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**Efforts to implement the United Nations Declaration on
the Rights of Indigenous Peoples**

Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination

Draft report of the Expert Mechanism on the Rights of Indigenous Peoples

Summary

In the present draft report, the Expert Mechanism on the Rights of Indigenous Peoples examines good practices and lessons learned regarding efforts to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, focusing on self-determination initiatives undertaken by indigenous peoples and States since the adoption of the Declaration in 2007.



I. Introduction

1. At its intersessional meeting held in Pretoria in 2019, the Expert Mechanism on the Rights of Indigenous Peoples decided to prepare a report on the right to self-determination. For that purpose, an expert seminar, hosted by the Centre for Human Rights Research of the University of Manitoba and the Expert Mechanism, was held virtually on 4 and 5 February 2021.¹ The present draft report has been informed by the seminar and submissions received from indigenous peoples, States, national human rights institutions and civil society.²

2. The present draft report builds upon other United Nations studies and reports on self-determination and should be read in conjunction with the Expert Mechanism's other reports, in particular its reports on the right to participate in decision-making, recognition, reparation and reconciliation, land rights and free, prior and informed consent, in which it expounded on the right to self-determination as the fundamental norm upon which indigenous rights are grounded.³ As expressed by the Special Rapporteur on the rights of indigenous peoples, the right of self-determination is a foundational right, without which indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed.⁴ The present draft report is focused on the development of the right to self-determination since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007.

II. History of self-determination

3. Indigenous peoples around the world invoke the right to self-determination as the normative basis of their relationship with the State. That has been influenced by the development of international human rights law and, eventually, indigenous peoples' participation in the United Nations system. The right to self-determination is recognized in the Charter of the United Nations and in common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." That language has its roots in the decolonization movement and was adopted from the second operative paragraph of the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁵ adopted by the General Assembly by its resolution 1514 (XV) of 14 December 1960, establishing the normative basis of independence for colonial territories. In paragraph 2 of the resolution, the General Assembly elucidated self-determination in the colonial context as the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development. Even so, in paragraph 6 of the resolution, the Assembly declared that any attempt to disrupt the national unity and territorial integrity of the State was incompatible with the purposes of the Charter.

4. Decolonization marked a change in the way self-determination was characterized by States and by international law,⁶ and the decolonization movement was inspirational for many indigenous leaders, many of whom also did not distinguish their situation from one of colonization.⁷

5. The adoption of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations in 1970 was a pivotal moment in the development of the right to self-

¹ Presentations made at the expert seminar will be posted on the webpage of the Expert Mechanism.

² Submissions received for the present report will be posted on the webpage of the Expert Mechanism.

³ A/HRC/18/42; A/HRC/21/53; A/HRC/39/62; and A/HRC/45/38.

⁴ A/HRC/12/34, para. 41.

⁵ See also Sheila Nelson, *Decolonization: Dismantling Empires and Building Independence* (Broomal, PA, Mason Crest Publishers, 2007).

⁶ General Assembly resolutions 1514 (XV) and 1541 (XV).

⁷ Marc Weller, chapter 5, "Self-determination of indigenous peoples: articles 3, 4, 5, 18, 23 and 46 (1)", in *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Jessie Hohmann and Marc Weller (eds.) (Oxford, Oxford University Press, 2018).

determination beyond the decolonization context.⁸ The Declaration also included a disclaimer against any action that would compromise the territorial integrity of the State: “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”⁹ That signalled a shift of self-determination beyond concerns about State sovereignty and involved a deeper examination of the term “peoples” and the meaning of self-determination for peoples internally within a State.

6. In the post-cold war environment, the focus on the internal governance of States as a characteristic of self-determination emerged. Following the end of communism, democratic governance was increasingly viewed as a normative rule of the international system and the essential elements of democracy were derived from the right to political participation as established in the Charter of the United Nations, article 21 of the Universal Declaration of Human Rights and article 25 of the International Covenant on Civil and Political Rights.

7. As the most controversial and contested right in international law, self-determination posed substantial challenges for the indigenous participants in the 25 years of developing the United Nations Declaration on the Rights of Indigenous Peoples. There were several States that continued to argue that the right to self-determination would lead to secession, as borne out in the decolonization movement. Those concerns were averted by including in the Declaration a safeguard clause in article 46. The safeguard clause was extracted from the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, to guarantee the territorial integrity of States. In fact, article 46 became a catch-all provision to arrest State fears about the implications of the recognition of indigenous rights upon State systems. The recognition of indigenous peoples’ right to self-determination in the United Nations Declaration on the Rights of Indigenous Peoples was pioneering because it was the application of the right to self-determination to a group.

III. Legal framework

8. The fundamental norm of the United Nations Declaration on the Rights of Indigenous Peoples is the right to self-determination recognized in article 3: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” The right to self-determination is manifested in articles 4, 5, 18, 19, 20 and 33 of the Declaration, which expound on its implementation at the domestic level. Without article 3, none of the other rights can be fulfilled.

9. The international history of self-determination is set out above. It is also recognized in the African Charter on Human and Peoples’ Rights and in the American Declaration on the Rights of Indigenous Peoples of 2016. Prior to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights invoked common article 1 of the Covenants in cases relating to indigenous peoples and in their consideration of State party reports, mainly in the context of indigenous land rights, economic rights, the right to participation and indigenous institutions.¹⁰ However, the challenge for the Human Rights Committee’s jurisprudence is that cases are considered in the context of individual, as opposed to collective, rights. Recently, the Committee on the Elimination of Racial Discrimination recommended that a State party take steps towards the extraconstitutional recognition of indigenous peoples, including by implementing the fundamental right to self-determination of indigenous peoples and the establishment of shared governance.¹¹ The

⁸ General Assembly resolution 2625 (XXV).

⁹ *Ibid.*

¹⁰ See CCPR/C/119/D/2668/2015; E/C.12/SLV/CO/3-5; CCPR/C/SWE/CO/7; and CCPR/C/ECU/6.

¹¹ See CERD/C/AUS/CO/18-20; and CERD/C/NZL/CO/21-22.

Committee on the Elimination of Discrimination against Women has also recommended a constitutional amendment to recognize explicitly the rights of indigenous women, in particular their right to self-determination, in line with the United Nations Declaration on the Rights of Indigenous Peoples, and expressed its concern about the general lack of recognition of the right of indigenous peoples to self-determination in the State party concerned.¹² The Inter-American Court of Human Rights has also underpinned indigenous people's rights, though use of common article 1 of the Covenants in its interpretations of its judgments in cases on indigenous rights.¹³

10. Cultural self-determination, as one of the four main pillars of article 3, also includes language, ceremonial and cultural heritage, spirituality and sports rights, and its meaning is expanded upon throughout the Declaration (arts. 11–16, 31 and 34). It has been described as the right to recapture indigenous peoples' identity, reinvigorate their ways of life, reconnect with the Earth, regain their traditional lands, protect their heritage, revitalize their languages and manifest their culture, all of which are considered "as important to indigenous people as the right to make final decisions in their internal political, judicial, and economic settings".¹⁴ The Committee on Economic, Social and Cultural Rights characterizes culture as a broad, inclusive concept encompassing all manifestations of human existence, among other things ways of life, language, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. For the Committee, the right to take part in cultural life is also interdependent on other rights enshrined in the International Covenant on Economic, Social and Cultural Rights, including the right of all peoples to self-determination.¹⁵ The Human Rights Committee, in interpreting article 27 of the International Covenant on Civil and Political Rights, has expressed the positive duties incumbent on States to protect indigenous peoples' cultural rights and the requirement to interpret the right to culture consistently with the right to self-determination in the context of indigenous peoples' issues.¹⁶ While there are many references to ceremonies and spirituality in the United Nations Declaration on the Rights of Indigenous Peoples, the American Declaration on the Rights of Indigenous Peoples contains a formal recognition of indigenous spirituality.

