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**Promotion and protection of all human rights, civil,
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including the right to development**

Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples

Note by the Secretariat

The present report is submitted to the Human Rights Council by the Special Rapporteur on the rights of indigenous peoples pursuant to her mandate under Council resolution 33/12. The report contains brief reference to the activities of the Special Rapporteur since the submission of her last report and provides a thematic study on attacks against and the criminalisation of indigenous human rights defenders and reflects on available prevention and protection measures. The report concludes with recommendations on how various stakeholders can prevent violations and improve protection.

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I. Introduction

1. The present report is submitted to the Human Rights Council by the Special Rapporteur on the rights of indigenous peoples pursuant to her mandate under Council resolution 33/12. The report contains brief reference to the activities of the Special Rapporteur on the rights of indigenous peoples since the submission of her last report and provides a thematic study on attacks against and the criminalisation of indigenous human rights defenders and reflects on available prevention and protection measures.

II. Activities of the Special Rapporteur

2. Since she presented her last report to the Council, the Special Rapporteur has carried out two official country visits: to Mexico from 8 to 17 November 2017 (A/HRC/39/17/Add.2) and to Guatemala from 1 to 10 May 2018 (A/HRC/39/17/Add.3).

3. A more detailed description of activities is contained in the Special Rapporteur's report to the General Assembly (add doc report no). It highlights recent thematic work on indigenous peoples' right to self-governance; consultation and free, prior and informed consent; indigenous peoples in isolation and initial contact; country visits, communications and other activities.

III. Attacks and criminalisation of indigenous peoples defending their rights

A. Introduction

4. The Special Rapporteur on the rights of indigenous peoples is gravely concerned over the drastic increase in attacks and acts of violence, criminalisation and threats against indigenous peoples, particularly those arising in the context of large-scale projects involving extractive industries, agribusiness, infrastructures, hydroelectric dams and logging. These violations are occurring in the context of intensified competition and exploitation of natural resources, as observed during country visits and through the increasing number of related allegations. In several countries, increased militarisation adds to threats against indigenous peoples. The Special Rapporteur has therefore decided to elaborate a thematic report to draw attention to the escalation of these concerns.

5. The focus of this report is on the distinctive characteristics of attacks against and the criminalisation of indigenous peoples defending their rights under the United Nations Declaration on the rights of indigenous peoples and under human rights treaties, with emphasis on violations occurring in the context of development projects. The report considers the collective and individual impact on indigenous peoples and assess the effectiveness of prevention and protective measures, including the identification of good practices and prevailing challenges with regards to protective measures for indigenous peoples. The Special Rapporteur notes that indigenous peoples are subjected to criminalisation in a range of contexts, including structural racism and discrimination, areas which may be subject to future analysis and reports.

6. In accordance with her mandate, the Special Rapporteur has continuously addressed concerns over indigenous leaders and members of indigenous communities, and those who seek to defend their rights, who are subject to undue criminal prosecution and other acts, such as direct attacks, killings, threats, intimidation, harassment, and other forms of

violence, in her country reports, communications to Governments, press releases and other public statements.

7. Concerns have also been raised by other UN human rights mechanisms, including other special procedures and human rights treaty bodies. The Special Rapporteur on the situation of human rights defenders has documented acts of violence, stigmatisation and criminalisation against persons engaged in the defense of environmental and land rights, which in many cases include indigenous leaders and community members.¹ While several reports in recent years have referred to the situation of criminalisation and the risks environmental human rights defenders face, these reports have not specifically addressed these concerns through the optic of indigenous peoples' rights nor focused on the collective impact on indigenous communities,² a lacuna this report seeks to complement.

B. Methodology

8. In preparation of this report the Special Rapporteur drew from both primary and secondary sources. Information received first-hand during country visits as well as communications³ sent by the mandate on alleged violations have informed this report.

9. In order to consult a broad range of actors, the Special Rapporteur launched a public call for inputs on the subject of attacks and criminalisation of indigenous peoples, their collective impact on communities and on the prevention and protection measures available. In response, over 70 written submissions were received, primarily from indigenous and human rights organisations from various regions, the majority of the submissions originating from Latin America. The report also draws on a review of the wealth of reports on related aspects of the subject issued by civil society, human rights mechanisms, including regional human rights systems, and independent national human rights institutions.

10. Furthermore, the Special Rapporteur on the rights of indigenous peoples convened a two-day expert consultation in Geneva on 19 and 20 March 2018 on the issue of criminalisation and attacks faced by indigenous peoples who seek to defend and assert their rights. The consultation provided a space for dialogue between representatives of indigenous peoples, civil society organisation and human rights mechanisms to address the particular risks faced by indigenous peoples, their causes and consequences as well as courses of action for improving the protection of indigenous peoples. In addition, a consultation meeting with indigenous representatives took places on the side-lines of the Permanent Forum on indigenous issues in April 2018.

IV. Normative framework

11. An understanding of the nature of indigenous peoples' rights is necessary in the discussion of the measures required to provide access to justice and reparations and other human rights guarantees in the context of indigenous peoples facing attacks, criminalisation and other acts as a consequence of their efforts to assert and defend their rights.

¹ Special Rapporteur on the situation of human rights defenders, Report to the GA on environmental defenders, A/71/281 (2016)

² Ibid. ; Inter-American Commission on Human Rights, Report on the criminalization of human rights defenders, OEA/Ser.L/V/II.Doc.49/15 (2015)

³ All communications sent by the mandate can be searched at; <https://spcommreports.ohchr.org/>

12. Attacks and criminalisation impact on a wide range of human rights. The causes and impacts of the criminalisation and violence against indigenous peoples must be understood and addressed from the particular framework of the United Nations Declaration on the rights of indigenous peoples and international and regional human rights instruments. These international legal sources recognise indigenous peoples' rights to self-determination, to their traditional lands, territories and natural resources, self-government, cultures and ways of life. For indigenous peoples, these and other human rights are mostly enjoyed collectively and reflect the special relationship with their traditional lands, territories and natural resources which form the basis of their collective identity and their physical, economic and cultural survival.

13. The State's responsibility to protect the right to life, liberty and security of person is enshrined in article 3 of the Universal Declaration of Human Rights, in articles 6 (1) and 9 (1) of the International Covenant on Civil and Political Rights (ICCPR) and in article 7 of the United Nations Declaration on the Rights of Indigenous Peoples. Both negative and positive aspects are included: on the one hand, States must refrain from violating the rights of human rights defenders; on the other hand, they should act with due diligence to prevent and investigate human rights violations and bring the perpetrators to justice. Of relevance is also article 30 of the United Nations Declaration on the Rights of Indigenous Peoples, which affirms that military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

14. Article 9 of the ICCPR sets out the guarantees that no one shall be subjected to arbitrary arrest or detention and that no one shall be deprived of his liberty except on grounds established by law. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for their arrest and brought promptly before a judge and tried within a reasonable time or released. It shall not be the general rule that persons awaiting trial shall be detained in custody.

