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Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation

Report of the Expert Mechanism on the Rights of Indigenous Peoples

Summary

In the present 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 recognition, reparation and reconciliation initiatives undertaken since the adoption of the Declaration in 2007.

The report provides an overview of the concepts of recognition, reparation and reconciliation, anchoring them in the Declaration and other international human rights instruments. It includes a series of examples from throughout the indigenous sociocultural regions to illustrate the central nature of recognition, reparation and reconciliation for the implementation of the Declaration and the role it plays as an instrument of reconciliation. The Expert Mechanism offers conclusions and recommendations, with a view to assisting indigenous peoples and States to better address the long-term effects of colonization, discrimination and the dispossession of their lands, territories and resources.



I. Introduction

1. In September 2016, in its resolution 33/25, the Human Rights Council amended and expanded the mandate of the Expert Mechanism on the Rights of Indigenous Peoples. Among other things, the Council decided that the Expert Mechanism should identify, disseminate and promote good practices and lessons learned regarding the efforts to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, including through reports to the Council.

2. In the present report, the Expert Mechanism addresses efforts to implement the Declaration, with a focus on recognition, reparation and reconciliation initiatives undertaken since the adoption of the Declaration in September 2007. These themes are foundational to the interpretation and application of the Declaration, given that it prescribes both remedial and ongoing measures for achieving indigenous peoples' rights. The Declaration acknowledges, among other things, that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources. Numerous articles of the Declaration go on to prescribe substantive and procedural aspects for remedying such injustices to ensure that they will not be repeated in the future.

3. While the Expert Mechanism recognizes that there is still much to be done so that States meaningfully establish new relationships with indigenous peoples, based on the recognition of their rights and on freedom from discrimination and wrongdoing, in the present report it examines good practices, focusing on the legal recognition of indigenous peoples, the forms of reparation made by States for past injustices and reconciliation processes aimed at repairing the relationships between indigenous peoples, States and other actors.

4. The Expert Mechanism called for submissions from States, indigenous peoples, national human rights institutions and other stakeholders. Where permission was granted, the submissions have been made publicly available on the Expert Mechanism's website.¹ The report also benefited from two studies on access to justice previously carried out by the Expert Mechanism in 2013 and 2014 (A/HRC/24/50 and Corr.1 and A/HRC/27/65). In those studies, the Expert Mechanism addressed a series of themes related to the present report, including restorative justice and the link between access to justice and truth and reconciliation.

5. The present study will explore the impact of colonization, including through the dispossession of lands, territories and resources, and of assimilationist policies on the human rights of indigenous peoples; recognition of past violations and subsequent efforts towards reconciliation (including public apologies, national truth commissions, review and modification of legislation and landmark court cases at the regional and national levels); and reconciliation initiated by indigenous peoples and States. Particular attention will be devoted to good practices and lessons learned that may encourage similar processes to move forward in the recognition of indigenous peoples' rights, constitutionally and legislatively, particularly by those processes aimed at recognizing and addressing discrimination based on theories and attitudes that promote a sense of superiority over indigenous peoples.

6. Current obstacles to the implementation of the Declaration are often related to the absence or denial of processes of recognition, reparation and reconciliation. In some places, such a lack continues to justify violence against indigenous peoples and the denial of indigenous identity, territorial rights and, crucially, their autonomy and self-determination. Lack of recognition, reparation and reconciliation can also lead to regression in the promotion and protection of indigenous peoples' rights and can potentially lead to gross human rights violations, such as genocide, policies that enable the widespread removal of

¹ www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ReportRecognitionReparationsReconciliation.aspx.

indigenous children and other family members, and the further dispossession of indigenous peoples of their lands and territories.

II. Overview of recognition, reparation and reconciliation in the Declaration and other legal instruments

7. The United Nations Declaration on the Rights of Indigenous Peoples was adopted on 13 September 2007 after over two decades of negotiations including both indigenous peoples and Member States. It is a unique international instrument in that, for the first time, the rights holders were directly involved in the drafting process. From the moment of its adoption, the Declaration was hailed as a vehicle for reconciliation. As the Secretary-General stated on that day, the adoption of the Declaration marked “a historic moment when United Nations Member States and indigenous peoples reconciled with their painful histories and resolved to move forward together on the path of human rights, justice and development for all”.²

8. Several paragraphs in the preamble to the Declaration shed light on the remedial and ongoing aspect of the need to address indigenous peoples’ situations not only through the affirmation of rights but also through the visibility and respect for indigenous peoples’ histories and present situations. The preamble links recognition and reconciliation, stating that the recognition of the rights of indigenous peoples in the Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on the principles of justice, democracy, respect for human rights, non-discrimination and good faith. Furthermore, in the preamble, the international community also:

(a) Affirmed that all doctrines, policies and practices based on advocating the superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust;

(b) Expressed concern that indigenous peoples had suffered from historic injustices as a result of their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising their rights;

(c) Recognized the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.

9. Beyond the preamble, the Declaration has several provisions relating to the recognition of indigenous peoples as such and to the recognition of individual and collective rights that are integral to their very existence as distinct peoples. In particular, the Declaration upholds indigenous peoples’ right to self-determination (art. 3); their right to maintain their distinct political, legal, economic, social and cultural institutions while retaining their right to participate fully in the life of the State (art. 5); their collective right to live in freedom, peace and security as distinct peoples (art. 7); their right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned (art. 9); their right to determine their own identity or membership in accordance with their customs and traditions (art. 33); and their right to participate in decision-making and the States’ duty to obtain their free, prior and informed consent before adopting measures that may affect them (arts. 18–19).

10. To operationalize the remedial nature of indigenous peoples’ rights, the Declaration makes several references not only to “remedies” but also to the concepts of “redress” and “restitution”. These include the right not to be subjected to forced assimilation or destruction of their culture, along with the States’ duty to provide effective mechanisms for the prevention of and redress for such situations (art. 8); redress and restitution in relation to cultural, intellectual, religious and spiritual property taken without free, prior and

² See www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Statement-SG-IDWIP-2007.pdf.

informed consent (art. 11); redress for indigenous peoples deprived of their means of subsistence and development (art. 20); redress in relation to lands, territories and resources (arts. 28 and 32); and remedies for infringements of indigenous peoples' individual and collective rights (art. 40).

11. In the Declaration, the international community sets the international standard to prevent any attempt at, continuation of or regression to assimilationist policies, doctrines or practices with regard to indigenous peoples and encourages States to promote and protect specific and differentiated rights for indigenous peoples. The full, effective and integrated implementation of the Declaration should therefore be recognized as a comprehensive framework for recognition, reparation and reconciliation. The Declaration also provides the necessary elements to approach reparation from the perspective of indigenous peoples, taking into account their cultural specificities, their spiritual connection to their lands (which are essential for their survival as distinct peoples) and their right to participate fully and effectively in decision-making. The understanding of reparation and reconciliation as legal concepts continues to evolve, and indigenous perspectives on these terms must be taken into account.

