

BACKGROUND NOTE FOR THE DEVELOPMENT OF A
SYSTEM WIDE ACTION PLAN TO ENSURE A COHERENT
APPROACH TO ACHIEVING THE ENDS OF THE UNITED
NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS
PEOPLES

Background Note 4

**Overview of the Findings of the Special Rapporteur
on the Rights of Indigenous Peoples on implementation of the
United Nations Declaration on the Rights of Indigenous Peoples**

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Introduction

Three reports issued by the Special Rapporteur on the rights of indigenous peoples have analysed information relevant to factors that facilitate or debilitate implementation of the Declaration on the Rights of Indigenous Peoples, including within the UN system. These include:

- (1) Report of the Special Rapporteur on factors that debilitate commitment to and action by States and other actors to implement the Declaration on the Rights of Indigenous Peoples (2013);
- (2) Report of the Special Rapporteur on the need to harmonize the activities within the United Nations that affect indigenous peoples (2012); and
- (3) Report by the Special Rapporteur on the issue of obstacles to the implementation of the UN Declaration on the Rights of Indigenous Peoples (2014).

I. Report of the Special Rapporteur on factors that debilitate commitment to and action by States and other actors to implement the Declaration on the Rights of Indigenous Peoples

The previous Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, dedicated his final report to the General Assembly (A/68/317) on the subject of the “factors that debilitate commitment to and action by States and other actors to implement the Declaration on the Rights of Indigenous Peoples”, drawing on his six years of experience as Special Rapporteur.

A. Obstacles to implementation of the Declaration

- a) Characterizing the Declaration as non-binding or merely aspirational
- b) Characterizing the Declaration as granting a special status to indigenous peoples
- c) Mischaracterizations of the right to self-determination
- d) Lack of awareness of the Declaration in its role in promoting reconciliation and social harmony

B. Obstacles that relate to the UN system and that relate to UN coherence

- a) All of the observations mentioned in the report could relate to the UN system (i.e. they are not State-specific). The UN system is most specifically referred to in context of awareness-raising.
- b) No observation relates specifically to UN coherence.

C. Recommendations for overcoming obstacles

- a) Awareness-raising and renewing a commitment to the Declaration and to improving the human rights conditions of the world’s indigenous peoples.

See Annex I for specific language from the Report.

II. Report of the Special Rapporteur on the need to harmonize the activities within the United Nations that affect indigenous peoples

The previous Special Rapporteur, James Anaya, also dedicated a report to the General Assembly on “the need to harmonize the activities within the United Nations that affect indigenous peoples” (A/67/301).

A. Obstacles to implementation of the Declaration

- a) Lack of conformity of UN system activities with the Declaration on the Rights of Indigenous Peoples (various specific examples mentioned in the case of activities of particular UN agencies, funds, programmes and other processes)

B. Obstacles that relate to the UN system and that relate to UN coherence

All of the observations mentioned in the report relate to the UN system. Given that the report is dedicated to “harmonizing” the various activities of the UN, all recommendations could relate to coherence. The main message with respect to coherence is that the myriad activities within the system must be in line with the Declaration, which defines the minimum standards for any activity within the UN system that touches upon indigenous peoples

C. Recommendations to the UN system for overcoming obstacles

- a) Develop initiatives aimed at promoting the rights of indigenous peoples, in accordance with the Declaration.
- b) Ensure that the design and execution of their various activities and programmes are consistent with and reinforce the Declaration.
- c) Take specific steps to ensure awareness among directors and staff of the Declaration and its provisions and to ensure that the Declaration is a key reference in any decision-making or programming affecting indigenous peoples at all levels of operation.
- d) In budgeting, ensure that appropriate funding is set aside for activities which promote implementation of the Declaration, as well as ensuring that budgeted activities do not conflict with its provisions.
- e) Reform existing operational policies or guidelines relating to indigenous peoples or interpret as necessary to ensure compliance with Declaration. If the wording of a text is such that it cannot be applied consistently with the Declaration, it should be amended or reformed.
- f) Develop, as appropriate, guidelines or policy directives to promote and ensure respect for the rights of indigenous peoples.
- g) Consult with indigenous peoples, in accordance with the same standards of consultation that apply to Member States under the Declaration, in the development and execution of activities or policies which may affect the rights or interests of indigenous peoples.
- h) Establish specific consultative procedures with indigenous peoples.
- i) The Inter-Agency Support Group on Indigenous Issues has an important role to play in implementing the recommendations set out
- j) Develop the capacities and skills of indigenous peoples to ensure that they are able to engage effectively with the UN.

See Annex II for specific language from the Report.

III. Report by the Special Rapporteur on the issue of obstacles to the implementation of the UN Declaration on the Rights of Indigenous Peoples

Following on these reports, the current Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, dedicated her first report to the Human Rights Council (A/HRC/27/52) to the issue of obstacles to the implementation of the Declaration, with a practical focus.

A. Obstacles to implementation of the Declaration

- a) The failure or reluctance of governments to recognize the existence or status of indigenous peoples within their countries;
- b) Challenges in practical implementation measures, which includes:
 1. Awareness raising
 2. Need for concerted implementation efforts, through planning
 3. Development of indicators to measures progress
 4. Identification of good practices
 5. Conflicting interpretations about the content of core rights
- c) Outstanding reconciliation and redress for historical wrongs by States;
- d) Ongoing negative attitudes towards indigenous peoples on the part of the broader societies in which they live; and
- e) The social and economic conditions of indigenous peoples preventing the full exercise of their human rights.

B. Obstacles that relate to the UN system and that relate to UN coherence

Of the obstacles mentioned, reference to the UN is not specifically made. However, many of the observations made could apply to the UN system equally as they do to States, especially those identified under the challenges in practical implementation measures. No obstacles specifically mention UN coherence.

C. Recommendations for overcoming obstacles

- a) Need to employ a flexible approach to definition of indigenous peoples that take into account the core attributes that distinguish indigenous peoples from minorities groups and other local communities. That approach focuses on the rights at stake and asks whether the international framework with respect to the rights of indigenous peoples proves useful in addressing the issues and concerns faced by the group in question.
- b) With respect to identifying practical steps for implementation, carry out strategic planning, develop monitoring mechanisms and indicators, and identify what has worked and try to replicate successful experiences.

