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**INDIGENOUS ISSUES**

**Human rights and indigenous issues**

**Report of the Special Rapporteur on the situation of human rights and  
fundamental freedoms of indigenous people, Rodolfo Stavenhagen**

## Summary

Since the preparation of his second annual report to the Commission on Human Rights, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has carried out two official country missions, to Mexico (1-18 June 2003) and Chile (18-29 July 2003) to observe the situation of indigenous peoples. The country mission reports are contained in documents E/CN.4/2004/80/Add.2 and Add.3, respectively. He also visited indigenous communities in Canada (May 2003), Norway and Finland (October 2003), and has maintained extensive contact with indigenous representatives throughout the world and at international meetings. He continues cooperating with United Nations bodies and agencies on issues concerning indigenous peoples.

The present report concentrates on the obstacles, gaps and challenges faced by indigenous peoples in the realm of administration of justice and the relevance of indigenous customary law in national legal systems, issues that indigenous representatives and government delegations, at the Working Group on Indigenous Populations, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the Commission on Human Rights and most recently at the Permanent Forum on Indigenous Issues, have identified repeatedly as being of crucial importance for the full enjoyment of the human rights of indigenous peoples.

Indigenous peoples the world over are usually among the most marginalized and dispossessed sectors of society, the victims of perennial prejudice and discrimination. Even when protective legislation is available, their rights are frequently denied in practice, a pattern that is of particular concern in the administration of justice. The justice system covers a wide variety of institutions including courts and tribunals, official registries and land title offices, correctional centres and prisons, designated law enforcement units, public prosecutors and legal services of all kinds, including legal aid clinics. The Special Rapporteur has emphasized that a fair and effective justice system is crucial in fostering reconciliation, peace, stability and development among indigenous peoples.

Information from different sources indicates that, in many countries, indigenous peoples do not have equal access to the justice system and that in the operation of the justice system, they frequently encounter discrimination of all kinds. This is partly due to racism and partly the result of the non-acceptance of indigenous law and customs by the official legal institutions of a national State. Indigenous people tend to be overrepresented in the criminal justice system, are often denied due process and are frequently victims of violence and physical abuse. Indigenous women and children are particularly vulnerable in this respect. Numerous cases of criminalization of indigenous social and political protest activities have come to the attention of the Special Rapporteur. Language and cultural differences play their role in this pattern of discrimination, and they are not always sufficiently addressed by the State. Some countries have made progress in recognizing the specific needs of indigenous people in the field of justice and have adopted laws and institutions designed to protect their human rights. Indigenous customary law is being increasingly recognized by courts and lawmakers, as well as by public administration. Some countries are experimenting with alternative legal institutions and conflict resolution mechanisms, with encouraging results.

The Special Rapporteur recommends that States carry out exhaustive reviews and, if necessary, reforms of their justice systems to better protect the rights of indigenous peoples. He invites the Commission on Human Rights to take up this issue with member States. Such reforms should include respect for indigenous legal customs, language and culture in the courts and the administration of justice; the full participation of indigenous people in justice reform; and the establishment of alternative justice mechanisms.

In addition to the country mission reports, addendum 1 contains information on communications and responses from Governments on alleged human rights violations received and processed during the period from 15 December 2002 to 15 December 2003. The Special Rapporteur also transmits to the Commission for its consideration addendum 4, containing the conclusions and recommendations of the Expert Seminar on Indigenous Peoples and Administration of Justice, convened at the request of the Commission on Human Rights, which was held in Madrid from 12 to 14 November 2003.

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## Introduction

1. The mandate of the Special Rapporteur was established by the Commission on Human Rights in its resolution 2001/57. In its resolution 2003/56, the Commission encouraged the Special Rapporteur to continue to examine ways and means of overcoming existing obstacles to the full and effective protection of the human rights and fundamental freedoms of indigenous people, and to request, receive and exchange information on violations of the rights of indigenous people, wherever they may occur.
2. The Commission requested the Special Rapporteur to continue working on the topics included in his first report (E/CN.4/2002/97 and Add.1) and, in particular, those that may contribute to advance the debate on fundamental issues of the “Draft United Nations declaration on the rights of indigenous peoples”. He is also requested to pay special attention to violations of the human rights of indigenous women and children, to take into account a gender perspective and to consider the recommendations of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance on matters concerning his mandate.
3. In 2003, the Special Rapporteur presented his second annual report to the Commission which focused on the impact of large-scale or major development projects on the human rights and fundamental freedoms of indigenous peoples and their communities (E/CN.4/2003/90 and Add.1-3). He is now pleased to present to the Commission this third thematic annual report in accordance with resolution 2003/56.
4. Since the presentation of his first report, the Special Rapporteur has continued gathering information on the situation of the human rights of indigenous peoples, following developments in the United Nations system, participating in international and national conferences and research seminars, evaluations, training workshops and the like that deal directly with the issues of his mandate, and has undertaken research on some of the major issues affecting indigenous peoples which he set out in his first report (E/CN.4/2002/97, para. 113). He has also carried out two official country missions, to Mexico (1-18 June 2003) and Chile (18-29 July 2003). The Special Rapporteur has continued paying special attention to the situation of indigenous women and children when visiting countries, including attending specific gatherings to hear their concerns. The country mission reports are contained in documents E/CN.4/2004/80/Add.2 and Add.3, respectively. Also, at the invitation of the Assembly of First Nations, he visited Canada in May 2003 and at the invitation of the Sami Parliament, northern Norway and Finland in October 2003, to observe the situation of indigenous peoples in both areas.
5. The Special Rapporteur attended the second session of the Permanent Forum on Indigenous Issues (New York, May 2003) and transmitted a statement to the Committee on the Rights of the Child on its day of general discussion on the rights of indigenous children (Geneva, September 2003). He also took part in events and lectured at academic institutions on different aspects of his mandate. On the occasion of Human Rights Day (10 December), the Special Rapporteur joined other mechanisms of the Commission on Human Rights in a statement strongly condemning all acts of intimidation and reprisal against individuals and groups who seek to cooperate, or have cooperated, with the United Nations or representatives of its human rights bodies, including indigenous groups and leaders. Furthermore, he has continued developing contacts with numerous indigenous and human rights organizations around the world

and strengthening cooperation with United Nations bodies and agencies. He is especially grateful to the Governments, indigenous peoples' organizations, United Nations agencies, research institutions and concerned individuals who responded positively to his appeal for information.

6. This report concentrates thematically on a major issue that is of particular concern to indigenous peoples, namely the problems they face in dealing with the justice system and the relation between indigenous customary law and national legal institutions, particularly as concerns the protection of human rights. The major concerns involving indigenous rights range from issues related to land, territory, the environment and natural resources to language, culture and education. A fair and effective justice system is crucial in fostering reconciliation, peace, stability and development among indigenous peoples.

7. To support the work of the Special Rapporteur in this area, a questionnaire was sent to Governments and United Nations agencies and programmes aimed at seeking information on legislation, policies and programmes on this subject. The Special Rapporteur thanks the Governments of Argentina, Australia, Chile, Finland, Guatemala, Mexico, New Zealand, Norway and the Russian Federation for their timely responses and comprehensive information, which were most helpful in the preparation of this report. He also thanks multilateral agencies such as the International Labour Organization (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Development Programme (UNDP), the World Intellectual Property Organization (WIPO) and the United Nations Children's Fund (UNICEF) for the information brought to his attention. He also wishes to express his appreciation to the numerous organizations of indigenous peoples and human rights associations that provided him with valuable information.