11. Language rights are integral elements of the right to self-determination.¹⁷ The Committee on Economic, Social and Cultural Rights has stressed that indigenous languages are a paramount part of cultural rights and are also a key factor for the enjoyment of all economic, social and cultural rights.¹⁸ The Committee urged States parties to take all measures necessary to promote and protect indigenous languages and to ensure that indigenous peoples could practice their languages without discrimination, and reiterated the need to urgently recognize indigenous languages and facilitate their active presence in educational systems, including, when feasible, education of and in those languages.¹⁹

12. Article 4 is particularly significant, given that it explicitly refers to the exercise of the right to self-determination alongside the related concepts of autonomy and self-government. Autonomy, as defined by the Special Rapporteur on the rights of indigenous peoples, is the power that indigenous peoples have to organize and direct their internal life, according to their own values, institutions and mechanisms, within the framework of the State of which they are part.²⁰ The American Declaration on the Rights of Indigenous Peoples also addresses indigenous peoples' collective right to self-governance, in its article VI. There are many

¹² See CEDAW/C/NPL/CO/6.

¹³ See Inter-American Court of Human Rights, *Members of the Saramaka People v. Suriname* (case No. 12,338); and *Kichwa Indigenous People of Sarayaku v. Ecuador* (case No. 12,465).

¹⁴ Siegfried Wiessner, "Indigenous sovereignty: a reassessment in light of the United Nations Declaration on the Rights of Indigenous Peoples", *Vanderbilt Journal of Transnational Law*, vol. 41, No. 4.

¹⁵ Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009).

¹⁶ See *Mahuika and others v. New Zealand*, (CCPR/C/70/D/547/1993).

¹⁷ See E/C.19/2008/3.

¹⁸ See E/2020/22–E/C.12/2019/32.

¹⁹ *Ibid.*

²⁰ As quoted in the submission from the national human rights institution of El Salvador.

references in the United Nations Declaration on the Rights of Indigenous Peoples, outside of article 4, on indigenous peoples' right to their own institutions, to administer their autonomy and self-governance and to participate fully, if they so choose, in the political, economic, social and cultural life of the State (arts. 5, 18, 20 and 34).

13. Self-determination is exercised as a collective right belonging to the indigenous group, membership of which is based on self-identification and collective acceptance of group members without discrimination.²¹ The Declaration attests to indigenous peoples' right to belong to an indigenous community or nation (art. 9) and to determine their own identity or membership, in accordance with their traditions and customs (art. 33). Recently, the Committee on Economic, Social and Cultural Rights urged a State to adopt a law recognizing indigenous peoples on the basis of self-identification and protecting their rights, including the right to ownership of the lands that they traditionally occupy or use as sources of livelihood and the respect for their free, prior and informed consent in decision-making processes affecting their rights and interests.²² The Committee on the Elimination of Racial Discrimination has recommended that, in line with its general recommendation No. 23 (1997) on the rights of indigenous peoples, in defining who is eligible to vote for members of an indigenous parliament, the State accord due weight to the rights of the indigenous people to self-determination, to determine their own membership and not to be subjected to forced assimilation.²³ The International Labour Organization and the African Commission on Human and Peoples' Rights also indicated that, self-identification was key in the debate at the national and regional levels regarding the legal recognition of indigenous peoples.²⁴

14. All the rights in the Declaration are indivisible, interdependent and grounded in the overarching right to self-determination.²⁵ The exercise of self-determination is therefore indispensable for indigenous peoples' enjoyment of all their other rights, including, importantly, land rights (arts. 25–28, 30 and 32) and political participation (arts. 18–20 and 34). The Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination have also made the connection between land rights and self-determination.²⁶ The connection between self-determination and the right to participation in the decision-making process and to the free, prior and informed consent of indigenous peoples in matters affecting them has also been analysed in previous reports of the Expert Mechanism.²⁷ In a case in Ecuador in 2019, a first instance court, whose judgment was subsequently upheld, indicated that: “The relationship between the right to self-determination and indigenous peoples' participation in decision-making is an ongoing process, as this ensures that indigenous peoples continue to participate in decision-making and retain control over their destinies, which means that institutions must be designed to enable indigenous peoples to make decisions in relation to their internal and local affairs, and also to participate collectively in external decision-making processes, in accordance with relevant human rights standards.”²⁸ It reaffirmed that the basis for prior consultation is self-determination.²⁹

15. The right to self-determination has an internal and external dimension. The former is determined by the physical dimensions of the State and the rights of all peoples to pursue freely their economic, social and cultural development, including by taking part in the conduct of public affairs without outside interference.³⁰ For the first time, the Human Rights

²¹ Marc Weller, chapter 5, “Self-determination of indigenous peoples”; E/C.19/2004/2; www.un.org/esa/socdev/unpfii/documents/session_10_crp_5.pdf; *Sanila-Aikio v. Finland* (CCPR/C/119/D/2668/2015); *Lovelace v. Canada*, communication No. 24/1977; and see www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/RequestsUnderNewMandate.aspx.

²² See E/C.12/NAM/CO/1.

²³ CERD/C/FIN/CO/20-22, para. 12; and see CERD/C/FIN/CO/23.

²⁴ See www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_115929.pdf.

²⁵ See A/HRC/45/38.

²⁶ See CRC/C/BRA/CO/2-4; and CERD/C/AUS/CO/18-20.

²⁷ Submission from Mauro Barelli; see also A/HRC/39/62; and A/HRC/45/38.

²⁸ Tribunal de Garantías Penales de Pastaza, decision of 9 May 2019 (case No. 16171-2019-00001), pp. 17 and 81 and annex 2.

²⁹ *Ibid.*, p. 63.

³⁰ See *Sanila-Aikio v. Finland* (CCPR/C/124/D/2668/2015); and *Käkkäläjärvä et al. v. Finland* (CCPR/C/124/D/2950/2017).

Committee made a specific reference to internal self-determination under article 1 of the International Covenant on Civil and Political Rights in landmark cases against Finland in 2019 and cited the Declaration as an authority in its analysis of indigenous rights.³¹ In its decisions, the Committee noted that the Sámi Parliament ensured an internal self-determination process that was necessary for the continued viability and welfare of the indigenous community as a whole. It found that Finland had improperly intervened in the Sámi's rights to political participation regarding their specific rights as an indigenous people, finding a violation of articles 25 and 27 of the Covenant, as interpreted in the light of article 1.

16. A primary manifestation of “external” determination, is the right of indigenous peoples, in particular those divided by international borders, to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders (art. 36 (1)).³² At the time of adoption of the Declaration, all States recorded their sense that the adoption of the Declaration, and all articles contained in it, was subject to the application of the reservation contained in article 46 on territorial integrity.³³

17. External self-determination may also include indigenous peoples' right to determine their place in the international community based upon the principle of equal rights.³⁴ From an indigenous perspective, participation by indigenous peoples in the international indigenous movement is an example of the exercise of external self-determination.³⁵ That includes expressions of indigenous peoples at the United Nations and other international forums where they can express their world views and perspectives on the international level, external to their own communities. The “importance of ensuring that indigenous peoples' voices, the very people whose self-determination is affirmed by the Declaration, are heard in the international community through participation in international policy forums and decision-making bodies” is recognized.³⁶

18. For indigenous peoples in voluntary isolation the right to self-determination should be understood as the guarantee of respect for their decision to remain in isolation. Their right to life may be violated if their right to self-determination is denied. Isolation is a strategy of collective preservation, allowing them to maintain their own systems of thought, cultures, languages and traditions and to survive the threats caused by any forced contact with the outside world.³⁷ The Special Rapporteur on the rights of indigenous peoples, referred to the principle of no contact as an expression of indigenous peoples' right to self-determination.³⁸ That right is supplemented by article 8 of the Declaration, which recognizes that indigenous peoples have the right not to be subjected to forced assimilation. Article XXVI of the American Declaration on the Rights of Indigenous Peoples specifically recognizes that indigenous peoples in voluntary isolation or initial contact have the right to remain in that condition and to live freely and in accordance with their cultures and that States should, with the knowledge and participation of indigenous peoples and organizations, adopt appropriate policies and measures to recognize, respect and protect the lands, territories, environment and cultures of those peoples, as well as their life and individual and collective integrity.³⁹

³¹ See *Ibid.*; see also CCPR/C/FIN/CO/7.