15. The right to due process and a fair trial enshrined in article 14 of the ICCPR enshrines that all persons are equal before the courts, are entitled to a fair and public hearing by a competent, independent and impartial tribunal and have the right to be presumed innocent until proved guilty. Everyone has the right to be tried without undue delay, to free legal counsel and free assistance of an interpreter if he or she cannot understand the language used in court. United Nations Declaration on the Rights of Indigenous Peoples sets out (article 13) that States shall take effective measures to ensure that the right to indigenous languages is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation. The International Labour Organisation Convention on Indigenous and Tribal Peoples No. 169 specifies in article 10 that preference should be given to sanctions other than imprisonment when criminal sanctions are imposed on members of indigenous peoples.

16. Self-determination is an overarching right of utmost importance for indigenous peoples as it affirms their right to freely pursue their economic, social and cultural development. The right to self-determination is enshrined in common article 1 of the International Covenant on Economic, Social and Cultural Rights and the ICCPR and in article 3 of the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration on Human Rights Defenders recognises the legitimacy of the defense of land rights by acknowledging the 'valuable work' of human rights defenders in the elimination of violations, including those resulting from 'the refusal to recognize the right of peoples to

self-determination and the right of every people to exercise full sovereignty over its wealth and natural resources'.⁴

17. The failure to ensure land rights constitutes the core underlying cause for violations of indigenous peoples' rights. The United Nations Declaration on the Rights of Indigenous Peoples affirms the right of indigenous peoples to own and control their lands and territories in articles 25, 26, 27 and 32 while the International Labour Organization Convention on Indigenous and Tribal Peoples No. 169 enshrines territorial rights for indigenous peoples in articles 14 to 19.

18. The right to development is affirmed in several provisions of the Declaration on the Rights of Indigenous Peoples, notably in article 32, which sets out that indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. The Declaration furthermore affirms that States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to adopting and implementing legislative or administrative measures that may affect them and their free and informed consent should also be obtained prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (articles 27 and 32). In its jurisprudence, the Human Rights Committee has underlined that indigenous peoples' right to participate goes beyond consultation: 'participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community'.⁵

19. The rights to peaceful assembly and to freedom of association are set out in articles 21 and 22 of the ICCPR while the right to participation in the conduct of public affairs and decision-making is enshrined in article 25. The Declaration on the rights of indigenous peoples furthermore affirms that indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions (arts. 5, 18, 20, 27 and 34).

20. The provision of and access to information are prerequisite elements in order to ensure that indigenous peoples can participate in consultation processes. Article 19(2) of the ICCPR guarantees the right to 'seek, receive and impart information' as part of the right to freedom of expression.

21. Before consultations can be carried out in relation to any proposed projects, States must ensure that human rights and environmental impact assessments has been undertaken. Binding legal obligations in this regard exist in the Convention on Biological Diversity (article 14.1.a) which requires States to undertake 'environmental impact assessment of proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and allow for public participation in such procedures'. The United Nations Framework on Climate Change (article 4. 1. f) similarly affirms the obligation that States employ impact assessments of projects or measures undertaken by them to mitigate or adapt to climate change, with a view to minimizing adverse effects on public health and on the quality of the environment. Both these treaties have next to universal adherence with 196 and 197 States Parties, respectively.

⁴ A/RES/53/144, preamble

⁵ *Poma Poma v Peru*, CCPR/C/95/D/1457/2006, para. 7.6

22. In 1992, the Rio Declaration set out in Principle 10 that everyone shall have access to information, including on activities in their communities, that States shall facilitate the opportunity to participate in the decision-making process and effective access to justice, including redress and remedy in environmental matters, shall be provided. The United Nations Environment Programme has underlined that the importance of these ‘access rights’ in promoting transparent, inclusive and accountable environmental governance’.⁶

23. The Special Rapporteur on human rights and the environment has emphasised that in order to protect human rights, assessments of environmental impacts should also examine the possible impacts of proposed projects and policies on the enjoyment of all relevant rights, including the rights to life, health, food, water, housing and culture. Such assessments should provide meaningful opportunities for the public to participate, should consider alternatives to the proposal, and should address all potential environmental impacts, including transboundary effects and cumulative effects that may occur as a result of the interaction of the proposal with other activities; the assessment should result in a written report that clearly describes the impacts; and the assessment and the final decision should be subject to review by an independent body.⁷ For indigenous peoples, this obligation requires that the information contained in the human rights impact assessment be available in their languages and in a culturally appropriate form.

24. The State’s obligation to provide an effective remedy for human rights violations is enshrined in article 2 (3) (a) of the ICCPR. This requires that perpetrators are brought to justice and that victims be provided with reparation⁸. The United Nations Declaration on the Rights of Indigenous Peoples (article 40) affirms that indigenous peoples have the right to access to and to prompt decisions through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such decisions shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and to international human rights.

25. Furthermore, article 8 of the United Nations Declaration on the Rights of Indigenous Peoples sets out the right to effective mechanisms for prevention of, and redress for, actions which have the aim or effect of dispossessing indigenous peoples of their lands, territories or resources. The Declaration (article 10) stipulates that indigenous peoples shall not be forcibly removed from their lands unless they have provided their free, prior and informed consent. Should violations have occurred, victims have the right to fair redress, including restitution and compensation, and, where possible, the option of returning to their lands. When this is not possible, they are entitled to 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. 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 (article 28 of the Declaration).

26. Transnational corporations and other business enterprises should respect human rights, as set out in the Guiding Principles on Business and Human Rights. The Guiding Principles aim to implement the United Nations “Protect, Respect and Remedy” Framework, which rests on three pillars: the State duty to protect against human rights abuses by third parties, including businesses; the corporate responsibility to respect human

⁶ <https://www.unenvironment.org/news-and-stories/story/unep-implementing-principle-10-rio-declaration>

⁷ Special Rapporteur on human rights and the environment, Report to the HRC on framework principles on human rights and the environment, A/HRC/37/59 (2018)

⁸ Human Rights Committee, General Comment No. 31 (2004)

rights; and the need for access to an effective remedy for victims of business-related human rights abuses.⁹ The Guiding Principles (article 18) require that business enterprises identify and assess any actual or potential adverse human rights impacts through meaningful consultation with potentially affected groups, as an integral part of their responsibility to respect human rights.

V. Root causes and drivers behind attacks and criminalisation

27. The intensified competition over natural resources led by private companies, at times with Government complicity, has placed indigenous communities seeking to protect their traditional lands at the forefront as targets of persecution.