8. The Special Rapporteur is also encouraged by the increasing number of contributions from academic institutions on issues such as indigenous customary law and alternative dispute resolution mechanisms. To support his work in this area, and encouraged by the proposal contained in Commission resolution 2003/56, the Office of the United Nations High Commissioner for Human Rights (OHCHR), together with the Universidad Nacional de Educación a Distancia (UNED), the leading Spanish distance education institution, organized an expert seminar on this subject, whose contributions were helpful in the drafting of this report. He also wishes to thank Dr. Alexandra Xanthaki for her collaboration in the preparation of this report as well as the Centre UNESCO de Catalunya for the support provided to the mandate.

## **I. ADMINISTRATION OF JUSTICE, INDIGENOUS PEOPLES AND HUMAN RIGHTS**

9. In his missions to various countries and throughout his extensive contacts with indigenous communities and organizations, the Special Rapporteur has observed that one of the more problematic areas regarding the human rights of indigenous peoples is the field of administration of justice. The effective protection of human rights can be achieved only if all persons without discrimination of any kind have free access to justice, and if the dispensing of justice is carried out fully, disinterestedly and impartially. As the Special Rapporteur has informed the Commission on Human Rights in his previous reports (E/CN.4/2002/97, E/CN.4/2003/90), indigenous peoples have been the historical victims of persistent patterns of denial of justice over long periods of time.

10. Here justice must be understood not simply as the effective application of the law and the operation of a good judiciary system, but also as a process whereby people who are persistently and severely disadvantaged may find ways to overcome different types of disadvantage through legitimate and socially acceptable means over the long run. Indigenous peoples are one segment of human society (but by no means the only one) that fits this description. Social responses to such persistent inequalities that affect individuals and collectivities vary widely: from different kinds of public policies to remedial action, restitution, compensation, and access to the courts. All have been attempted somewhere at one time or another, with varying outcomes, and the human rights performance of any State must be measured against the results.

11. Indigenous communities have struggled long and hard to overcome these structural injustices, albeit not always successfully. They have used various means in different proportions, such as confrontation, mobilization, negotiation, legislation and litigation. In fact, First Nations in Canada have been very actively litigating in order to obtain justice and have obtained some notable successes, but litigation is a drawn-out and expensive process that is not always available to indigenous peoples in other countries that have different legal traditions. Confrontation and social mobilization are occurring in many places where legal and political processes do not always work in favour of the rights of indigenous peoples. In recent years, negotiation and legislation have become an important recourse for indigenous rights, but even then the issue of their effective implementation is still open. In this wider context, justice issues facing indigenous peoples take on many different forms that may be dealt with under various subcategories.

#### **A. The courts and the rights of indigenous peoples**

12. Pervasive denial of justice may be the result of historical processes such as the appropriation of indigenous land by colonizers and settlers on the basis of the now defunct doctrine of *terra nullius*, the imposition of land-titling schemes from which indigenous communities may be excluded, the non-recognition of their cultural identity, the unilateral abrogation of treaties and agreements with indigenous peoples by national Governments, the pillaging of the cultural heritage of native communities, the official rejection of the use of native languages, etc. Land rights have played a crucial role in the search for justice by indigenous peoples. When the laws and the courts uphold the dispossession of indigenous lands (as has happened throughout history in numerous parts of the world), then the cause of justice is not well served. On the other hand, recent judicial decisions and new legislation in some countries show promise that the situation may improve under certain circumstances, in accordance with evolving international standards regarding the human rights of indigenous peoples. The following examples illustrate some of these issues.

13. Court decisions are sometimes based on the recognition of aboriginal title, and they point to an encouraging trend in various countries. In Australia, for example, the High Court noted that the nature and occurrence of native title must be ascertained as a matter of fact, by reference to the laws and customs of the indigenous inhabitants who possess that title. However, in another decision in 2002, concerning the Yorta Yorta land claim, the High Court made requirements for native title claims more difficult for indigenous peoples to fulfil.

14. In the United States, a court in Oklahoma held that the legal question concerning occupancy of the land would be solved in accordance with the way of life, customs and usages of the indigenous people who are its users and occupiers. The Inter-American Court of Human Rights upheld the rights of the indigenous Awas Tingni community to the protection of their property in a landmark case against the Government of Nicaragua, which had failed to provide adequate recognition and protection of the community's customary land and resource tenure. Yet in 2002, the community submitted a new complaint for violation of constitutional rights to the Bilwi Court of Appeal to force the Government to comply with the decision of the Court.

15. The Sapporo District Court in Japan found the expropriation of Ainu land and the submersion of important Ainu religious, cultural and archaeological sites illegal (see E/CN.4/2003/90, paragraph 20). In Malaysia, a court decided that the Orang Asli have a proprietary interest in the customary and traditional lands occupied by them and have the right to use and derive profit from the land. In the late 1990s, the Constitutional Court of Colombia upheld the rights of the U'wa indigenous community against a licence for oil prospection on indigenous territory which the Government had given to a multinational corporation without the prior consent of the community. In another case, the Court upheld the rights of the Emberá-Katío with respect to the activities of an energy company which were damaging the environment and threatening the survival of this indigenous community.

16. The Supreme Court of Norway decided that the Sami people of Manndalen were the legitimate owners of the Svartskogen property on the basis of use from time immemorial, contrary to the determination of the Unenclosed Land Commission which had considered it to be State-owned land. In an earlier case, a majority of the Court had decided in favour of the reindeer-herding Sami community's claim to the use of its ancestral common pastures in Selbu, against competing claims by individual landowning farmers, who had been supported since the nineteenth century by the official Lapp Commission.<sup>1</sup>

17. About 5,000 Khoikhoi people comprise the Richtersveld community in the Northern Cape of South Africa, where they have lived since time immemorial. In the late 1920s, a mine was opened on their land, and the community was removed to a nearby reserve. The Land Claims Court ruled that any rights the Richtersveld community may have had to the land were extinguished when the area was annexed by the British in 1847. It said that the Khoikhoi were "insufficiently civilized" to have rights to their traditional territories which had been declared *terra nullius* and had become Crown lands recognized after annexation. In 2003 however, upon appeal, the Constitutional Court of South Africa ordered the restitution of the land, including mineral rights. It ruled that the Richtersveld community had been in exclusive possession of the claimed lands prior to the annexation by the British Crown in 1847 and that these rights survived the annexation. The Land Claims Court had erred in finding that the community had lost its rights because it was insufficiently civilized to have its land rights recognized. It also ruled that the practices which gave rise to dispossession were racially discriminatory because they were based on the false, albeit unexpressed, premise that, because of the Richtersveld community's race and lack of civilization, they had lost all rights to the land upon annexation.