See Annex III for specific language from the Report

Annex I

Specific language from Report of the Special Rapporteur on factors that debilitate commitment to and action by States and other actors to implement the Declaration on the Rights of Indigenous Peoples (2013);

57. Throughout his mandate the Special Rapporteur has been especially cognizant of the directive by the Human Rights Council, in its resolutions [15/14](#) and [6/12](#), paragraph 1 (g), that he promote the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate. Because of this directive and the Declaration's stature as the principal statement of the United Nations on indigenous rights, since assuming his mandate in May 2008, the Special Rapporteur has regarded the Declaration as providing the principal normative frame of reference for his work, as made clear in his numerous thematic and country reports and communications regarding alleged violations of human rights.

58. The Special Rapporteur continues to observe that, despite expressions of commitment to the Declaration and significant positive developments worldwide, a great deal remains to be done to see the objectives of the Declaration become a reality in the everyday lives of indigenous peoples of the world. In previous reports, the Special Rapporteur has provided extensive analysis of the Declaration and the need for concrete steps to advance in the implementation of the human rights standards enshrined therein ([A/67/301](#), paras. 26 to 32, 82; [A/66/288](#), paras. 62 to 76; [A/65/264](#), paras. 54 to 69; 83 to 88; [A/64/338](#), paras. 37 to 64, 68 to 75; and [A/HRC/9/9](#), paras. 18 to 90). He still fears that the wide gap between the rights mentioned in the Declaration and its effective implementation will persist, leading to a certain complacency and acceptance of that condition by dominant actors and within the United Nations system. As he has stressed before, this cannot be allowed to happen.

59. The Special Rapporteur perceives that, among many States and other powerful actors, commitment to the Declaration is weakened, not just by contending political and economic forces, but by certain ambiguities and positions about the status and content of the Declaration. In the following discussion, the Special Rapporteur confronts some of these ambiguities and positions, in the hope of helping to overcome their debilitating effects and advancing toward a strong global commitment to the Declaration and its implementation. Also discussed is the need for greater awareness of the Declaration and of its role as an instrument of reconciliation and social harmony.

A. The normative weight of the Declaration

60. Throughout the course of his mandate, the Special Rapporteur has heard numerous Governments emphatically characterize the Declaration on the Rights of Indigenous Peoples as non-binding or merely aspirational, thereby according the Declaration a diminished status and rationalizing a diminished commitment to its terms. Although the Special Rapporteur has addressed the issue of the Declaration's status in past reports, given the persistent references to the Declaration as non-binding, the Special Rapporteur would like to again provide some observations on this issue.

61. The Special Rapporteur readily acknowledges that, under prevailing international law doctrine, declarations adopted by resolution of the United Nations General Assembly, unlike

treaties, are not themselves direct sources of law. But to say simply that the Declaration is non-binding is an incomplete and potentially misleading characterization of its normative weight. It has long been widely understood that standard-setting resolutions of the General Assembly can and usually do have legal implications, especially if called “declarations”, a denomination usually reserved for standard-setting resolutions of profound significance.

62. The General Assembly has a long history of adopting declarations on various human rights issues, including the first international human rights instrument of the United Nations, the Universal Declaration of Human Rights, adopted in 1948. These declarations, like other resolutions, are adopted by the General Assembly under the authority granted to it under Article 13 (1) (b) of the Charter of the United Nations to make recommendations for the purpose of assisting with the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

63. Although technically a resolution, the Declaration has legal significance, first, because it reflects an important level of consensus at the global level about the content of indigenous peoples’ rights, and that consensus informs the general obligation that States have under the Charter — an undoubtedly binding multilateral treaty of the highest order — to respect and promote human rights, including under Articles 1 (2), 1 (3), 55 and 56 of the Charter. The Declaration was adopted by an overwhelming majority of Member States and with the support of indigenous peoples worldwide and, as noted earlier, the few States that voted against the Declaration each subsequently reversed their positions. Especially when representing such a widespread consensus, General Assembly resolutions on matters of human rights, having been adopted under the authority of the Charter itself, can and do inform Member States’ obligations under the human rights clauses of the Charter.

64. Secondly, some aspects of the Declaration — including core principles of non-discrimination, cultural integrity, property, self-determination and related precepts that are articulated in the Declaration — constitute, or are becoming, part of customary international law or are general principles of international law, as found by the International Law Association after a committee of experts conducted an extensive survey of international and State practice in relation to the Declaration.² A norm of customary international law arises when a preponderance of States (and other actors with international personality) converge on a common understanding of the norm’s content and generally expect compliance with, and share a sense of obligation to, the norm. It cannot be much disputed that at least some of the core provisions of the Declaration, with their grounding in well-established human rights principles, possess these characteristics and thus reflect customary international law.

65. Finally, the Declaration is an extension of standards found in various human rights treaties that have been widely ratified and that are legally binding on States. Human rights treaties with provisions relating to the rights of indigenous peoples include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. The human rights treaty bodies that interpret and apply these treaties now frequently apply their provisions in ways that reflect the standards in the Declaration and sometimes explicitly refer to the Declaration in doing so. This happens, in particular, with regard to treaty provisions affirming principles of non-discrimination, cultural integrity and self-determination: principles that are also incorporated into the Declaration and upon which the Declaration elaborates with specific reference to indigenous peoples. Although the

Declaration is not necessarily dispositive when interpreting a treaty the provisions of which intersect with those of the Declaration, it provides important guidance of significant weight.