28. As documented by the Special Rapporteur on the rights of indigenous peoples, instances of criminalisation and violence arise, in most cases, in the context of indigenous leaders and community members voicing opposition to large projects relating to extractive industries, agribusiness, infrastructures, hydroelectric dams and logging. In other instances, indigenous peoples' ways of life and subsistence are deemed illegal or incompatible with conservation policies, leading to the prohibition of indigenous traditional livelihoods and the arrest, detention, forced evictions and other human rights violations against indigenous peoples. This topic was explored in her report to the General Assembly in 2016.¹⁰ An additional emerging concern is the rush to undertake climate change adaption and mitigation which, unless they build in human rights safe guards, risk undermining the rights of indigenous peoples, an issue the Special Rapporteur explored in her report to the Human Rights Council last year.¹¹

29. Since she assumed her mandate, the Special Rapporteur has witnessed a number of large-scale projects first-hand, including during official country visits to Brazil, Guatemala, Honduras, Mexico, the United States of America and the Sapmi.¹² She has heard numerous testimonies and continuously receives information, as part of her mandate to address communications on alleged human rights violations, indicating the devastating impacts that certain projects have on indigenous peoples, resulting in serious negative impacts on their systems of government, social cohesion, livelihoods, environment, health, and rights to food and water.

30. A crucial underlying cause of the current intensified attacks is the lack of respect for indigenous peoples' collective land rights and the failure to provide indigenous communities with secure land tenure, as this in turn undermines their ability to effectively defend their lands, territories and resources from the damage caused by large-scale projects. This is a concern that has been raised by the respective Special Rapporteurs on the rights of indigenous peoples since the creation of the mandate in 2001. However, the urgency to address this situation in view of the rapidly expanding encroachment by large-scale projects is taking on a new dimension. Meanwhile, the important contribution indigenous peoples can make in terms of ensuring better conservation and climate change adaption and

⁹ A/HRC/17/31, para. 6

¹⁰ Special Rapporteur on the rights of indigenous peoples, Report to the GA on conservation and indigenous peoples' rights, A/71/229 (2016)

¹¹ Special Rapporteur on the rights of indigenous peoples, Report to the HRC on climate change and climate change funds, A/HRC/36/46 (2017)

¹² Reports of the Special Rapporteur on the rights of indigenous peoples to the HRC on her country visits to Sapmi A/HRC/33/42/Add.3 (2015); Honduras, A/HRC/33/42/Add.2 (2016); Brazil, A/HRC/33/42/Add.1 (2016); USA, A/HRC/36/46/Add.1 (2017); Mexico, A/HRC/39/17/Add.2 (2017); Guatemala A/HRC/39/17/Add. 3 (2018), respectively

mitigation strategies, addressed in recent mandate reports,¹³ cannot reach full potential if indigenous peoples' land rights are still being contested.

31. While some countries have adopted legislation in favour of indigenous collective land rights, challenges still remain in ascertaining these in practice. Commonly, legislation pertaining to for example forestry, mining and the energy sector is not harmonised with indigenous peoples' territorial rights and these rights are disregarded to the benefit of commercial interests.

32. Disregard of indigenous rights of traditional lands ownership breeds tensions, subsequent violence and criminalisation, as indigenous peoples become trespassers or illegal occupants of their own lands, subject to criminal charges such as 'usurpation' or illegal occupation, and liable to forced evictions and removal from the lands they rely upon for their livelihoods, social and cultural cohesion and spiritual traditions. In the worst instances, escalating militarisation compounded by historical marginalisation results in indigenous peoples being targeted under national security acts and anti-terrorism legislation, putting them in the line of fire, at times literally, by the army and the police.¹⁴

33. The priority of indigenous peoples is the protection of their traditional lands, territories and natural resources. Indigenous peoples question a purely commercial development model which disregards their rights and causes irreparable harm to the environment and the natural resources that they depend on for their survival.

34. The Special Rapporteur is particularly concerned over the rapid increase of such projects, commonly funded through international and bilateral investment agreements, as the financial gains primarily benefit foreign investors who have little or no regard for the rights of local indigenous communities and environmental protection. All too often, these projects leave affected indigenous peoples further marginalised and entrenched in poverty as their natural resources are destroyed. Furthermore, the legal construct of projects funded through investments agreements is generally designed to exclude possibilities for affected communities to seek remedies and redress.¹⁵

35. The escalation of attacks against indigenous peoples is occurring in the context of a skewed power structure whereby private companies yield significant influence over States and ensure that regulations, policies and investment agreements are tailored to promote the profitability of their business. The complexity of corporate structures in the global economy represents a further challenge as intricate and opaque layers of ownership obstruct access to information and efforts to hold the private sector accountability for human rights due diligence.

36. The Special Rapporteur is gravely concerned at the global pattern of persistent disregard of the rights of indigenous peoples who are voicing concerns because of the negative impacts development projects are having on their lands. Such projects are frequently undertaken without consulting with the indigenous peoples concerned nor is their free, prior and informed consent sought. When measures have been undertaken to consult with indigenous peoples, such processes have often been culturally inadequate, lacked good faith and primarily been driven by an incentive to rubberstamp already elaborated projects with no intention of allow for genuine review or participation in their

¹³ A/71/229, A/HRC/36/46

¹⁴ A/HRC/24/41/Add.3

¹⁵ Special Rapporteur on the rights of indigenous peoples, Report to the GA on international investment agreements and investment clauses of free trade regimes, A/70/301 (2015); Special Rapporteur on the rights of indigenous peoples, Report to the HRC on international investment agreements and investor-State dispute settlements, A/HRC/33/42 (2016)

design and execution. All too often, such so-called consultations have created divisions and undermined indigenous decision making institutions.

37. The Special Rapporteur on human rights defenders has alerted that the lack of information and transparency and opaque decision-making are not only major flaws in the implementation of large-scale development projects, but also lead to the disempowerment and vulnerability of defenders and affected communities, and seriously undermine the credibility and legitimacy of both State and non-State actors involved in the projects.¹⁶

38. Indigenous peoples are increasingly challenging such projects through social mobilisation and through legal avenues. In retaliation for advocating for the protection of their lands, indigenous peoples are being accused of being ‘obstacles to development’ and of ‘acting against national interests’. Indigenous leaders and communities seeking to raise their concerns over the negative impacts of projects on their rights, livelihoods and the environment have been targeted in violent attacks. They have been killed, forcibly displaced, threatened and intimidated and subject to insidious harassment by criminal charges which often are nebulous, grossly inflated or fictitious. The aim of these attacks, whether violent or legal, is to silence any opposition by indigenous peoples to business interests and to prevent indigenous peoples from exercising their rights.

