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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## Rights of indigenous peoples

### Report of the Special Rapporteur on the rights of indigenous peoples\*

#### *Summary*

The present report summarizes activities undertaken since the Special Rapporteur on the rights of indigenous peoples submitted her previous report to the Human Rights Council and provides a thematic study on the rights of indigenous peoples and justice. In the report, the Special Rapporteur analyses issues related to access to justice for indigenous peoples, whether through the ordinary justice system or through their own indigenous justice mechanisms. She explores the interaction and harmonization between ordinary and indigenous justice systems and the opportunities offered by legal pluralism.

The Special Rapporteur concludes with recommendations aimed at strengthening access to justice for indigenous peoples, while upholding international human rights standards, in both ordinary and indigenous justice systems.

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## **I. Introduction**

1. The present report is submitted to the Human Rights Council by the Special Rapporteur on the rights of indigenous peoples pursuant to her mandate under Council resolution 33/12. In the report the Special Rapporteur summarizes the activities undertaken since her previous report (A/HRC/39/17) and provides a thematic study on the experience of indigenous peoples with justice. She concludes with recommendations on how various stakeholders can prevent violations and improve protection.

## **II. Activities of the Special Rapporteur**

2. Since she presented her previous report to the Human Rights Council, the Special Rapporteur has carried out two official country visits: to Ecuador from 19 to 29 November 2018 (see A/HRC/42/37/Add.1) and to Timor-Leste from 8 to 16 April 2019 (see A/HRC/42/37/Add.2).

3. A more detailed description of her activities is contained in the Special Rapporteur's report to be submitted to seventy-fourth session of the General Assembly, in which she further studies the question of the rights of indigenous peoples to self-governance; to consultation and free, prior and informed consent; indigenous peoples in isolation and initial contact; country visits; communications; and other activities (A/74/149).

## **III. Indigenous peoples and justice**

### **A. Background, aims and methodology**

4. The respect and promotion of the systems of justice of indigenous peoples and issues of discrimination against and stigmatization of indigenous peoples within the ordinary justice system have been recurring topics in the work of successive Special Rapporteurs on the rights of indigenous peoples, including through communications, country visits and participation in seminars and conferences.

5. In 2004, the former Special Rapporteur presented a report on this topic to the Commission on Human Rights (E/CN.4/2004/80). The report concentrated on the obstacles, gaps and challenges faced by indigenous peoples in the administration of justice and the recognition of customary law in national legal systems as an essential element of the full enjoyment of the human rights of indigenous peoples. The present report builds on the findings from that report.

6. Indigenous cultures around the world are manifold and each follow unique customary rules and traditional practices. They are embedded in countries with very different political and historical contexts in relation to indigenous peoples. Nevertheless, a number of recurring issues arise globally and continue to cause deep concern to indigenous peoples, regarding their individual and collective rights as regards access to justice and their right to maintain distinct customary legal systems.

7. Key concerns raised by indigenous peoples met by the Special Rapporteur included the lack of effective recognition of their systems of justice by local, regional and national authorities, ongoing discriminatory and prejudicial attitudes against indigenous peoples in the ordinary justice system and against their distinct indigenous systems of justice; inadequate redress and reparation; and the lack of effective coordination between indigenous justice systems and the State justice authorities. Indigenous and other actors also noted the need for observance of international human rights by indigenous justice systems, including in relation to women, children and persons with disabilities.

8. The Special Rapporteur highlights the need to advance justice for indigenous peoples on the national agenda and more broadly in relation to Sustainable Development Goal 16 on access to justice for all, as essential to enforcing and realizing other collective

and individual rights of indigenous peoples. In the present report she presents observations and recommendations to State institutions (executive, judicial and legislative), indigenous peoples, international institutions and agencies, and civil society.

9. Without accessible courts or other legal mechanisms through which they can protect their rights recognized under national and international normative instruments, indigenous peoples become vulnerable to actions that threaten their lands, natural resources, cultures, sacred sites and livelihoods. At the same time, recognition of their own justice systems is important to respond to their rights and needs with respect to justice, self-governance and culture. Effective access to justice implies access to both the State legal system and their own systems of justice.<sup>1</sup>

### **Methodology**

10. In the present report, the Special Rapporteur examines international standards regarding indigenous customary justice, relevant domestic legislation and judicial decisions, observations and recommendations made by international human rights bodies, including those of the Expert Mechanism on the Rights of Indigenous Peoples (see A/HRC/24/50 and Corr.1 and A/HRC/27/65). Information received first-hand during country visits and communications sent by the mandate on alleged violations<sup>2</sup> have also informed the report.