18. In March 2000, the Nairobi High Court ruled that the eviction of between 5,000 and 10,000 members of the Ogiek tribe from Tinet forest in Kenya was legal even though it affected the rights of hundreds of families to their ancestral lands. The Special Rapporteur invites the Government of Kenya to respect the rights of the Ogiek people to their traditional habitat.<sup>2</sup>

19. The Government of New Zealand has informed the Special Rapporteur that the individual and collective rights of Maori are recognized by the justice system in two ways. First, although the Treaty of Waitangi does not provide directly enforceable rights, the New Zealand courts have shown a proactive approach to interpreting and applying the principles of the Treaty where these are included in specific legislation. Secondly, the Waitangi Tribunal has been established to hear individual and collective Maori claims against the Crown for breaches of principles of the Treaty. The process for the settlement of historical (pre-1992) grievances is now well established and involves both apologies and reparations, as well as measures to provide ongoing recognition of cultural interests in specific sites and resources. The Tribunal, whose bicultural mandate and jurisdiction are established in the Treaty, continues to provide a forum for the expression and investigation of the collective and individual rights of Maori.

20. Some national laws maintain the alienation and exclusion of indigenous peoples from the justice system altogether. For example, the Constitution of Nepal declares the State to be a Hindu kingdom and Nepali language the official language; there is no recognition of the indigenous peoples and discriminatory legislation prohibits indigenous peoples from carrying out their own traditional activities, including hunting and fishing, and other expressions of their cultural identity. For the same reasons, no indigenous person may become an official in any capacity of the country's judiciary.<sup>3</sup>

21. Reports indicate that in the Russian Federation, the rights of indigenous peoples are still not protected, despite guarantees to the contrary in the 1999 Federal Law on the Guarantees of the Rights of Indigenous Numerically Small Peoples of the Russian Federation.<sup>4</sup> The main problem appears to be the lack of implementation of the Federal Law at the regional and local levels, a concern expressed repeatedly by international bodies and experts.<sup>5</sup>

22. In several of the countries he visited, the Special Rapporteur has come across situations where there appears to be incompatibility between human rights legislation pertaining to indigenous peoples and other sectoral laws (such as legislation regarding the environment or the exploitation of natural resources, or the titling of private landholdings). When asked to rule on competitive claims on such issues, the courts may sometimes render judgements that protect the rights of indigenous communities, but just as often they may hand down rulings that are detrimental to these rights. The Special Rapporteur has always recommended that the rights of indigenous peoples as set out in national and international laws should have priority over any other interests and has called upon Governments to make efforts to adjust their legislations accordingly. The cases mentioned above are representative of the issues encountered by indigenous communities. The Special Rapporteur calls upon the justice system in all countries to attach the highest priority to the human rights of indigenous peoples and to decide court cases in accordance with the international principles of human rights; he also invites the Commission on Human Rights to recommend such action to member States.

## **B. Discrimination and the justice system**

23. The widespread lack of access to the formal justice system due to ingrained direct or indirect discrimination against indigenous peoples is a major feature of the human rights protection gap. Often this only reflects the physical isolation and lack of means of communication in indigenous areas, but it also occurs when public resources are simply insufficient to build up an effective judiciary designed for the needs of indigenous communities. More seriously, it may signal the fact that the official legal culture in a country is not adapted to deal with cultural pluralism and that the dominant values in a national society tend to ignore, neglect and reject indigenous cultures. Numerous studies document bias or discrimination suffered by indigenous persons in the justice system, particularly in the criminal justice area, where women, youth and children are often particularly disadvantaged. Of special concern is the overrepresentation of indigenous people in criminal proceedings and prisons. Some cases illustrate this situation.

24. Entrenched habits of discrimination against indigenous peoples weigh heavily on the justice system in some countries, such as India. During discussions about justice reform, it was observed that plea bargaining is used as a way of making indigenous and vulnerable persons accept charges for crimes they have not committed; laws protecting vulnerable groups are not enforced, because of the negative attitude of law enforcement agencies towards these persons; and a survey indicates that the prosecution system does not appear to work properly.<sup>6</sup>

25. Indigenous people are still victims of discrimination in the administration of justice in Australia. Since 1997, Aboriginal prisoners regularly constitute over 20 per cent of the total prison population of the country, although Aboriginals make up only 2.4 per cent of the total population. The situation is even worse in women's and youth facilities, where the number of indigenous women is 20 times that of non-indigenous women. Young Aboriginal people are more likely to receive harsher treatment by the police; they are overrepresented in juvenile detention centres by 10 per cent and in police custody and correctional institutions by 21 per cent. Indigenous children make up more than 40 per cent of all children in correctional institutions. A review of the Children (Protection and Parental Responsibility) Act 1997 in New South Wales found that the Act "has impacted almost solely on Aboriginal young people to the extent that it may be grounds for a complaint of indirect racial discrimination to domestic and international bodies".<sup>7</sup>

26. Reports also indicate that, as in the case of Mexico,<sup>8</sup> indigenous women tend to be abused and harassed while in detention, and may become involved in drug and prostitution schemes operating in prisons.

27. The Royal Commission on Aboriginal Peoples found that in Canada "Aboriginal people who encounter the justice system are confronted with both overt and systemic discrimination, which is one of the reasons why many Aboriginal persons have not received due justice".<sup>9</sup> Canadian Aboriginals make up 16 per cent of the prison population, although they only represent 2 per cent of the whole population. They are incarcerated 8.5 times the rate of non-Aboriginal peoples, their arrest rate is nearly double and the rate of incarceration nearly four times the national average.<sup>10</sup>

28. Aboriginal citizens in detention are also prone to suffer violence. In 2000, for example, police officers were accused of abandoning two indigenous men to freeze to death on the outskirts of Saskatoon. A survey by Correctional Service of Canada pointed out that abuse played a more widespread part in the lives of Aboriginal women inmates compared to non-native women. In 1996, Indian and Northern Affairs Canada reported that, "Aboriginal women with status under the Indian Act and who are between the ages of 25 and 44 are five times more likely to experience a violent death than other Canadian women in the same age category".<sup>11</sup>

29. In the United States, in the State of Alaska, Natives regularly comprise 34 per cent of all prisoners although they represent only 17 per cent of the population. Adult Native Alaskans are incarcerated at a rate 3.2 times higher than that of white Alaskans and Native Alaskan juveniles are 1.8 times as likely to be adjudicated delinquent as white juveniles. Many people do not speak English well enough to understand court publications, forms and in-court proceedings. However, judges are not trained to know when a language interpreter is needed, how to decide if a particular interpreter is qualified, or how to use interpreters in court. Interpreters are not trained in legal proceedings neither are they monitored. Moreover, judges and court system personnel do not receive regular cross-cultural training about indigenous peoples in their area.<sup>12</sup>

30. The overrepresentation of indigenous people in corrective institutions is often linked to overpolicing in areas where indigenous persons live and to the intense focus by enforcement bodies on indigenous activities, which leads to higher levels of arrests. Studies show that indigenous people are overrepresented in court, are charged with more offences than non-indigenous, are more likely to be denied bail, spend less time with their lawyers and receive higher sentences when pleading guilty.<sup>13</sup> Indifference by law enforcement bodies to complaints by indigenous people can also be discriminatory, as seen in a pattern of poor police responses to complaints about violence and other disturbances. One reason suggested is the perception that domestic violence is part of Aboriginal culture or a "tribal norm"; others blame racist stereotypes by Whites that indigenous people do not deserve police protection.<sup>14</sup>

31. Whereas the Government of New Zealand reports that there is no strong evidence of discrimination against Maori defendants in court, an official study recommends that "strategies need to be developed to eliminate negative attitudes, to avoid the over-policing of Maori ...".<sup>15</sup> Because Maori continue to be overrepresented in crime statistics, the Government has put in place a Crime Reduction Strategy (CRS) to address these issues.<sup>16</sup>

32. Violence against indigenous people, and particularly women and youth, is widespread in numerous countries, and only in some States are judicial inquiries held to investigate accusations of such violence. In the countries he has visited on official missions, the Special Rapporteur has received numerous reports about violence and physical abuse of indigenous people by local authorities, law enforcement agencies, military units, vigilante groups, paramilitaries and private armed squads. Similar complaints are presented regularly by indigenous and human rights organizations to the relevant international bodies. They express a serious pattern of human rights violations of indigenous people that must be addressed squarely by the justice system wherever it occurs.

