 94 calls to action. They were intended to form the blueprint for reconciliation in the future and called upon all levels of government – federal, provincial, territorial and municipal – to make fundamental changes in policies and programmes in order to repair the harm caused by residential schools. In total, 12 of the 94 calls to action specifically referenced implementing the Declaration. By tying itself and the concept of reconciliation directly and intrinsically to the Declaration, the Commission challenged all levels of Canadian government and society to throw off the legacy of colonialism and fully implement the Declaration.

75. In Finland and Sweden, truth and reconciliation commissions have been established and their work is currently under way. The report of the Truth and Reconciliation Commission of Norway, issued in June 2023, contains a set of recommendations that revolve around five main pillars on which the reconciliation process must be based: knowledge and communication, language, culture, prevention of conflicts and implementation of regulations. The Commission suggests follow-up on how to bring Norwegian legislation into accordance with international obligations concerning land rights, among others. As a result, coordination actions among Sami Peoples have taken place in order to ensure implementation of the recommendations.<sup>95</sup>

76. The Waitangi Tribunal in New Zealand is a standing commission of inquiry that makes recommendations on claims brought by Māori relating to legislation, policies, actions, inactions or omissions of the Crown that are alleged to breach the Treaty of Waitangi. In its final report (WAI 2417), the Tribunal devoted a preliminary chapter to the Treaty and the United Nations Declaration on the Rights of Indigenous Peoples. It includes recognition of the Declaration's "significant normative weight" and justifications for interpreting Treaty principles in accordance with the Declaration.<sup>96</sup> However, the new Government reportedly intends to review the role of the Waitangi Tribunal.<sup>97</sup>

## **H. Measures taken to uphold the rights of Indigenous Peoples in international forums and mechanisms**

77. The adoption of the Declaration has allowed for changes to take place at the global level. It paved the way for direct participation by Indigenous Peoples in the different processes that are dealing with issues relevant to them. It should be noted that even before the Declaration was adopted in 2007, international bodies were increasingly recognizing the need to include Indigenous Peoples in those processes.<sup>98</sup> They include both thematic forums, such as meetings concerning the [United Nations Framework Convention on Climate Change](#), and human rights bodies. In relation to the jurisprudence of the United Nations human rights treaty bodies, numerous recommendations and observations have come from various bodies, including the Committee on the Elimination of Racial Discrimination, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. As detailed below, they have highlighted land rights, autonomy, discrimination against Indigenous women, consultation and consent, and the impact of business activities on Indigenous Peoples.

78. In 2018, Ibero-American States and Indigenous Peoples developed the Ibero-American Action Plan for the Implementation of the Rights of Indigenous Peoples. It promotes common objectives and coordinates programming between national authorities and Indigenous Peoples, with the participation of Indigenous women and youth, and with regional and global bodies present in the region.<sup>99</sup>

79. Indigenous Peoples participated in the United Nations Conference on Environment and Development (Earth Summit) and have taken part in the Conferences of the Parties to the [United Nations Framework Convention on Climate Change](#) for many years. In 2000,

<sup>95</sup> Presentation by Eirik Larsen at the expert meeting, November 2023.

<sup>96</sup> Submission from New Zealand Human Rights Commission, November 2023.

<sup>97</sup> Submission from New Zealand Human Rights Commission, January 2024.

<sup>98</sup> Presentation by Minnie Degawan at the expert meeting, November 2023.

<sup>99</sup> Submission from Spain (in Spanish).



Indigenous Peoples were formally recognized as a constituency and the International Indigenous Peoples' Forum on Climate Change was created in 2008 to coordinate Indigenous Peoples' attendance at and impact on those Conferences and to discuss priorities, negotiate items and organize side events. To date, more than 60 decisions that reference Indigenous Peoples and Indigenous knowledge have been adopted at Conferences of the Parties or in reports adopted by subsidiary bodies.<sup>100</sup> It is significant that the Local Communities and Indigenous Peoples Platform Facilitative Working Group was established and its composition ensures equitable representation with States parties, and that selection of Indigenous Peoples' representatives now takes place without oversight or the participation of Member States.