12. The international community has also made other efforts to recognize indigenous peoples and to strengthen their participation. In paragraph 33 of the outcome document of the World Conference on Indigenous Peoples, adopted by the General Assembly in its resolution 69/2, Member States committed to considering ways to enable the participation of indigenous peoples' representatives and institutions in meetings of relevant United Nations bodies on issues affecting them. In its resolution 71/321, the Assembly decided to continue its consideration of possible measures necessary to enhance the participation of indigenous peoples' representatives and institutions in relevant United Nations meetings on issues affecting them at its seventy-fifth session, taking into account the achievements in that regard of other bodies and organizations throughout the United Nations system, to be preceded by consultations with indigenous peoples' representatives and institutions from all regions of the world as an input to the intergovernmental process. In that connection, the Expert Mechanism has repeatedly recommended that the Human Rights Council recognize indigenous peoples' institutions and allow them to participate in the Council's sessions and relevant events.

13. The question of reparation can be particularly controversial. There are several important international instruments providing guidance on this issue. Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination requires States parties to assure effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination. In the International Covenant on Civil and Political Rights, States undertake to ensure that any person whose rights or freedoms under the Covenant are violated have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity, and that any persons claiming such a remedy have their right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy. It also provides that States parties must ensure that the competent authorities enforce such remedies when granted (art. 2.3).

14. Although an examination of these concepts in international law is crucial for the purposes of the present report, it is also of paramount importance to address indigenous concepts of recognition, reparation and reconciliation. These are often based on indigenous peoples' understanding of harm and trust and have individual and collective dimensions. Indigenous peoples also see recognition, reparation and reconciliation as a means of addressing colonization and its long-term effects and of overcoming challenges with deep historical roots. In this regard, recognition of indigenous peoples' claims to their lands, the decolonization of education systems and the recognition of indigenous juridical systems and customary laws should be considered an essential part of recognition, reparation and reconciliation.

III. Recognition

15. Recognition as indigenous peoples is fundamental to indigenous peoples' rights and the achievement of the ends of the Declaration. Across the world, recognition exists in many forms. At one end of the spectrum are weak forms of recognition that can involve symbolic recognition of indigenous peoples' rights and indeed historical harms, such as a formal apology or a few words of recognition of facts relating to preoccupation, dispossession and survival. On the other hand, there are strong forms of recognition that can take the shape of treaties, constitutional recognition of treaty rights or aboriginal rights, indigenous parliaments or designated parliamentary seats, or autonomous regions. In its previous reports, the Expert Mechanism has documented the many ways in which States Members of the United Nations have utilized weak and strong forms of recognition.

16. Even so, the recognition of indigenous peoples is still a challenge in several regions. In Asia for example, indigenous peoples are often not recognized as "peoples" but referred to as cultural communities, national minorities or tribal groups, which can be interpreted as assimilationist language. In Africa, several States have long denied the existence of indigenous peoples as distinct peoples, sometimes referring to them using derogatory terminology. In the Russian Federation, although indigenous peoples are constitutionally recognized, legislation establishes a numerical barrier: communities with more than 50,000 people in total cannot be enrolled in the list of indigenous small-numbered peoples that entitles them to the corresponding legal protection, despite having otherwise similar characteristics as those enrolled (A/HRC/15/37/Add.5, para. 8). This restriction not only prevents some indigenous peoples from being able to use the guarantees provided by law, it also threatens some already enrolled indigenous communities, such as the Nenets, whose population according to census of 2010 is growing. On the subnational level, however, there are promising trends. The Constitutional Court of the Republic of Sakha (Yakutia), referring to the Declaration, has stated that the Sakha people are an indigenous people in the Republic. Similarly, in the Republic of Karelia, the authorities recognize Karelians as an indigenous people in government regulatory documents and every fourth year issue an executive order "on the implementation of the decisions of the Congress of Karelian People".

17. Recognition of indigenous peoples as such is critical in and of itself but also paves the way for the fulfilment of the entire array of collective and individual rights enshrined in the Declaration and other sources of international law, including self-determination, rights to lands, territories and resources, and cultural rights. Recognition of the rights under the Declaration should involve constitutional and statutory forms in addition to concrete actions, including measures of reparation for past wrongs. For example, indigenous peoples' aboriginal and treaty rights have been recognized in the Constitution of Canada since 1982. Recently, legislation has been proposed in Canada to harmonize federal law with the Declaration and treaty negotiations are ongoing.

18. Constitutional recognition is afforded to indigenous peoples and their rights in several countries and is a practice that should be encouraged. This is particularly the case in Latin America, where the jurisprudential developments of the Inter-American system and the use of the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169) have played an important role. For example, the Constitution of the Plurinational State of Bolivia is based on the principle of a "plurinational State". Article 2 recognizes the "precolonial existence" of indigenous peoples and their "ancestral domain" over their territories and also guarantees their self-determination within the framework of the unity of the State, including rights to autonomy, self-government and culture, and recognition of their institutions. Similarly, the Constitution of Ecuador recognizes and guarantees a series of rights for "indigenous peoples and nations", including the right to develop and strengthen their identity and forms of social organization; the prohibition of racism and discrimination; rights to lands, territories and resources; and recognition, reparation and redress for communities affected by racism, xenophobia and other forms of intolerance and discrimination (art. 57). Article 171 explicitly recognizes

indigenous justice.³ The Constitution of Panama recognizes and respects the ethnic identity of indigenous communities (art. 90), and guarantees the reservation and collective property of the lands required for the achievement of their economic and social well-being (art. 127). The Constitution of Mexico City also serves as a promising example, in that it recognizes the rights of indigenous peoples at the subnational level and gives legal force to the Declaration's provisions.

19. In sub-Saharan Africa, the identification and recognition of indigenous peoples faces many challenges. The Constitution of Kenya, while not explicitly stating a recognition of indigenous peoples, includes "indigenous communities", defined as a "community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy" within the broader term of "marginalised communities" (art. 260). The Constitution of Nigeria recognizes ethnic diversity, including for the purposes of representation in government and public service, but does not go as far as recognizing indigenous peoples as such.⁴ However, while the Constitution does not recognize any group as indigenous, the African Commission on Human and Peoples' Rights has previously identified the Ogoni, Ijaw and nomadic Fulani as indigenous peoples in Nigeria.⁵ This example shows the important role that regional institutions can play in the recognition of indigenous peoples and their rights.