33. Reports on the situation of indigenous people in detention suggest that they are held in overcrowded prisons where conditions are frequently below standard, that they are not provided with basic health and other services, in violation of international principles for the treatment of

prisoners, and are often held in facilities far from their home communities with little contact with their families. Complaints have also been received about restrictions on their religious rights by prison officials, such as access to their spiritual leaders, who are sometimes harassed, or limitations on religious practices by inmates and their defenders.

34. Legislation imposing mandatory imprisonment for minor offences also appears to target offences that are committed disproportionately by indigenous peoples. The Committee on the Rights of the Child (see A/53/41), the Human Rights Committee (see CCPR/C/AUS/98/3 and 4) and the Committee on the Elimination of Racial Discrimination (see CERD/C/304/Add.1 and A/55/18) have all noted that this measure discriminates in practice against indigenous peoples and leads to penalties unrelated to the severity of the offences committed. It is encouraging to see that the Australian Juvenile Justice Amendment Act (No. 2) 2001 repealed mandatory sentencing for juvenile offenders, whereas the Sentencing Amendment Act (No. 3) 2001 repealed mandatory sentencing for property offences against adults.<sup>17</sup>

35. States should ensure that indigenous children in contact with the juvenile justice system are protected from discrimination and that their cultural rights are respected. In many countries, indigenous peoples face discrimination at all levels of society; for this reason, it is essential to train law enforcement officials in child rights and raise awareness about discriminatory practices in an intercultural environment. Law enforcement officials must be especially sensitive to the needs of aboriginal girls in contact with the juvenile justice system.

36. Indigenous children may also be at a disadvantage when their families cannot afford legal counsel and free legal aid is not provided. Indigenous children are at high risk of not being properly defended, hence more likely to be found guilty and to endure harsher sentences than their non-indigenous counterparts. Legal assistance should also be provided in their language and be of good quality. The Convention on the Rights of the Child sets forth the rights of children in the justice system that must be effectively protected by State authorities under all circumstances, especially in the case of indigenous youth and children in an intercultural environment. Owing to geographical and cultural distances between indigenous communities and official agencies, birth registration rates of indigenous children are often quite low. Registration is important for all children to be able to enjoy the protection they are entitled to in the juvenile justice system.

37. The language of judicial proceedings is often a problem for the adequate protection of the rights of indigenous people. In countries where indigenous languages are not officially recognized, this may be a major disadvantage. Contrary to legal provisions, interpreters and public defenders for indigenous people may not be available, and if they are, it is likely that they are not adequately trained or well versed in indigenous culture. Frequently, court officials may be biased against indigenous people in their districts. Such is often the case in some Asian countries, where legal texts and proceedings are written and carried out in English or a national language not understood by an indigenous community.<sup>18</sup> When they cannot participate actively in judicial proceedings, indigenous people are particularly vulnerable and are unable to exercise any control over crucial matters concerning their fate.

38. In Guatemala, the right of defendants to a Maya-language interpreter was introduced in the Penal Code in 1992 and court interpreters have been hired since 1998. In fact, however, ordinary justice ignores indigenous law and criminalizes it, and it also discriminates against

indigenous people because of their language and culture. Language is one of the main difficulties preventing access by the indigenous to ordinary justice, national registries and any legal proceeding. Indigenous-language speakers are at a disadvantage in the justice system, which operates in a cultural and linguistic framework that is not theirs. Judicial proceedings take place in Spanish, even in areas with a high concentration of indigenous people, and the number of interpreters or bilingual legal practitioners is totally insufficient. The situation of indigenous women is even more serious because of their high rates of monolingualism and illiteracy.<sup>19</sup>

39. Ongoing intercultural training should be given to justice administration officers. Officials of judicial bodies need to be aware of the indigenous groups in their areas. Indigenous people should have the opportunity to become members of the judicial administration, in order to overcome the atmosphere of “learned helplessness” in which they are immersed. States should adopt positive measures that encourage indigenous employment in legislative, judicial, enforcement and corrective bodies.

40. In order to facilitate indigenous peoples’ contacts with the judicial system, the idea of court facilitators, or court navigators, has been suggested. The facilitator is a person familiar with the legal systems and court processes and who also understands indigenous native languages and cultures. Courts in Manitoba and Colorado have already put this into practice. The Canadian 2003 Youth Criminal Justice Act is a step in the right direction, reducing the use of the formal justice system and overreliance on incarceration and improving mechanisms of reintegration and rehabilitation for indigenous youth. The Act also applies the principles of participation and consultation with indigenous communities concerning youth in the criminal justice system.<sup>20</sup> The Committee on the Rights of the Child has recommended that States parties respect the methods customarily practised by indigenous peoples for dealing with criminal offences committed by children when it is in the best interest of the child and in accordance with the Convention on the Rights of the Child. All these dimensions are also taken into account in other international instruments related to juvenile justice, including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines).<sup>21</sup>

41. In this regard, traditional methods of restorative justice have been identified as a means of responding positively to offences committed by children, in accordance with human rights principles. Indigenous traditions can be a means of dealing with children in conflict with the law in a constructive manner, without resorting to punitive approaches, hence favouring their reintegration in the community. Constructive approaches to dealing with children in conflict with the law should build on indigenous traditions; they can be educational, favouring the child’s rehabilitation, as they involve both the child and the community, and they prove to be less costly and more effective than keeping a child in detention.

42. The obstacles indigenous people face in the justice system are merely symptoms of a larger picture of complex social problems related to a history of discrimination, marginalization and social exclusion, including poverty and unemployment, which is often expressed through alcoholism and drug abuse, homelessness and violence. Indigenous women are even more

affected by socio-economic factors. Incarceration often occurs in the context of intolerably high levels of family violence, overpolicing for selected offences, ill-health, joblessness and deprivation. Studies on indigenous women in prison reveal life experiences fraught with danger from violence.