³² International Law Association, report of the Seventy-Fourth Conference, held at The Hague in 2010, focused on the rights of indigenous peoples; see also A/HRC/EMRIP/2019/2/Rev.1.

³³ See A/61/PV.107. See also submission from New Zealand. For views on the application of general international law principles to indigenous peoples, see International Law Association, report of the Seventy-Fourth Conference.

³⁴ See <http://hrlibrary.umn.edu/gencomm/genrexxi.htm>.

³⁵ Dalee Sambo Dorough, “Indigenous peoples and the right to self-determination: the need for equality: an indigenous perspective”, paper presented at the seminar on the right to self-determination of indigenous peoples held in New York on 18 May 2002.

³⁶ Submission from New Zealand.

³⁷ Submission from the International Working Group on indigenous peoples Living in Voluntary Isolation or in Initial Contact in the Amazon and Gran Chaco.

³⁸ See A/73/176.

³⁹ See www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-20-es.pdf.

IV. Exercise of self-determination by indigenous peoples

19. Self-determination is an ongoing process in which institutions of decision-making are devised that enable indigenous peoples to make decisions related to their internal and local affairs and to participate collectively in external decision-making processes.⁴⁰ The exercise of self-determination varies by region and by the peoples involved and is determined by the relationship and level of their recognition within the State. All efforts in moving towards self-determination have been and continue to be a struggle for indigenous peoples. As one indigenous leader expressed: “the progress towards realization of self-determination is not a straight road, but one marked by setbacks and obstacles”.⁴¹ The examples below demonstrate the regional nature of the development of self-determination.

20. The self-rule government and parliament of Greenland are regarded as unique, because they were initiated by Greenlanders themselves and negotiated peacefully with the Government of Denmark.⁴² Since 2009, indigenous peoples have held authority over all matters internal to Greenland, whereas the Danish authorities still control defense and foreign policy, among other matters. The Sámi peoples have parliamentary structures across three countries (Finland, Norway and Sweden), the fact of which grants them the right to cultural and political self-determination on their traditional lands, of which they have usufruct as opposed to ownership rights, and decision-making authority, as well as the right to consultation.⁴³

21. In the United States of America, over 500 federally recognized tribes retain jurisdiction over their own territories, to a significant extent. They have clear jurisdiction to determine their own membership, government and justice system and over their own internal affairs. Tribal governments generally maintain judicial and regulatory jurisdiction over their lands. While the federal and state governments often assert authority in indigenous territories, especially in criminal law, the trend is to restore tribal governance, as in the Tribal Law and Order Act of 2010 and the Supreme Court’s decision in *McGirt v. Oklahoma*. More broadly, tribes in the United States are working to reclaim their own laws, customs and traditions and to implement the Declaration through tribal institutions, such as the Navajo Nation Human Rights Commission and Muscogee (Creek) National Council.⁴⁴ In Alaska, United States, there are several examples of extraordinary expression of the right of self-determination in the management of resources central to Inuit food security, including through the Alaska Eskimo Whaling Commission. Those activities involve collaboration with the federal Government and internationally with the International Whaling Commission.⁴⁵

22. Some indigenous peoples have high levels of autonomy in their regions. In the Plurinational State of Bolivia, the Guaraní are successfully exercising their self-determination on portions of their territories in an indigenous native peasant autonomy model, as provided for in the domestic legal framework. Difficulties in implementation have arisen due to the diversity of non-Guaraní communities under their management and control, and the adaptation of the current governmental structure to the Guaraní system of collective decision-making.⁴⁶ In Colombia, the Emberá Cristianía indigenous reserve has been exercising administrative, legislative, judicial and political autonomy over portions of its ancestral lands for over 40 years, albeit not without challenges. Today, indigenous communities in Colombia are particularly concerned about the lack of implementation of the “ethnic chapter” of the peace agreement, which should have allowed communities to establish their own justice systems to deal with the consequences of the armed conflict.⁴⁷ The

⁴⁰ See A/HRC/15/35.

⁴¹ Presentation made by Lisa Henrito at the expert seminar convened by the Expert Mechanism in February 2021.

⁴² See A/73/176.

⁴³ See A/HRC/45/38.

⁴⁴ See <https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf>.

⁴⁵ Submission from the Inuit Circumpolar Council.

⁴⁶ See A/74/49.

⁴⁷ See E/C.19/2018/7; and www.iwgia.org/images/documents/Recommendations/Autonomi_report_UK.pdf.

indigenous Comarca of Guna Yala in Panama have enjoyed a high level of autonomy and self-government since 1938, including collective land rights, election of their own authorities and control over their internal affairs and over non-renewable natural resources.⁴⁸ One of the hallmarks of Guna Yala is the prominent role of women in the local economy and the political sphere. Women have in the past served as community chiefs, and each community is required to include a woman in its delegation to the Guna General Congress, their highest authority. The Guna also recently elected a woman to represent them for the first time in the National Assembly of Panama in 2019.⁴⁹ In Peru, the Autonomous Territorial Government of the Wampis Nation was self-declared in 2015, after the adoption of its statute of autonomy. The Wampis wish to enter into dialogue with the State for the recognition of their authorities within the State.⁵⁰ In the United States, the Onondaga Nation, based within New York State, has its own system of government, does not accept funding from the Federal Government and does not participate in United States elections.⁵¹ In Nicaragua, the inhabitants of the Caribbean Coast have their own autonomous regions under Law No. 28, entitled “Statute of Autonomy of the Regions of the Caribbean Coast of Nicaragua”.⁵²

23. In the Bolivarian Republic of Venezuela, some indigenous peoples administer their own lands and communities. In the Maurak Pemon community, the current elected indigenous leader ensures the running of an airport; she also oversees a security body to protect and defend their rights to land and supports the 432 indigenous families in their territory of 38,000 hectares of land that borders with Brazil. They have their own system of administration of justice, whereby they apply their own customs and traditional knowledge, even in cases of murder. The non-indigenous justice courts are in favour of indigenous peoples being returned to their jurisdiction to be tried and sentenced. The challenges experienced relate to the militarization of their land, the movement of indigenous peoples across borders, illegal invasions of and economic interest in their land, demonstrated by the intensification of conflict after the activation of the Orinoco Mining Belt in 2016.⁵³

24. Some indigenous peoples exercise autonomy at the municipal level. In Ecuador, local governments are established through indigenous municipalities.⁵⁴ Indigenous communities administer justice under ancestral or ad hoc mechanisms, hearing cases on land conflicts, cattle theft and domestic and sexual violence. However, in recent years, several indigenous judicial authorities have been criminally prosecuted, reflecting “a lack of understanding, on the part of the ordinary justice system, of the legitimate practices and processes of the indigenous justice system”.⁵⁵ As of July 2020, four persons who were detained for those reasons had received amnesty from the National Assembly. In many communities in Mexico (Capulalpam de Méndez, Ayutla de los Libres and San Francisco Cherán), indigenous peoples exercise their self-determination through municipal elections regulated according to their own customary regulatory systems and the creation of municipal governments and councils and thereby build their autonomy within the structure of the State.⁵⁶ However, some communities continue to be in opposition to the State, such as the Zapatista movement, groups of which have implemented alternative local governments and their own health service and hold and grant land under their own normative systems. Their activity has provoked numerous conflicts with non-Zapatista communities.⁵⁷

25. Many indigenous peoples have their own territorial protection. In Ecuador, several communities have organized territorial protection systems as an expression of their self-determination, with significant achievements. The Sinangoe community, made up of 200 Ai’Cofán people, formed their own guard dedicated to monitoring 50,000 hectares of their

⁴⁸ See A/HRC/27/52/Add.1.