66. *Whatever its legal significance, moreover, the Declaration has a significant normative weight grounded in its high degree of legitimacy. This legitimacy is a function not only of the fact that it has been formally endorsed by an overwhelming majority of United Nations Member States, but also the fact that it is the product of years of advocacy and struggle by indigenous peoples themselves. The norms of the Declaration substantially reflect indigenous peoples' own aspirations, which after years of deliberation have come to be accepted by the international community. The Declaration's wording, which has been endorsed by Member States, explicitly manifests a commitment to the rights and principles embodied in the Declaration. It is simply a matter of good faith that States adhere to that expression of commitment to the norms that indigenous peoples themselves have advanced.*

67. *In sum, the significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character. The Special Rapporteur reiterates that implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification.*

B. The Declaration's foundations in equality and human rights

68. *Equally debilitating to the Declaration are characterizations of the instrument as granting a status to indigenous peoples of privilege over other groups, a characterization the Special Rapporteur has heard expressed by State officials and others in positions of influence in numerous local settings outside the diplomatic arena. Such characterizations of the Declaration implicitly question its fairness, thereby undermining its legitimacy.*

69. *Far from elevating indigenous peoples over others, the Declaration, in article 2, aims to ensure that indigenous peoples and individuals are equal to all other peoples and individuals. Equality and non-discrimination are bedrock principles of the Declaration, in accordance with the United Nations human rights regime more generally, as made clear in the Declaration's preamble (inter alia, paras. 2, 5 and 22) and in several of its provisions (inter alia, art. 1, 2 and 17). To ascribe to the Declaration any design of privilege or superiority is a gross distortion of its true character.*

70. *While the Declaration does articulate standards that are specific to indigenous peoples, it does not fundamentally create for indigenous peoples new substantive rights that others do not enjoy, as pointed out previously by the Special Rapporteur (A/64/338, para. 47). Rather, it recognizes for them the human rights that they should have enjoyed all along as part of the human family, contextualizes those rights in the light of their particular circumstances and characteristics, in particular their communal bonds, and promotes measures to remedy the rights' historical and systemic violation. The interconnectedness of all human rights and their universality, along with their propensity to give rise to context-specific prescriptions, is illustrated by the Declaration's articulation of norms that are, at the same time, grounded in universal human rights but specific to indigenous peoples. The interrelationships between universal rights of equality, self-determination, cultural integrity, property, development, and social and economic welfare, understood in the specific context of indigenous peoples, define a range of specific indigenous peoples' rights that are articulated in the Declaration.*

71. *In keeping with this context specificity, the basic normative justification of the Declaration is stated in paragraph 6 of the preamble, in which it is acknowledged that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests. The Declaration's preamble thus stresses the essentially remedial purpose of the instrument against a backdrop of universal human rights.*

72. *It is precisely because the human rights of indigenous groups have been denied, with disregard for their particular characteristics, that there is a need for the Declaration. In other words, the Declaration exists because indigenous peoples have been denied equality, self-determination, and related human rights, and not in order to grant them privilege over others. This remedy should not have to exist, just as the history of oppression that gives rise to it should not have been. But that history did occur, and its ongoing consequences make necessary a global remedial response that is appropriate to indigenous peoples' particular circumstances and characteristics, which is what the Declaration represents.*

C. The centrality of the right of self-determination

73. *A centrepiece of the United Nations Declaration on the Rights of Indigenous Peoples is article 3, which affirms: "Indigenous peoples have the right to selfdetermination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." During the more than two-decade debate that preceded the adoption of the Declaration, it was increasingly understood that self-determination is a foundational principle that anchors the constellation of indigenous peoples' rights.*

74. *Yet the Declaration's affirmation of indigenous peoples' right to selfdetermination, and hence the force of the Declaration itself, has been blunted by the position advanced by some States that this right is different from the selfdetermination of peoples in international law. This position has served only to detract from the core consensus that is represented in the Declaration's affirmation of self-determination for indigenous peoples and from defining the specific modalities for implementing the right.*

75. *The Special Rapporteur strongly disagrees with any implication that the right to self-determination of indigenous peoples, as affirmed in the Declaration, is apart from the right to self-determination that peoples generally enjoy under international law, for reasons set forth in his extensive academic writing on the subject.⁵ To be sure, the right to self-determination, like other rights, gives rise to different prescriptions in different contexts, but at its core, it is the same fundamental human right for all peoples. To suggest otherwise is difficult, if not impossible, to justify within a human rights framework in which equality and non-discrimination are bedrock maxims, and is contrary to the Declaration itself, which provides, as already pointed out, that indigenous peoples and individuals are equal to all other peoples and individuals.*

76. *That being said, the Special Rapporteur is of the view that it is not necessary to resolve the debate about the nature of the Declaration's affirmation of selfdetermination in relation to international law in order for there to be a meaningful commitment to that affirmation. The position that the self-determination recognized in the Declaration is different from that of international law is born of the assumption, mistaken in the view of the Special Rapporteur,*

that under international law, self-determination necessarily means the right to become an independent State. But indigenous peoples, as such, rarely, if at all, seek independent statehood outside of classic situations of non-self-governing territories. Thus, the position is of little or no practical utility for the States that assert it and is mostly a distraction.

77. Whatever the validity of that position, it is clear that the right to selfdetermination affirmed in the Declaration, like the right as affirmed in international law generally, has a core meaning around which there is substantial consensus. That meaning, essentially, is that indigenous peoples have the right to pursue their own destinies in all spheres of life, under conditions of equality, and to live within governing institutional orders that are devised accordingly. The focus of States, along with that of relevant international institutions and indigenous peoples themselves, should be on strengthening commitment to this core principle and taking practical steps to implement it.

D. The need for greater awareness of the Declaration and its role in promoting reconciliation and social harmony

78. Based on his work over the two terms of his mandate, the Special Rapporteur is convinced that a still pending crucial task is raising awareness about the Declaration among Government actors, the United Nations system, indigenous peoples themselves, and, more generally, society. The Special Rapporteur has observed throughout his work a lack of knowledge and understanding about the Declaration, the values it represents or the deep-seated issues confronting the indigenous peoples that it addresses.

79. As already noted, the text of the Declaration evolved from sentiments articulated by indigenous peoples that prompted discussion on a global scale about their rights and place in the world. Government actors were moved to embrace a vision of a world in which indigenous peoples and their diverse cultures survive as parts of the global human mosaic. The Declaration's words mark the transition from an era in which dominant thinking justified infringing or ignoring indigenous peoples rights to an era in which indigenous peoples' rights are recognized within the global programme to advance human rights and peaceful relations among the peoples of the world.