43. Discrimination against indigenous peoples in the justice system (as well as against other minorities of all kinds) is a widespread occurrence.<sup>22</sup> While it is often related to the personal prejudice and subjective attitudes of judges, magistrates, attorneys, prosecutors and government officials, it is more importantly related to systemic rejection of indigenous cultures and identities. The justice system does no more than express the dominant values of a society, and when these are biased against indigenous peoples (as is so often the case), the courts tend to reflect them. Only in recent years, and to a great extent as a result of developments in the international arena, has the atmosphere begun to change. The Special Rapporteur calls upon all members of the judiciary and related institutions to take due account of the cultures and values of indigenous peoples and communities in providing and ensuring justice in the widest and most generous sense of this concept, whenever indigenous peoples and communities are involved.

### **C. The criminalization of indigenous protest activities**

44. One of the more serious human rights protection deficiencies in recent years is the trend towards the use of laws and the justice system to penalize and criminalize social protest activities and legitimate demands made by indigenous organizations and movements in defence of their rights. Reports indicate that these tendencies appear in two guises: the application of emergency legislation such as anti-terrorist laws, and accusing social protestors of common misdemeanours (such as trespassing) to punish social protests. Examples from various parts of the world have come to the attention of the Special Rapporteur.

45. In India, the adoption of the Prevention of Terrorism Act, 2002, has led to the detention of many Adivasis from Jharkhand, including indigenous activists, children and elderly. Until March 2003, when the Madras High Court upheld the supremacy of the Juvenile Justice Act over anti-terrorist laws, several indigenous children had been arrested as terrorists.<sup>23</sup>

46. In Guatemala, for example, the criminal justice system overpenalizes certain kinds of crimes by weighting the system towards offences that have less social relevance or that could be addressed differently. Such is the case of felonies concerning property that could be dealt with by way of reparations. Yet the Penal Code forbids exchanging a prison sentence for monetary compensation in the case of theft or robbery, whereas it allows it in the case of homicide. Crimes against property are the most common felonies to reach the courts and the culprits fill the prisons. In the context of deep social problems, the penal response to social conflicts still tends towards the criminalization of the social demand for rights. An example of this tendency is the use of the accusation of trespassing (implying three, and up to six years of imprisonment) against individuals who may be peacefully occupying a piece of uncultivated land as part of a social conflict over traditional land rights.<sup>24</sup>

47. A similar situation occurs in Chile where Mapuche community leaders have recently received heavy prison sentences for alleged "terrorist" acts committed in the framework of social conflict over land rights, giving rise to serious concern about due process of law in that country (see E/CN.4/2004/80/Add.3).

48. Historically, indigenous peasant organizations claiming land ownership in Honduras have not met with a sympathetic response from the Government. The incarceration of union and indigenous leaders, together with the lack of access to professional legal representation and interpreters, account for the overrepresentation of the indigenous population in the penal system. According to Amnesty International, over the last decade, police officers, death squads and the military have reportedly been involved in the killings of indigenous leaders.<sup>25</sup>

49. In Mexico, the Special Rapporteur received complaints about indigenous community activists being prosecuted and jailed on “fabricated” charges of ordinary offences for their participation in social mobilization over rights issues (see E/CN.4/2004/80/Add.2).

50. During his mission to the Philippines in 2002, the Special Rapporteur was informed that indigenous organizations that defend ancestral domains and land rights or resist the encroachment of alien commercial interests on their territories are often criminalized as subversive, and their members prosecuted as “terrorists” (see E/CN.4/2003/90/Add.3, para. 49).

51. According to information provided to the Special Rapporteur during his visit to Canada in April 2003, members of First Nations who actively confront government authorities over land or fishing rights (as in British Columbia and Nova Scotia) are sometimes prosecuted and sentenced for common law offences, without due regard to the social and cultural implications of their actions.

52. The case of Leonard Peltier, a Native American Indian activist who was convicted in 1975 following a shooting incident at Wounded Knee (South Dakota), has been repeatedly brought to the attention of the Special Rapporteur. Leonard Peltier was tried, convicted and sentenced to prison over 25 years ago in proceedings which have raised serious due process concerns and led a number of distinguished personalities to seek clemency.<sup>26</sup> The case remains an issue of serious concern for the Special Rapporteur.

53. An ominous trend in current affairs is that human rights abuses occur not only during states of emergency or in authoritarian non-democratic regimes, but also within the framework of the rule of law in open transparent societies, where legal institutions are designed to protect individuals from abuse and to provide any victim of alleged human rights violations with mechanisms for access to justice and due process. Rights abuses committed against indigenous people often happen in the context of collective action initiated to press the legitimate social claims of marginalized, socially excluded and discriminated against indigenous communities. Private vested interests and beleaguered authorities belonging to local power structures often use the law to dismantle such movements by penalizing prominent leaders either through the application of common criminal statutes and regulations or by invoking politically motivated anti-terrorist legislation. The Special Rapporteur strongly urges that legitimate social protest activity of indigenous communities not be so penalized by the arbitrary use of criminal legislation designed to punish crimes that endanger the stability of democratic societies. He urges States to use non-judicial means to solve social conflicts through dialogue, negotiation and consensus.

#### **D. Indigenous law and culture and alternative dispute resolution**

54. A strong and persistent demand of indigenous peoples concerns the recognition of their cultures and customary legal systems in the administration of justice. Arguments have been advanced that the non-recognition or rejection of native customary laws and mores are another indication of human rights violations that lead to abuses being committed in the justice system. The non-recognition of indigenous law is part of a pattern of the denial of indigenous cultures, societies and identities in colonial and post-colonial States, and the difficulty that modern States have had in recognizing their own multicultural make-up. In many countries, a monist conception of national law prevents the adequate recognition of plural legal traditions and leads to the subordination of customary legal systems to one official legal norm. In these circumstances, non-official legal traditions have hardly survived at all, or have become clandestine. While legal security is provided in the courts in the framework of one official judicial system, indigenous peoples, whose own concept of legality is ignored, suffer from legal insecurity in the official system and their legal practices are often criminalized.<sup>27</sup> Given the discrimination existing in the national judicial systems, it is not surprising that many indigenous peoples distrust it and that many ask for greater control over family, civil and criminal matters. This reflects questions relating to self-government and self-determination. To remedy the many injustices and indignities that indigenous peoples suffer in the justice system, alternative ways of dispensing justice and solving social conflicts have been attempted in numerous countries. Some States have made progress in recent years in recognizing and taking account of such customary practices, but others are still reluctant to modify their own legal structures in this sense. Numerous cases have been brought to the attention of the Special Rapporteur.

55. A positive example is provided by Greenland Home Rule. Although based on the Danish system and administered by the Danish authorities, the Greenland justice system is responsive to the standards and values of Greenlandic society and traditional Inuit legal practice and customary law, with a strong emphasis on resocialization and the principle of extensive lay participation in the administration of justice. The judicial system differs significantly from the Danish system to which it is attached. Greenland has 16 local district courts that handle a wide variety of cases, including criminal and family law. Citizens are called to act as district judges, lay judges and defence counsel while local police handle the prosecuting function. The presiding judge is a lay judge who is assisted by two lay assessors. When a case is brought before the Greenland High Court in Nuuk, it is analysed and attended to by legally trained prosecutors, judges and counsel. In 1994, the Justice Review Commission recommended, inter alia, that local judges must have knowledge of the local community and its cultural values, and language skills in Greenlandic (see CERD/C/319/Add.1, paras. 139-141).

