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Discussion on the six mandated areas of the Permanent Forum (economic and social development, culture, environment, education, health and human rights), with reference to the United Nations Declaration on the Rights of Indigenous Peoples and the 2030 Agenda for Sustainable Development

Criminalization of Indigenous Peoples' human rights

Note by the Secretariat

Summary

At its twenty-second session, the Permanent Forum on Indigenous Issues appointed Naw Ei Ei Min and Rodrigo Eduardo Paillalef Monnard, members of the Forum, to conduct a study to examine the criminalization of Indigenous Peoples' human rights, to be submitted to the Forum at its twenty-third session. The present note contains the report on the study.¹ The study was focused on the typology and examples of criminalization, relevant international instruments and jurisprudence and access to justice, and conclusions and recommendations.

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¹ With thanks to Fergus MacKay, Senior Legal Counsel and Policy Adviser, Indigenous Peoples Rights International, for research support.



I. Introduction

1. The Permanent Forum on Indigenous Issues has received numerous complaints about the criminalization of Indigenous Peoples in the exercise of their human rights, including as it pertains to various forms of protest or opposition to perceived violations of those rights. At its twenty-third session, for example, the Forum received information on the criminalization of the defence of rights, especially those related to lands and resources, the activities of Indigenous journalists and linguistic freedoms. With respect to the latter, the Forum explained that “criminalization jeopardizes the preservation of Indigenous languages and customs and the integrity of Indigenous Peoples’ culture and traditions”.² In many cases, it aggravates other or underlying human rights violations. The Committee on the Elimination of Racial Discrimination, for example, has stated that, where consultations are “held against a backdrop of threats, criminalization and harassment ... any consent obtained is not freely given”.³

2. These practices have been condemned by the General Assembly, which has urged States to take necessary measures “to ensure the rights, protection and safety of Indigenous Peoples, including Indigenous leaders and Indigenous human rights defenders”.⁴ These issues are also arising with greater frequency before the treaty bodies and special procedures of the Human Rights Council.⁵ The former Special Rapporteur on the rights of Indigenous Peoples dedicated part of an annual report⁶ to this subject. The Permanent Forum now builds upon that report, fully endorsing her recommendations. As the issue is not adequately understood and incidences are increasing and intensifying, the Forum considers it important that the United Nations system give increased attention to the criminalization of Indigenous Peoples’ human rights, including at the country level, and recommendations in that regard are made in paras. 30–35 below.

3. The criminalization of Indigenous Peoples has deep historical roots as well as contemporary manifestations. It dates back to the origins of modern international law, when colonial powers debated, implemented and manipulated various legal norms to allow for “just wars”, forcible dispossession, enslavement and even extermination, directed in particular against those deemed uncooperative or hostile.⁷ These historical examples remain relevant to the extent that they continue to have an impact on Indigenous Peoples today.⁸ As colonial powers consolidated control, the laws and forms of criminalization persisted and/or morphed into various measures

² [E/2023/43-E/C.19/2023/7](#), para. 59.

³ [CERD/C/MEX/CO/18-21](#), para. 20.

⁴ General Assembly resolution [77/203](#), ninth preambular para. and para. 28.

⁵ See, for example, [CERD/C/RUS/CO/25-26](#), paras. 18–21; [CERD/C/NIC/CO/15-21](#), para. 41 (d); [CCPR/C/PER/CO/6](#), paras. 38, 39, 42 and 43; [CAT/C/BRA/CO/2](#), paras. 19 and 20; [E/C.12/GTM/CO/4](#), para. 11 (c); [CEDAW/C/HND/CO/9](#), para. 42 (c); [A/HRC/36/46/Add.1](#), para. 93; and [A/HRC/51/28](#), para. 107 (k).

⁶ [A/HRC/39/17](#).

⁷ See, for example, Simon Bull, “‘The land of murder, cannibalism, and all kinds of atrocious crimes?’ Maori and crime in New Zealand, 1853–1919”, *British Journal of Criminology*, vol. 44, No. 4 (July 2004) (“Analysis points to conflict and critical criminology as the principal paradigms through which the ‘crimes’ of the powerful colonial state converted Maori into criminals.”).

⁸ See, for example, S. James Anaya, “Reparations for neglect of indigenous land rights at the intersection of domestic and international law: the Maya cases in the Supreme Court of Belize”, in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini, ed. (Oxford, Oxford University Press, 2008), p. 567 (The massive loss of lands that accompanied colonization was “typically facilitated by colonial and state policies and laws that accorded diminished or no value to the presence of indigenous peoples and their pre-existing land tenure. The legacies of such policies and laws continue today in state legal systems and administrative practices.”).

criminalizing “being Indigenous”, including outlawing cultural, religious and spiritual practices and even criminalizing traditional dress in some countries; stealing Indigenous children from their families; and various other assimilationist laws and associated sanctions.⁹ In other cases, colonial laws intended to suppress independence movements are now applied to Indigenous Peoples and their demands for self-determination and other rights (for example, legislation granting special powers to military forces, and various sedition laws).

4. Two kinds of criminalization are discussed herein. The first is pervasive and deeply embedded in laws, policies and attitudes. It is also often a function of “structural racism and discrimination”, especially when rooted in the non-recognition of Indigenous Peoples’ legal personality.¹⁰ Examples are varied and numerous, regularly resulting from inadequate or ineffective legal recognition of and respect for self-determination, land, cultural and other rights.¹¹ It is even more pronounced where third parties assert legal interests that purport to impair or negate Indigenous rights. The second category concerns the more common understanding of the concept of the misuse of criminal law by State and non-State actors with the aim of criminalizing the work of Indigenous human rights defenders (for example, for opposing government and private sector projects on their lands).¹² Violence, discrimination, denials of access to justice and impunity are also associated with repression and criminalization, as are grossly disproportionate conviction, incarceration and recidivism rates.¹³ According to Indigenous Peoples Rights International, despite representing 6 per cent of the global population, Indigenous defenders suffered nearly 20 per cent of attacks between 2015 and 2022 and were much more likely to experience violent attacks, a significant percentage of which constituted “judicial harassment” in the context of private sector operations.¹⁴

5. The criminalization of Indigenous land, subsistence and governance rights continues to be widespread and is particularly acute where these rights are not adequately recognized in domestic law. This is principally true of unduly restrictive laws with regard to State, national, Crown or public lands; forest reserves, biodiversity and protected areas; climate adaptation and mitigation measures; the extractives and large-scale agriculture sectors; and wildlife. Such criminalization is generally predicated on the disregard or denial of Indigenous Peoples’ internationally guaranteed human rights and/or the discriminatory privileging of the interests of the State or others. Some of these laws are rooted in colonial law and practice, others were developed in

⁹ See, for example, [A/76/180](#), para. 10 (“The impact of colonialism remains evident in the overrepresentation of indigenous people in detention. ... Colonialism resulted in a State that perpetuated it through a legal, institutional and cultural apparatus that subjected colonized populations to discrimination, assimilation, criminalization and, in some cases, violence; and denied them basic rights such as ownership of ancestral lands and resources, and access to justice, health, education and economic opportunities.”).