20. In other cases, indigenous peoples may not be recognized at the constitutional level but through comprehensive laws. Such is the case of the Philippines where, aiming to correct historical injustices, enforce constitutional mandates and observe international norms, the rights of indigenous peoples have been recognized, promoted and protected through the Indigenous Peoples Rights Act of 1997.⁶

21. Other promising trends include the recent approval by the Cabinet of Japan of a law that recognizes the Ainu as indigenous peoples. However, Ainu representatives claim that the law in itself does not constitute an effort to achieve recognition, reparation and reconciliation if there is no reference to past violations⁷ and other indigenous peoples in Japan continue to seek recognition. There are also ongoing efforts to achieve constitutional recognition of indigenous peoples in Australia through a referendum. In the period 2016–2017, the Australian Referendum Council conducted constitutional dialogues with indigenous peoples in 12 regions to ensure that any constitutional reform had the consensus of the Aboriginal and Torres Strait Islander populations.⁸ The outcome of the First Nations National Constitutional Convention was the Uluru Statement from the Heart and the call for voice, treaty and truth, reforms that embody recognition, reparation and reconciliation. The opposition party has committed to a referendum to recognize an Indigenous Voice to the Parliament.⁹ In the 2018 budget, the Government of Australia committed 7 million Australian dollars to the process for designing the constitutional voice and 160 million Australian dollars to conduct the referendum.

22. There has also been a call for constitutional transformation in New Zealand, where a Constitutional Advisory Panel was established in 2011 to support the consideration of constitutional issues by reporting to the deputy Prime Minister and to the Minister of Maori Affairs "on an understanding of New Zealanders' perspectives on our constitutional arrangements, topical issues and areas where reform should be undertaken".¹⁰ The 2016 Matike Mai Aotearoa Report of the Independent Constitutional Transformation Working

³ Submission from the Office of the Ombudsman of Ecuador.

⁴ Submission from the National Human Rights Commission of Nigeria.

⁵ International Labour Organization and African Commission on Human and Peoples' Rights, *Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries* (Geneva, 2009).

⁶ Submission from the Commission on Human Rights of the Philippines.

⁷ Submission from the Asia Indigenous Peoples Pact.

⁸ Australia, *Final Report of the Referendum Council* (Canberra, 30 June 2017).

⁹ Submission from the Australian Human Rights Commission.

¹⁰ The report of the Advisory Panel is available at www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/constitutional-advisory-panel/.

Group proposes models for an inclusive constitution, based on the Treaty of Waitangi, with a focus on improved relationships reflecting self-determination, partnership and equality. In this regard, the Committee on Economic, Social and Cultural rights urged New Zealand to take immediate steps, in partnership with Maori representative institutions, to implement the recommendations of the Constitutional Advisory Panel regarding the role of the Treaty of Waitangi, and to consider the proposals put forward in the Matike Mai Aotearoa Report (E/C.12/NZL/CO/4, para. 9 (a)).

23. Treaty bodies have often underlined the importance of the recognition of indigenous peoples across all regions. For example, the Committee on the Elimination of Racial Discrimination expressed concern at the failure of France to fully recognize the existence of indigenous peoples in its overseas territorial collectivities. It feared that that failure might prevent the State from adopting the most appropriate, targeted measures to respond to the specific needs and concerns of indigenous peoples, particularly in regard to their enjoyment of economic, social and cultural rights on an equal footing with the rest of the population, in accordance with articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. Accordingly, the Committee recommended that France consider revisiting its position on the non-recognition of indigenous peoples in the overseas collectivities (CERD/C/FRA/CO/20-21, para. 11).

24. The Human Rights Committee expressed concern at the classification by Rwanda of vulnerable populations like the Batwa as “historically marginalized groups”, which it found to be an insufficient classification that could not ensure that such groups were recognized as indigenous and benefited from the protection of their right to enjoy their culture in community. The Committee recommended that Rwanda take the necessary steps to guarantee the recognition of minorities and indigenous peoples and to ensure the effective legal protection of indigenous peoples’ rights to their ancestral lands and natural resources, as well as ensure access to effective remedies for members of indigenous groups for any violations of their rights (CCPR/C/RWA/CO/4, para. 48). The Committee on the Rights of the Child expressed concern about the marginalization and discrimination that indigenous children in South Africa faced, including children belonging to Khoisan peoples, and at the lack of legal recognition of indigenous peoples and their rights. It recommended that South Africa consider legally recognizing the rights of indigenous peoples, including Khoisan peoples, with full recognition of the rights of indigenous children (CRC/C/ZAF/CO/2, paras. 65–66).

25. The Committee on Economic, Social and Cultural Rights expressed concern about the lack of recognition of the rights of indigenous peoples in the Constitution of Chile, and urged the State to follow through with its commitment to guarantee the recognition of the rights of indigenous peoples under the new Constitution (E/C.12/CHL/CO/4, para. 8).

26. The treaty bodies have also addressed the lack of recognition of collective rights, particularly in relation to lands, territories and resources. For example, the Committee on the Elimination of Racial Discrimination urged Suriname to comply with legally binding rulings of the Inter-American Court of Human Rights and, in particular, to take steps to grant legal recognition of collective juridical capacity. It also expressed concerns about the Government’s authorization of mining and logging activities by private companies that threatened irreparable harm to indigenous and tribal peoples without the free, prior and informed consent of the peoples concerned and without any prior impact assessment, as required pursuant to articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD/C/SUR/CO/13-15, paras. 25–26 and 30).

27. Recognition of indigenous peoples is critical in and of itself but is also instrumental to the fulfilment of collective and individual rights under the Declaration, including the right to self-determination, cultural rights and rights to lands, territories and resources. As stated by the National Human Rights Commission of Australia, recognition must have symbolic meaning as well as deliver substantive change.¹¹

¹¹ Submission from the Australian Human Rights Commission.

28. The recognition of indigenous peoples' rights to their lands and resources bears particularly strong links to their recognition as peoples. Due to the fact that colonization and subjugation of indigenous peoples have been intrinsically related to the dispossession of their lands, cultures and identities, the recognition of indigenous lands and territories, as set out in articles 26 and 27 of the Declaration, is a central element for recognition, reparation and reconciliation. While some States have made progress in the formal recognition of indigenous peoples' rights to lands, this remains a challenge for indigenous peoples in various regions, including in countries where there has been a regression in such rights.

29. Lack of recognition, particularly of collective land rights and traditional land tenure arrangements, is rooted in the colonial legacy of racism and discrimination against indigenous peoples. Therefore, recognition, protection and restitution of indigenous lands continues to be the main cause of conflict in all regions. The Special Rapporteur on the rights of indigenous peoples has repeatedly stressed the importance of recognizing collective land rights in order to address the root causes of human rights violations against indigenous peoples. In her most recent report (A/HRC/39/17), which focused on the criminalization of indigenous human rights defenders, the Special Rapporteur recommended that States recognize the collective land rights of indigenous peoples. That recognition required States to, *inter alia*, provide procedures for adjudicating land titles that were accessible, prompt and effective; review expropriation laws; provide adequate mechanisms of land dispute resolution; protect indigenous peoples effectively from encroachment by way of early warning systems and on-site monitoring systems; and prohibit forced evictions.