⁴⁹ See www.ohchr.org/EN/Issues/IPeoples/Pages/E-learningIP.aspx.

⁵⁰ See A/74/49.

⁵¹ See E/C.19/2018/7.

⁵² Submission from the national human rights institution of Nicaragua.

⁵³ Presentation made by Lisa Henrito at the expert seminar convened by the Expert Mechanism in February 2021.

⁵⁴ See A/HRC/42/37/Add.1.

⁵⁵ *Ibid.*

⁵⁶ See www.iwgia.org/images/documents/Recommendations/Autonomi_report_UK.pdf; and A/74/149.

⁵⁷ Submission from the Fundación para el Debido Proceso, Mexico.

ancestral territory. In 2018, they won a case before the Constitutional Court, which “recognized their right to free, prior and informed consent” regarding activities that affect their access to natural resources in their territory, invalidating mining concessions. The people of Ai’Cofán also achieved their goal of buying a drone to aid in the monitoring of invaders conducting mining, hunting and logging activities.⁵⁸ During the coronavirus disease (COVID-19) pandemic, the communities themselves carried out containment and community care tasks.⁵⁹ The challenges expressed by indigenous peoples include official mistrust of indigenous guards, often referred to as paramilitary, as was the case for the Sinangoe, and the militarization of indigenous territories.⁶⁰

26. Some indigenous peoples express their self-determination in urban areas. In Mexico City, indigenous peoples hold elections and form governments by custom in Tepepan in Xochimilco and some neighbourhoods in Tláhuac. The Totonacas and Nahuas of Cuetzalán del Progreso have created cooperatives that have allowed them to control the price of essential products, promote savings and investment through their savings cooperatives and improve trading conditions for some of their products. They have influenced municipal planning by preventing certain activities in their territory using legal means. In the state of Morelos, four new indigenous municipalities have been created (Xoxocotla, Coatetelco, Hueyapan and Tetelcingo) that will be governed according to their customs and traditions, as have many towns in Chiapas, Guerrero, and other states. The challenges include organized crime, mining, logging, excessive water concessions, agroindustrial developments, tourism projects, airports, highways and the general imposition of development projects, inciting division, conflict and violence within the communities throughout Mexico.⁶¹ In Argentina, several indigenous communities (Inchiñ Mapuche, Pikunche, Puelche and Malalweche) have established a political organization representing the Mapuche Nation People in the current province of Mendoza, with administrative responsibilities allowing them to respond to requests for community development, to survey territories and to have access to indigenous community property and health and intercultural education, among other things.⁶²

27. Some indigenous peoples are establishing their own energy enterprises. In New Mexico, United States, the Picuris Pueblo have “engaged in a collaborative venture with intertribal authorities and the federal Government to build a 1 MW solar panel to make them the “first 100 per cent solar-powered tribe in the United States””.⁶³ Another example comes from a “cooperative venture of seven Sioux tribes in the Great Plains”, United States, with a production capacity of up to 2 GW “to increase access to electricity and funding for infrastructure projects”.⁶⁴

V. Indigenous peoples defending and supporting their self-determination

28. A further expression of indigenous peoples’ self-determination, linked to participation and the development and maintenance of their own decision-making institutions, is through the indigenous-led protocols for free, prior and informed consent in North and Latin America, including in Argentina, Belize, Bolivia (Plurinational State of), Brazil, Canada, Colombia, Guatemala, Honduras, Paraguay, Suriname and the United States of America. In Peru, protocols are in the process of being drafted.⁶⁵ The protocols are an important tool in preparing indigenous peoples, States and other parties to engage in a free, prior and informed consent process, setting out how, when, why and whom to consult.⁶⁶

⁵⁸ Submission from the Ecuador Alianz; see also www.culturalsurvival.org/news/koef-grant-partner-spotlight-asentamiento-ancestral-cofan-de-sinangoe-ecuador.

⁵⁹ Submission from the Ecuador Alianz.

⁶⁰ Submission from the Ecuador Alianz.

⁶¹ Submission from the Fundación para el Debido Proceso, Mexico.

⁶² Submission from XUMEX.

⁶³ See A/73/176.

⁶⁴ Ibid.

⁶⁵ Submissions from the International Work Group for Indigenous Affairs and Argentina.

⁶⁶ See A/HRC/39/62; and A/HRC/EMRIP/2010/2.

29. There are many examples of indigenous peoples in all regions expressing their self-determination by dissenting or refusing to consent to development projects on their land, often availing themselves of the national courts.⁶⁷ In one recent example, in Australia, the Gomeroi peoples mobilized against two key projects, namely, the Shenhua mine near Gunnedah and the Santos CSG projects in the Pilliga Forest. They did so by refusing community consent through pre-approval processes, utilizing existing consultation procedures and litigation and engaging with private sector collaborators and community sector supporters.⁶⁸

30. The Inuit Circumpolar Council adopted the Circumpolar Inuit Declaration on Sovereignty in the Arctic in 2009 and an Inuit Arctic policy in 2010, to acknowledge and recognize the right to self-determination of the Inuit peoples. They declared that Inuit were a united people, albeit living across a far-reaching circumpolar region in Greenland, Denmark, Canada, the United States and the Russian Federation, and that they should be recognized nationally and internationally as such. The Inuit Circumpolar Council promotes sustainable development and collaboration among Inuit businesses, and, in 2020, representatives from Inuit businesses throughout the region initiated the International Inuit Business Association to help to fight poverty, develop infrastructure and move closer to Inuit self-determination.⁶⁹

VI. Exercise of indigenous self-determination in regional and international contexts

31. The participation of indigenous peoples in international forums is an important expression of their external self-determination, and many indigenous peoples' organizations are realizing the importance of such participation and increasing their representation at such meetings.⁷⁰ The importance of that participation was recognized by the General Assembly, by its adoption of resolution 71/321, on enhancing the participation of indigenous peoples' representatives and institutions in meetings of relevant United Nations bodies on issues affecting them. That process is ongoing on the basis of decisions taken by the General Assembly.

32. Indigenous peoples take part in all indigenous specific mandates and are taking part at the international level outside indigenous specific mandates, such as the work of the international human rights mechanisms, including the United Nations treaty bodies, the universal periodic review mechanism of the Human Rights Council and the special procedures of the Council. They are represented in the Local Communities and Indigenous Peoples Platform initiated by the parties at the twenty-third session of the Conference of the Parties to the United Nations Framework Convention on Climate Change.⁷¹ They participated actively in the processes that led to the development of the 2030 Agenda for Sustainable Development, and in the review of its implementation, and are undertaking their own monitoring of Sustainable Development Goal implementation at the national and local levels.⁷² The Expert Mechanism's new mandate, allowing indigenous peoples the opportunity to seize the support of the mechanism for dialogue facilitation, capacity-building and technical cooperation, is a form of self-determination, as is its revised mandate to decide on the themes of its own reports.

33. Indigenous peoples express their self-determination at the regional level through strategic litigation on self-determination, with some measure of success, before the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. The decisions of those bodies in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of the Endorois Welfare Council) v. Kenya* and *African Commission on Human and Peoples' Rights v. Republic of Kenya*,

⁶⁷ See A/HRC/45/38; and A/HRC/39/62.

⁶⁸ Submission from Jumbunna.

⁶⁹ Submission from the Inuit Circumpolar Council.

⁷⁰ Submission from the Articulação dos Povos Indígenas do Sul do Brasil.

⁷¹ See www4.unfccc.int/sites/nwpstaging/News/Pages/Inidigenous-Peoples-and-Local-Communities-Platform-Update.aspx.