39. Even when indigenous peoples have managed to successfully challenge projects in court and when injunctions have been ordered, still companies plough ahead with projects in disregard with judicial orders to suspend projects. The Special Rapporteur is furthermore deeply concerned that in recent judgments, there have been incidents when high courts have ordered consultations to take place post-facto the initiation of large-scale projects, as attempts to seek to justify compliance with international norms a posteriori. This is not in accordance with international standards on consultation and consent.¹⁷

VI. A global crisis unfolding

40. Recent studies by the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on human rights and the environment have raised alerts over ‘a global crisis’ of attacks against environmental human rights defenders, highlighting that many of these defenders are members of indigenous communities.¹⁸

41. One report on human rights defenders killed worldwide in 2017, documents the murder of 312 defenders in 27 countries and indicates that 67 per cent of the persons killed were engaged in the defence of land, environmental and indigenous peoples’ rights and nearly always in the context of mega projects, extractive industry and big business. Around 80 per cent of the killings took place in just four countries: Brazil, Colombia, Mexico and the Philippines.¹⁹ Another source documented 200 killings across 24 countries in 2016 of people defending their land, forests and rivers against destructive industries. The study concluded that almost 40 per cent murdered were indigenous and that Latin America accounted for more than 60% of the killings.²⁰

¹⁶ Special Rapporteur on human rights defenders, A/68/262 (2013)

¹⁷ Country visit report Guatemala, A/HRC/39/17/Add. 3 , para. 37.

¹⁸ Special Rapporteur on the situation of human rights defenders, A/71/281 (2016); Special Rapporteur on human rights and the environment, *Policy brief on environmental human rights defenders, a global crisis* (2017)

¹⁹ Front Line Defenders, *Annual Report 2017* (2018)

²⁰ Global Witness, *Defenders of the Earth Report* (2017)

42. The Special Rapporteur has observed the disconcerting escalation of violent attacks through her mandate to issuing communications and undertake fact-finding country visits. While the vulnerability of indigenous peoples to attacks while seeking to defend their lands has been a long-standing concern of the mandate, the drastic escalation of such acts in recent years is of grave concern. The Special Rapporteur has recorded a significant and rising number of such attacks with particular frequency in Brazil, Colombia, Ecuador, Guatemala, Honduras, India, Kenya, Mexico, Peru and the Philippines. This is not an exclusive list, however the same countries have been identified by other human rights mechanisms and civil society organisations that monitor attacks against indigenous peoples, so there are consistent indications that these countries represent particularly worrying situations where authorities have repeatedly been urged to take action to improve the protection of indigenous peoples, yet failed to do so.

43. The situations in the above countries as particularly worrisome, however there are also patterns of concern in other countries, and it should also be emphasised that the reported cases on attacks do not provide the full picture as the ability to report cases is impacted by several factors. Among these are remoteness of indigenous communities, access to means of communications, linguistic diversity, and lack of recognition of indigenous peoples as such.. The strength of the national human rights civil society and to what extent local human rights organisations liaise with indigenous organisations are factors which play into whether the attacks are reported on. It must be presumed that in large parts of the world, a significant number of attacks against indigenous defenders go unreported and never figure in the media.

44. While the killing of indigenous defenders represents the apex violation, such attacks tend to occur in the context of violence and threats to them and their communities, including enforced disappearances, forced evictions, judicial harassment, arbitrary arrests and detention, limitations to the freedom of expression and freedom of assembly, stigmatization, surveillance, travel bans and sexual harassment.

45. Although some global data estimates exist on defenders who have been killed, there is no such information available on the extent to which judicial harassment and criminal charges are levied against indigenous peoples. The criminalisation of indigenous peoples occurs in a variety of contexts and using a multitude of penal provisions. Commonly, criminal charges are presented against indigenous peoples who oppose large-scale projects and seek to inform and organise their communities, demanding access to information and that their right to participate in consultations and free, prior informed consent be obtained. Leaders are targeted as a strategy to suppress and silence the entire community.

46. Several situations where private entities have provided false information or filed unsubstantiated allegations against defenders have been brought to the attention of the Special Rapporteur. Reports indicate that judges and prosecutors have contributed to the misuse of criminal law by accepting false testimony, issuing warrants without sufficient evidence, allowing unfounded prosecutions to advance, and by improperly interpreting the law to incriminate indigenous defenders. While legislators may not be directly involved in criminalisation, they contribute through the adoption of laws that unduly punish expressions of rights such as freedom of expression and assembly or pass legislation that includes vague definitions of criminal offenses, including serious offenses such as terrorism.²¹ The Inter-American Court of Human Rights has raised concerns over biases and

²¹ Inter-American Commission on Human Rights, *Criminalisation of the work of human rights defenders*, (2015), paras. 57, 63-71

stereotypes in the reasoning in national jurisprudence regarding prosecutions of indigenous peoples under anti-terrorist legislation in the case of the Mapuche people in Chile.²²

47. Prior to the presentation of criminal charges, defamation and smear campaigns are often directed through social media against indigenous peoples, their leaders and communities, accusing them of being anti-development and acting against the national interest. Hate speech based on racism and discrimination fuels such discourse. In the worst cases, social media portrays indigenous peoples as members of criminal gangs, guerrillas, terrorists and threats against national security. Defamation campaigns are often developed by business actors²³, with overt or covert support of corrupt government officials, whose financial interests are affected by indigenous peoples' defense of their lands.

48. In presenting criminal charges, multiple broad and ill-defined charges are often levied. Examples of such charges include 'trespassing', 'usurpation', 'conspiracy', 'kidnapping', 'coercion', 'perturbation of public order' and 'instigation of crime'. In several countries a crime of 'aggravated usurpation' is commonly applied to indigenous land rights defenders, it is considered a crime 'in flagrante', which implies restrictions on the right to defense guaranteed in international human rights standards. Instances of 'states of emergency' being declared in order to suspend judicial guarantees and to justify the suppression of peaceful social protests have also been widely reported.²⁴

49. At times, arrest warrants are issued for charges on the basis of poor evidentiary standards and uncorroborated witness testimonies and lack clear links between the charges and the alleged acts. At times, the accusations fail to specify individual responsibility for the alleged acts, for example when arrest warrants are issued for several community members, accusing them all to be responsible for a single criminal act, such as a murder, without referring to their individual role, which in turn would appear to be a form of collective punishment against the whole community concerned. In some instances, arrests warrants are deliberately not executed but left pending, leaving the indigenous person affected under a perpetual threat of being arrested when deemed convenient for the authorities.

50. Procedural guarantees are frequently flaunted and indigenous peoples are particularly disadvantaged as they may not have the means to seek legal counsel. They are unlikely to be in a position to demand the assistance of an interpreter as in most countries where indigenous languages are spoken, there is little or no availability of such interpretation within the judicial system, nor do ordinary justice systems give much if any consideration to the customs, traditions and legal systems of indigenous peoples. The prosecution of indigenous individuals is characterised by prolonged periods of pre-trial detention, at times lasting several years, especially in the case of indigenous leaders. The strategic objective is disarticulation of their voice. Even if acquitted, indigenous individuals are rarely awarded remedies.