30. Treaty bodies have also repeatedly made reference to the recognition and protection of indigenous peoples' lands. In the case of Norway, for example, the Committee on the Elimination of Racial Discrimination expressed concern at the gap between the recognition of Sámi collective and individual land rights in the Finnmark Act and the recognition of those rights in practice. The Committee recommended that Norway take concrete steps to give full practical effect to the legal recognition of the rights of Sámi to their lands and resources, as provided for in the Finnmark Act, to enable the Sámi to maintain and sustain their livelihoods with the right to free, prior and informed consent on all projects and concessions (CERD/C/NOR/CO/21-22, paras. 28–30).

31. The Committee on Economic, Social and Cultural Rights expressed concern that many indigenous peoples in Uganda, including the Benet, Batwa and pastoralist communities, were denied access to their ancestral lands and were prevented from preserving their traditional way of living. The Committee also expressed concern about the inadequate definition of "indigenous peoples" in the Constitution of Uganda and the complete absence of information as to whether indigenous peoples enjoyed rights as required under article 1 of the International Covenant on Economic, Social and Cultural Rights. The Committee recommended that Uganda recognize indigenous peoples' rights to their ancestral lands and natural resources and the inclusion of the recognition of indigenous peoples in the Constitution, in line with the United Nations Declaration on the Rights of Indigenous Peoples. It also recommended that the State strengthen efforts to consult indigenous peoples and to ensure their effective enjoyment of their economic, social and cultural rights (E/C.12/UGA/CO/1, para. 13).

32. The Committee on the Elimination of Discrimination against Women has addressed the issue of recognition of landownership by indigenous women. For example, it recommended that Argentina adopt measures to formally recognize indigenous women's land tenure and ownership, and promote dialogue at the community level aimed at eliminating discriminatory norms and customs that limited indigenous women's landownership rights (CEDAW/C/ARG/CO/7, para. 40).

33. The establishment of indigenous *comarcas* (regions) in Panama serves as a good example of how recognition of land is tied to self-determination, autonomy and cultural rights. Based on the constitutional recognition of indigenous peoples and their collective

rights to their lands, Panama has established five indigenous *comarcas* through the adoption of specific laws. The legal framework of the Guna Yala *comarca*, established by law No. 16 of 1953¹² as the San Blas *comarca* and renamed in 1998, recognizes the Guna peoples' collective rights to their lands, their self-government institutions and their legal systems (with the exception of penal matters). This highly protective framework has served as a basis for the establishment of four additional *comarcas* in the country (Ngäbe-Buglé, Emberá-Wounaan, Guna de Madugandí and Guna de Wargandí), which together account for over 20 per cent of the country's territory. In addition to recognizing self-government arrangements, the *comarca* framework also effectively creates a quota for indigenous representation in the national legislature.

34. Recognition of indigenous languages is another key aspect of the recognition of indigenous peoples and is receiving greater attention in the framework of the International Year of Indigenous Languages. As the Expert Mechanism previously pointed out in its study on this theme (A/HRC/21/53), indigenous cultures and languages are a central and principal feature of indigenous peoples' identities as collectivities and as individuals. There are several examples of both constitutional and legal recognition of indigenous peoples' languages. In Mexico, the Constitution recognizes indigenous peoples' right to preserve and enrich their languages. There is also a general law on the linguistic rights of indigenous peoples, adopted in 2003, which regulates the acknowledgement and protection of indigenous communities' individual and collective rights with regard to their languages and recognizes the linguistic diversity of the country.¹³

35. In Brazil, the Constitution recognizes indigenous peoples' rights to their social organization, customs, languages, creeds and traditions, as well as their original right to the lands they traditionally occupy. In addition to the recognition of the link between languages and land rights, article 210 of the Constitution and secondary laws provide that minimum curricula for elementary schools must ensure a common basic education and respect for national and regional cultural and artistic values and that in elementary education indigenous peoples may use their native languages and their own learning methods.

36. While the Constitution of Morocco recognizes Tamazight (the Amazigh language) as an official language, there are challenges to its implementation, including a lack of access to education at all levels in the Amazigh language (E/C.12/MAR/CO/4, para. 50). There is a similar situation in Algeria, where Tamazight has been recognized as an official language since 2016, but a lack of equality with Arabic persists. In the Russian Federation, while some indigenous languages have official status in their territories, federal law generally prohibits recognition of indigenous languages that are not expressed in Cyrillic script.

37. Recognition of indigenous peoples by international organizations is also very important for their participation in decision-making. One of the most powerful examples of such recognition is the Arctic Council, in which six indigenous organizations have the status of permanent participants in the Council and are integrated into the work of the Council in all areas. Similarly, the Barents Euro-Arctic Council recognizes the participation of some, but not all, indigenous peoples in the region.

38. Recognition by the State is a crucial first step towards establishing a relationship of peace and respect with indigenous peoples. The recognition of indigenous peoples' collective right to live in freedom, peace and security as distinct peoples in accordance with article 7 of the Declaration, as well as the recognition of their lands, territories and resources, can pave the way for reparation and reconciliation, two related concepts that are addressed in the next section.

¹² Available at <https://docs.panama.justia.com/federales/leyes/16-de-1953-apr-7-1953.pdf>.

¹³ National Human Rights Commission, *Derechos lingüísticos de los pueblos indígenas* (Mexico City, 2016). Available at www.cndh.org.mx/sites/all/doc/cartillas/2015-2016/19-dh-linguisticos.pdf (in Spanish).

IV. Reparation and reconciliation

39. The concepts of reparation and reconciliation are closely interlinked and often overlap. Any separation of the two for the purposes of the present report would be arbitrary and, for this reason, they are addressed together in order to avoid an artificial separation of examples and jurisprudence related to these concepts. As stressed by the Quebec Native Women's organization in its submission to the present report, reparations are a *sine qua non* for reconciliation. These concepts must also all be understood from an intergenerational and collective perspective. Another key term in this discussion is redress, given how prominently it features in the Declaration (see paras. 7–14 above). In the view of the Expert Mechanism, the concept of redress includes recognition of past wrongs, which leads to both reparation and reconciliation.

40. In designing, implementing and analysing attempts at reparation and reconciliation, indigenous peoples and States should take into consideration that the process is as important as the outcome. Indigenous perspectives need to be incorporated at all stages, and indigenous peoples' full and effective participation is essential if the outcomes of such processes are to be successful and, indeed, legitimate. For example, from an indigenous peoples' perspective, given their spiritual connections with their lands and territories, monetary reparation may not, on its own, provide sufficient redress and reconciliation. The limits of monetary payment are of course readily apparent when it comes to injuries such as genocide or the removal of children, for which no amount of money could ever compensate. In the context of indigenous peoples, the limits of monetary payment are also readily apparent in many cases of land and resource dispossession, where the spiritual and cultural value of the land also transcends economic terms.

41. In the report on his visit to the United States of America, the Special Rapporteur on the rights of indigenous peoples acknowledged the limitations of the Indian Claims Commission, a tribunal that awards only monetary redress. While noting that the creation of the Commission in 1946 was a significant effort to comprehensively resolve the grievances of Indian tribes, and that the Commission had determined hundreds of land claims based on treaties or ancestral occupation, he highlighted the fact that the Commission had only provided monetary compensation as a remedy and was a product of the assimilationist frame of thinking of the period, further complicating many fundamental issues or leaving them unresolved (A/HRC/21/47/Add.1, para. 77).