56. Courts in several States have accepted indigenous customs when dealing with land issues. The Supreme Court of Canada found in its decision in the *Delgamukw* case that occupancy sufficient to support aboriginal title should be based on both the physical occupation of the land in question and the pattern of land holdings in Aboriginal law. It accepted the use of indigenous oral histories as proof of historical facts, and ruled that "this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents".<sup>28</sup> There is a growing trend

towards adapting the rules of evidence and requirements of proof to indigenous perceptions. This suggests that the courts are attempting to take into account the cultural identity of indigenous communities and to show some willingness - as in this case - to consider indigenous perceptions of land ownership and occupation.

57. It is important that treaties signed between indigenous communities and States be taken into account when deciding land issues. Unfortunately, in several land rights cases national courts seem to ignore the international standards on indigenous rights, including those concerning restitution and compensation.

58. In South Africa, the Traditional Courts Act (2003) authorizes and establishes a hierarchy of customary courts whose jurisdiction extends to criminal and civil cases. In accordance with the Act, the courts will be operated by members of the community and decisions will be based on the customary laws of the community, in line with the constitutional values of democracy and equality.

59. Indeed, many indigenous cultures do not share the emphasis of official legal systems on judgement, punishment, and taking the offender out of his community. Comparative research shows that in dealing with offenders, indigenous legal systems tend to emphasize restitution, compensation and the restoration of social and community harmony rather than punishment and the physical isolation of delinquents which occurs in most official judicial systems handled by State administrations.

60. Indigenous communities in Ecuador retain many of their legal practices based on indigenous customs and traditions. Common conflicts are dealt with by the family, whereas more important matters are referred to the competent indigenous authorities, who discuss the matter in a general community assembly. However, claims are often raised that these actions are limited only to minor cases. The Special Rapporteur is of the opinion that efforts should be made to seek ways to ensure that indigenous judicial systems are complementary to the State system.

61. In Guatemala, Maya communities continue to use their legal systems to solve conflicts between their members following Maya traditions and based on dialogue and negotiation. Maya customary laws attempt to involve the whole community in resolving matters of conflict, including property issues, family issues and theft. Community members also seek general advice from the Maya authorities.

62. Cultural programmes exist in several United States prisons, where there are many indigenous inmates, and have proven to be very beneficial. Indigenous representatives have repeatedly asked for indigenous prisoners to have the right to have access to native spiritual leaders and counsellors, sacred medicines and instruments such as sage, cedar, sweetgrass, tobacco, corn pollen, sacred pipes, medicine bags, eagle feathers and headbands and ceremonies such as the sweat lodge and pipe ceremonies.<sup>29</sup> In Australia, indigenous peoples participate in programmes, such as community policing, night patrols, Community Justice Panels and Groups, circle sentencing and Aboriginal courts, such as the Nunga Court, the Murri Court and the Koori Court.

63. In Guerrero, Mexico, indigenous communities created an inter-community local police force, whose aim is to complement the work of the State police and to prevent, prosecute and punish offences and crimes committed in the communities. It also seeks new ways to re-integrate the delinquent and facilitate his return to the community, working in social services or other community tasks (see E/CN.4/2004/80/Add.2).

64. The New Zealand Bill of Rights Act (1990) guarantees offenders the right to interpretation if needed and to legal aid, which may include having documents served and filed in Maori. The Department of Corrections and New Zealand Police have cultural advisers available for Maori. In 2001-2002, the Legal Services Agency supported 24 Community Law Centres, including 4 Maori Community Law Centres. The Maori language was recognized officially under the Maori Language Act 1987. The legislation recognizes the right of Maori to speak Maori in courtrooms and provides translation services for the judiciary. The Government is committed to improving the responsiveness of the criminal justice system to Maori. Provision has been made for the inclusion and utilization of Maori justice processes and practices within the system itself.

65. In some States where national laws do recognize indigenous peoples and their rights, these laws are not applied in practice. In the Russian Federation, recent federal laws guarantee a wide range of indigenous rights, including their participation in the development of laws and the implementation of programmes that affect them, as well as the possibility of a quota system in order to ensure that indigenous peoples have a voice in legislative bodies. However, secondary, regional and local legislation to implement the principles of the federal legislation has not yet been adopted.<sup>30</sup>

66. In Morocco, parents are often not able to give their children an indigenous name, because the registrars refuse to acknowledge indigenous names. Although the Royal Decree of 17 October 2001 recognized the Amazigh dimension of the Moroccan identity and a new law on the registry system was adopted in 2002, parents must still use a list of non-indigenous names in choosing children's names.<sup>31</sup> Measures that do not recognize the cultural identity of indigenous peoples are inconsistent with article 27 of the International Covenant on Civil and Political Rights and ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

67. Indigenous customary law, which is often not recognized by the official legal system, is rooted in local traditions and customs and usually answers the needs of indigenous communities regarding the maintenance of social order and harmony, the solution of conflicts of various kinds and the process of dealing with offenders. Countries that have been able to incorporate respect for customary indigenous law in their formal legal systems find that justice is handled more effectively, particularly when dealing with civil and family law, but also in certain areas of criminal law, so that a kind of legal pluralism appears to be a constructive way of dealing with diverse legal systems based on different cultural values.

68. Some critics argue that the customary law of indigenous peoples does not provide sufficient guarantees for the protection of universal individual human rights. But even if this were a true statement based on sufficient evidence, it should not be used to write off indigenous customary law altogether, but rather as a challenge to bring both approaches closer together by

making them more effective in the protection of human rights - both individual and collective. Legal pluralism in States is an opportunity for allowing indigenous legal systems to function effectively as parts of or parallel to national legal systems.

69. The Special Rapporteur recommends that indigenous law be accorded the status and hierarchy of positive law within the framework of the right to self-determination, and that States that have not yet done so undertake ways and means, in consultation with indigenous peoples, of opening their judicial systems to indigenous legal concepts and customs.

70. Various United Nations specialized agencies and programmes have recognized the relevance of such customary laws and encouraged its incorporation in the national legal system. Within the framework of the Universal Declaration on Cultural Diversity adopted by the General Conference in 2001, UNESCO encourages interdisciplinary exchanges between indigenous and non-indigenous experts geared to promoting the recognition, safeguarding and revitalization of indigenous cultural resources and identities. Among other activities, UNESCO supports a project among the Mapuche-Tehuelche people in Argentina focused on conflict resolution. UNDP also supports the strengthening of traditional local community justice structures and conflict resolution mechanisms, and encourages in particular the participation of women at all levels.

71. In response to the argument that special recognition of indigenous legal institutions may be inconsistent with the principle of non-discrimination, international law recognizes the need for positive measures to protect the rights of minorities and for policies aimed at correcting conditions that prevent or impair the full enjoyment of their rights.<sup>32</sup> Positive measures, especially for indigenous peoples, are also foreseen in ILO Convention No. 169 and other international instruments.

72. Such positive measures are being applied in a number of States. New Zealand reports on the use of indigenous prayers to commence court proceedings or public meetings, and sacred sites are acknowledged and protected under environmental legislation. The Ngai Tahu Claims Settlement Act (1998) contains extensive statutory acknowledgment of the mythological and sacred origins of natural landmarks. The Resource Management Act (1991) recognizes that in matters of national importance, all persons must take into account the relationship between the Maori and their lands and environment, as well as the principles of the Treaty of Waitangi.<sup>33</sup> In Finland, customary law forms part of domestic sources of law and can thus be applied to court proceedings involving indigenous people.