80. Implementation of standards articulated in the Declaration first requires an awareness of those standards and their justification by Government and United Nations actors at all levels, including those actors whose functions and powers touch upon the lives of indigenous peoples. There is also a great need for educating the public about the Declaration and the issues it seeks to address. It will remain difficult for the goals of the Declaration to be achieved amid competing political, economic and social forces unless the authorities and non-indigenous sectors of the societies within which indigenous peoples live come to share in awareness and conviction about those goals.

Annex II

Specific language from the Report of the Special Rapporteur on the need to harmonize the activities within the United Nations that affect indigenous peoples (2012);

In the report, the Special provides comments on the need to harmonize the myriad activities within the United Nations system which affect indigenous peoples. The Special Rapporteur noted that the UN system is undertaking numerous activities and making decisions that affect indigenous peoples. He emphasize that “on a daily basis, multiple institutions within the system undertake hundreds of activities and manage millions of dollars within programmes that have a direct or indirect impact on indigenous peoples” (paragraph 21). The Special Rapporteur also made mention of processes underway to develop and implement policies and guidelines related to indigenous peoples (paragraph 21).

The Special Rapporteur makes clear that that benchmark for reference within the UN system regarding work on indigenous peoples. He stressed that in the preamble to the Declaration, the General Assembly emphasizes that the UN has an important and continuing role in promoting and protecting the rights of indigenous peoples. The Declaration further provides in articles 41 and 42 that “that the organs and specialized agencies of the United Nations system and other intergovernmental organizations should contribute to the realization of the provisions in the Declaration through financial and technical assistance; that ways of ensuring the participation of indigenous peoples on issues affecting them should be established; and that the United Nations, its bodies and agencies and Member States should promote respect for and application of the Declaration as well as follow-up on its effectiveness” (paragraph 26).

With this in mind, the Special Rapporteur notes that some UN institutions have adopted new policies, programmes or guidelines that are generally, but not in all respects consistent with the principles and rights affirmed in the Declaration (paragraph 29). The Special Rapporteur noted that this includes the guidelines on indigenous Peoples’ issues developed by the United Nations Development Group, “which are designed to assist the United Nations system to mainstream and integrate indigenous peoples’ issues into processes for operational activities and programmes at the country level and establish a broad framework for implementing a human rights based and culturally sensitive approach to develop for and with indigenous peoples (ibid).

Specific United Nations processes and programmes reviewed in the report include those relating to the United Nations Educational, Scientific and Cultural Organization; the Food and Agriculture Organization of the United Nations; the World Intellectual Property Organization; the Convention on Biological Diversity; the United Nations Framework Convention on Climate Change; the United Nations Conference on Sustainable Development; the World Bank Group; and programmes aimed at reducing emissions from deforestation and forest degradation. In his report, the Special Rapporteur observed that the UN system has carried out important work to promote the rights of indigenous peoples. However, he stated that greater efforts need to be carried out to “ensure that all actions within the system which affect indigenous peoples are in harmony with their rights particular their rights as affirmed in the United Nations Declaration on the Rights of Indigenous Peoples”.

Finally, the Special Rapporteur makes a series of concluding observations and recommendations to the UN system for improvement. The specific language of the observations and recommendations made are worth reading in full and are as follows:

82. The Declaration on the Rights of Indigenous Peoples, which was adopted by the General Assembly in 2007, calls upon the various components of the United Nations system to contribute to and promote the full realization of the rights affirmed in the Declaration (articles 41 and 42). Given this mandate from the General Assembly, the Declaration defines the minimum standards for any activity within the United Nations system which touches upon the concerns of indigenous peoples, in addition to being a stimulus for affirmative measures to promote their rights.

83. A number of institutions and processes within the United Nations system have done important work to promote the rights of indigenous peoples. However, greater efforts need to be made to maximize action throughout the United Nations system to promote those rights and ensure that all actions within the system which affect indigenous peoples are in harmony with their rights, particularly as affirmed by the Declaration on the Rights of Indigenous Peoples.

84. The agencies, funds, programmes and intergovernmental organizations of the United Nations system should develop or further pursue initiatives within their respective programme areas which are aimed at promoting the rights of indigenous peoples, in accordance with the Declaration. Furthermore, in all instances they should insure that the design and execution of their various activities and programmes are consistent with and reinforce the Declaration.

85. To this end, United Nations institutions should take specific steps to ensure awareness among their directors and staff of the Declaration and its provisions and to ensure that the Declaration is a key reference in any decision-making or programming affecting indigenous peoples at all levels of operation. Furthermore, in their budgeting, agencies should ensure that appropriate funding is set aside for activities which promote implementation of the Declaration, as well as ensuring that budgeted activities do not conflict with its provisions.

86. Operational policies or guidelines relating to indigenous peoples, such as those of FAO and the World Bank Group, should be reformed as necessary, or interpreted to ensure compliance with relevant international standards as set forth in the Declaration, applicable treaties and other sources. Other institutions within the United Nations system should develop, as appropriate, guidelines or policy directives to promote and ensure respect for the rights of indigenous peoples.

87. In addition, agencies, funds, programmes and intergovernmental organizations of the United Nations system should consult with indigenous peoples, in accordance with the same standards of consultation that apply to States under the Declaration, in the development and execution of activities or policies which may affect the rights or interests of indigenous peoples. Specific consultative procedures should be established in this regard.

88. The United Nations Inter-Agency Support Group on Indigenous Issues has an important role to play in implementing the recommendations set out above, building upon initiatives it has already taken in this regard.

95. A coordinated effort should be made to develop the capacities and skills of indigenous peoples to ensure that they are able to participate effectively in international processes which affect their rights and to engage effectively in consultations with United Nations institutions in the elaboration, implementation and evaluation of programmes affecting them. Some initiatives have been taken in this regard, but it is apparent to the Special Rapporteur that more capacity-building opportunities for indigenous peoples are required. Initiatives for such capacity-building could be advanced by the Inter-Agency Support Group on Indigenous Issues.