42. The Special Rapporteur recommended that the United States take determined action within a programme of reconciliation and that such activity should begin with an apology for the wrongs committed against indigenous peoples. He argued that such an apology should not go unnoticed; rather, it should be a point of public awakening and mark a path towards reconciliation and a more enlightened framing of relations between indigenous peoples and the United States. Some of the pending issues that the Special Rapporteur identified for a programme of reconciliation included severed or frayed connections with culturally significant landscapes and sacred sites; limitations on indigenous self-governing capacity, including preventing indigenous authorities from acting with full force to combat violence against women; and the pathologies left by the removal of indigenous children from their communities (*ibid.*, paras. 72–78).

43. Reparation can include a series of measures applied to redress a human rights violation. The guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights (CCPR/C/158) provide a useful description of measures of reparation. These can include restitution with a view to restoring rights that have been violated; rehabilitation, such as medical or psychological treatment; compensation for both material and moral harm; measures of satisfaction, including the issuance of public apologies where appropriate; and guarantees of non-repetition. While the guidelines pertain exclusively to the rights contained in the Covenant, they can serve as a framework to understand reparation in broader settings, including with regard to the rights contained in the Declaration. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law are another key source, setting out a

similar framework for reparation but in a broader context that is often applicable to human rights violations suffered by indigenous peoples.

44. Transitional justice is another useful concept when discussing reparation and reconciliation. In a strict sense, transitional justice can be defined as “the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response”.¹⁴ While the application of transitional justice has traditionally centred on post-conflict or post-dictatorship contexts, its objectives and precepts provide a framework to address reparation and reconciliation for indigenous peoples. The aims of transitional justice will vary depending on the context but certain features are constant: the recognition of the dignity of individuals, the redress and acknowledgment of violations, and the aim to prevent them from happening again.¹⁵ Transitional justice also places great emphasis on the participation of the victims themselves throughout the process, which is in line with the right of indigenous peoples to participate in decision-making and the duty of the State to obtain their free, prior and informed consent. These objectives and principles correspond to indigenous peoples’ demands for justice for historical violations or for recent violations rooted in historical causes.¹⁶

45. Reconciliation can be seen as a broader concept than reparation and should be understood as a process rather than a destination. Although specific to the Canadian context and to the issue of the removal of children from their families, the Truth and Reconciliation Commission of Canada set out 10 principles of reconciliation, which serve as a framework to understand the term as it applies more broadly to the rights of indigenous peoples. These principles can be adapted to apply more generally to reconciliation initiatives:¹⁷

(a) The United Nations Declaration on the Rights of Indigenous Peoples is the framework for reconciliation at all levels and across all sectors of society;

(b) Indigenous peoples, as self-determining peoples, have human rights that must be recognized and respected. Where applicable, existing treaties and constitutional rights must be recognized, observed, honoured and enforced as acts of reconciliation;

(c) Reconciliation is a process of healing of relationships that requires public truth sharing, apology and commemoration that acknowledge and redress past harm;

(d) Reconciliation is a process of healing relationships that requires constructive action to address the ongoing legacies of colonialism that have had destructive impacts on indigenous peoples’ education, cultures and languages, health, child welfare, the administration of justice, and economic opportunities and prosperity;

(e) Reconciliation must create a more equitable and inclusive society by closing the gaps in social, health and economic outcomes that exist between indigenous and non-indigenous sectors of society;

(f) All peoples share responsibility for establishing and maintaining mutually respectful relationships and, where treaties apply, they are the basis for a strengthened partnership;

(g) The perspectives and understandings of elders and traditional knowledge keepers of the ethics, concepts and practices of reconciliation are vital to long-term reconciliation;

(h) Supporting indigenous peoples’ cultural revitalization and integrating indigenous knowledge systems, oral histories, laws, protocols and connections to the land into the reconciliation process are essential;

¹⁴ International Center for Transitional Justice, “What is Transitional Justice?”, 2019.

¹⁵ Ibid.

¹⁶ Submission from Quebec Native Women.

¹⁷ Original text available at http://publications.gc.ca/collections/collection_2015/trc/IR4-6-2015-eng.pdf.

(i) Reconciliation requires political will, joint leadership, trust building, accountability and transparency, as well as a substantial investment of resources;

(j) Reconciliation requires sustained public education and dialogue, including youth engagement, about the history and legacy of violations of indigenous peoples' rights, as well as the historical and contemporary contributions of indigenous peoples to society.

46. Truth and reconciliation commissions have emerged as a key mechanism to address past wrongs and to prevent further violations from taking place. They are vital processes in that they raise awareness and encourage stocktaking regarding violations of the rights of indigenous peoples. Truth and reconciliation commissions have been crucial in placing the situation of indigenous peoples, both past and present, on national agendas, and often lead to further steps towards justice, including criminal justice procedures, as well as guarantees of non-repetition and other measures of reparation. More importantly though, truth and reconciliation commissions assist in (re)establishing relationships and trust.

47. Truth commissions can contribute to recognition, reparation and reconciliation in that they:

- (a) Provide visibility to human rights violations and victims;
- (b) Recognize human rights violations as significant for the national agenda;
- (c) May lead to criminal justice, reparations and guarantees of non-recurrence;
- (d) May empower victims to participate actively in measures of redress.¹⁸

48. Two key examples of commissions established to specifically address the rights of indigenous peoples are the Truth and Reconciliation Commission of Canada and the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission. These two processes are unique in that they were established jointly by indigenous peoples and governments, and indigenous peoples participated fully from the outset. They also addressed both historical human rights violations and the intergenerational roots of the current situation of indigenous peoples.

49. The Truth and Reconciliation Commission of Canada (2008–2015) was established in response to the demands of residential school survivors and had a mandate:

(a) To reveal to Canadians the complex truth about the history and ongoing legacy of church-run residential schools in a manner that fully documented the individual and collective harm perpetrated against aboriginal peoples and honoured the resilience and courage of former students, their families and communities;

(b) To guide and inspire a process of truth and healing, leading to reconciliation within aboriginal families and between aboriginal peoples and non-aboriginal communities, churches, governments and Canadians generally. The process was to work to renew relationships on a basis of inclusion, mutual understanding and respect.¹⁹

50. Following extensive truth-telling, research regarding residential schools and their legacy and testimonies of residential school survivors gathered through a series of national events held across Canada, the Commission issued 94 calls to action. They contain concrete recommendations regarding the legacy of the residential school system; the adoption and implementation of the Declaration on the Rights of Indigenous Peoples as the framework for reconciliation; child welfare; health; education; and languages and cultures; among

¹⁸ Presentation by Eduardo González at the eleventh session of the Expert Mechanism. Webcast available at <http://webtv.un.org/search/item8-panel-discussion-on-recognition-4th-meeting-11th-session-expert-mechanism-on-rights-of-indigenous-peoples/5807866725001/?term=recognition%20reparations%20reconciliation&sort=date&page=2> (starting at 1:10:40).