¹⁰ [A/HRC/39/17](#), para. 5.

¹¹ See, for example, [A/HRC/42/37/Add.1](#), para. 97 (“It is essential that decisive action be taken to put an end to the abusive use of the criminal system against indigenous persons and leaders for defending their rights in the context of extraction projects on their lands, territories and natural resources, for exercising indigenous jurisdiction, or for carrying out their traditional practices”).

¹² Inter-American Commission on Human Rights, *Criminalization of Human Rights Defenders* (OEA/Ser.L/V/II.Doc.49/15), para. 1.

¹³ See, for example, [CAT/C/NZL/CO/7](#), para. 32 (“The State party should increase its efforts to reduce the disproportionately high number of Maori in prisons and to reduce recidivism, including by identifying its underlying causes, by revising regulations and policies leading to the high rates of incarceration of Maori and by enhancing the use of non-custodial measures and diversion programmes.”).

¹⁴ Indigenous Peoples Rights International and Business and Human Rights Resource Centre, “Protector not prisoner: Indigenous peoples face rights violations and criminalization in climate actions”, November 2022, p. 5.

the post-colonial era, and some are very recent in origin.¹⁵ For instance, Indigenous Peoples complained that the constitutional revisions completed in June 2023 in Argentina were made without the effective participation of Indigenous Peoples and have restricted and criminalized the right to protest as part of measures facilitating lithium mining.¹⁶

6. In a 2023 study on industrial development and Indigenous land stewardship, the authors concluded that, in the future, industrial development could threaten over 60 per cent of Indigenous Peoples' lands, or 22.7 million square kilometres in 64 countries.¹⁷ Therefore, it can be expected that criminalization also will increase, for example, as "carbon stocks" and ecosystem services are further traded and monetized, large-scale agriculture and "green energy transition" projects increase in number, protected areas expand in line with international targets and natural resources become scarcer and more remote geographically.¹⁸ A survey of 5,097 existing "energy transition mineral" projects found that 54 per cent were located on or near Indigenous Peoples' lands and that the figure was considerably higher for unmined deposits.¹⁹ Population movements and competition for land caused by climate change will also be a likely driver. The misuse and abuse of criminal law and process concerning legitimate opposition and complaints will increase commensurately, as will the need for more coordinated and systematic action to address such misuse and abuse. This is especially true in connection with the inappropriate use of anti-terrorism,²⁰ sedition,²¹ infrastructure,²² national security and racketeering laws²³ and the abuse of civil or administrative law processes that results in criminal or criminal-like sanctions.²⁴ Criminal defamation laws have also been misused in Latin America and South-East

¹⁵ See, for example, Dilip Chakma and Joan Carling, "Diminishing forest protection in India: Indigenous voices against controversial forest law amendment", *Indigenous Peoples Rights International*, 8 August 2023.

¹⁶ Juan Cruz Ferre, "Jujuy stands up against multinational mining companies and anti-democratic reforms", *North American Congress on Latin America*, 12 August 2023.

¹⁷ Christine M. Kennedy and others, "Indigenous peoples' lands are threatened by industrial development; conversion risk assessment reveals need to support indigenous stewardship", *One Earth*, vol. 6, No. 8 (2023).

¹⁸ See, for example, Joan Martinez-Alier, "Mapping ecological distribution conflicts: the EJAtlas", *Extractive Industries and Society*, vol. 8, No. 4 (December 2021).

¹⁹ John R. Owen and others, "Energy transition minerals and their intersection with land-connected peoples", *Nature Sustainability*, vol. 6 (February 2023), p. 204. See also Samuel Block, "Mining energy-transition metals: national aims, local conflicts", *MSCI*, 3 June 2021 ("97% of nickel, 89% of copper, 79% of lithium and 68% of cobalt reserves and resources in the U.S. are located within 35 miles of Native American reservations").

²⁰ See, for example, Virginius Xaxa, "India is targeting defenders of indigenous rights as 'Terrorists'", *Scientific American*, 4 January 2021; International Commission of Jurists, "Danger in dissent: counterterrorism and human rights in the Philippines", January 2022, p. 1 (relating to the "tactic of vilifying ... human rights defenders ... and categorically branding them as 'terrorists' and/or 'communists' without substantial proof of any unlawful conduct, in a practice locally known as 'red-tagging'"); and Human Rights Watch, "Amazonians on trial: judicial harassment of indigenous leaders and environmentalists in Ecuador", 26 March 2018.

²¹ See, for example, Gladson Dungdung, "Criminalization of Pathalgari movement", *International Work Group for Indigenous Affairs*, 3 September 2021.

²² See, for example, Kaylana, Mueller-Hsia, "Anti-protest laws threaten indigenous and climate movements", *Brennan Centre for Justice*, 17 March 2021. Since 2016, 18 states of the United States have increased criminal penalties for trespassing, damage, and interference with infrastructure sites such as oil refineries and pipelines, and these laws draw from national security legislation enacted to protect physical infrastructure.

²³ See, for example, United States of America, District Court for the Southern District of New York, *United States v. Steven Donziger*, BL 171489, Case No. 19-CR-561, 2020.

²⁴ See, for example, Amnesty International, "Criminalization of Wet'suwet'en land defenders", 23 March 2023 ("Nineteen land defenders were charged with criminal contempt in July 2022 by the B.C. Prosecution Service for allegedly disobeying the 2019 interlocutory injunction order to stay away from pipeline construction sites").

Asia to prosecute Indigenous human rights defenders.²⁵ The cited laws are often vague and imprecise on their face, inter alia, violating the principle of legality.