Annex III

Specific language from the Report by the Special Rapporteur on the issue of obstacles to the implementation of the UN Declaration on the Rights of Indigenous Peoples (2014)

Ongoing obstacles to the full realization of indigenous peoples' rights

10. *There is a strong legal and policy foundation upon which to build the implementation of indigenous peoples' rights, and there have been many advances, which the Special Rapporteur hopes to examine and document during the course of her mandate. Nevertheless, many challenges continue to confront indigenous peoples throughout the world. As noted above, a core aspect of the mandate of the Special Rapporteur is to examine ways and means of overcoming existing obstacles to the full and effective protection of the rights of indigenous peoples. As an initial step, and given that the present report is her first to the Human Rights Council, the Special Rapporteur would like to identify in broad strokes some of those obstacles which are found to some extent in all countries in which indigenous peoples are living.*

11. *The obstacles identified in the present section are (a) the failure or reluctance of governments to recognize indigenous peoples; (b) challenges in the development of practical implementation measures; (c) reconciliation and redress for historical wrongs yet to be completed; (d) ongoing negative attitudes towards indigenous peoples on the part of the broader societies in which they live; and (e) social and economic conditions preventing the full exercise of indigenous peoples' human rights. The list is of course neither comprehensive nor exhaustive and the obstacles identified above are in many ways interrelated. It is meant, however, to provide a framework for understanding where further work is needed and to assist in developing measures for action. While the Special Rapporteur fully acknowledges the difficulties in confronting and overcoming those continuing problems, she hopes to be able to make headway on tackling some of the obstacles during the course of her mandate.*

A. Recognition of indigenous peoples

12. *One barrier to the implementation of the international human rights standards concerning indigenous peoples relates to how the concept of "indigenous peoples" is applied in relation to certain groups, as its application can be both under- and overinclusive: the indigenous rights framework can be applied in relation to groups that share characteristics similar to indigenous peoples worldwide and, to a somewhat lesser extent, to groups that do not. Clearly, the human rights situation of groups around the world is diverse and complex, and varies from country to country and community to community, and yet there are issues and circumstances that are common to certain groups that are generally identified as indigenous peoples. The Special Rapporteur is concerned that, by failing to recognize groups as indigenous peoples, States and other powerful actors avoid applying the international standards and protection mechanisms that are most appropriate to address the kinds of human rights concerns that these groups face in common with groups which are generally identified as indigenous around the world.*

13. In that regard, the Special Rapporteur would like to emphasize that this is not a problem resulting from, or which can be resolved by, attempting to arrive at an international definition of “indigenous peoples”. As is often repeated in the literature on the subject, no such definition exists. The United Nations Declaration on the Rights of Indigenous Peoples does not attempt to provide one, although it does affirm that indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions (art. 33). For its part, International Labour Organization Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries refers to self-identification “as a fundamental criterion for determining the groups to which the provisions of this Convention apply” (art. 1, para. 2) and notes that the Convention will apply to those peoples “whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions”, as well as those descended from pre-colonial populations and who retain some or all of their own social, economic, cultural and political institutions (art. 1, para. 1).

14. The Special Rapporteur notes with particular concern that a number of States have somewhat restrictive criteria relating to the recognition of indigenous status. That may result in approaches to land rights, socioeconomic policy and development, for example, that may fail to recognize the distinct circumstances, problems and experiences faced by indigenous peoples, including connections to land, distinct cultures and ways of life, discrimination and exclusion, and disadvantage. Approaches that do not recognize indigenous peoples or acknowledge that certain groups may face distinct challenges similar to other indigenous peoples around the world, do not allow for key tools and resources offered by the international indigenous framework to be employed — a framework that was developed precisely to respond to indigenous peoples’ concerns in a way that takes into consideration their distinct contexts and experiences.

15. The Special Rapporteur fully acknowledges that this is a sensitive topic in many areas, especially in the context of Africa and Asia, where many groups can be considered in a literal sense indigenous or native to the areas in which they continue to live. That concern was addressed by the Working Group of Experts on Indigenous Populations/Communities in Africa of the African Commission on Human and Peoples’ Rights, which observed rightly that “if the concept of indigenous is exclusively linked with a colonial situation, it leaves us without a suitable concept for analysing internal structural relationships of inequality that have persisted after liberation from colonial dominance”. Thus, the Working Group noted that the understanding of the term indigenous peoples “should put much less emphasis on the early definitions focusing on aboriginality ... The focus should be more on the more recent approaches focusing on self-definition as indigenous and distinctly different from other groups within a state”.

16. There is therefore a need to implement a flexible approach that takes into account the core attributes that distinguish indigenous peoples from minority groups or other local communities. In that regard, the Special Rapporteur welcomes and adopts the approach of the previous Special Rapporteur, which focuses on the rights at stake and asks whether the international framework with respect to the rights of indigenous peoples proves useful in addressing the issues and concerns faced by the group in question. In particular, the previous Special Rapporteur stated that the mandate is relevant to those groups “who are indigenous to the countries in which they live and have distinct identities and ways of life, and who face very particularized human rights issues related to histories of various forms of oppression,

such as dispossession of their lands and natural resources and denial of cultural expression” (A/HRC/15/37/Add.1, para. 213). In any case, in line with the practice of other international human rights mechanisms and the previous Special Rapporteur, the Special Rapporteur will not necessarily accept prima facie a State’s determination of a group’s indigenous status, without looking at other factors when examining the specific human rights situation of a group within a particular country.

B. Challenges to the practical implementation of indigenous peoples’ rights

17. As the United Nations Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly only in 2007, its implementation is still somewhat in a formative stage. States are facing various difficulties in the operationalization of indigenous peoples’ rights, which include a lack of awareness about the rights and standards, difficulties in identifying practical steps for implementation and conflicting interpretations of the content of rights. Certainly, in addition to addressing the issues identified in the present subsection, it is also necessary for States to demonstrate political will, technical capacity and financial commitment in order for operationalization to take place and be successful, although the Special Rapporteur will not go into depth on those factors here.