80. More recently, Indigenous Peoples have emphasized the need for dialogue on biodiversity beyond national jurisdiction and the importance of Indigenous knowledge concerning coastal seas and the ocean. Highlighting the interrelated nature of the biodiversity of the Arctic Ocean and its coastal seas, Inuit were direct actors in the finalization of the legally binding Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, which explicitly invokes both the Declaration and provisions concerning Indigenous knowledge. In relation to the marine environment, actions by Indigenous Peoples crystallized in the Inuit's successful pursuit of provisional consultative status within the International Maritime Organization and their direct participation in the negotiations concerning plastics and microplastics.

81. In recent years, the human rights treaty bodies have continued to contribute to a comprehensive body of jurisprudence on Indigenous Peoples' rights through individual communications. In 2018, the Human Rights Committee adopted Views in the case of *Sanila-Aikio v. Finland*, citing articles 8.1, 9 and 33 of the Declaration. The Committee considered that the rulings of the Supreme Administrative Court of Finland affected the rights of the Sami People to engage in the electoral process regarding the institution intended by the State party to secure effective internal self-determination and the right to their own language and culture.<sup>101</sup> In its advisory note following a country engagement mission to Finland in 2018, the Expert Mechanism underlined the fact that "the right to self-determination, including the right to self-identification that section 3 of the Act seeks to protect, is a collective right held by the Sami people as a whole".<sup>102</sup> In 2023, the Committee on the Elimination of Racial Discrimination referred to the Declaration in its opinion in *Nuorgam et al. v. Finland*, in which it found that the rulings of the Supreme Administrative Court of Finland had violated the petitioners' right, as members of the Sami People, to collectively determine the composition of the Sami Parliament and to take part in the conduct of public affairs.<sup>103</sup> Despite those rulings, more recent court decisions have been similarly problematic as they potentially affect the ability of the Sami to elect their leaders.

82. In 2022, in its Views on *Billy et al. v. Australia*, the Human Rights Committee invoked the Declaration and affirmed that the State's failure to adequately protect Indigenous Peoples against the adverse impacts of climate change violated their rights to enjoy their culture and to be free from arbitrary interference in their home, private life and family.<sup>104</sup> As some scholars have pointed out, the issues raised and addressed in those Views may well read like a checklist for future submissions on climate change-related matters. As climate change litigation proliferates and expands before international bodies and domestic courts, involving not only States but also corporations, such an attempt at codification may in fact become the agenda of the future.<sup>105</sup>

<sup>100</sup> Presentation by Dalee Sambo Dorough, member of the Expert Mechanism on the Rights of Indigenous Peoples, at the expert meeting, November 2023.

<sup>101</sup> [CCPR/C/124/D/2668/2015](https://www.ohchr.org/en/hrc-subidiaries/expert-mechanism-on-indigenous-peoples/country-engagement).

<sup>102</sup> See <https://www.ohchr.org/en/hrc-subidiaries/expert-mechanism-on-indigenous-peoples/country-engagement>.

<sup>103</sup> [CERD/C/106/D/59/2016](https://www.ohchr.org/en/hrc-subidiaries/expert-mechanism-on-indigenous-peoples/country-engagement).

<sup>104</sup> [CCPR/C/135/D/3624/2019](https://www.ohchr.org/en/hrc-subidiaries/expert-mechanism-on-indigenous-peoples/country-engagement).

<sup>105</sup> Maria Gavouneli, "Introductory note to Views adopted by the Committee under art. 5(4) of the Optional Protocol, concerning communication No. 3624/2019 (U.N.H.R. Committee)", *International Legal Matters*, vol. 62, No. 5 (October 2023).