7. There is also a persistent shortcoming in much of the work on Indigenous human rights defenders insofar as collective aspects are often underappreciated or disregarded. For example, as the Special Rapporteur on the Rights of Indigenous Peoples observed, Indigenous “leaders are targeted as a strategy to suppress and silence the entire community”.²⁶ In the Indigenous context, the defender is normally a community leader and part of collective action. Criminalization affects both individual and collective rights and the nexus between the two, negatively affecting self-determination and other core rights.²⁷ By way of analogy, regarding the forced disappearance of a Maya leader, the Inter-American Court of Human Rights explained that his community was deprived of his direct participation in the structures of the State, “a necessary prerequisite for [their] self-determination”.²⁸ In addition, Indigenous leaders “exercise their charge by mandate or designation and in representation of a community. This duality is both the right of the individual to exercise the mandate ... as well as ... the right of the community to be represented. In this sense, the violation of the first reverberates in the damage of the other right”.²⁹ This dual aspect of criminalization also requires attention, as does the intergenerational and/or transgenerational harm that often results.³⁰

II. Typology of criminalization

A. Definition of criminalization

8. There is no internationally accepted definition of criminalization, much less one that is attuned to Indigenous characteristics and rights. In her 2018 report,³¹ the Special Rapporteur on the rights of Indigenous Peoples set out criteria that are useful in this respect, and recent jurisprudence adds important details (as described in the present report). Both the criteria and the recent jurisprudence cover the two categories of criminalization noted above and discussed further below.³² With this in mind, the following is proffered as a working definition to guide future work:

- Criminalization is the unjustified application or use of criminal laws and processes by the State and/or non-State actors: (a) in relation to the exercise of rights vested in Indigenous Peoples, individually and collectively; and/or (b) where, by aim or effect, the State or non-State actors seek to hinder, suppress or punish legitimate organization, complaints, protests and other actions that are

²⁵ [A/76/222](#), para. 33; *ibid.*, para. 44 (“More than 200 indigenous rights defenders were killed in Latin America between 2015 and 2019”). See also [CCPR/C/HND/CO/2](#), para. 41 (“As a matter of urgency, take practical steps to ... consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious cases, and imprisonment is never an appropriate penalty”).

²⁶ [A/HRC/39/17](#), para. 45.

²⁷ See, for example, Inter-American Court of Human Rights resolution 70/2022, Precautionary Measures No. 822-22, Jhon Anderson Ipia Bubu regarding Colombia, 11 December 2022, para. 36 (“Attacks against [Indigenous Peoples’] authorities ... ‘have an impact not only on the direct victim, but also on the peoples and communities themselves’”).

²⁸ Inter-American Court of Human Rights, *Chitay Nech and others v. Guatemala*, Judgment of 25 May 2010, para. 113.

²⁹ *Ibid.*, para. 115.

³⁰ See also [CEDAW/C/GC/39](#) (2022), para. 40 (“Gender-based violence ... undermines the collective spiritual, cultural, and social fabric of indigenous peoples and their communities, also causing collective and sometimes inter-generational harm”).

³¹ See [A/HRC/39/17](#).

³² *Ibid.*, para. 28.

intended to assert, protect and defend those rights, whether domestically or internationally. This may include non-criminal law in which the aim or effect is similar and sanctions are comparable.

B. Two aspects of the criminalization of Indigenous Peoples' human rights

Failure to recognize and secure internationally agreed human rights in law and violations of those rights

9. This aspect concerns the unjustified criminalization of the exercise of (normally collective) rights, including various property, self-government, cultural, spiritual, economic and other rights. In some cases, it includes the criminalization of various relationships to territory, all of which are crucial to identity, well-being and “survival”.³³ It is usually rooted in the failure to adequately and effectively recognize and secure Indigenous rights in national law, in particular rights to own and control lands, territories and resources and associated guarantees such as free prior and informed consent, and failures to provide legal certainty for those rights.³⁴ As the Special Rapporteur on the rights of Indigenous Peoples explained, “legislation pertaining to, for example, forestry, mining and the energy sector is not harmonized with indigenous peoples’ territorial rights and these rights are disregarded to the benefit of commercial interests”.³⁵

10. Criminalization extends into many aspects of life and affects the exercise of many different rights. For example, most likely hundreds of Indigenous Peoples have been imprisoned for up to 12 years for the crime of “cow slaughter” in Nepal, where the dominant religion is imposed on Indigenous Peoples for whom eating buffalo is both accepted and tied to important cultural traditions.³⁶ Traditional occupation of land is also criminalized in some countries, and Indigenous Peoples have been convicted of criminal trespass and forcibly evicted from their ancestral lands pursuant to judicial orders in favour of third parties.³⁷

11. Criminalization sometimes also occurs because of disproven notions that Indigenous knowledge or traditions are inferior to “Western science” (for example, demonstrably false notions that non-Indigenous management of biodiversity is superior to Indigenous Peoples’ relationships to territory), and this often also results in

³³ See, for example, Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Judgment of 28 November 2007), para. 129 (in which survival is defined as the ability to “preserve, protect and guarantee the special relationship that [they] have with their territory” so that “they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected”).

³⁴ See, for example, Inter-American Commission on Human Rights, *Protest and Human Rights* (OEA/Ser.L/V/II CIDH/RELE/INF.22/19, para. 213 (“The statutory definition of unlawful occupation does not clearly define the adverb ‘illegally, for any purpose’, nor does it clearly describe the requisite intent of the perpetrator needed to meet the elements of the crime. Consequently, indigenous people and peasants who – although lacking formal title – have for years been in possession of the lands they consider to be their ancestral or rightful property, have often been criminally prosecuted.”)

³⁵ [A/HRC/39/17](#), para. 31.

³⁶ [CERD/C/NPL/CO/17-23](#), paras. 22–24.

³⁷ See, for example, *UNCERD Urgent Action Procedure: Guatemala*, 22 December 2022; and *Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion* (OEA/Ser.L/V/II.Doc.43/15), para. 478 (inter alia: “14 Maya Q’eqchi communities ... [were] forcibly evicted ... pursuant to a criminal proceeding”).

the criminalization of associated activities, such as the traditional use of fire.³⁸ In this respect, many rights-restrictive protected areas and wildlife-, biodiversity- and climate-related laws, policies and programmes lack a rational basis and are unnecessary and disproportionate. This is true concerning requirements for restricting human rights, let alone for the application of criminal sanctions, yet Indigenous Peoples continue to be prosecuted all over the world because of such laws. This often represents a double penalty, given that the exercise of Indigenous rights is being criminalized and other forms of punitive sanctions are also applied (for example, the denial of land rights, forced relocation, the burning of homes and beatings). As noted earlier, this has deep historical roots; as one commentator observed, the “ideological justification for the dispossession of Aborigines was that ‘we’ could use the land better than they could”.³⁹

12. These forms of criminalization form the bulk of those that require redress. The first step is an analysis of laws, policies and practices to identify where the exercise of rights has been criminalized and what the purported justifications may be. In turn, this allows for comprehensive legislative and other reform proposals to remedy defects. As these issues concern the exercise of internationally guaranteed rights, the onus is on the State to strictly justify the legitimacy of any use of criminal sanctions.