51. Indigenous institutions and organisations have also been subject to illegal surveillance, registers and confiscations under various pretexts, such as the control of foreign donor funding. Laws imposing registration requirements and the control of funding to certain organisations weaken the mobilisation of indigenous communities and restrict the support they receive from civil society organisations. The strategy of silencing indigenous communities often extends to civil society organisations and lawyers who seek to assist

²² Inter-American Court of Human Rights, *Case of Norín Catrimán and others v. Chile*, Judgment of 29 May 2014, para. 228

²³ Country visit report Mexico, A/HRC/39/17/Add.2, para. 67

²⁴ Article 19, *Deadly Shade of Green Report* (2016), p. 40; *Protection International, Criminalisation of Human Rights Defenders Report* (2015), pp. 23-24

them. Such incidents have resulted in lawyers who represent indigenous communities in litigation being physically attacked and even victims of extra-judicial executions.

52. The administrative and legal challenges that indigenous peoples face in such situations requires specific and targeted support from civil society and the international community, different than the supported they need when they have been victims of threats or physical attacks. Criminalisation raises sensitivities for the international community, which does not want to be seen to be interfering in domestic legal processes. However, when supporting companies or governments engaging in these practices, international actors such as multilateral development banks, development financial institutions, or funds such as the Green Climate Fund, risk contributing to and exacerbating criminalisation.

53. In the preparation of this report, the Special Rapporteur received information about hundreds of situations of attacks and criminalisation taking place in many parts of the world. In order to highlight the overall deteriorating situation, this report will illustrate with some recent examples, while emphasizing that these are not meant to be an exhaustive description as they regrettably only represent a limited snap-shot of the unfolding crisis. They do however give some insights into the current state of affairs.

54. The Special Rapporteur was particularly disturbed to observe the dire situation of indigenous defenders in Guatemala during her most recent official country visit in May 2018. A staggering seven indigenous leaders were killed during and shortly after her visit. They were killed in different locations by different means, among the seven, some were shot in the head and in the back while others were stabbed in the throat and their bodies mutilated by machetes. All were representatives of two indigenous farmers' organisations advocating for land rights and political participation. The killings took place in a broader national context of pernicious closing of spaces for civil society. The President of Guatemala has been publicly hostile to human rights organisations, draft legislation in Parliament seeks to restrict the work of non-governmental organisations²⁵ and social media, driven by private actors, stigmatises indigenous peoples defending their rights, labelling them as 'criminals' and 'terrorists' who are 'anti-development'.²⁶

55. Added to this context is the escalating number of criminal charges, reportedly in the hundreds, being filed in Guatemala against indigenous leaders and community members. The active participation of private entities in pressing charges signals the collusion between prosecutors and judges with companies and landowners in some of these cases. While in Guatemala, the Special Rapporteur visited several indigenous leaders in prison in retaliation for their land rights advocacy and attempts to litigate against large-scale projects on their territories. Arrest warrants have been issued for vague charges and in some instances on the basis of uncorroborated witness testimonies. The repeated suspension of hearings and the long periods of preventive detention violate fair trials guarantees.²⁷

56. In Kenya, the mandate of the Special Rapporteur has long-standing concerns over the situation of several indigenous peoples, including the Sengwer, Ogiek and Maasai, in particular in relation to conservation and climate change projects. In the past two years, there has been an escalation of violence in the Embobut forest where the Kenya Forest Service has repeatedly evicted and burnt Sengwer homes as well as arrested community members.²⁸ These acts have taken place despite that the Sengwer are in litigation challenging the evictions and an injunctive court order has been issued to preventing such evictions in the interim. Several Sengwer have been shot by the Kenya Forest Service,

²⁵ OHCHR and Inter-American Commission on Human Rights, Joint press statement, 27 June 2018

²⁶ Country visit report Guatemala, A/HRC/39/17/Add.3, paras. 54, 58

²⁷ Ibid. paras. 52-58

²⁸ KEN 1/2017, KEN 7/2017

including one Sengwer herder who was killed in January 2018. The European Commission has funded a climate change project in the area, with the Kenya Forest Services among the recipients of funding. The Special Rapporteur on the rights of indigenous peoples made a public call for the project to ensure respect for human rights and within days, the European Commission decided to suspend the climate change project pending an assessment of its human rights compliance.²⁹

57. In the Philippines, indigenous peoples are stigmatised and suspected of being members of the communist New People's Army and have been subjected to attacks, forced displacement, arbitrary arrests and threats. Militarisation has rapidly escalated in recent years and the number of extra-judicial executions has increased dramatically. Indigenous Lumad communities in Mindanao have been particularly targeted.³⁰

58. In retaliation for having raised concerns over the escalating violence, in February 2018 the Special Rapporteur was herself, together with 30 other known advocates for indigenous peoples rights and some 600 people in total, included in a petition submitted by the Department of Justice seeking that a Manila Court declare the Communist Party of the Philippines and the New People's Army (CPP-NPA) as terrorist and outlawed organizations. The petition claims that the named individuals are known officers and members of CPP-NPA. The Special Rapporteur rejects these accusations as baseless and irresponsible. The stigmatisation and defamation of human rights defenders jeopardise their security. The Special Rapporteur wishes to appreciate the expressions of support and solidarity that she has received³¹ and urges the international community to continue to monitor the situation and safety of human rights defenders in the Philippines.

59. In Colombia, most killings of human rights defenders are taking place in rural areas where the FARC-EP was historically present and indigenous peoples are among the most affected.³² There is a persistent stigma of associating indigenous peoples with guerillas. Since the signing of the peace agreements with the FARC-EP in 2016, some 50 indigenous leaders have been killed. Furthermore, the continued presence of the ELN and the increasing threats and attacks from former paramilitary groups aggravates the situation. The Human Rights Ombudsman continues to raise early warning alerts over attacks and threats against indigenous peoples in various regions and the Constitutional Court has alerted about a number of indigenous peoples in the country at risk of extinction.³³ The Special Rapporteur has sent several communications on the killings of indigenous leaders by armed groups³⁴ and over arbitrary detention, prosecutions and the excessive use of force by government forces against indigenous protesters.³⁵

60. Brazil is by far the most dangerous country in the world for indigenous human rights defenders. During the Special Rapporteur's country visit to Brazil in 2016, community members in Mato Grosso do Sul showed her bullet wounds on their bodies and showed

²⁹ KEN 1/2018; OTH 1/2018; Press release

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22584&LangID=E>

³⁰ PHL 2/2018, PHL 16/2017, PHL 8/2017, PHL 4/2015

³¹ Including from the Special Rapporteur on human rights defenders

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22783&LangID=E> ; also from the International Union for the Conservation of Nature, UNEP, the Saami Council, the European Parliament, the Permanent Forum on Indigenous Issues, the CERD Committee , UNREDD, EMRIP, the Center for International Environmental Law, Amnesty International, Frontline Defenders and others

³² Annual OHCHR Report on Colombia, A/HRC/37/3/Add.3, paras. 8-11

³³ <http://www.defensoria.gov.co/>; Constitutional Court Auto 004 de 2009

³⁴ COL 7/2016, COL 1/2014

³⁵ COL 6/2016

places where family members had been killed. They also recounted incidents of arbitrary arrests, torture and criminalisation of their leaders. Both Government and civil society organisations working with indigenous peoples provided her with disturbing accounts of a regular pattern of threats and intimidation by State and private actors.³⁶ Impunity is pervasive in relation to attacks, killings and intimidation of indigenous peoples and frequently arise in contexts where indigenous peoples attempt to assert their rights over their lands and go hand in hand with the criminalisation of indigenous leaders.