¹⁹ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (McGill-Queen's University Press, 2015).

other themes.²⁰ While at its origin the Commission focused on the residential school system and its legacy, the calls to action address a broad range of issues that are crucial for reconciliation and for the implementation of the Declaration.

51. The Maine-Wabanaki Child Welfare Truth and Reconciliation Commission (2013–2015) carried out a truth-seeking process in order to “uncover the truth about child-welfare practice as it affected Maine’s Native people”.²¹ The Commission was collaboratively formed following an agreement between the Governor of the state of Maine and the Chiefs of the five Wabanaki tribes. Its goals included: to create and establish a more complete account of the history of the Wabanaki people in the state child-welfare system; to improve child-welfare practices; and to promote individual, relational, systemic and cultural reconciliation. The Commission carried out interviews with over 150 people, including elders, adoptees, persons who had been in the child welfare system as children and case workers from the Department of Health and Human Services. The Commission’s analysis showed that, between 2000 and 2013, Wabanaki children in Maine entered foster care at 5.1 times the rate of non-native children. Its recommendations included respect for tribal sovereignty, strengthening the teaching of Maine native American history in the state’s schools and capacity-building and policy improvements at the Department for Health and Human Services.

52. There are important lessons to be drawn from these processes, as in some countries indigenous peoples continue to face the removal of children by State institutions but also by religious institutions, or even individuals. The experience of the National Native American Boarding Schools Healing Coalition, established in 2012 in the United States, illustrates the obstacles that indigenous peoples face in seeking reparation and reconciliation for historical wrongs and intergenerational trauma caused by the removal of children.²² Often, international norms on children’s rights are not properly applied to indigenous children in adoption processes, a phenomenon that requires urgent measures and further investigation.

53. Although in its initial stages, another promising reconciliation initiative is the Truth and Reconciliation Commission established in June 2017 by the parliament of Norway. The Commission is investigating the “Norwegianization” policy and injustices committed against the Sámi indigenous people and the Kven Norwegian Finnish minority, one of the recognized national minorities in Norway.²³ The Commission, which is set to deliver its report in September 2022, was set up in close partnership with the affected communities and organizations, which are involved in and consulted throughout its work. The composition and mandate were decided in cooperation with the Sámi Parliament and with representatives of Kven Norwegian Finnish organizations. The Commission’s mandate is to research the policy and activities carried out by Norwegian authorities against these groups since around 1800, to investigate the impact of the Norwegianization policy today, and to propose measures for continued reconciliation.

54. There are also cases of truth commissions of a more general scope, following conflicts or dictatorships, that devote specific attention to the rights of indigenous peoples. Several post-conflict truth commissions in Latin America have placed particular emphasis on indigenous peoples, stemming from the recognition that they suffered disproportionately during the conflicts and in their aftermath. Most recently, the truth commission (*Comisión de la Verdad*), established in Colombia in November 2018 for a three-year mandate incorporated from the very outset an ethnic approach, through the participation of and recognition of rights guaranteed to “ethnic peoples” (which in the Colombian context include indigenous peoples, but also people of African descent, among others). This

²⁰ A full listing of the calls to action is available at http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf.

²¹ See www.mainewabanakireach.org/maine_wabanaki_state_child_welfare_truth_and_reconciliation_commission.

²² Statement by the Healing Coalition at the twelfth session of the Expert Mechanism. Webcast available at: <http://webtv.un.org/meetings-events/human-rights-council/watch/item-8-united-nations-declaration-6th-meeting-12th-session-expert-mechanism-on-rights-of-indigenous-peoples/6060710756001> (starting at 1:48:00).

²³ Submission from Norway.

approach seeks to ensure indigenous peoples' rights to truth, justice and reparation, both individually and collectively, and promotes a recognition from society as a whole not only of the impact of the conflict on ethnic peoples but also their actions of resistance and their contribution to the construction of the identity of the Colombian nation. The Commission plans to implement this approach in its guidelines, procedures, protocols and final report.²⁴

55. Another important precedent in this regard is the historical clarification commission (Comisión para el Esclarecimiento Histórico) in Guatemala (1997–1999), which did not have an explicit mandate to examine violations of the rights of indigenous peoples, but concluded that acts of genocide had been committed against the Maya indigenous peoples.²⁵ Similarly, truth and reconciliation commissions in Peru (2001–2003) and Paraguay (2004–2008), included specific conclusions regarding indigenous peoples. The National Truth Commission of Brazil (2011–2014) investigated crimes committed between 1946 and 1988, which included a prolonged period of military dictatorship, and found that at least 8,000 indigenous persons had been killed in the cases analysed. Despite lacking an explicit mandate to address violations of the rights of indigenous peoples, the Commission also found that the model of development launched under the dictatorship had had a serious impact on the Amazon region and had led to violations of indigenous peoples' rights. The final report of the Commission therefore includes a chapter on human rights violations committed against indigenous peoples.²⁶

56. In Africa, the Truth, Justice and Reconciliation Commission of Kenya (2009–2012) investigated human rights violations from the country's independence until 2008. Its purview included the crimes of persecution and genocide, as defined by the Rome Statute of the International Criminal Court. The Commission developed a focus on differential experiences, including Hon minority groups, indigenous people and gross violations of human rights in its final report.²⁷

57. In addition to truth and reconciliation commissions, there are other processes or mechanisms for reconciliation that have been implemented. Some of these can be grouped under the term "measures of satisfaction", which are meaningful but also symbolic in nature.

58. In Australia, the formal apology made by the Parliament to indigenous Australians for the forced removal of children (the Stolen Generations) in 2008 is one such example. Also in 2008, the Prime Minister of Canada offered an apology on behalf of all Canadians for the Indian residential schools system. This was followed by payments of over 3 billion Canadian dollars in compensation to over 38,000 applicants between 2007 and 2018. More recently, in 2017, Canada issued 10 Principles Respecting the Government of Canada's Relationship with Indigenous Peoples, guided by the Declaration, which included the recognition and implementation of the right to self-determination.²⁸

59. In another example, the Congress of the United States of America issued an apology to native Hawaiians in 1993 for the overthrow of the Kingdom of Hawaii, recognizing that it had resulted in the suppression of the "inherent sovereignty of the Native Hawaiian people". The apology also called for reconciliation efforts.²⁹ However, as pointed out by the Special Rapporteur on the rights of indigenous peoples, the call for reconciliation remained unfulfilled, while a growing movement of indigenous Hawaiians challenged the legitimacy

²⁴ Submission from the Comisión de la Verdad.

²⁵ Comisión para el Esclarecimiento Histórico, *Guatemala, memoria del silencio: conclusiones y recomendaciones* (1999), paras. 108–123 (in Spanish). Available at www.undp.org/content/dam/guatemala/docs/publications/UNDP_gt_PrevyRecu_MemoriadelSilencio.pdf.