Criminalization of defenders

13. This category concerns the misuse of criminal law by State and non-State actors with the aim of criminalizing the work of Indigenous human rights defenders.⁴⁰ It is often individualized to certain persons who are the face of resistance owing to their leadership role but can also involve entire communities or nations or multiple variations thereof. This is particularly pronounced when Indigenous Peoples oppose government and private sector projects on their lands and is also sometimes evident in other activities, even in land regularization processes, including the removal of third parties.⁴¹ In addition, observers have identified a pronounced difference in treatment compared with the non-Indigenous population: “when Indigenous people protest, they are considered enemies of the state. When settlers protest, they are treated as sensitive stakeholders critical to the resolution of the conflict.”⁴² There are real-world consequences: in 2021 alone, one report records that 200 land and environmental defenders were killed worldwide, of whom more than 40 per cent were

³⁸ See, for example, Rika Fajrini, “Environmental harm and decriminalization of traditional slash-and-burn practices in Indonesia”, *International Journal for Crime, Justice and Social Democracy*, vol. 11, No. 1 (2022), p. 30 (“... at least 48 People in East, West and Central Kalimantan were arrested for land clearing by using fire in 2019 ...”).

³⁹ Patrick Wolfe, “Settler colonialism and the elimination of the native”, *Journal of Genocide Research*, vol. 8, No. 4 (2006), p. 389.

⁴⁰ Inter-American Commission on Human Rights, *Report on the Criminalization of Human Rights Defenders* (OEA/Ser.L/V/II.Doc.49/15), para. 1 (inter alia: “Human rights defenders in various contexts are systematically subjected to unfounded criminal proceedings in order to paralyze or delegitimize their causes”), and para. 3 (“The criminalization of human rights defenders through the misuse of criminal law involves the manipulation of the State’s punitive power by State and non-State actors in order to hinder their advocacy work, thereby preventing the legitimate exercise of their right to defend human rights”).

⁴¹ See, for example, Peter Anton Zoettl, “The (il)legal Indian: the Tupinambá and the juridification of indigenous rights and lives in north-eastern Brazil”, *Social and Legal Studies*, vol. 25, No. 1 (2016) (relating to the ongoing process of the demarcation of an indigenous territory, where the “leaders are being persecuted and criminalized by the Federal Police and the judiciary”).

⁴² Robin Tress, “Policing protest: a double standard”, The Council of Canadians, 18 October 2020. See also Joanne Barker, *Red Scare: The State’s Indigenous Terrorist* (Oakland, California, University of California Press, 2021) (detailing how politicians in the United States and Canada use discourses of terrorism against indigenous activists).

Indigenous Peoples.⁴³ In Colombia, 611 “environmental defenders” were assassinated between 2016 and 2021, of whom 332 were Indigenous Peoples.⁴⁴

14. The aim of criminalization is usually to impede or stop Indigenous Peoples and their representatives from seeking protection for rights or to punish them for doing so. This is sometimes achieved in a different way, for example by not applying criminal laws to non-Indigenous peoples who are violating Indigenous rights (both selective application, which results in de facto and sometimes de jure criminalization of Indigenous occupation through the consideration of “competing claims”, and prolonged conditions of impunity that appear to give tacit approval to the violations and associated repression). Such a strategy also converts what, at least initially, should be public law matters – rights over collectively held lands and resources – into private law disputes, in which criminal sanctions can be sought and applied against Indigenous Peoples in relation to a variety of judicial orders, including criminal contempt arising from civil litigation. This phenomenon has been specifically identified in disputes between Indigenous Peoples and the private sector around pipelines in Canada,⁴⁵ where it is rare that convictions are overturned on appeal.⁴⁶

15. In Costa Rica, violence has erupted in some legally titled Indigenous territories as the Indigenous owners seek to have non-Indigenous illegal occupants removed. In some cases, 80 to 90 per cent of the territory is illegally occupied, and this has been unambiguously against national law since at least 1977.⁴⁷ Indigenous leaders are being threatened, attacked and assassinated for seeking no more than respect for their lawful property rights.⁴⁸ This includes the failure to execute judicial orders upholding Indigenous rights. The illegal occupants file their own lawsuits or countersuits and sometimes obtain judicial eviction orders against the Indigenous Peoples. The violence and related actions serve only one purpose: the intentional infliction of severe physical and mental suffering as punishment for, and to forcefully deter Indigenous Peoples from, seeking to regain possession of their titled lands. The rule of law is speedy for the illegal occupants but virtually non-existent and unjustifiably delayed for the Indigenous Peoples, and impunity prevails with respect to the assassination of prominent Indigenous leaders.⁴⁹

⁴³ Global Witness, *Decade of Defiance: Ten Years of Reporting Land and Environmental Activism Worldwide* (2022). See also, [CAT/C/GTM/CO/7](#), paras. 38 and 39 (“Reports of a significant increase in attacks against human rights defenders and journalists ... mostly those defending indigenous peoples’ rights”).

⁴⁴ Steve Grattan, “‘We must not show fear’: Colombia’s children learn to defend their way of life”, *The Guardian*, 25 July 2022.

⁴⁵ See, for example, Irina Ceric, “Beyond contempt: injunctions, land defense, and the criminalization of indigenous resistance”, *South Atlantic Quarterly*, vol. 119, No. 2 (April 2020) (relating to how “injunctions and the subsequent use of contempt charges carve out a distinctly colonial space within Canadian law for the criminalization of Indigenous resistance, facilitating access to resources and lands and easing the operation of extractive capitalism”).

⁴⁶ Court of Appeal for British Columbia, *Trans Mountain Pipeline ULC v. Mivasair*, Case No. 2023 BCCA 299, Judgment of 25 July 2023.

⁴⁷ See, for example, Fergus MacKay and Alancay Morales Garro, “Violations of indigenous peoples’ territorial rights: the example of Costa Rica”, in *Equality and Non-Discrimination*, Antônio Augusto Cançado Trindade and César Barros Leal, eds. (Fortaleza, Brazil, Brazilian Institute Human Rights, 2014).