61. The Special Rapporteur observed during her visit to Honduras in 2015 that criminalisation frequently occurs in the context of peaceful protests against logging, mining or hydroelectric projects. Indigenous leaders have been tried for offences such as ‘appropriation of land’ and ‘damage to private property’, among others.³⁷ While in Honduras, the Special Rapporteur met with Berta Cáceres, who was subsequently killed due to her opposition to the Agua Zarca dam. Other indigenous Lenca defenders have also been attacked and killed.

62. The Special Rapporteur has, together with other special procedures, sent several communications on the situation both to the Government of Honduras and to financial investors supporting the Agua Zarca dam project.³⁸ Several financial investors, including the Netherlands Development Finance Company-FMO, the Central American Bank for Economic Integration and Finnfund, suspended funding for the project. After a year-long probe, an investigative panel known as the International Advisory Group of Experts (GAIPE) concluded in November 2017 that Honduran state agents and senior executives of hydroelectric company Desarrollos Energéticos (DESA) colluded in the planning, execution and cover-up of the assassination of Berta Cáceres.³⁹

63. In India allegations have been received concerning the failure to ensure free, prior and informed consent in the States of Jharkhand, Madhya Pradesh, Chhattisgarh and Telangana in the context of logging, mining and conservation projects affecting Adivasi lands and resources. In August 2017 ten persons, among them seven women, were arrested when they conducted a peaceful demonstration against the eviction of 40,000 families, among them Adivasi communities, as a result of the construction of the mega project Sardar Sarovar Dam in the Narmada river valley.⁴⁰ In north east India, concerns by the mandate have been raised in the context of Adivasis who have been attacked, stigmatised for alleged association with maoist naxalites and prosecuted under security legislation, including in the states of Chhattisgarh and Telangana.⁴¹

64. The Special Rapporteur visited Mexico in 2017 and observed that threats, harassment and the criminalisation of members of indigenous communities during consultation processes tend to undermine the ‘free’ character of the same. For example, community members of the Yaqui tribe have suffered various attacks, threats and criminalisation for opposing the construction of an aqueduct and of a gas pipeline and for demanding consultations and that their free, prior and informed consent be sought for projects built in their territories. The indigenous leader Mario Luna was detained in 2014 for leading community protests on criminal charges of ‘illegal deprivation of liberty’ and ‘theft’. Since being released, he has continued to be threatened and attacked, despite calls

³⁶ Country visit report Brazil, A/HRC/33/42/Add.1, paras.18, 31; BRA 6/2016; BRA 1/2016; BRA7/2015;

³⁷ Country visit report Honduras, A/HRC/33/42/Add.2

³⁸ HND 4/2017; HND 4/2016; HND 2/2016; HND 3/2014

³⁹ <https://www.gaipe.net/>

⁴⁰ IND 8/2017; IND 9/2017

⁴¹ IND 2/2017; IND 1/2016

from the Mexican National Human Rights Commission to ensure his protection and that the Inter-American Commission on Human Rights has issued precautionary measures in favour of the Yaqui community.⁴² The serious situation of attacks and violence against indigenous communities was also observed in the Montañas de Guerrero, Sierra Tarahumara and Chiapas.

65. In Ecuador, concerns have been raised over several situations, including the attacks and criminalisation of Sápara leaders, including Gloria Ushigua on charges of ‘terrorist acts’, ‘sabotage’ and ‘obstruction’, for opposing petroleum exploitation on indigenous territories.⁴³

66. In Thailand, indigenous livelihoods, such as rotational farming and beekeeping have been banned and indigenous peoples have been evicted from lands declared Protected Areas. This despite evidence showing the contributions of indigenous peoples’ traditional livelihood practices to biodiversity conservation and climate change mitigation and adaptation.⁴⁴

67. On 3 May 2017, the Supreme Court of Peru acquitted the Quechua defender, Maxima Acuña de Chaupe, who had been charged with ‘illegally occupying land’. Due to her opposition of the Yanacocha mining company, she has been the victim of several attacks, intimidation, attempted evictions and judicial harassment. On appeal, she was acquitted of all charges and her land rights were recognised. The Special Rapporteur on the rights of indigenous peoples, together with other special procedures, have sent several communications relating to Ms. Acuña de Chaupe’s case.⁴⁵ Concern has also been expressed by the mandate over the conviction of the Aymara leader Walter Aduriri, who was convicted to seven years in prison in July 2017 on charges of ‘disturbances’ in the context of protests against mining concessions in the Puno region.⁴⁶

68. In Ethiopia, indigenous Anuak land rights defenders have been prosecuted under anti-terrorist legislation and subjected to prison sentences, torture and solitary confinement.⁴⁷

69. In 2012, authorities in Russia introduced so called ‘foreign agent law’. According to the law, NGOs must declare themselves “foreign agents” if they exercise political activities and receive finance from abroad. RAIPON is the main indigenous umbrella organisation Russian Association of Indigenous Peoples of the North, Siberia and the Far East. In 2012, the Ministry of Justice suspended operations of RAIPON for three months referring to the non-compliance of the organisation’s rules with the new legislation. In 2014, two indigenous defenders were prevented and attempts were made to prevent two more from travelling from Russia to New York to take part in the United Nations World Conference on Indigenous Peoples.⁴⁸

70. In 2016, thousands of protestors, including Native Americans, protested against the pipeline construction at the site of the Dakota Access Pipeline at the border of North and South Dakota, close to the Standing Rock Sioux Reservation in the USA. While Sioux leaders advocated for protests to remain pacific, State law enforcement officials, private security companies, as well as the North Dakota National Guard employed a militarised

⁴² A/HRC/39/17/Add.2; MEX 7/2017; MEX 10/2015

⁴³ ECU 2/2017

⁴⁴ A/71/229; A/HRC/24/41/Add.3, A/HRC/6/15/Add.3

⁴⁵ PER 1/2016; PER 3/2015; PER 1/2014

⁴⁶ PER 9/2017

⁴⁷ ETH 3/2016

⁴⁸ RUS 8/2014; RUS 7/2012

response to protests. More than 400 people were allegedly arrested, about 90% of them being from the Standing Rock Sioux tribe, including Chairman Dave Archambault II. Civil society organisations reported the use of excessive violence and humiliations during the arrests.⁴⁹

VII. Individual and collective impacts

71. The targeting of indigenous persons impacts both on the individual as well as on the entire indigenous community. The killings of indigenous leaders and community members cause irreparable harm and damages the social fabric of indigenous peoples. Such attacks are undertaken with the expressed intent to silence their voices, rupture their organisation and impede indigenous peoples' ability to express concerns over matters affecting their communities. The remoteness of indigenous communities, and their limited access to state authorities responsible for providing protection and establishing the accountability of perpetrators, leaves indigenous peoples particularly vulnerable.