²⁶ Presentation by Eduardo González at the eleventh session of the Expert Mechanism. The chapter on indigenous peoples in the report of the National Truth Commission of Brazil is available at <http://cnv.memoriasreveladas.gov.br/images/pdf/relatorio/Volume%202%20-%20Texto%205.pdf> (in Portuguese).

²⁷ Vol. II C, chap. 3, available at <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1003&context=tjrc-core>.

²⁸ Submission from Canada.

²⁹ United States, Public Law 103–150, 103rd Congress Joint Resolution 19 (1993).

and legality of the annexation of Hawaii following the overthrow, as well as the process by which Hawaii had moved from its designation as a non-self-governing territory under United Nations supervision to being incorporated into the United States as one of its federal states in 1959. The Special Rapporteur added that, in the meantime, indigenous Hawaiians saw their sacred places under the domination of others and they continued to fare worse than any other demographic group in Hawaii in terms of education, health, crime and employment (A/HRC/21/47/Add.1, paras. 65–66).

60. Partnerships between governments and indigenous peoples have also been useful as a mechanism for reconciliation. One such example is the establishment of treaties between indigenous nations and state governments. For example, indigenous nations in British Columbia, Canada, have pursued treaty negotiations with the federal and provincial governments since 1993, resulting in eight treaties to date that are constitutionally protected, and focus on the transfer of government lands to indigenous nations, self-government and other indigenous rights such as cultural rights. These treaties are viewed as an effective mechanism to implement the Declaration.³⁰ The British Columbia Treaty Commission, established in 1992, oversees, advocates for and facilitates the recognition and protection of indigenous titles and rights and the implementation of the Declaration through these treaties and serves as an example of a mechanism in which indigenous peoples participate fully, on an equal footing with federal and provincial governments. Although at a much earlier stage, there are also efforts in the Australian state of Victoria for the development of treaties and agreements with indigenous peoples. The state Parliament of Victoria passed legislation in 2018 in order to establish an Aboriginal representative body, which would have the task of developing the framework for future treaty negotiations with the state.³¹

61. Regional mechanisms, particularly courts, also play a crucial role, and their decisions have often served as vehicles for reparation and reconciliation processes. The Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights have issued landmark decisions establishing the grounds for reparation regarding land rights and cultural rights, among others. In the case of the *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012), the Inter-American Court of Human Rights held that Ecuador was responsible for “the violation of the rights to consultation, to indigenous communal property, and to cultural identity ... to the detriment of the Kichwa Indigenous People of Sarayaku” for granting a permit to a private oil company to carry out oil exploration activities in its territory without previously consulting the Sarayaku. The Court considered that the judgment in and of itself constituted a form of reparation, but also ordered various measures of restitution, satisfaction, guarantees of non-repetition and compensation. These included the cleaning of the affected territories, a requirement to consult the Sarayaku in a “prior, adequate and effective manner” in the event of future intentions of carrying out extractive activities on their territories, and monetary compensation for pecuniary and non-pecuniary damages.

62. In the case of the *Kaliña and Lokono Peoples v. Suriname* (2015), the Inter-American Court declared the State responsible for the violation of rights to recognition of juridical personality, to collective property, to political rights and to cultural identity, and of the duty to adopt domestic legal provisions. In the view of the Court, as a result of those violations, the Kaliña and Lokono did not have a delimited, demarcated and titled territory. Reparations included the granting of legal recognition of collective juridical personality and the delimitation, demarcation and granting of lands and territories.

63. In Belize, the Maya Leaders Alliance won a case brought before the Caribbean Court of Justice, the highest appellate court in Belize, through which the customary land rights of the Maya were deemed to be valid under and protected by the Constitution. In addition to the demarcation and titling of their lands, the Court ruled that the Maya were also due monetary compensation.³² The implementation of the rulings is ongoing.

³⁰ Submission from the British Columbia Treaty Commission.

³¹ Submission from the Australian Human Rights Commission.

³² The full text of the decision is available at https://elaw.org/system/files/bz.mayaleaders_0.pdf.

64. In Africa, two cases, both taking place in Kenya, have set groundbreaking precedents for the recognition of indigenous peoples' rights to their lands. In *Endorois Welfare Council v. Kenya* (2010), the African Commission on Human and Peoples' Rights found that the eviction of the Endorois people from their traditional homeland in Lake Bogoria in the 1970s to make way for a national park violated their rights to religious practice (due to their spiritual connections to their land), to property, to cultural life in the community, to dispose of their wealth and natural resources, and to economic, social and cultural development. The African Commission recommended a series of reparations, including recognition of the Endorois' ownership of their lands and restitution thereof, ensuring unrestricted access for the Endorois community to Lake Bogoria for religious and cultural rites and for grazing their cattle and the payment of compensation for all the losses suffered.

65. In *African Commission on Human and Peoples' Rights v. Kenya* (2012) (commonly referred to as the "Ogiek case"), the African Court on Human and Peoples' Rights determined that by evicting the Ogiek people from their ancestral land in the Mau Forest, the Government of Kenya had violated seven articles of the African Charter on Human and Peoples' Rights with regard to the Ogiek people's rights to culture, religious practice, property and the free disposal of their wealth and natural resources. The Court also ruled that the Government of Kenya had violated article 1 of the African Charter, which requires States to take the legislative and other measures to give effect to the rights and freedoms guaranteed in the Charter, and article 2, which prohibits discrimination.

66. Although the Government was ordered to take "all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six months",³³ the Court withheld its ruling on reparations. It decided to rule on reparations in a separate decision, based on additional submissions from the parties, which is still forthcoming.

67. There are two additional aspects of the Ogiek ruling worth highlighting. The first is the degree to which it draws upon the United Nations Declaration on the Rights of Indigenous Peoples. In its decision, the African Court made reference to several articles of the Declaration, including article 8 (on the right not to be subjected to forced assimilation or destruction of culture) and article 26 (on rights to lands, territories and resources). The second is the fact that it recognized the Ogiek as "an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability".³⁴ The analysis that led to that conclusion³⁵ serves as a crucial precedent for the often complex issue of the recognition of indigenous peoples in the African context.³⁶

68. While the actual implementation of these decisions at the national level and the associated reparations continues to be a challenge in many of these cases, court decisions in themselves can already constitute a form of reparation (as underlined by the Inter-American Court in its decisions) and may pave the way for subsequent reparation and reconciliation processes.

69. At the national level, in Australia, the Native Title Act (1993) has provided a framework, however flawed, for the limited recognition of indigenous peoples' rights to their lands, territories and resources, as well as for the recognition of their traditional laws and customs. It also serves as a mechanism for payment of limited compensation. Most recently, the High Court issued a landmark decision in a matter brought forward by the Ngaliwuru and Nungali traditional owners in the town of Timber Creek in the Northern Territory. The Court awarded approximately 2.5 million Australian dollars in compensation to the traditional owners for the impact of 53 land grants and public works on their native

³³ Judgment, para. 223.