⁴⁸ See, for example, [A/HRC/51/28/Add.1](#); and Fred Pearce, “Lauded as green model, Costa Rica faces unrest in its forests”, *Yale Environment* 360, 21 March 2023.

⁴⁹ [A/HRC/51/28/Add.1](#), paras. 36–39 and 47 ff.

C. Relevant international instruments and jurisprudence

General human rights norms

16. A full review of the applicable international standards and mechanisms is beyond the scope of this paper.⁵⁰ Much is general human rights law, which should be informed by the relevant Indigenous-specific norms, including greater attention to collective aspects and harm.⁵¹ A considerable part of the normative framework is the collective rights of Indigenous Peoples, including as restated in the United Nations Declaration on the Rights of Indigenous Peoples and as developed by the treaty bodies and the regional systems. In addition to pertinent regional instruments (for example, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, art. 7 (15) of which requires that Indigenous Peoples' human rights be fully guaranteed in its implementation), the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms is relevant. It provides that States shall prevent and protect against “any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence” of the legitimate exercise of human rights and that everyone shall be legally protected when “reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights ... as well as acts of violence perpetrated by groups or individuals”.⁵²

17. These norms, on their face, preclude the misuse of criminal law in relation to the exercise of human rights or to the suppression or punishment of the legitimate defence of human rights by Indigenous leaders and their peoples. However, what is meant by the misuse of criminal laws and procedures, or the punitive power of the State more generally, is partly the crux of the matter and will likely be further developed in future case law and authoritative opinion. This also applies in principle to the private sector, a point, inter alia, directly addressed in the Guiding Principles on Business and Human Rights and associated commentary. Indigenous Peoples may also develop and apply laws and measures within their own jurisdictions to address various aspects of criminalization, including measures to deal with offences and sanctions internally.⁵³

18. The Inter-American Court of Human Rights has previously addressed attacks on human rights defenders in general⁵⁴ and the illegitimate application of “anti-terrorism” laws to the Mapuche people as a means of suppressing legitimate protest and organization, classifying this as the criminalization of Indigenous protest.⁵⁵ Among other findings, it determined that criminal law “may be applied in a discriminatory manner” where convictions are founded on “negative stereotypes”⁵⁶

⁵⁰ See, for example, Inter-American Commission on Human Rights, *Protest and Human Rights*.

⁵¹ *Ibid.*, para. 22.

⁵² Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, arts. 12 (2) and 12 (3); see also art. 17.

⁵³ See, for example, CERD/C/106/D/61/2017 (concerning State obligations to recognize indigenous legal systems and authorities and to give effect to the acts thereof).

⁵⁴ See, for example, Inter-American Court of Human Rights, *Human Rights Defender and others v. Guatemala*, Judgment of 28 August 2014; and Inter-American Court of Human Rights, *Kawas-Fernández v. Honduras*, Judgment of 3 April 2009.

⁵⁵ Inter-American Court of Human Rights, *Norín Catrimán and others v. Chile*, Judgment of 29 May 2014. See also Inter-American Court of Human Rights, *Chitay Nech and others v. Guatemala*, Judgment of 25 May 2010.

⁵⁶ Inter-American Court of Human Rights, *Norín Catrimán and others v. Chile*, Judgment of 29 May 2014, para. 223.

and that “the mere use of this reasoning ... constituted a violation of the principle of equality and non-discrimination”.⁵⁷ Article 46 of the United Nations Declaration on the Rights of Indigenous Peoples serves to uphold this general principle, providing that any valid limitations on Indigenous Peoples’ human rights “shall be non-discriminatory”. The Court also drew attention to underlying causes, stating that “it is essential” that the State resolve a range of land and other rights concerns.⁵⁸ Similar observations have been made by the Committee Against Torture.⁵⁹

19. More recently, the Inter-American Court of Human Rights addressed prosecutions for the use of radio frequencies by Indigenous Maya community radio operators.⁶⁰ They were charged with theft (of frequencies) in relation to operating without a radio licence. In assessing the legitimacy of State action, the Court concluded that it was “imperative to take into account” Indigenous Peoples’ right to establish and operate their own radio stations, that they were prevented by discriminatory laws and practice from doing so and that the State had failed to alleviate or correct that discrimination.⁶¹ In relation to valid reasons for limiting the affected rights (for example, respect for the rights of others or protection of national security, public order, health or morals), it found that the criminal prosecutions were incompatible with the applicable norms.⁶² Observing that criminal law should be used only to “the extent strictly necessary to protect legal assets from the most serious attacks that damage or endanger them”,⁶³ it concluded that raids against community radio operators, the seizure of their equipment and their criminal prosecution were neither appropriate or necessary.⁶⁴ The criminal prosecution was “disproportionate, since it excessively affected freedom of expression and the right to participate” in Maya cultural life, and an illegitimate restriction on the right to freedom of expression.⁶⁵ The same logic could apply to the majority of criminalization of either kind.

20. The Inter-American Court of Human Rights was requested to further explain the above conclusion by means of an interpretation judgment. The Court recalled that it had ruled that the arrest, prosecution and criminalization of the community radio operators were unnecessary and disproportionate. Thus, the Court clarified that “a full reading of the decision reveals that the State must refrain from prosecuting individuals who operate community radio stations”.⁶⁶ The State “must annul the convictions handed down against members of indigenous communities, and all effects deriving therefrom”.⁶⁷ The Court explained further that “a measure of reparations ordered in similar cases has been to ‘set aside’ all judgments issued by domestic courts whenever the Court has found a violation ... based on judicial findings of civil or criminal liability contrary to the right to freedom of thought and expression”.⁶⁸

21. These issues also often overlap with guarantees aimed at preventing torture, which encompass both torture and cruel, degrading and inhuman treatment. The Committee Against Torture has previously applied the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Indigenous

⁵⁷ Ibid., para. 228.

⁵⁸ Ibid., para. 182.

⁵⁹ CAT/C/CHL/CO/6, para. 19; and CAT/C/68/D/882/2018 (2020), para. 2.1.

⁶⁰ Inter-American Court of Human Rights, *Maya Kaqchikel Indigenous Peoples of Sumpango and others v. Guatemala*, Judgment of 6 October 2021.

⁶¹ Ibid., para. 167.

⁶² Ibid., para. 166.

⁶³ Ibid., para. 168.

⁶⁴ Ibid., para. 169.

⁶⁵ Ibid., para. 170.

⁶⁶ Inter-American Court of Human Rights, *Maya Kaqchikel Indigenous Peoples of Sumpango and others v. Guatemala*, Judgment of 27 July 2022, para. 39.