⁷² See E/C.19/2018/2; and A/73/176.

respectively, provide essential guidance on the implementation of the rights of indigenous peoples.⁷³

34. One concern expressed by some indigenous peoples is the move to group indigenous peoples with “local communities” by States and intergovernmental organizations within multiple international conventions and other multilateral agreements.⁷⁴ Such a development may have the impact of undermining the rights of indigenous peoples under the Declaration, in particular their right to self-determination. A further concern expressed by indigenous peoples is the impact that the COVID-19 crisis has had on indigenous people’s ability to take part in international events and the difficulties that they often face in participating remotely.⁷⁵

VII. Challenges in achieving self-determination

35. The non-recognition of indigenous peoples as indigenous peoples has a negative effect on the implementation of their rights under the Declaration, none more so than the right to self-determination. The constitutional recognition of indigenous peoples provides legal authority for the realization of their right to self-determination. Failure to legally recognize indigenous peoples obviates that right. In some States, the ongoing urgency to address the violent repression of indigenous peoples leaves little space for the realization of the right to self-determination. In many States, there are no debates about the principles of autonomy or pluralism to develop frameworks for indigenous self-determination, and they are often seen as a threat to the national security and territorial integrity of the State and as being against national developmental interests, rather than as a potential means of ensuring those rights.⁷⁶

36. For many indigenous peoples, their right to self-determination has advanced little since the adoption of the Declaration. Mass evictions and the dispossession of land for use in conservation projects or infrastructural development or by extractive industries and the privatization of indigenous lands for investment negatively affect their livelihoods, economic resources, social and cultural identity and their self-determination. Such is the case for the Pygmies/Twa in the Democratic Republic of the Congo, the Ogiek and Sengwer in Kenya and the Maasai in the north of the United Republic of Tanzania. Development projects undertaken without adequate consultation with indigenous peoples affect the right of indigenous peoples to self-determine, and to their own development, such as the LAPSET Corridor programme and the Mombasa-Nairobi Standard Gauge Railway in Kenya that cut across indigenous areas.⁷⁷ In Mexico, traditional territory of the Rio Yaqui peoples was transformed by irrigation districts, causing irreparable harm to the biodiversity of the area and a lack of water.⁷⁸

37. The challenges in the pursuit of self-determination, and the violence often associated with it, are referred to in numerous submissions received by the Expert Mechanism. Recently in northeast India, numerous new or expanded peace accords were signed in an attempt to put an end to violence in the region, such as the Bodo Accords, the Tripura Indigenous (tribal) People Accords, the Karbi Accords, the Mizo Accord and the Naga Accords.⁷⁹ In the case of the Chittagong Hill Tracts, in Bangladesh, which has a semi-autonomous administrative authority, although legislation has been enacted to implement self-government provisions, the lack of constitutional recognition of the Chittagong Hill Tracts Peace Accord of 1997

⁷³ African Commission on Human and Peoples’ Rights: *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of the Endorois Welfare Council) v. Kenya*, (communication No. 276/03), decision of 2 February 2010; and African Court on Human and Peoples’ Rights, *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, (application No. 006/2012), judgment of 26 May 2017.

⁷⁴ See www.inuitcircumpolar.com/news/icc-policy-paper-on-local-communities-chronicles-opposition-to-the-undermining-and-erosion-of-inuit-rights/.

⁷⁵ Submission from the Unrepresented Nations and Peoples Organization.

⁷⁶ Presentation made by Gam Shimray at the expert seminar convened by the Expert Mechanism in February 2021.

⁷⁷ Presentation made by Daniel Kobei at the expert seminar convened by the Expert Mechanism in February 2021.

⁷⁸ Submission from the University of Arizona.

⁷⁹ Joint submission from the Naga Peoples’ Movement, North East India.

leaves its implementation dependent upon the political will of the central Government.⁸⁰ That has led to an increase in tensions between the central Government and the indigenous communities.⁸¹ Similarly, in Guatemala, although peace agreements, which included some level of autonomy for indigenous peoples, were converted into national law in 2005, the implementation of that law has been described as slow by United Nations entities and regional human rights bodies.⁸² In Indonesia, to answer the demand of the aspirations of the indigenous peoples of West Papua for independence, the Government granted special autonomy in October 2001. However, by June 2010, the great deliberation of the Papuan People's Assembly, together with the indigenous peoples of West Papua, concluded that the implementation of special autonomy in Papua had failed.⁸³ Even self-determination processes under the decolonization process are not necessarily smooth. As New Caledonia goes through a process of decolonization from France, negotiated with indigenous peoples, there have been ongoing debates about the right to vote of the Kanak people, self-determination and indigeneity. Under the Nouméa Accord, the third of three referendums will most likely be held in 2022.

38. While the path to self-determination is often difficult, the realization of indigenous people's human right to self-determination has demonstrable links to improved outcomes for indigenous peoples in all areas of their lives. In assessing the impact of COVID-19 on indigenous peoples, the Expert Mechanism observed that there was a correlation between how well indigenous peoples were faring during the pandemic and their ability to exercise their right to self-determination: the closer a State was to achieving the ends of the Declaration, the better indigenous peoples would fare.⁸⁴ Numerous entities have emphasized that the right to self-determination represents a key foundation for effective public policy aimed at improving outcomes for indigenous peoples under the justice system and the contemporary child welfare system and in the areas of education and labour.⁸⁵ Early impact assessments have reported improvements in youth development and adult empowerment, with a significant return on investment in terms of impact on the justice system and a broader social and economic impact for the community.⁸⁶

39. There is a direct link between self-determination and indigenous peoples' rights over their own lands and resources. Indigenous peoples with recognized land and resource rights and peoples with treaties, agreements or other constructive arrangements with States have had greater success in conducting beneficial relations with private sector natural resource companies on the basis of free, prior and informed consent than have peoples without recognized rights.⁸⁷ The Harvard Project on American Indian Economic Development has documented numerous examples of successful indigenous-run development programmes, concluding "that when Native nations make their own decisions about what development approaches to take, they consistently outperform external decision-makers" in areas such as governmental form, natural resources management, economic development, health care and social services.⁸⁸

40. Some indigenous peoples see the denial of their right to self-determination, frequently through lack of respect for treaty and other relationships, as a root cause of atrocities, such as residential schools, murdered and missing indigenous women and girls or stolen children, as well as the negative impacts on health, economic and social well-being and justice. Some suggest that lasting peace cannot be secured without the realization of self-determination and

⁸⁰ A/HRC/9/9/Add.1, para. 50; and see E/C.19/2011/6; and E/C.19/2014/4; and CCPR/C/BGD/CO/1, para. 12.

⁸¹ Submission from the Unrepresented Nations and Peoples Organization.

⁸² See A/74/149; A/HRC/39/17/Add.3; and Organization of American States, Inter-American Commission on Human Rights, "Situation of human rights in Guatemala: diversity, inequality and exclusion"; see also E/CN.4/2003/90/Add.2; and CERD/C/GTM/CO/16-17.

⁸³ Submission from the West Papua Interest Association.

⁸⁴ See A/HRC/46/72; and submission from Alianza Ecuador.

⁸⁵ See A/73/176.

⁸⁶ See www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf.

⁸⁷ See E/CN.4/Sub.2/AC.4/2002/3.

⁸⁸ See A/69/267.

suggest increased self-determination as a means of moving towards achieving Sustainable Development Goal 16, with the objective of promoting inclusive and peaceful societies and reducing inequalities.⁸⁹ Others point to the need to respect the right to self-determination as a crucial step towards reconciliation.⁹⁰

VIII. Citizenship and political participation

41. Indigenous citizenship, which includes citizenship of their own people and citizenship of the nation State, and political participation have been described as an offshoot of exercising self-determination rights by indigenous people. Citizenship is exercised through the guarantee of the right to participation.⁹¹ Different indigenous peoples have different approaches to indigenous citizenship: for some, they are citizens first of their nation or people and of the State second, whereas others only identify with the dominant group in a limited way. In some countries, the only way that indigenous peoples can express themselves politically is through political engagement. However, the engagement of indigenous peoples when it comes to voting in elections or standing for election is often limited. Sometimes, that is due to direct and indirect barriers that limit their electoral eligibility to either vote in an election or stand for election. In Australia, electoral disqualifications, such as “unsound mind” or “persons serving a lengthy term of imprisonment”, apply to every citizen equally, but disproportionately affect Aboriginal and Torres Strait Islander peoples.⁹²

42. In New Mexico, United States, there are a good number of indigenous representatives who serve in the state legislature and have positive participation. In addition, there is more and more accountability to the large indigenous communities by non-indigenous peoples.⁹³ That situation is not replicated everywhere, and, in some State legislatures in the African region, there is the perception that indigenous representatives are assimilated into mainstream politics.⁹⁴ In the Russian Federation, in Khanty-Mansi Autonomous Okrug – Ugra, there are representatives of three small numbered indigenous peoples, totalling 31,000 people, or 2 per cent of the total population.⁹⁵ In the United States, in 2018, the first indigenous women were elected to Congress.