73. Indigenous peoples have claimed new rights based on the recognition of their cultural and ethnic characteristics. In this context, tribal courts have grown into expressions and conduits of self-determination and self-governance, a purpose not always viewed positively by States. A good example is the Court of the Navaho Nation, in the United States, which has criminal jurisdiction for offences committed by Navahos and Native Americans of other tribes who come within the jurisdiction of the reservation, and civil jurisdiction over any action arising within the Navaho Nation or having an adverse impact on it. The Court uses general principles of American common law, federal statutes and agency regulations, and its court rules are similar to those used in the federal judicial system. At the same time, the Court also uses Navaho common law, based on societal traditions that are preserved in creation lore, ceremonies, chants, prayers, and similar carriers of cultural values. For major crimes, individual Navahos are subject to

federal law and prosecuted in federal courts. The Navaho Nation legal system also uses a traditional legal process alongside the American common law model called *Hozhooji Naat'aanii*, or peacemaking, which is a form of mediation where peacemakers give opinions to assist parties in resolving their dispute through teaching and guidance.<sup>34</sup>

74. In 1999, the Tsuu T'ina Nation of Alberta, Canada, inaugurated, with provincial government support, a comprehensive aboriginal justice system, in a partnership that blends aboriginal justice traditions, including the office of peacemaker, with the Provincial Court of Alberta. The Tsuu T'ina Court has jurisdiction over offences that take place on the reserve; the peacemaker's role includes active promotion and teaching of traditional values and restoring harmony within the community. The Federation of Saskatchewan Indian Nations is negotiating with the federal and provincial governments to set up a justice system rooted in First Nation values, culture and spirituality, which represents a community-driven process. The Mi'kmaq Nation is working on similar projects.<sup>35</sup>

75. In New Zealand, the Treaty of Waitangi, signed in 1840 by the settler government and more than 100 Maori chiefs, recognized local Maori land and fishing rights, but these had been whittled away by subsequent governmental and private actions. The Waitangi Tribunal was established by the Treaty of Waitangi Act 1975 to hear claims by Maori about the acts or omissions of the Crown that have prejudiced them and to make recommendations to the Crown on those claims, which may include grievances concerning discrimination in relation to the justice system. The Tribunal attempts to restore Maori status both substantively, through its carefully considered decisions, and procedurally, by giving due respect to Maori custom. Findings of fact are often based upon extensive historical and anthropological research, but its uniqueness lies in its procedural features - an innovative amalgam of Maori custom and British settler court practice. The Maori Land Court is the only Maori court; it deals with land issues and its transactions are carried out in a traditional and appropriate manner, including the use of the Maori language.

76. There is increasing interest in New Zealand in the concept of restorative justice. The Ministry of Justice interprets this in a practical sense to mean a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future. The adoption or recognition of restorative justice concepts in legislation brings customary and statute law closer together. The concept and practice of Family Group Conferences, closely allied with restorative justice models, aims to provide holistic engagement with young offenders and give them, their families and the community a stake in reducing crime and building stronger communities from the "flax roots" up.

77. Norway now has both a Land Disputes Tribunal, which adjudicates on questions relating to land titles, the right of usufruct and boundary disputes involving Sami people, and a district court within the Sami language administrative district, in which the Sami and Norwegian languages have equal status.

78. In Australia, the Community Justice Group projects, which started in 1993, aim to provide Aboriginal peoples with a mechanism for dealing with problems of justice and social control that is consistent with Aboriginal law and cultural practices as well as the

Anglo-Australian legal system. These projects have contributed to the decline in the crime rate and level of violence, especially juvenile crime, and to a change in social patterns and perceptions about the justice system.

79. The Agreement on Identity and Rights of Indigenous Peoples of 1995 in Guatemala, which is part of the Peace Agreements of 1996, established the need for a new national justice system adapted to the model of a pluricultural State, which includes three institutional mechanisms: (a) ordinary justice; (b) indigenous law as a system of norms, procedures and local authorities for the social regulation and solution of conflicts within indigenous communities; and (c) alternative conflict resolution mechanisms (ACRM). A system of Ethnic Defenders in indigenous areas, staffed by indigenous language-speaking lawyers, was set up in 2001, hoping to improve the access by indigenous people to the justice system. However, this model, as pointed out by the Special Rapporteur in his country report on Guatemala (E/CN.4/2003/90/Add.2), has not yet succeeded in providing an answer to the multiple justice issues facing indigenous peoples.

80. These are positive examples of how customary indigenous rights can coexist with the national legal systems. Indigenous communities in the cases described above have some autonomy to operate their own judicial laws, systems and institutions.

81. In Colombia, indigenous peoples have the constitutional right to exercise their own justice in their territorial space and to apply their own norms and procedures through their own authorities, their only limitation being the respect for “fundamental minimums” as set out by the Constitutional Court. Consequently, indigenous people cannot be dealt with in the ordinary justice system, which is seen as being culturally different from the indigenous environment. The new Penal Code recognizes the right of indigenous people to be judged by their peers.<sup>36</sup>

82. Many of the injustices of which indigenous peoples are the victims and most of the grievances which they have aired over the years at the national and international levels are not sufficiently well addressed by recourse to constitutionally established ordinary courts. They also require other institutional resources, such as special legislation, political negotiations and political will, alternative conflict resolution mechanisms, spiritual commitment, and lengthy and participatory healing processes. The setting-up in some countries of post-conflict truth commissions (as in Chile, Guatemala, Peru and South Africa) have been a step in the right direction, but if their recommendations are not acted upon, their consequences will be negligible. Above all, they will require extensive changes in public policy objectives designed to alter the traditional unequal, and often discriminatory, relationship between States and indigenous peoples and that will fully include the participation of indigenous peoples in decision-making processes. But the justice system needs to play a crucial role in this historical transformation. The justice system will have to change from being an instrument for the control of indigenous people by the State to becoming a tool for the protection and promotion of the rights of indigenous peoples. As the Special Rapporteur has pointed out in the preceding sections of this report, at the present time the picture is ambiguous. He invites member States to take an increasingly active role in reshaping their indigenous justice systems in order to respond fairly and generously to the historical challenge that they have been presented with.

## II. CONCLUSION

83. The above observations and discussion bear witness to the human rights problems that indigenous peoples face in the realm of justice and confirm the need for national Governments and the international community to address these issues constructively. Inevitably, each situation described or referred to in the present report has its distinct characteristics and its own dynamics. No policy or strategy for improving the access to justice by indigenous peoples or for eliminating the abuses in the justice system can ultimately be successful in the long term if the root causes of disadvantage are not also addressed.

84. Through his study of the issue, and especially through his country missions, local visits and dialogue with leaders and individuals in the various communities around the world, the Special Rapporteur has found that a human rights protection gap with regard to indigenous peoples is clearly manifested in the operational deficiencies of the justice system, particularly in the area of criminal justice, and largely explains the widely reported lack of confidence of indigenous peoples in their national systems of administration of justice.