1. Lack of awareness and understanding of the United Nations Declaration on the Rights of Indigenous Peoples

18. An initial issue is the lack of awareness and understanding of the Declaration and other relevant instruments among State and non-State actors. In his first report to the Human Rights Council, the previous Special Rapporteur identified various mechanisms for the operationalization of the Declaration, and specifically recommended that States “make efforts to raise awareness [about the Declaration] and provide technical training to government officials, members of the legislative branch and of national human rights institutions, judicial authorities and all other relevant actors, including civil society and indigenous peoples themselves” (A/HRC/9/9, para. 58). While many States have made significant headway in that regard, within other States there is still very insufficient knowledge among relevant actors about the international standards concerning indigenous peoples.

2. Need for concerted implementation efforts

19. However, even when State authorities are aware of international standards, there is need for further guidance on how to implement the standards. A first step is undoubtedly, together with indigenous peoples, to assess needs, identify priorities and develop strategic action plans with goals and time frames for implementation. Planning that takes into account and incorporates steps to implement indigenous peoples’ rights can take place in the context of the development of broader education, health, housing, elections, local governance and resource development strategies (see A/HRC/24/41, paras. 49–51), as well as in other areas. Involving indigenous peoples at the outset in planning will go a long way in speeding up implementation and avoiding conflicts about how implementation is carried out down the road; yet, it is a step that is often overlooked.

20. As part of the planning process, baselines and indicators can also serve as steady reference points for guiding action and measuring progress. They can be established at both

the international and national levels, through the creation of new indicators and new forms of data collection, or through the disaggregation of data to ensure that indigenous peoples' situations are understood and their needs are assessed. At the most basic level, the indicators should assist with the detection of discrimination, inequality and exclusion, and allow for comparisons to be made between indigenous peoples and other social groups. In any case, it is essential that indigenous peoples participate in defining the issues to be addressed and the indicators used, and that indigenous peoples' own views on well-being and their visions for the future are taken into account.

21. It is of course also useful in that connection to identify what has worked and to try to replicate successful experiences in other contexts. While it is no secret that good practices for the promotion and protection of indigenous peoples' human rights are still few and far between, examples are emerging. In that regard, a core aspect of the mandate of the Special Rapporteur is the identification of good practices and she hopes to contribute to documenting positive experiences during the course of her mandate. States, indigenous peoples themselves, non-governmental organizations and the United Nations system also play important roles in exchanging experiences about where good practices are occurring, and they should take advantage of reporting processes before international human rights mechanisms, such as the United Nations treaty bodies and the universal periodic review, to highlight examples.

22. It is also important to obtain reports on good practices and obstacles from various United Nations agencies, programmes and funds and other multilateral institutions that have policies on indigenous peoples for which the United Nations Declaration on the Rights of Indigenous Peoples was used as a reference point. Related to that is the extent of implementation of the human rights-based approach to development has been applied to address the specific situations of indigenous peoples. The common understanding of a rights-based approach championed by the Office of the United Nations High Commissioner on Human Rights, jointly with the United Nations Development Group, is one important framework which links the development agenda with economic, social and cultural rights.

3. Conflicting interpretations about the content of core rights

23. Yet, the steps outlined above will still not resolve some of the more complex issues related to implementation. There are still conflicting interpretations among key actors of the content of core rights of indigenous peoples and disagreement about how rights are to be applied in specific situations, especially when competing rights and interests may be at stake and balancing of rights needs to take place. Differing interpretations of rights by States, indigenous peoples, business enterprises, non-governmental organizations and others result in an uneven application of the standards and stymie progress in implementation. The Special Rapporteur has observed that differences in interpretation exist especially in relation to rights to lands and resources; the application of the duty of States to consult with and seek the free, prior and informed consent of indigenous peoples in matters that affect them; and harmonizing State and customary indigenous governance and justice systems.

24. The Special Rapporteur observes that much work remains to be done to ensure that States and indigenous peoples come together to find common ground and agreement on the most controversial issues. In that regard, States and indigenous peoples often settle into entrenched positions and take adversarial approaches, a tendency that is especially notable in the context of natural resource development.

25. Assistance and guidance by international human rights mechanisms and other external experts is essential in that regard. First, the international and other external actors can help provide guidance and a deeper understanding of the content of international human rights standards. The mandate of the Special Rapporteur can play, and already has played, a crucial role in that regard, as has the work of other international human rights mechanisms, including the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples, the United Nations treaty bodies and regional human rights mechanisms, and the work of the Secretariat. Second, beyond just engaging in thematic analysis and interpretation of particular rights, assistance from the international system and other experts can provide technical assistance, including mediation, to help States and indigenous peoples work through conflicts and disagreements where they arise. In this second area in particular, much more work can be done.

26. In situations in which agreement simply cannot be reached and decisions must be taken, recourse mechanisms must be available at the national and international levels. At the national level, domestic courts are intended to provide that oversight, although in some cases there is debate as to their effectiveness. At the international level, there are already various mechanisms for monitoring State compliance, including the treaty bodies, the Human Rights Council's universal periodic review process, regional human rights oversight mechanisms and the mandate of the Special Rapporteur on the rights of indigenous peoples. Of those mechanisms, only the Special Rapporteur's mandate focuses on monitoring how the rights of indigenous peoples in particular are respected, protected and fulfilled.

C. Unfulfilled need for reconciliation and redress for historical wrongs

27. Also presenting barriers to the full and effective realization of the rights of indigenous peoples are steps that have not yet been taken towards reconciliation with indigenous peoples and redress for past violations of human rights. Indigenous peoples around the world in the past have suffered gross and systematic violations of their human rights and those violations have ongoing consequences in the present day that continue to affect their human rights situation. In most countries in which indigenous peoples live, however, meaningful reconciliation efforts have yet to place. Without such efforts, it will be difficult for indigenous peoples to overcome their situations of extreme marginalization, and to ensure sustainable relationships based on trust, mutual respect and partnership, between indigenous peoples and the States within which they live.