IX. Recognition by States of indigenous self-determination

43. The way in which the self-determination of indigenous peoples is recognized by the State plays a significant role in its realization, and such recognition differs greatly between States, regions and indigenous peoples. Mechanisms that support the domestic implementation of the right to self-determination, including constitutional recognition, treaties, legislation on political participation, consultation and free, prior and informed consent are crucial indicators of the stage of indigenous peoples’ self-determination. Some States recognize that indigenous peoples, and not the Government, whose role should be a supportive one, should dictate how self-determination is exercised.⁹⁶ That view is shared by indigenous peoples who warn against State-imposed models of self-determination and speak to the tendency of indigenous governance structures to take on a corporate form within a Western regulatory framework.

44. Few constitutions, other than those of the Plurinational State of Bolivia (2009) and Mexico (2001), expressly recognize self-determination. Others tend to focus on autonomy,

⁸⁹ Submission from the Unrepresented Nations and Peoples Organization; see also A/73/176.

⁹⁰ Submission from the Canadian Coalition.

⁹¹ Submission from Ecuador.

⁹² Presentation made by Dani Larkin at the expert seminar convened by the Expert Mechanism in February 2021.

⁹³ Presentation made by June Lorenzo at the expert seminar convened by the Expert Mechanism in February 2021.

⁹⁴ Presentation made by Lounes Belkacem at the expert seminar convened by the Expert Mechanism in February 2021.

⁹⁵ Submission from the Russian Federation.

⁹⁶ Submission from New Zealand.

rather than full self-determination, such as the constitutions of Canada (1982), Colombia (1991), Ecuador (with respect to indigenous peoples in voluntary isolation, 1998 and 2008), Nicaragua (1987) and Panama (1938).⁹⁷ The Constitution of the Russian Federation includes a recognition of local self-government as a constitutional right that is not limited to indigenous peoples. Issues relating to the protection of the rights of “small numbered indigenous peoples” fall under the joint jurisdiction of the Federation and the autonomous regions.⁹⁸ The Constitution of Australia refers to the self-determination of all the people of Australia as a whole, with no specific meaning to indigenous peoples,⁹⁹ which has meant that the forms of indigenous governance recognized by the State have been very limited.¹⁰⁰ A suggestion to rectify that is legislative reform establishing a constitutionally enshrined indigenous “voice” in Parliament so that Aboriginal and Torres Strait Islander peoples have a voice and political presence in law and policymaking processes in Parliament.¹⁰¹

45. Some constitutions recognize the pre-existence of indigenous peoples, such as that of the Bolivarian Republic of Venezuela. In 2014, El Salvador modified article 63 of its Constitution to recognize the existence and rights of indigenous peoples. In Asia, there are at least five countries in which indigenous peoples are recognized, including in the Constitution of the Philippines (1987), which is one of the most progressive.¹⁰² However, such recognition is considered to have had a very limited impact on indigenous peoples’ lives in the region. In Sweden, since the constitutional reform undertaken in 2011, the Sámi people have been recognized in the Constitution of Sweden, which prescribes an obligation to promote the maintenance and development of Sámi culture and communities.¹⁰³ Some States have constitutional recognition of the right to participation in the State. The Constitution of Paraguay establishes that indigenous peoples are guaranteed the right to participate in the economic, social, political and cultural life of the country, in accordance, *inter alia*, with their customary practices.¹⁰⁴

46. Constitutional recognition is not enough without secondary legislation to facilitate its compliance. That is the case in El Salvador, where there is no law yet on the rights of indigenous peoples to their territory, indigenous governance or cultural identity, as fundamental elements of their autonomy, and attempts to draft such a law have lacked adequate consultation.¹⁰⁵ Some States have adopted legislation on political participation, including Paraguay (Law No. 6279).¹⁰⁶ Moreover, many laws have been enacted in the Plurinational State of Bolivia (Autonomy Framework Act No. 031 of 2010), Colombia (various laws that regulate participation) and Nicaragua (Statute of Autonomy of the Atlantic Coast Regions, Act No. 28 of 1987). Legislation in Panama has established five indigenous regions with high levels of autonomy.¹⁰⁷ In the Bolivarian Republic of Venezuela, there is an organic law on indigenous peoples and communities, as there is in the Russian Federation.¹⁰⁸

47. States have adopted legislation to operationalize free, prior and informed consent as a mechanism for achieving self-determination in all areas of indigenous life, from education, language revitalization and health care to land issues and development.¹⁰⁹ A recent example is the decree of July 2019 of the Congo establishing procedures for the consultation and participation of indigenous peoples in economic development projects, operationalizing article 3 of Law No. 5-2011 on the promotion and protection of the rights of indigenous

⁹⁷ Submission from the International Work Group for Indigenous Affairs; and Marc Weller, chapter 5, “Self-determination of indigenous peoples”.

⁹⁸ Submission from the Russian Federation.

⁹⁹ Marc Weller, chapter 5, “Self-determination of indigenous peoples”.

¹⁰⁰ Presentation made by Megan Davis at the expert seminar convened by the Expert Mechanism in February 2021.

¹⁰¹ *Ibid.*

¹⁰² See A/74/149.

¹⁰³ Submission from Sweden.

¹⁰⁴ Submission from the national human rights institution of Paraguay.

¹⁰⁵ Submission from the national human rights institution of El Salvador; see also CERD/C/SLV/CO/18-19.

¹⁰⁶ Submission from the national human rights institution of Paraguay.

¹⁰⁷ Submission from the International Work Group for Indigenous Affairs.

¹⁰⁸ See A/HRC/15/37/Add.5.

¹⁰⁹ See A/HRC/39/62; and submission from Ecuador.

populations. Free, prior, and informed consent is an integral component of exercising the right to self-determination and may grant opportunities for States, third parties and indigenous peoples to achieve some rebalancing of power and strengthened partnership.¹¹⁰ However, some indigenous peoples are wary of what is often the conflation of free, prior and informed consent, when managed through the State, with the right to self-determination, which has had unintended consequences for some indigenous peoples.¹¹¹ For that reason, the Expert Mechanism encourages States and the private sector to promote and respect indigenous peoples' own protocols, as an essential means of preparing the State, third parties and indigenous peoples to enter into consultation and cooperation.¹¹² Free, prior and informed consent is only one element in the advancement of indigenous peoples' right to full self-determination and should not be used to distract from the broader right of indigenous peoples to freely determine their futures in their entirety.