## Annex

### **Expert Mechanism Advice No. 17 (2024): Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration**

1. The Expert Mechanism provides the following advice on the measures taken by States to achieve the ends of the United Nations Declaration within the context of their human rights obligations and responsibilities.
2. There is a general understanding that the Declaration synthesizes the spectrum of fundamental human rights already enshrined in various treaties and international jurisprudence in the context of Indigenous Peoples. The United Nations treaty bodies have frequently referred to the Declaration to interpret relevant provisions of these treaties in matters involving Indigenous Peoples. Similarly, the Declaration helps States interpret and understand their existing human rights obligations as a matter of international and domestic law.
3. The Declaration has contributed to the development of – and at least partially reflects – general principles of international law or customary international law. The Declaration includes several key provisions that correspond to existing State obligations under customary international law.
4. States should operationalize the rights affirmed in the Declaration in ways that entail clear programmes of legal and policy reform, institutional action and reparations for past wrongs.
5. States should, in cooperation and collaboration with Indigenous Peoples, incorporate frameworks to implement the Declaration into domestic law. Implementing the Declaration will normally require States to adopt new laws or to amend existing legislation at the domestic level, as well as developing a regulatory framework, as provided in article 38 of the Declaration, which calls for appropriate legislative measures.
6. States should institute constitutional and other legal reforms and judicial actions to recognize and operationalize the rights of Indigenous Peoples under the Declaration at the local level. The legislative process should apply a comprehensive approach to synchronize different elements and levels of legislation and regulations in order to make them consistent.
7. Legal and institutional transformations required by the Declaration are usually not sufficiently addressed solely by enacting specific Indigenous laws and legislation. States should aim to transform broader legal structures in key areas in concert with these requirements. Article 38 highlights the central role of Member States in promoting the content of the Declaration and its connection to existing obligations to which they have already committed under other human rights instruments.
8. While the legislative implementation of the Declaration is not always coupled with constitutional reforms, it does provide the judiciary with tools that they can use to maintain the relationship between justice and jurisprudence. The Declaration is progressively interpreted in national, regional and international jurisprudence and judicial decisions on Indigenous Peoples' rights. In the light of this development, States should take into account the norms of customary law and appoint more Indigenous judges.
9. In implementing article 38 of the Declaration, States should establish monitoring bodies that can build political momentum towards the advancement of the rights of Indigenous Peoples across society. States, in cooperation and collaboration with

**Indigenous Peoples, should carry out strategic planning and develop monitoring mechanisms and indicators to identify steps for the practical application of the human rights norms set out in the Declaration and for its effective implementation. States should create autonomous Indigenous-specific institutions to monitor the implementation of the Declaration and assess fulfilment of government responsibilities and obligations.**

**10. States should take steps to achieve the ends of the Declaration and the realization of the right of Indigenous Peoples to have treaties, agreements and other constructive arrangements concluded with them or their successors recognized, observed and enforced.**

**11. In cases where States have initiated or concluded national inquiries, truth commissions and other processes or mechanisms for reconciliation, a fundamental step following up on such commissions is the analysis of action taken by States to respond to the final reports, conclusions and recommendations that may yield constructive examples of implementation of the Declaration.**

**12. States should provide their civil servants with comprehensive training on the provisions of the United Nations Declaration on the Rights of Indigenous Peoples and its implementation.**

**13. Indigenous Peoples should continue to build their own institutional capacity and expertise on their rights affirmed in the Declaration and on how to enforce them at the national, regional and international levels, including by participating in lawmaking work by expanding their opportunities to exercise legislative initiative and to participate directly in parliaments of all levels. Indigenous Peoples should be able to engage with lawyers' groups when ongoing judicial reviews or litigation on Indigenous Peoples' rights exist, focusing on the use of the Declaration. In this regard, it is recommended that steps be taken to create the conditions and platforms for Indigenous Peoples and State authorities to discuss legal reforms. States should also assist Indigenous Peoples to initiate educational programmes together with other actors such as academia.**

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