³⁴ Ibid., para. 112.

³⁵ Ibid., paras. 105–111.

³⁶ Lucy Claridge, "Victory for Kenya's Ogiek as African Court sets major precedent for indigenous peoples' land rights", briefing note (London, Minority Rights Group International, 2017).

title rights.³⁷ The case, beyond its significance in and of itself, also creates a precedent for compensation in other native title cases. However, it should be noted that the Commonwealth routinely funds challenges to native title. The Australian states that challenged the Timber Creek decision from the lower courts to the highest court fought the compensation. This highlights the complexity of the recognition of indigenous rights and reparation. In Australia, it has flowed from protracted litigation that Aboriginal people can ill afford, and for many indigenous people's calls into question the State's commitment to reconciliation.

70. In Brazil, the Federal Court of Amazonas is still considering the Waimiri-Atroari claim for an official apology and reparations due to past violations related to the construction of road BR-174 under the military regime.³⁸ In a preliminary decision on the case in 2017, the Court requested the State to present the files of the Army from that period. Moreover, in considering the request not only to define monetary reparation for past violations but also to ensure under a rights-based approach that past violations were not repeated, the Court referred to ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), in support of the proposition that no current development project that would have a great impact on Waimiri-Atroari indigenous lands should proceed without their consultation and consent, using their own consultation protocols. The Court also ruled that the State had to ensure protection of sacred areas and places important to indigenous memories, including the 1970s and 1980s, when the National Truth Commission found that the Waimiri-Atroari had been reduced from nearly 3,000 people to 332 individuals.

V. Conclusions and recommendations

A. General

71. **The United Nations Declaration on the Rights of Indigenous Peoples should be the main framework for recognition, reparation and reconciliation. Recognition of indigenous peoples, as well as reparation and reconciliation relating to past and current injustices, are essential elements for the effective implementation of the Declaration. Likewise, the Declaration itself is an instrument to pursue recognition, reparations and reconciliation.**

72. **Any process of reparation and reconciliation must be approached from an indigenous perspective, taking into account cultural specificities, including the spiritual connection of indigenous peoples to their lands, their traditions related to identifying and healing injuries³⁹ and their right to participate fully and effectively in decision-making.**

73. **Indigenous peoples view recognition, reparation and reconciliation as a means of addressing colonization and its long-term effects and of overcoming challenges with deep historical roots. In this regard, recognition of the right of indigenous peoples to self-determination (including free, prior and informed consent),⁴⁰ their rights to autonomy and political participation, their claims to their lands and the recognition of indigenous juridical systems and customary laws should be considered an essential part of recognition, reparation and reconciliation.**

³⁷ Submission from Australia.

³⁸ See www.mpf.mp.br/am/sala-de-imprensa/noticias-am/decisao-da-justica-reconhece-violacoes-contra-povo-waimiri-atroari-na-abertura-da-br-174 (in Portuguese).

³⁹ For some examples of indigenous peoples' own traditions of collective healing used in contemporary settings, see Jenni Monet, "Mohawk women integrate the condolence ceremony into modern systems", *Indian Country Today*, 21 March 2012; and *Wiping the Tears of Seven Generations*, a film directed by Fidel Moreno and Gary Rhine on the use of the Lakota tradition of "wiping the tears" in activities to address seven generations of grief since the Wounded Knee massacre.

⁴⁰ See A/HRC/39/62.

B. Recognition

74. Recognition as indigenous peoples is the most basic, critical form of recognition, from which other types of recognition flow. In this regard, the Expert Mechanism stresses that States, the United Nations system and international organizations have a duty to recognize indigenous peoples as distinct peoples, with collective and individual rights protected under the Declaration.

75. As enshrined in article 33 of the Declaration, indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. While State recognition is of paramount importance, self-identification and self-recognition are also essential principles.

76. Constitutional recognition of indigenous peoples should be encouraged, although, where this is not possible, recognition through other means, including national laws, could be pursued. In this regard, constitutional language should be construed broadly in favour of recognizing indigenous rights, including as a basis for reconciliation.

77. Recognition of indigenous peoples is critical in and of itself but is also instrumental to the fulfilment of collective and individual rights under the Declaration, including the right to self-determination, cultural rights and rights to lands, territories and resources.

78. Recognition must be understood as the first step towards establishing a relationship of peace and respect between indigenous peoples and States, and as a prerequisite for reparation and reconciliation initiatives.

C. Reparations and reconciliation

79. In devising, implementing and evaluating reparation and reconciliation initiatives, indigenous peoples and States should bear in mind that the process is as important as the outcome. As several of the examples cited in the present report show, a crucial factor in the success of reconciliation and reparation initiatives is the incorporation of indigenous perspectives at all stages and the full and effective participation of indigenous peoples, which is essential if these processes are to have a successful, legitimate outcome.

80. The concepts of reparation and reconciliation must be understood from an intergenerational and collective perspective.⁴¹ Although a truth and reconciliation commission may address a particular series of violations or an event in time, it is crucial to recognize that, in the case of indigenous peoples these violations and events are inseparable from a long history of colonialism.

81. Truth and reconciliation commissions have emerged as key mechanisms to address past wrongs and prevent further violations from taking place. When driven by indigenous peoples' demands and implemented in full partnership with State authorities, such commissions have proven to be particularly effective, although they are not the only model for the meaningful engagement of States with indigenous peoples in recognition, reparation and reconciliation processes.

82. In cases where indigenous peoples are not the main proponents of a truth and reconciliation commission, or in a commission with a broad mandate that is not focused exclusively on indigenous peoples, there should be consultation with indigenous peoples prior to the establishment of the commission and during its operation. This leads to clarity and understanding of the expectations, objectives, processes and possible outcomes.

⁴¹ Lorie M. Graham, "Reparations, self-determination, and the seventh generation", *Harvard Human Rights Journal*, vol. 21, No. 1 (Winter 2008).

83. **Indigenous representatives, chosen by indigenous peoples themselves, must participate at all levels and stages. Particular attention should be given to hearing the voices of indigenous elders, women, children and persons with disabilities. Full participation also nurtures an environment of trust, which is a crucial factor in the success of any truth and reconciliation commission.**

84. **Particular attention must be given to translating the results of truth and reconciliation commissions into a reality. In this regard, concrete and measurable recommendations are useful tools to ensure accountability with regard to all parties, as illustrated by the Canadian Truth and Reconciliation Commission's calls to action.**

85. **While apologies and other measures of satisfaction are to be commended, they should translate into tangible changes in terms of respect for and protection of the rights of indigenous peoples.**

86. **As several examples referenced in the report show, regional courts can play a key role in upholding the recognition of indigenous peoples' rights and in granting reparations. In this regard, it is crucial to raise awareness among judges regarding the Declaration. However, States should be more accountable for the implementation of the decisions taken by such bodies at the national level.**