48. In 2019, British Columbia, Canada, passed the Declaration on the Rights of Indigenous Peoples Act¹¹³ to implement the United Nations Declaration on the Rights of Indigenous Peoples in state law. A second piece of domestic Canadian legislation is currently before the Federal Parliament, namely, bill C-15, entitled "An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples", which would require the Federal Government to take steps to implement the Declaration. Both of those pieces of legislation were developed jointly with indigenous peoples. In 2020, the Government of Sweden proposed a draft bill to the parliament, entitled "Consultation on Matters concerning the Sámi People", in consultation with the Sámi Parliament. It aims to give the Sámi people the right to be consulted in matters of special significance to them.¹¹⁴

49. Historical and modern treaties are a feature of indigenous peoples' self-determination, defined by a Canadian constitutional lawyer as "a constitutionally protected sharing of sovereignty among the signatories to the treaty".¹¹⁵ Such countries include Canada, New Zealand and the United States, and interestingly, one indigenous people, the Onondaga Nation, has signed treaties with both Canada and the United States. In New Zealand, an indigenous-led process is seeking constitutional transformation for equality of governance, and, similarly in Australia, constitutional recognition of an indigenous peoples' voice to Parliament is being pursued, given the vulnerability of possible state and territorial treaties to being overridden by the Federal Government. A guiding principle for negotiations is a recognition of the right to self-determination,¹¹⁶ and the consultation processes have been led and designed by indigenous people.¹¹⁷ In Canada, under modern treaties, some indigenous peoples indicate that, although they have the authority to make laws, they lack the authority to adjudicate and enforce their laws, and there is no funding for enforcement.

50. In 2019, Canada, British Columbia and the First Nations Summit endorsed a new recognition and reconciliation of rights policy for treaty negotiations in British Columbia,¹¹⁸ as a framework, *inter alia*, to implement the Declaration, including the rights to free, prior and informed consent and self-determination. In 2017, through the execution of the Canada-Métis Nation Accord, Canada and the Métis Nation agreed that they must be involved as partners in any legislative or policy development that affects the lives and rights of Métis Nation citizens.¹¹⁹

¹¹⁰ See E/C.19/2005/3; and submission from New Zealand.

¹¹¹ Presentation made by Megan Davis at the expert seminar convened by the Expert Mechanism in February 2021.

¹¹² See A/39/62.

¹¹³ See <https://jfklaw.ca/bill-c-15-united-nations-declaration-on-the-rights-of-indigenous-peoples-act/>.

¹¹⁴ Submission from Sweden.

¹¹⁵ See www.bctreaty.ca/sites/default/files/LegalOpinionHoggMillenTreatiesandShareSovereigntyCanada.pdf.

¹¹⁶ See www.legislation.vic.gov.au/in-force/acts/advancing-treaty-process-aboriginal-victorians-act-2018/001.

¹¹⁷ See www.aboriginalvictoria.vic.gov.au/treaty-bodies; and submission from the Castan Center for Human Rights.

¹¹⁸ See www.bctreaty.ca/sites/default/files/RecognitionandReconciliationofRightsPolicyforTreatyNegotiations.pdf.

¹¹⁹ Submission from the Inuit Circumpolar Council.

51. Some States are developing national plans of action¹²⁰ to implement the Declaration. In 2019, the Government of New Zealand established a Declaration Working Group as an independent body to provide advice and recommendations on the form and content of a Declaration plan.¹²¹ Other activities include a ministerial working group,¹²² a Māori Constitutional Convention to be held in 2021, with calls for constitutional transformation,¹²³ the establishment of the Office for Māori Crown Relations in 2018, reform of the legislation and institutions governing Māori land, the establishment of independent advisory groups in a range of areas of importance to Māori, the indigenous restorative justice processes for young people, including Rangatahi courts, and the reorientation of the first instance court system, Te Koti-a-Rohe/District Court, to more appropriately reflect contemporary society's expectations of it.¹²⁴

52. Other States refer to the titling of indigenous land as a move towards self-determination.¹²⁵ Nicaragua has finalized the titling of almost 96 per cent of indigenous territories in an effort to restore the rights of indigenous communities and communities of African descent.¹²⁶ In Ecuador, the unified project on access to land for family producers and mass legalization has responded to requests received from 51 communes, communities and centres belonging to the Kichwa, Shuar, Sapara, Shiwiar, Montubio, Manta Huancavilca and peoples of African descent and nationalities and has allocated 485,721.75 hectares in 11 provinces of the country between 2011 and 2021. Ecuador refers to numerous other laws adopted to support self-determination in the areas of health, autonomy, culture and education.¹²⁷

53. The negotiations between Finland, Norway and Sweden concerning a Nordic Sámi Convention were completed in 2017, and a dialogue between the States and the Sámi Parliaments is ongoing. They expect to sign the Convention in 2021. The overall objective of developing a Nordic Sámi Convention is to secure the protection of human rights of the Sámi so that they can preserve and develop their languages, culture, livelihoods and social life across national borders.¹²⁸

X. Indigenous self-determination and the rights to culture, language, ceremony, spirituality and sports and traditional games

54. The Expert Mechanism has previously described indigenous peoples' cultures as including tangible and intangible manifestations of their ways of life, achievements and creativity. They are expressions of their self-determination and of their spiritual and physical relationships with their lands, territories and resources. Indigenous culture is a holistic concept based on common material and spiritual values and includes distinctive manifestations in language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, festive events, music, sports and traditional games, behaviour, habits, tools, shelter, clothing, economic activities, morals, value systems, world views, laws and activities, such as hunting, fishing, trapping and gathering.¹²⁹ The preservation of linguistic and cultural diversity, as well as the preservation of traditional, indigenous knowledge and biological biodiversity, can only be achieved by guaranteeing the right to self-determination of indigenous peoples.¹³⁰

¹²⁰ See A/HRC/36/56.

¹²¹ Submission from New Zealand.

¹²² See www.tpk.govt.nz/docs/undrip/tpk-undrip-he-puapua.pdf.

¹²³ Submissions from New Zealand and the Independent Monitoring Mechanism of New Zealand.

¹²⁴ Submission from New Zealand.

¹²⁵ See A/HRC/45/38.

¹²⁶ Submission from the national human rights institution of Nicaragua.

¹²⁷ Submission from Ecuador.

¹²⁸ Submission from Sweden.

¹²⁹ See A/HRC/21/53.

¹³⁰ See E/C.19/2008/13.

55. There is some evidence of indigenous communities mobilizing to revitalize cultural practices. In Australia, “birthing on country” initiatives seek to promote maternal and newborn health and well-being through cultural practices that were strengthened over thousands of generations and have only relatively recently been disrupted by non-indigenous intervention.¹³¹ In Ecuador, to conserve indigenous peoples agrobiodiversity, 22 seed houses have been set up to produce and conserve genetic material linked to the customs and traditions of native peoples, and, in 2020, a meeting on ancestral practices and knowledge on the cultivation of quinoa took place, with the aim of revitalizing ancestral knowledge and developing a catalogue of practices.¹³²

56. Historically, laws and policies of many States prohibited the use of indigenous languages and sought to suppress customs and traditions, as a means of undermining indigenous political institutions and individual and collective identities and of assimilating indigenous peoples into the dominant culture. Indigenous languages represent an inherent part of identity and promote the maintenance and transmission of indigenous peoples’ knowledge and traditions. Languages contain within them the tools to express indigenous collective juridical and political methodology and organization. In many cases, indigenous peoples have maintained their traditions orally, embedded in their languages. An opportunity for the Muscogee (Creek) Nation, in the United States, has been the process of relating the human rights affirmed in the Declaration by translating it into the Muscogee language, which helps to relate international human rights to concepts in tribal worldviews and ceremonial life.

57. El Salvador has established an early language immersion programme, called Cuna Nahuat, in the municipalities of Izalco, Santo Domingo de Guzmán and Santa Catarina Masahuat, aimed at indigenous children, which is attended by older indigenous women Nahuat speakers, called *Nantzín*.¹³³ In New Zealand, the reforms highlighted in the Expert Mechanism’s study on language and culture, including support for Māori education and a Māori television service, have meant that many New Zealanders are getting better at pronouncing Māori words. Self-determination, or its analogue in New Zealand *tino rangatiratanga*, has been central to all those reforms, reforms sought and controlled by Māori.¹³⁴ Argentina has been promoting the creation of a body of translators for the 17 languages of the indigenous peoples there, to be involved in various areas, including legal, health, education, culture, social, university, sports, gender, youth, children and politics.¹³⁵ In Australia, projects such as the rediscovering indigenous languages project have engaged with First Nations to make documentary sources available and to develop programmes and resources to facilitate the revitalization of First Nations languages.¹³⁶

58. The importance of indigenous languages was recognized and celebrated internationally during the International Year of Indigenous Languages, following the concern that at least one indigenous language dies every two weeks. The International Year was followed by a commitment to begin the International Decade of Indigenous Languages, 2022–2032. Currently, work is under way on a global plan of action, with an overarching theme and 10 thematic areas.