⁶⁷ Ibid., para. 45.

⁶⁸ Ibid., para. 46.

Peoples,⁶⁹ adopting over 25 recommendations to date.⁷⁰ In a 2022 decision, the Committee recommended that Mexico offer reparations that are respectful of the victim's "worldview as a member of the Ayuujk Indigenous People" and provide guarantees of non-repetition, including a "systematic review of interrogation and arrest procedures, and the cessation of the criminalization of the defence of indigenous peoples' rights".⁷¹ Moreover, "the spirit of the Convention is to prevent torture, not simply to redress it once it has occurred".⁷² This requires systematic assessments of States' legal frameworks, institutions and policies, including as they concern criminalization (pursuant to article 11 of the Convention).

22. This kind of analysis is not restricted to the Committee Against Torture, as all human rights instruments require that national law be assessed and, if necessary, amended to comply with treaty obligations. More generally, the Inter-American Court of Human Rights also "underscores the necessity that the representatives and authorities of indigenous peoples actively participate in the preparation, implementation and evaluation of the States' criminal policies and that relations of dialogue and cooperation be established between these authorities and the regular justice".⁷³ This is broadly consistent with articles 3, 4, 5, 18, 19 and 34 of the United Nations Declaration on the Rights of Indigenous Peoples as well as requirements for securing Indigenous Peoples' effective participation and consent under general human rights instruments.⁷⁴

23. Criminalization of both kinds is prominent in the conservation sector, in particular as it concerns laws on protected areas, wildlife and other biodiversity-related matters. In many cases, traditional occupation is criminalized, as are traditional and other livelihoods, cultural and spiritual practices, and traditional governance systems for the control and management of lands. As various authorities have held, this is both unnecessary and disproportionate given that Indigenous Peoples' human rights and conservation objectives are compatible, and the evidence also supports the view that impairing or negating Indigenous Peoples' human rights undermines those conservation objectives.⁷⁵ In this regard, the adoption of the Kunming-Montreal Global Biodiversity Framework is an important development. Its implementation "must ensure" respect for Indigenous Peoples' rights "in accordance with relevant national legislation, international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples, and human rights law".⁷⁶ If States are to meet the targets therein, this requires participatory assessment and, where necessary, amendment or repeal of national laws, policies and practices that violate Indigenous Peoples' human rights, and this is doubly the case, and more urgent, with respect to criminal sanctions.

⁶⁹ See, for example, CAT/C/72/D/992/2020; CAT/C/68/D/882/2018; and CAT/C/GC/2, para. 21 ("Protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that ... their laws are in practice applied to all persons, regardless of ... indigenous status").

⁷⁰ See, for example, CAT/C/NIC/CO/2; CAT/C/BOL/CO/3; CAT/C/CAN/CO/7; CAT/C/GTM/CO/7; CAT/C/BGD/CO/1; CAT/C/NAM/CO/2; CAT/C/PAN/CO/4; CAT/C/NOR/CO/8; CAT/C/CHL/CO/6; CAT/C/COL/CO/5; CAT/C/COG/CO/1; and CAT/C/NZL/CO/6.

⁷¹ CAT/C/72/D/992/2020, paras. 9 (c) and 9 (e).

⁷² CAT/C/68/D/882/2018, para. 8.10.

⁷³ Inter-American Court of Human Rights, Advisory Opinion OC-29/22, 30 May 2022, para. 287.

⁷⁴ See, for example, CCPR/C/137/D/3585/2019; and CERD/C/102/D/54/2016.

⁷⁵ A/HRC/34/49, para. 59 ("Protecting the human rights of indigenous peoples and local communities has been shown to result in improved protection for ecosystems and biodiversity. Conversely, trying to conserve biodiversity by excluding them from a protected area typically results in failure. In short, respect for human rights should be seen as complementary, rather than contradictory, to environmental protection").

⁷⁶ CBD/COP/15/L.25, para. 8.

Principles of the United Nations Declaration on the Rights of Indigenous Peoples

24. The United Nations Declaration on the Rights of Indigenous Peoples makes no reference to criminalization as such. Nonetheless, articles 1 and 2 unambiguously provide, respectively, that “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms” and that they “are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity”. These two articles provide a sufficient basis for addressing most instances of criminalization, and more so when read together with other provisions. Moreover, the Expert Mechanism on the Rights of Indigenous Peoples explains that the “implementation of the [United Nations Declaration on the Rights of Indigenous Peoples] should be seen as a framework for reconciliation and as a means of implementing indigenous peoples’ access to justice”, both of which are pertinent in this context.⁷⁷ Access to justice issues (both Indigenous and State-based justice systems) and disproportionate conviction and incarceration rates, and the treatment of Indigenous Peoples in the criminal justice and penal systems more broadly, are also directly related.⁷⁸

25. Moreover, any criminal sanctions concerning the exercise of the human rights guaranteed in the United Nations Declaration on the Rights of Indigenous Peoples are inherently suspect and likely invalid and that articles 18, 19, 38 and 40 would require addressing and correcting criminalization in national laws and practices, including through effective judicial and other remedies. Article 46 also requires that the exercise of the rights in the United Nations Declaration on the Rights of Indigenous Peoples “shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.” This greatly limits the scope of any permissible criminalization of the exercise of the rights guaranteed in the United Nations Declaration on the Rights of Indigenous Peoples or aspects thereof, and, more generally, the same principle would apply to rights guaranteed in other international instruments.⁷⁹

Access to justice

26. Article 40 of the United Nations Declaration on the Rights of Indigenous Peoples provides that “Indigenous Peoples have the right to access to and prompt decision 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 a decision shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous Peoples concerned and international human rights”.⁸⁰ Rights to access to remedies, including for various forms of criminalization, are well developed in human rights law, even if there is a large implementation gap. Although improving, the recognition of and respect for Indigenous law, authorities and procedures, including for resolving offences

⁷⁷ See Office of the High Commissioner for Human Rights (OHCHR), “Access to justice in the promotion and protection of the rights of indigenous peoples” (Expert Mechanism Advice No. 5), para. 1, in *Thematic Advice of the Expert Mechanism on the Rights of Indigenous Peoples: A Compilation (2009–2013)* (Geneva, OHCHR, 2013).

⁷⁸ See, for example, Stephen G. Baines, “Disrespecting indigenous rights in the prison system of Roraima state, Brazil”, *Études Rurales*, vol. 196 (2015).

⁷⁹ See also [A/HRC/22/28](#).