28. There is no one path or fast track towards reconciliation, and the history and context in each country will necessarily make responses different. However, the process generally includes a first step of acknowledging a history of wrongdoing. In some countries, reconciliation efforts have included a formal apology to indigenous peoples for past wrongdoing or particularly egregious human rights violations. For example, in 2008 the Government of Australia issued a formal apology to aboriginal peoples, "for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss" and in particular for "the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country".² Similarly, in 2008 in Canada, the Government apologized to aboriginal peoples for its role in the Indian Residential Schools system, recognizing that "the absence of an apology has been an impediment to healing and reconciliation".³ Other States that have issued formal apologies are the United States with regard to historical suffering inflicted upon Native Americans;

Norway and Sweden, with respect to past treatment of the Sami peoples; and New Zealand, where formal apologies often form part of negotiated settlement agreements under the Treaty of Waitangi.

29. It is worth noting that the public nature of those apologies contributes to their efficacy. In a counter-example mentioned by the previous Special Rapporteur in his report on the situation of indigenous peoples in the United States (A/HRC/21/47/Add.1), although the Government made the important step in 2010 of issuing a formal apology to Native Americans which acknowledged widespread wrongdoing by the Government “strangely, the apology was buried deep in a defense appropriations act, and apparently few indigenous people, much less the public in general, were made aware of it” (ibid., para. 74). Public recognition is fundamental for numerous reasons, including providing recognition to indigenous victims, demonstrating a commitment on the part of the State to put an end to or remedy violations and educating the broader society about the history of mistreatment of indigenous peoples and the Government’s role in that regard.

30. Also essential to reconciliation are affirmative steps of redress to remedy the ongoing manifestations of harm. Throughout the United Nations Declaration on the Rights of Indigenous Peoples there are calls for “effective mechanisms” for redress in connection with a range of rights. Indeed, as noted by the previous Special Rapporteur in his first report to the Human Rights Council, the Declaration in its entirety can be understood as fundamentally a “remedial” instrument that “aims at repairing the ongoing consequences of the historical denial of the right to self-determination and other basic human rights affirmed in international instruments of general applicability” (A/HRC/9/9, para. 36). Specifically, redress is required for any action aimed at depriving indigenous peoples of their integrity as distinct peoples (art 8, para. 2 (a)); any action with the aim or effect of dispossessing them of their lands, territories or resources (art. 8, para. 2 (b)); any form of forced assimilation or integration (art. 8, para. 2 (d)); for the taking of their cultural, intellectual, religious or spiritual property (art 11); depriving them of their means of subsistence (art. 20, para. 2); as well as for the development, utilization or exploitation of their mineral, water or other resources (art. 32, para. 2).

31. Perhaps the clearest manifestation that redress is still needed for indigenous peoples around the world is their continued lack of access to and security over their traditional lands. In that regard, in article 28 of the Declaration, it is stated that “indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent” and that this compensation “shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress”. While advances have without a doubt been made over the past several decades in returning lands to indigenous peoples and protecting their existing land bases, more remains to be done nearly everywhere. There are, of course, a number of ways in which land restitution can and has taken place, including through executive decrees, judicial decisions or negotiated arrangements, although complications can arise, especially when competing private third party interests are involved.

32. Finally, meaningful reconciliation must also include steps to ensure the nonrecurrence of violations. This is essential for rebuilding trust and restoring confidence in the State and

indeed, it is difficult to envision true healing by indigenous peoples in an environment in which violations continue to occur. While States have gone a long way towards putting an end to the most egregious human rights violations against indigenous peoples, abuses are still occurring in all the countries in which they live. Current violations often present the most urgent issues that need addressing and are often the focus of attention of the international human rights system. However, addressing those violations does not take the place of the still much needed deeper reconciliation efforts that recognition and redress can provide.

33. The Special Rapporteur would like to point out that implementing all of the abovementioned measures does not necessarily guarantee that true reconciliation will occur. An essential component of the process also involves shifting attitudes on a personal and societal level, which the Special Rapporteur fully acknowledges is not an easy task. She discusses particular concerns in that regard in the following section. It should also be noted that, in 2014, the Expert Mechanism on the Rights of Indigenous Peoples continued its study entitled “Access to justice in the promotion and protection of the rights of indigenous peoples — restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities” (see A/HRC/EMRIP/2014/3/Rev.1), including a discussion on restorative justice and provides further comments on the issue.

D. Ongoing negative attitudes towards and distorted perceptions of indigenous peoples

34. Linked with reconciliation yet to be completed and preventing the full enjoyment of the rights of indigenous peoples are the ongoing negative perceptions of indigenous peoples among the broader societies in which they live, including within governments. As noted further below, the Special Rapporteur observes that there is a range of such attitudes towards indigenous peoples, from those that are outwardly prejudicial, to those that ignore or undervalue indigenous peoples’ distinct identities and ways of life, to those that fail to understand the reasons for protecting indigenous rights. One or more of those attitudes may be present at any time. Each has effects both on a State’s efforts to respond to indigenous peoples’ concerns and on indigenous peoples themselves, potentially resulting in negative self-image or the suppression of indigenous identities.

35. Ongoing discrimination against indigenous peoples has its roots in the perceived superiority of the colonial population and its descendants, perceptions that were historically accompanied by laws and policies aimed at suppressing or eliminating indigenous identity and assimilating indigenous peoples into the dominant culture. In many countries, constitutional provisions and laws contained expressly racist language and barred indigenous peoples from carrying out a range of their own activities, such as performing cultural and religious ceremonies, and from participating in the life of the State, such as through voting or owning land. Some of the most notorious examples of such policies were those that overtly aimed at eliminating or “breeding out” aboriginal identity by removing indigenous children from their families and communities and placing them in nonindigenous environments, and by forbidding them to speak their own languages or practise their cultural traditions.