59. There are many expressions of culture for indigenous peoples, and that includes the arts and sports and traditional games. For Māori in New Zealand, activities that were suppressed by missionaries from the early 1800s have been making a revival in *waka ama*, Māori martial arts, the use of the *taiaha* and *patu* and *kapa haka*. Elite Māori athletes are important role models for young Māori, promote healthy lifestyles and help to combat negative stereotyping of Māori. In Australia, rugby has played a role in reconciliation. The

¹³¹ Submission from Jumbunna; see also <https://anmj.org.au/birthing-on-country-improving-indigenous-health>.

¹³² Submission from Ecuador.

¹³³ Submission from the national human rights institution of El Salvador.

¹³⁴ Presentation made by Andrew Erueti at the expert seminar convened by the Expert Mechanism in February 2021.

¹³⁵ Submission from Argentina.

¹³⁶ Kirsten Thorpe and Monica Galassi “Rediscovering indigenous languages: the role and impact of libraries and archives in cultural revitalisation”, *Australian Academic and Research Libraries*, vol. 45, No. 2.

Arctic Winter Games is a high-profile, circumpolar sport competition for northern and Arctic athletes. The Games celebrate sport and social and cultural exchanges. The Games include many of the same games as the Winter Olympics and feature Arctic sports, such as dog mushing and snowshoeing, and traditional Inuit games, such as the ear pull, one-foot high kick, kneel jump, airplane and knuckle hop.

60. In Viet Nam, two famous traditional sports in the Mekong Delta are boat racing in Soc Trang and Tra Vinh provinces and ox (bull) racing in An Giang province. The Khmer Krom had organized the boat racing and ox racing themselves during their cultural festivals for hundreds of years. However, in recent years, the State has been criticized for using those festivals to attract tourists, without sharing the benefits with the Khmer Krom.¹³⁷ The Mato Grosso Declaration, adopted at the Second International Sports Congress, held in Cuiabá, Brazil, from 9 to 16 November 2013, the Congress called upon States and Governments to join indigenous peoples in partnership and mutual respect in implementing their right to self-determination through sports and traditional games, as well as the manifestations of their traditional knowledge and cultural expressions.¹³⁸

XI. Conclusions and recommendations

61. **The recognition of indigenous peoples' collective right to self-determination in the Declaration cannot be underestimated. Indigenous people's status as "peoples" allows them to speak of their issues beyond the borders of the State, at international forums. That external aspect of self-determination, although it extends beyond borders, does not affect the territorial integrity of the State. States should support the participation of indigenous peoples in such forums and ensure their protection from possible reprisals.**

62. **Self-determination is a foundational right, without which other political, civil, economic, social and cultural rights are meaningless. Self-determination relates to indigenous peoples' right to decide on their own political future, within their own institutions, to take part in the political life of the State and to direct their political, economic, social and cultural development. Some of the information received however relates to self-determination efforts being imposed by States, rather than being at the initiative and direction of indigenous peoples – and sometimes without their participation.**

63. **There is a direct correlation between the extent of recognition of indigenous peoples as indigenous peoples by States and the extent to which States respect, protect and fulfill their right to self-determination. The greater the level of recognition, the more profound implementation of the right. That is clear at the regional level, where there are huge disparities in the implementation of that right. In some States, the recognition of indigenous peoples has facilitated their own, sometimes advanced, systems of governance, free, prior and informed consent, indigenous-led protocols and control and demarcation of their lands. In other States, there has been limited discourse on the implementation of that right, with it often being seen as a threat to the territorial integrity of the State and development, rather than as a way forward.**

64. **States should recognize indigenous peoples as indigenous peoples and their concomitant right to self-determination, preferably through a constitutional framework and in an exercise of effective participation and indigenous consultation carried out in accordance with the Declaration. States should adapt to the needs of each particular community, given that each one is very different and contemplating different forms of self-determination. They should build the political will within the State to acknowledge indigenous peoples' self-determination.**

¹³⁷ Submission from the Khmers Kampuchea-Krom Federation. The Khmer Krom are recognized by the State as an ethnic minority group but, according to the submission, self-identify as indigenous peoples.

¹³⁸ See A/HRC/30/53.

65. Self-government and autonomy are important constituent elements of the right to self-determination for indigenous peoples and have been a significant gain for indigenous peoples that have realized them. States should recognize in legislation indigenous peoples' own legal systems and institutions, normative and legal practices (customs and traditions) and autonomous and governmental systems and provide adequate funding and resources to support indigenous peoples in their pursuit of self-determination. Indigenous peoples should develop the competencies within their own communities on legislative, executive and judicial functions.

66. Self-determination is a broad concept and an ongoing process that can only be fully realized through the implementation of the full panoply of rights, notably, the rights to land, territories and resources, political participation, consultation and free, prior and informed consent and cultural rights. States should refrain from conflating free, prior and informed consent with self-determination.

67. States should recognize the land, participation and consultation rights of indigenous peoples, as set out in the Expert Mechanism's reports.¹³⁹ They should harmonize legislation to make it consistent with the right to self-determination of indigenous peoples and their right to their land, territory and resources, including laws on development projects, demarcation and agrarian reform. The protection of the rights of peoples in voluntary isolation and initial contact should be included.

68. States should respect indigenous peoples' right to define their own development. As the Expert Mechanism advised in its report on free, prior and informed consent, States and the private sector should promote, support and respect indigenous peoples' own protocols, as an essential means of preparing the State, third parties and indigenous peoples to enter into consultation and cooperation and for the smooth running of the consultations.¹⁴⁰

69. States should implement with indigenous peoples their treaties, their agreements and constructive arrangements in the pursuit of self-determination, and, in situations of shared sovereignty, States should trust indigenous peoples to govern and make sound decisions.

70. States should support the participation, political and otherwise, of indigenous peoples in the overall functioning of the State. That can be done through a constitutionally recognized indigenous voice and through a duty to consult or a right to be consulted.

71. States should promote the practice of traditional sports among indigenous peoples, ensuring that indigenous peoples themselves preserve their sports through the maintenance of control by and access to indigenous peoples and non-interference by the State.

72. States should establish national action plans for implementing the Declaration and ensure that such plans are grounded in the right to self-determination.

73. Indigenous peoples are encouraged to develop indigenous-led initiatives to define, revitalize and strengthen their self-determination, and States should support such initiatives, in order to understand, respect and enable the exercise of self-determination by indigenous peoples.

74. Indigenous peoples should further their involvement in international forums, including in non-indigenous-specific bodies, such as the human rights treaty bodies, and are encouraged to avail themselves of regional and international bodies to litigate on the right to self-determination in order to contribute to the development of international human rights law.

75. States should promote and support the use, development and maintenance of indigenous languages, including through the formal education system, to protect

¹³⁹ See A/HRC/18/42; A/HRC/21/53; A/HRC/39/62; and A/HRC/45/38.

¹⁴⁰ See A/HRC/39/62.

indigenous peoples' identities and, at the international level, through active support during the International Decade of Indigenous Languages, 2022–2032.

76. Without prejudice to the ongoing consultative process referred to in General Assembly resolution 71/321, aimed at enhancing the participation of the representatives and institutions of indigenous peoples in United Nations meetings, States should support ongoing efforts to provide the meaningful, effective and enhanced participation of indigenous peoples in the United Nations through their own representative institutions in all meetings relevant to the rights of indigenous peoples, including meetings of the Human Rights Council on issues affecting indigenous peoples.