⁸⁰ See also arts. 8 (2), 11 (2), 12 (2), 13 (2), 15 (2), 20 (2), 27, 28, 31 (2) and 32 (3) of the United Nations Declaration on the Rights of Indigenous Peoples.

internally and providing care for victims of criminalization, is less well developed in human rights law and jurisprudence. The Expert Mechanism on the Rights of Indigenous Peoples recalls in this regard that, pursuant to the right to self-determination, Indigenous Peoples “must have access to justice externally, from States, and internally, through Indigenous customary and traditional systems”.⁸¹

27. The Inter-American Court of Human Rights explains that States’ obligations to provide judicial remedies entail, first, to “legislate and ensure the due application by the competent authorities of effective remedies” and, second, “to guarantee the means to execute the respective decisions and final judgments issued by those competent authorities so that the rights that have been declared or recognized are truly protected”.⁸² The latter is a considerable problem and greatly undermines equal protection under the law and access to justice for many Indigenous Peoples. States are additionally obligated to recognize and secure Indigenous Peoples’ collective human rights in law and the remedies provided should offer “a real possibility ... to be able to defend their rights and exercise effective control over their territory”.⁸³ In 2020, the Court observed that “the adequate guarantee of communal property ... includes ... respect for the autonomy and self-determination of the indigenous communities over their territory”.⁸⁴ While both elements are often inadequately recognized in national law, the latter is normally disregarded or seriously deficient, and this leads to the criminalization of legitimate acts of Indigenous authorities. This includes the criminalization of Indigenous justice systems in some cases.

28. A recent positive development is the decision of the Committee on the Elimination of Discrimination against Women in a case involving the discriminatory legacy and contemporary effects of the Indian Act of Canada. In addition to recognizing the validity of Indigenous law on membership, the Committee observed that the law perpetuates “differential treatment of descendants of previously disenfranchised indigenous women, which constitutes transgenerational discrimination”.⁸⁵ This concept has clear ramifications for various historical acts and omissions and their ongoing effects, including criminalization and its transgenerational and intergenerational impacts and related trauma.⁸⁶ It also has repercussions for the criminal justice system, among others, given the grossly disproportionate incarceration rates that affect Indigenous Peoples, in particular Indigenous women, in some countries.⁸⁷ There are numerous studies on this subject,⁸⁸ in some of which specific causes are identified (for example, racism in the criminal justice system), but few of the studies consider the broader framework of Indigenous Peoples’ collective human rights or articulate remedial solutions

⁸¹ [A/HRC/24/50](#), para. 5, and also para. 19 (which reads that, with respect to “access to justice, self-determination affirms their right to maintain and strengthen indigenous legal institutions, and to apply their own customs and laws”).

⁸² Inter-American Court of Human Rights, *Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015, para. 239.

⁸³ *Ibid.*, para. 240.

⁸⁴ Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat Association v. Argentina*, Judgment of 6 February 2020, para. 153.

⁸⁵ [CEDAW/C/81/D/68/2014](#), para. 18.3.

⁸⁶ See, for example, Chloe Ortiz, “Indigenous incarceration as an extension of colonization”, in *2022 Annual Report: Impact of Law and Policy on Prison Environmental Justice*, David N. Pellow, ed. (University of California, Santa Barbara, 2022).

⁸⁷ See, for example, [CAT/C/NZL/CO/7](#), para. 31 (Māori represent “about 50 per cent of the total prisoner population, while constituting 17 per cent of the total population”).

⁸⁸ A very useful reference work is Chris Cunnen and Juan Tauri, *Indigenous Criminology* (Bristol, Policy Press, 2016), in particular chapter 6, “Reconceptualizing sentencing and punishment from an indigenous perspective”.

within the framework.⁸⁹ This framework should include: (a) the requirements in the United Nations Declaration on the Rights of Indigenous Peoples that Indigenous rights be equally guaranteed to males and females and that special attention be paid to the needs of women and children, pursuant to articles 44 and 22 thereof, respectively; and more generally (b) the gender analysis set out in general recommendation No. 39 (2022) of the Committee on the Elimination of Discrimination against Women, on the rights of Indigenous women and girls.⁹⁰ Similar issues also appear to be relevant in relation to the fact that Indigenous Peoples, and again women in particular, generally suffer from higher rates of violent crime and grossly inadequate responses in the criminal justice system.⁹¹

29. Another positive decision is the ruling of the Committee on the Elimination of Racial Discrimination in *Yaku Pérez Guartambel vs. Ecuador*. This concerns State obligations to recognize Indigenous legal systems and authorities and to give effect to the resulting measures (citing specifically arts. 3, 4, 5, 11, 33 and 34 of the United Nations Declaration on the Rights of Indigenous Peoples). These rights correspond to “legal pluralism”, where Indigenous and State jurisdictions coexist and operate through different authorities.⁹² The Committee decided that this was part of “the necessary cooperation and coordination that should be at the heart of the relationship between the [State] system and the indigenous system – [the latter] emanating [inter alia] ... from the right of indigenous peoples to autonomy and self-government”.⁹³ Furthermore, article 35 of the Declaration provides that “Indigenous peoples have the right to determine the responsibilities of individuals to their communities”, while article 34 serves to recognize the “right to promote, develop and maintain their ... juridical systems or customs”. These principles provide an adequate basis for the development or enhancement of Indigenous mechanisms and procedures for addressing various aspects of access to justice, criminalization, and culturally appropriate treatment, including tackling trauma.

III. Conclusions and recommendations

30. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance explained that “racialized criminalization of Indigenous Peoples ... is now a commonplace strategy that Governments and corporate actors use to suppress and eliminate opposition to extractivist projects”.⁹⁴ Similarly, presenting her report to the Human Rights Council in 2018, shortly after she and another former member of the Permanent Forum on Indigenous Issues had been illegitimately labelled “terrorists”, the former Special Rapporteur on the rights

⁸⁹ An exception is noted in Valmaine Toki, *Indigenous Courts, Self-Determination and Criminal Justice* (New York, Routledge, 2018) (containing an analysis of disproportionate incarceration and recidivism rates and proposing as a solution the institution of Indigenous courts based on Indigenous concepts of proper behaviour and punishment).

⁹⁰ See also Inter-American Court of Human Rights, *Rosendo Cantú and others v. Mexico*, Judgment of 31 August 2010 (To guarantee access to justice to indigenous peoples, “it is essential that States offer effective protection that takes into account their particularities, social and economic characteristics, as well as their situation of special vulnerability, customary law, values, customs and traditions”).