85. However, it is not an overstatement to assert that “injustice” in the justice system is only one expression of a more pervasive pattern of discrimination and social exclusion, and that it will only be overcome if all the rights of indigenous peoples, including the right to self-determination, are respected.

86. While States have shown political will in addressing some of the key issues, much work remains to translate it into effective action. In this regard, the Special Rapporteur wishes to draw the attention of States to the root causes of human rights violations within the justice system. He finds it appropriate to recommend that, in addressing these problems, the basic principle of consultation with and participation of indigenous peoples in considering any necessary changes in the legal and judicial system that may affect them, directly or indirectly, be respected.

### Notes

<sup>1</sup> Kirsti Strøm Bull, “*The Selbu case*” and “*The Svartskogen case*”, Norsk Retstidende, 2001.

<sup>2</sup> Amnesty International, *Racism and Administration of Justice* (London, 2001), pp. 91-92.

<sup>3</sup> Background paper presented at the Expert Seminar on Indigenous Peoples and Administration of Justice by Shankar Limbu (HR/MADRID/IP/SEM/2003/BP.10).

<sup>4</sup> See the report submitted by the Russian Federation pursuant to article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities (ACFC/SR (2000) 2).

<sup>5</sup> See the second report on the Russian Federation of the European Commission against Racism and Intolerance (CRI (2001) 41), and the consideration of the fourteenth periodic report of the Russian Federation by the Committee on the Elimination of Racial Discrimination (CERD/C/SR.1247).

<sup>6</sup> B. Fernando, “Contemporary problems in administration of justice in India: Answers to a questionnaire formulated by the Committee on Reforms of the Criminal Justice System”, *article 2* (Asian Legal Resource Centre), vol. 1, No. 2 (April 2002), p. 17.

<sup>7</sup> Background paper presented at the Expert Seminar on Indigenous Peoples and Administration of Justice by Bill Jonas (HR/MADRID/IP/SEM/2003/BP.25), p. 8. See also the statements submitted by the Aboriginal Heritage Support Group to the Working Group on Indigenous Populations in 1997 and 2000.

<sup>8</sup> Background paper presented at the Expert Seminar on Indigenous Peoples and Administration of Justice by Marcia Esparza (HR/MADRID/IP/SEM/2003/BP.20).

<sup>9</sup> Royal Commission on Aboriginal Peoples, 1993.

<sup>10</sup> Background paper presented at the Expert Seminar on Indigenous Peoples and Administration of Justice by Daniel Watson (HR/MADRID/IP/SEM/2003/BP.21).

<sup>11</sup> *Aboriginal Women: A Demographic, Social and Economic Profile*, Indian and Northern Affairs Canada, Summer 1996.

<sup>12</sup> *Alaska Justice Forum*, No. 1 (2000); *Alaska Supreme Court Report: Fairness and Access Problems and Recommendations*, *ibid.*, vol. 14, No. 3 (Fall 1997).

<sup>13</sup> The Committee on the Rights of the Child has observed that in Australia, indigenous youth are likely to be denied bail (CRC/C/15/Add.79, para. 22). See also Canadian Criminal Justice Association, *Aboriginal Peoples and the Criminal Justice System* (Ottawa, May 2000).

<sup>14</sup> J. Baker, “The scope for reducing indigenous imprisonment rates”, *Crime and Justice Bulletin*, (NSW Bureau of Crime Statistics and Research), No. 55 (March 2001).

<sup>15</sup> G. Maxwell and C. Smith, *Police Perceptions of Maori: A Report to the New Zealand Police and the Ministry of Maori Development/Te Puni Kokiri*, (Institute of Criminology, Victoria University of Wellington, March 1998), p. 6.

<sup>16</sup> *Report on Combating and Preventing Maori Crime* (2002).

<sup>17</sup> J. Bessant, “Australia’s mandatory sentencing laws, ethnicity and human rights”, *International Journal on Minority and Group Rights*, vol. 8, No. 4 (2001), pp. 369-384.

<sup>18</sup> Asian Development Bank, *Legal Empowerment: Advancing Good Governance and Poverty Reduction*, 2001.

<sup>19</sup> See R. Yrigoyen Fajardo, *Justicia y Multilingüismo*, Guatemala, USAID, 2001, p. 21.

<sup>20</sup> See Commission on First Nations and Métis Peoples and Justice Reform, *A Dialogue in Process: Focus on Youth - Interim Report* (2003).

<sup>21</sup> The Riyadh guidelines specifically mention indigenous children and emphasize that “special attention should be given to children of families affected by problems brought about by rapid and uneven economic, social and cultural change, in particular the children of indigenous, migrant and refugee families” (para. 15). The Beijing Rules contain several provisions with respect to the need to address the cultural diversity of juveniles in the justice system.

<sup>22</sup> See the preliminary paper by Leila Zerrougui, Special Rapporteur appointed to conduct a detailed study of discrimination in the criminal justice system (E/CN.4/Sub.2/2003/3).

<sup>23</sup> Background paper presented at the Expert Seminar on Indigenous Peoples and Administration of Justice by Sukas Chakma (HR/MADRID/IP/SEM/2003/BP.11).

<sup>24</sup> R. Yrigoyen Fajardo and V. Ferrigno Figueroa, *Acceso a la Justicia en Guatemala: Situación y Propuestas*, 2003.

<sup>25</sup> See Amnesty International, “Honduras: Justice Fails Indigenous People” (1999), and “Honduras: Stop Abuses Against Indigenous People” (2000).

<sup>26</sup> Open letter from Mary Robinson, United Nations High Commissioner for Human Rights to the President of the United States, 22 December 2000.

<sup>27</sup> R. Yrigoyen Fajardo, *Pautas de coordinación entre el derecho indígena y el derecho estatal*, Fundación Myrna Mack, 1999.

<sup>28</sup> *Delgamuukw* [1997] 3 SCR 1010, 1099-1100.

<sup>29</sup> Resolution adopted by the International Indian Treaty Council at a Conference of its Commission on Political Prisoners, Prisoners’ Rights and Persons under Detention, held in February 2002.

<sup>30</sup> A. Xanthaki, “Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North, Siberia and Far East”, *Human Rights Quarterly*, 1 (2004) (forthcoming).

<sup>31</sup> Background paper presented at the Expert Seminar on Indigenous Peoples and Administration of Justice by Hassan Idbalkssm (HR/MADRID/IP/SEM/2003/BP.15).

<sup>32</sup> Human Rights Committee, general comment No. 23 on the rights of minorities to enjoy, profess and practise their own culture (art. 27), para. 6.2.

<sup>33</sup> R. Ahdar, "Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments", *Oxford Journal of Legal Studies*, vol. 23, No. 4 (Winter 2003), p. 611, at p. 614.

<sup>34</sup> Background paper presented at the Expert Seminar on Indigenous Peoples and Administration of Justice by James Anaya (HR/MADRID/IP/SEM/2003/BP).

<sup>35</sup> Tripartite Forum, *Future Directions in Mi'kmaq Justice*, 2001.

<sup>36</sup> R. Yrigoyen Fajardo, et al. *Centros de reclusión en Colombia: un estado de cosas inconstitucional y de flagrante violación de derechos humanos*, Bogotá, UNHCHR, 2001.

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