72. The criminalisation of indigenous community members also has widespread impacts which affect the accused person, their family and the broader community. Unlike in the case of killings, where the attackers may be acting on behalf of a private actor, in the case of prosecutions there is a clear and active responsibility of state authorities in acts which stigmatise and place indigenous individuals and communities at risk.

73. As previous noted, prosecutions of indigenous community members are often preceded by defamation campaigns, at times with racist or discriminatory undertones, which seek to discredit and undermine the legitimate right of indigenous peoples to participate and voice their opinion in matters that affect them and their lands, territories and resources.

74. At the individual level, the issuing of arrest warrants for indigenous leaders on unsubstantiated and vague charges seeks to limit their ability to continue their important role as representatives of the community. The stigmatisation of indigenous leaders as 'criminals' seeks to portray them as disreputable representatives of the community, cause personal humiliation and seeks to alienate them within the community and rupture social cohesion. By alleging that they are criminals, it places them a significant risk of becoming targets of violent attacks. It may also result in restrictions of their freedom of movement, and force them to either go into hiding within their territories or abandon their communities and, depending on the threats against them, may oblige them to go into exile.

75. For indigenous individuals facing prosecution, there are significant impacts both on their mental physical wellbeing and on their economic means. They are forced to invest time and financial resources in their defense and travel expenses to attend court hearing, risk losing their livelihood. They will have reduced possibilities to defend the rights of their community as their resources and energy may be absorbed defending themselves against criminal charges.

76. Indigenous peoples are often placed in detention facilities far from their family and community. Extended pre-trial detention and trials cause long-term impacts on a family's livelihood, as the person may be the primary breadwinner or may miss planting and harvesting seasons. Having witnessed the impacts of prosecutions, other community members may feel obliged to discontinue advocacy on community concerns, out of fear of retaliation and of being subjected to criminal charges as well. In such instances, the

⁴⁹ Country visit report the United States of America, A/HRC/36/46/Add.1, paras 63-74; USA 14/2016; USA 7/2016

criminal prosecution has succeeded in destabilising the social and political organisation of indigenous communities. This is of particular concern in the case of indigenous traditional, cultural or spiritual leaders who play a pivotal role in the continuation of their peoples' traditions and their social, political and cultural institutions.

77. Even if criminal charges are eventually dropped, pre-trial detentions may last extended periods of a year or more due and for the individual, the stigma, loss of employment, family and community ties may be long-lasting and difficult or impossible to repair. Ultimately, acts of criminalisation that disrupt the participation of indigenous peoples in defining priorities and strategies for the development and use of their lands or territories and other resources will result in increased marginalisation and social inequalities.

78. Furthermore, there are gendered impacts that criminalised indigenous women face. Smear campaigns tend to target indigenous women by spreading rumours that they are 'dishonourable' women of 'poor reputation' who break indigenous traditions by engaging in public participation and advocacy on community concerns. The aim of such defamation is to disempower and alienate women from their family and community. While the majority of indigenous individuals who face criminal charges are men, women bear the brunt of their absence as they have to single-handedly assume all responsibilities for securing resources to sustain the family, including food and means to send their children to school. During her recent country visit to Guatemala, the Special Rapporteur met with numerous indigenous women, whose husbands were detained, and heard first-hand of the dire consequences for the women and the families affected.

VIII. Prevention and protection measures

79. States must adopt measures to prevent and protect indigenous peoples. Crucial in this regard is the establishment of accountability of perpetrators responsible for attacks against indigenous peoples. The global widespread impunity for violent acts against indigenous peoples continues to perpetuate their vulnerability and marginalisation.

80. It is imperative, in order to prevent conflicts and attacks, that authorities at the highest level recognise publicly the rights of indigenous peoples, and in particular the right of indigenous peoples to self-determination, including the right to determine priorities for the development or use of their lands or territories and other resources. This requires that the State consult and cooperate in good faith with the indigenous peoples through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.⁵⁰

81. Enabling a safe environment for indigenous peoples to advocate for their rights is key. Some countries have adopted legislation, policies and programs to provide protection mechanisms for human rights defenders, including for indigenous leaders and defenders. In Latin America, five countries (Colombia, Mexico, Brazil, Guatemala and Honduras) have created national protection programmes which, to a varying degree, provide protection measures for defenders. Recent assessments of these programmes have highlighted the importance of adopting collective and culturally protection measures for indigenous

⁵⁰ UNDRIP, Art. 32

peoples and the need to consider prevention aspects and to address root-causes of violence.⁵¹

82. The Special Rapporteur encourages existing protection programmes to be strengthened and other countries to adopt national policies and legislation in favour of human rights defenders and to establish protection programmes. The actual protection measures need to be culturally appropriate, consider gender aspects and be jointly developed with the communities concerned. An example of a measure adapted according to the requests of an indigenous community is the designation of local 'indigenous guards', with financial support from the national protection programme in Colombia, instead of police protection for the beneficiary.⁵² The distribution of solar powered telecommunication in remote areas to enhance protection is another measure useful for indigenous communities.

83. Indigenous communities have developed their own protection strategies and lessons should be drawn from such measures. In some countries, indigenous defenders have created local and regional support networks, which allow for reflection, information exchange, legal advice, situation analysis and strategic planning on how to improve protection in their communities.⁵³ Certain indigenous peoples have established their own monitoring systems in their territories to prevent violent attacks and access by unauthorised third parties. Some indigenous communities have successfully claimed customary land rights and through demarcation processes managed to halt forced evictions and reduce threats against their communities. Other indigenous communities have managed to halt permits for large-scale projects through injunctions where courts decided in their favour because of the failure to consult them and obtain their free, prior informed consent. Overall, in order for indigenous led protection systems to be more effective, there is a need for strengthen their own governance systems.