⁹¹ See, for example, Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada* (OEA/Ser.L/V/II.Doc.30/14).

⁹² CERD/C/106/D/61/2017, para. 4.6.

⁹³ *Ibid.*, para. 4.12.

⁹⁴ A/HRC/41/54, para. 60 (“The Inter-American Commission on Human Rights condemned cases of such criminalization in Argentina, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Peru and Venezuela (the Bolivarian Republic of), among others. One submission received from the Philippines reported torture, harassment, rape and murder of indigenous peoples by military and paramilitary forces tasked with protecting investment projects, seemingly at all costs.”).

of Indigenous Peoples explained that “the issue of criminalization of Indigenous Peoples is a global crisis”.⁹⁵ Her recommendations remain valid and form a strong basis and framework for action.

31. Considering the report of the Special Rapporteur on the rights of Indigenous Peoples, States and other relevant actors are urged to consider the following recommendations:

(a) Undertake comprehensive reviews of national laws so that they can adopt laws to ensure due process and effective remedies and revoke laws and criminal procedures that violate the principle of legality and contradict international obligations pertaining to Indigenous Peoples.⁹⁶ This should cover the full range of Indigenous rights, and Indigenous Peoples’ effective participation is required in these reviews;

(b) Assess existing protection mechanisms for human rights defenders, including Indigenous leaders and defenders, taking into account that “recent assessments of these programmes have highlighted the importance of adopting collective and culturally appropriate protection measures for indigenous peoples and the need to consider prevention aspects and to address root causes of violence”;⁹⁷

(c) Support governance systems of Indigenous Peoples, including their protection programmes (for example, the Indigenous Guard in Colombia). This can encompass the further development of Indigenous restorative justice initiatives or similar, including those focused on women, young people and children;⁹⁸

(d) Provide appropriate measures for access to justice for those incarcerated for exercising their collective rights, such as the use and management of their lands and resources, and those facing false charges to silence them.

32. Criminalization affects the achievement of a range of Sustainable Development Goals and interconnected human rights. Therefore, in line with articles 41 and 42 of the United Nations Declaration on the Rights of Indigenous Peoples, United Nations agencies, funds and programmes are urged to do the following:

(a) All agencies, funds and programmes should review, as proposed above, and support related actions, inter alia, in United Nations country-level programming and implementation and in the implementation of the system-wide action plan for ensuring a coherent approach to achieving the ends of the United Nations Declaration on the Rights of Indigenous Peoples;⁹⁹

(b) Regional and national offices of the Office of the United Nations High Commissioner for Human Rights and United Nations resident coordinator offices should collate data on criminalization and support reform initiatives aimed at eradicating this practice by promoting positive examples of efforts to prevent, reverse and remedy criminalization and its consequences;¹⁰⁰

⁹⁵ See, for example, United Nations Environment Programme, “Statement in response to allegations of terrorism against UN Special Rapporteurs”, 15 March 2018. See also [CERD/C/PHL/CO/21-25](#), para. 23 (inter alia, “the Committee is concerned that the vague provisions of the Anti-Terrorism Act of 2020 may be interpreted for the purposes of judicial harassment, a practice which may in turn compound criminal profiling of ... Indigenous Peoples”).

⁹⁶ [A/HRC/39/17](#), para. 91 (d).

⁹⁷ *Ibid.*, para. 81.

⁹⁸ See, for example, Heather Sauyaq Jean Gordon and Ranjan Datta, “Restorative justice in the arctic: indigenous knowledge for healing communities”, December 2020.

⁹⁹ [E/C.19/2016/5](#), para. 23.

¹⁰⁰ See, for example, Federal Government of Brazil, resolution No. 287 of 25 June 2019, establishes procedures for the treatment of indigenous people accused, defendants, convicted or deprived of liberty, and gives guidelines to ensure the rights of this population in the criminal sphere of the judiciary (available at <https://bit.ly/37HBM7>).

(c) The office of the Assistant Secretary-General for Human Rights, which is responsible for actions against reprisals, should pay attention to risks and the criminalization of Indigenous representatives participating in United Nations meetings and take action to facilitate the protection of victims of reprisals;

(d) The Food and Agriculture Organization of the United Nations, the United Nations Development Programme, the International Fund for Agricultural Development, the United Nations Environment Programme, the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization and United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), among others, should pay particular attention to the fact that Legislation that criminalizes the occupation of traditional lands, Indigenous livelihoods and traditional occupations and sustainable conservation practices very likely contravenes a range of protected rights.¹⁰¹ The entities should also consider its specific impacts on Indigenous women, and establish adequate programmes and policies to address the problem. There is a strong presumption that such laws are illegitimate and, consequently, must be repealed as a matter of priority.

33. National action plans to implement the United Nations Declaration on the Rights of Indigenous Peoples must address issues of criminalization and the necessary measures to support protection measures for Indigenous Peoples and systems and policies for their care.

34. With regard to the United Nations treaty bodies and special procedures, it is recommended that:

(a) The Treaty Bodies pay close and increased attention to criminalization in their reviews of State reports, highlighting these issues in interactive dialogues with States, in their general comments and recommendations and when deciding on communications, as well as connected issues of harm and trauma, including intergenerational and transgenerational harm and trauma;

(b) The Committee Against Torture develop a general comment on the human rights of Indigenous Peoples, including as it pertains to criminalization, and stress the need for concrete actions to prevent and remedy this practice, including as it relates to article 11 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(c) The special procedures continue to address and enhance their consideration of criminalization affecting Indigenous Peoples within their mandates;

(d) The Working Group on business and human rights conduct a specific study on the criminalization of Indigenous Peoples in the context of business operations.

35. The Permanent Forum on Indigenous Issues may also wish to consider the following measures in order to continue to consider this issue:

(a) Holding an expert group meeting on criminalization and Indigenous Peoples' human rights with a view to recommending further specific actions that could be taken by the United Nations system, with the participation of United Nations agencies and bodies, States and Indigenous experts;

(b) Commissioning a scoping study on transgenerational and intergenerational discrimination and harm, including where related to various forms of criminalization and its effects. The study may also examine the alarming disproportionate rates of pretrial detention, incarceration and recidivism among Indigenous Peoples, including underlying causes and remedies that may apply through the lens of the United Nations Declaration on the Rights of Indigenous Peoples and related human rights law.

¹⁰¹ See, for example, United Nations Declaration on the Rights of Indigenous Peoples, art. 20; and CCPR/C/135/D/3624/2019, para. 8.13.