36. Racist laws and policies of that kind have almost entirely been eliminated around the world and are no longer tolerated. However, it has to be noted that, to date, the legal frameworks in some countries continue to officially refer to indigenous peoples as primitive

tribal groups, subhumans or creatures. In most countries where indigenous peoples live, there have been many advances in furthering the rights of indigenous peoples, safeguarding their distinct cultures and ways of life and recognizing and combating the injustices that they still endure. Nevertheless, the laws and policies of the past have left in their wake continued discriminatory attitudes that distort perceptions of indigenous peoples and hinder their ability to thrive as distinct communities with their cultures, traditions and way of life intact. Those attitudes are evident at the individual, societal and institutional levels and can be perpetuated by public figures, the media and popular culture, everyday language and imagery, and even by children's schoolbooks.

37. One kind of negative attitude involves discrimination, prejudice and the stereotyping of indigenous peoples. This can take many different forms, including the perception that indigenous peoples' cultures and traditions are backward, primitive or underdeveloped, or that they suffer from widespread and entrenched social problems, such as alcoholism or violence against women. Such attitudes can be accompanied by the perception that indigenous peoples are incapable of managing their own affairs, or simply that the State can do it better, resulting in paternalistic laws and policies that limit or remove indigenous peoples' control over decisions relating to their own affairs, including their governmental or judicial systems.

38. Alternatively, indigenous peoples all but disappear from public awareness and discourse and are rendered invisible to the mainstream in the countries in which they live, their contributions to the history and the present-day social and cultural make-up of those countries unknown or not valued. This is especially evident in countries with a small number of indigenous peoples or where they live in rural and isolated areas and interaction with the mainstream society is minimal. Such invisibility hampers the ability of indigenous peoples to access national communications or the media, and to have their voices heard in decision-making centres, and can result in non-indigenous people speaking for them or making decisions on their behalf or in spite of them.

39. Other kinds of distorted views about indigenous peoples demonstrate a lack of understanding of why and how indigenous peoples' rights should be protected. Certainly, there are still many among the non-indigenous population who hold the view that indigenous peoples should just join the mainstream, or that they should "get over" their pasts and "move on". In that connection, indigenous peoples may be viewed as receiving special entitlements and privileges not enjoyed by the rest of the population, resulting in feelings of resentment among the broader society. Even if those views may not be outwardly pernicious, they can inhibit the development of differentiated rights protection and affirmative action measures that are needed for remedying ongoing situations of marginalization and ensuring that indigenous peoples can survive as distinct peoples.

40. Finally, the Special Rapporteur has also seen examples of indigenous peoples' interests being viewed as standing in opposition to those of the mainstream. This is especially true in the context of natural resource development. Rather than focusing attention on addressing the concerns raised by indigenous peoples in the context of specific projects, public figures and others instead portray indigenous peoples as "blocking" projects that could bring economic benefits to the country as a whole, or as having some ideological or categorical opposition to natural resource development. In those situations, rather than the interests of the State and the broader society being considered as encompassing indigenous peoples' interests, indigenous peoples are perceived as posing an impediment to national interests. Of

course, such perceptions add to a climate that is not conducive to governmental and public support for the promotion of the rights of indigenous peoples.

41. The United Nations Declaration on the Rights of Indigenous Peoples, in various articles, promotes as one of its central themes the elimination of discrimination against indigenous peoples. In particular, article 15 provides that “States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society”. Shifting attitudes and entrenched perceptions is no easy task, but it can be assisted to a great extent by increasing indigenous peoples’ participation in decision-making, through widespread education and awareness-raising programmes and, perhaps obviously, by governments themselves demonstrating a commitment to the implementation of indigenous peoples’ rights. The Special Rapporteur notes that the United Nations system can contribute to these efforts.

E. Social and economic conditions

42. The nearly universal disadvantageous social and economic conditions of indigenous peoples as compared to the majority of the population in the societies in which they live present barriers to the full exercise of their human rights. Unless indigenous peoples enjoy certain minimum conditions of well-being, they will be unable to truly thrive with their rights intact. According to many different indicators, indigenous peoples fare worse than their non-indigenous counterparts in terms of their development, including with regard to levels of poverty, education, health, unemployment, housing conditions, clean water and sanitation.

43. Certainly, a number of countries in which indigenous peoples live face enormous developmental challenges and indigenous peoples may be one group among many within country that experiences difficulties in that regard. Nevertheless, indigenous peoples face distinct challenges, and measures to address social and economic disparities must be differentiated from measures targeting other disadvantaged groups.

44. First of all, it is necessary to understand the linkages between indigenous peoples’ current disadvantaged situations and their history of being denied self-determination land and resource rights, and related rights essential to their economic and social development. In fact, development around the world has historically taken place and still takes place today at the expense of indigenous peoples; it has often been the case that indigenous peoples’ lands and resources have been taken, to their detriment and to the benefit of the development of others. Responses aimed at bettering the social and economic situation of indigenous peoples must take that history into account and attempt to restore to indigenous peoples what has been lost, including sufficient land to ensure a basis for economic development, and the means to exercise their self-determination over their development. Indeed, numerous studies have shown that increasing indigenous peoples’ control over their internal decision-making results in better economic growth outcomes.

45. An additional factor is that indigenous peoples often live in rural and isolated areas, which complicates the delivery of programmes and services designed to respond to their social and economic concerns. This, of course, is not an issue that can or should be resolved by moving indigenous peoples to urban areas as some countries have attempted to do, which could result in a violation of a number of their human rights. Rather, measures must be put in

place to ensure that indigenous peoples can enjoy the same social and economic rights as other segments of the population, without having to sacrifice important aspects of their cultures and ways of life, which include their attachment to their traditional lands.

46. Furthermore, given their unique cultures and ways of life, it must also be noted that social and economic development for indigenous peoples may be different than for other sectors of the population. Responses aimed at addressing ongoing problems must take into account special factors, including indigenous peoples' languages, traditions and ways of doing things. This is fundamental to the success of any relevant measures. One way to ensure the accommodation of indigenous peoples' cultures is by including them in the design and development of programming. In that connection, throughout the United Nations Declaration on the Rights of Indigenous Peoples, reference is made to the need for indigenous peoples to develop their own priorities for development and to be consulted and included in the process of crafting State programmes.