84. At the regional level, the importance of the precautionary and provisional measures awarded by Inter-American Commission on Human Rights and Inter-American Court of Human Rights are of significant importance as they underline the State responsibility to ensure the protection and safety of indigenous communities and individuals in imminent danger. The Special Rapporteur deeply regrets that, despite such measures having been awarded by the regional human rights system, national protection measures are often inadequate, as is sadly illustrated by the murder of several indigenous leaders and by the ongoing attacks and threats, for example against the Choréachi and Yaqui communities in Mexico, all of whom had been granted those measures

85. The landmark judgement in favour of the Ogiek peoples in Kenya by the African Court on Human and Peoples Rights issued in May 2017 affirms the Ogieks' collective rights to the Mau Forest and sends a strong signal in the region that indigenous land rights are to be protected and forced evictions halted.⁵⁴

⁵¹ Inter-American Commission on Human Rights, *Towards a comprehensive policy to protect human rights defenders*, OEA/Ser.L/V/II.Doc.207 (2018); Protection International/CEJIL, *The time is now for effective public policies to protect the right to defend human rights* (2017), pp. 106-111; A/HRC/39/17/Add.2, para. 68

⁵² A/HRC/37/3/Add.3, (2018), para. 21

⁵³ Peace Brigades International, *I think, therefore I resist-grassroots experiences of alternative protection and promotion of human rights in the context of large-scale economic investments* (2016)

⁵⁴ African Court on Human and Peoples' Rights, Judgement on Application 006/2012 filed by the African Commission on Human and Peoples' Rights on behalf of the Ogiek Peoples v. Republic of Kenya, 26 May 2017

86. On 3 July 2018, the European Parliament adopted a resolution on violations of the rights of indigenous peoples which denounces the continuing criminalisation of those who defend the rights of indigenous peoples and the right to land throughout the world. The resolution emphasises that the European Union and its Member States must raise the human rights of indigenous peoples and indigenous human rights defenders in bilateral and multilateral negotiations and diplomatic communications, push for the release of imprisoned human rights defenders and calls for the EU and its Member States to work to ensure that third country governments provide appropriate protection to indigenous communities and human rights defenders, and bring perpetrators of crimes against them to justice;⁵⁵ The Special Rapporteur welcomes the strong public stance taken by the European Union. This can play an important role in preventing violations.

87. At the international level, in March 2018 UNEP adopted a Policy on Environmental Defenders which identifies violations against indigenous peoples as a key concern where prevention and protection needs to be urgently stepped up. The policy establishes a rapid response mechanism to speak out on individual cases and to advocate for the rule of law in environmental matters.⁵⁶ UNEP simultaneously launched an 'Environmental Rights Initiative' which urges governments to strengthen institutional capacities to develop and implement policy and legal frameworks that protect environmental rights and which aims to assist businesses to better understand what their environmental rights obligations.⁵⁷

88. Another prevention initiative at the global level is *Framework of Analysis for the Prevention of Atrocity Crimes* developed by the United Nations Special Advisers on the Prevention of Genocide and on the Responsibility to Protect as a guide for assessing the risk of genocide, crimes against humanity and war crimes from an early warning perspective. With the help of the Framework, various actors can sound the alarm, promote action, improve monitoring or early warning by different actors, and help Member States to identify gaps in their atrocity prevention capacities and strategies. The Office of the Special Advisers uses this Framework to collect information and conduct assessments of situations that could potentially lead to atrocity crimes or their incitement.⁵⁸

IX. Conclusions and recommendations

89. **States carry the primary responsibility that ensure that indigenous peoples are able to safely exercise their rights and that accountability is established for violations against indigenous defenders. In order to halt the trend of attacks criminalisation and impunity for those who commit violations against indigenous peoples, concerted action is urgently needed.**

90. **Large-scale development projects are major drivers that are fuelling the escalation of attacks and the criminalisation of indigenous peoples. The frequent undertaking of such projects without genuine consultation nor measures to seek the free, prior informed consent of the indigenous peoples concerned must cease. Indigenous peoples are not against development but they reject 'development' models**

⁵⁵ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0279+0+DOC+XML+V0//EN>

⁵⁶ <https://www.unenvironment.org/explore-topics/environmental-governance/what-we-do/advancing-environmental-rights/un-environments>

⁵⁷ www.environmentalrightsinitiative.org

⁵⁸ http://www.un.org/en/genocideprevention/documents/publications-and-resources/Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf

which have been imposed on them without their participation, undermine their rights to self-determination and their right to set their own priorities for the development of their lands, territories and resources.

91. The Special Rapporteur recommends to:

States

- All violent attacks against indigenous defenders must be promptly and impartially investigated and measures taken to provide for effective redress and reparation.
- A zero-tolerance approach to the killing and violence against indigenous human rights defenders must be adopted at the highest Government level. All public officials must refrain from stigmatising indigenous communities affected by large-scale development projects and those defending their rights, and recognise that their concerns are legitimate components in a process aimed at securing sustainable development.
- States should ensure that legislation creates due diligence obligations for companies registered in their jurisdictions and those of their subsidiaries where there is a risk of human rights violations against indigenous peoples.
- Addressing criminalisation requires a comprehensive review of national laws, passing of laws to ensure due process and revocation of laws and criminal procedures that violate the principle of legality and contradict international obligations. Legislation that criminalises indigenous livelihoods, such as rotational agriculture, hunting and gathering should be repealed.
- Legislation and policies should be adopted to expressly support the protection of indigenous defenders and communities. Protection measures should ensure that both individual and collective protection aspects are addressed in practice, in close consultation with the indigenous peoples concerned. Indigenous led protection initiatives should inform the design of all measures that are adopted by authorities in favour of indigenous communities at risk.
- In order to address the root causes of attacks and criminalisation, collective land rights of indigenous peoples need to be recognised. This requires *inter alia* accessible, prompt and effective procedures to adjudicate land titles; the review of laws on expropriation; adequate mechanisms to resolve land disputes; effective protection from encroachment, including through early warning systems and on site monitoring systems; and the prohibition of forced evictions.
- Law enforcement officials and prosecutors should be trained on human rights standards and refrain from the criminalisation of indigenous peoples who are peacefully defending their rights to lands and resources.
- In order to implement the right to consultation and to free, prior informed consent, such processes need to be based on good faith. It is indispensable that indigenous peoples are afforded genuine participation, access to information in a culturally appropriate manner and in a language they understand. This requires involvement at all phases, including in human rights impact assessments, project planning, implementation and monitoring.

Independent national human rights institutions

- Closely monitor complaints relating to large-scale development projects through regular dialogue with and visits to affected indigenous communities at risk of attacks.

Private companies

- Exert human rights due diligence in all operations and adopt clear policy commitments to that effect.
- Perform ongoing human rights impact assessments for all projects, with the full participation of potentially affected indigenous communities.
- Avoid any acts of defamation which stigmatise indigenous peoples.

International financial institutions and donors

- International financial institutions, as well as State agencies that provide international assistance, should adopt and implement environmental and social safeguards that are consistent with human rights obligations, including by: (a) requiring the human rights impact assessments of all projects; (b) including specific protections for indigenous peoples; (c) stipulating effective participation of affected indigenous communities as a requirement; (d) providing for effective procedures to pursue remedies.

The international community

- Monitor that human rights impact assessments are conducted and that specific attention is given to the participation and protection needs of indigenous communities. Accountability mechanisms should be supported.

Civil society

- Continue to provide support, legal advice and facilitate the sharing of experiences in relation to protection measures for indigenous peoples.