11. In response to a public call for inputs and solicitation for contribution from States, the Special Rapporteur received contributions from 11 countries<sup>3</sup> and several indigenous and civil society organizations.<sup>4</sup> The report also draws on a review of reports and observations issued by civil society and academic articles related to the subject.

12. The Special Rapporteur participated in an expert consultation organized by the International Commission of Jurists in Bangkok in December 2018 on the issue of “indigenous and other traditional or customary justice systems in the Asia-Pacific region”. The consultation provided a space for dialogue and exchanges of experience and expertise between participants in both State and indigenous justice systems from across the Asia-Pacific region.<sup>5</sup>

## **B. Normative standards: right to indigenous justice, access to justice and right to a fair trial**

### **Right to indigenous justice**

13. The ability of indigenous peoples to continue and strengthen their own systems of administration of justice is an integral component of their rights to self-governance, self-determination and access to justice under international human rights instruments.

14. Article 4 of the United Nations Declaration on the Rights of Indigenous Peoples states that in exercising the right to self-determination, indigenous peoples “have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”. Article 5 asserts the right of indigenous peoples to maintain and strengthen their political, legal, economic, social and cultural institutions and article 34 the right to promote, develop and maintain their

<sup>1</sup> See “Human rights, indigenous jurisdiction and access to justice: towards intercultural dialogue and respect”, presentation by the Special Rapporteur at the international seminar on investigative techniques and indigenous issues, Colombia, 24 February 2016, available from <http://unsr.vtaulicorpuz.org/site/index.php/en/statements/116-indigenous-jurisdiction>.

<sup>2</sup> Available from <https://spcommreports.ohchr.org/>.

<sup>3</sup> Australia, Bolivia (Plurinational State of), Canada, Colombia, Denmark, Ecuador, Finland, Guatemala, Mexico, Norway and Ukraine.

<sup>4</sup> The contributions will be available on the webpage of the Special Rapporteur at [www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx](http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx).

<sup>5</sup> See “Indigenous and other traditional or customary justice systems in the Asia-Pacific region”, report of the 2018 Geneva Forum of Judges and Lawyers (June 2019).

institutional structures, including their juridical systems or customs in accordance with international human rights standards.

15. The Declaration furthermore provides for the right of indigenous peoples to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in the Declaration, including the rights mentioned above (art. 39).

16. The International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169) also provides for the recognition of indigenous justice systems. Article 8 provides for the recognition of indigenous customs, customary laws and institutions “where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights”. Article 9 provides that “to the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected”. It also sets out that with regard to penal matters, their customs shall be taken into consideration by the authorities and courts dealing with such cases.

17. At the regional level, the American Declaration on the Rights of Indigenous Peoples contains relevant provisions on the law and jurisdiction of indigenous peoples. Like the United Nations Declaration, it provides for the right of indigenous peoples to promote, develop and maintain their institutional structures, distinctive customs, procedures and practices and juridical systems or customs, in accordance with international human rights standards (art. XXII (1)). It also provides that “indigenous law and legal systems shall be recognized and respected by the national, regional and international legal systems” and that indigenous individuals are “entitled, without discrimination, to equal protection and benefit of the law, including the use of linguistic and cultural interpreters” in matters before State jurisdictions (art. XXII (2) and (3)).

#### **Access to justice and the right to remedy**

18. The obligation of the State to provide an effective remedy for human rights violations is enshrined in article 2 (3) (a) of the International Covenant on Civil and Political Rights and article 8 of the Universal Declaration of Human Rights. Perpetrators must be brought to justice and victims provided with reparation.<sup>6</sup>

19. The United Nations Declaration on the Rights of Indigenous Peoples affirms the right of indigenous peoples 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” which should give due consideration “to the customs, traditional, rules and legal systems of the indigenous peoples concerned and international human rights” (art. 40). Article 13 asserts the responsibility of States to ensure that the right to indigenous languages is protected and that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation.<sup>7</sup>

20. The Inter-American Court of Human Rights has upheld the obligation of States to guarantee the right of indigenous peoples to judicial protection, taking into account their specificities, their economic and social characteristics, their situation of special vulnerability and their customary law, values and customs.<sup>8</sup>

<sup>6</sup> See also Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant and General Assembly resolution 60/147.

<sup>7</sup> Analogous provisions on the right to take legal proceedings and the provision of interpretation are contained in article 12 of the Indigenous and Tribal Peoples Convention.

<sup>8</sup> See Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v. Paraguay*, judgment of 17 June 2005, para. 63, and *Sawhoyamaya Indigenous Community v. Paraguay*, judgment of 29 March 2006, paras. 82 and 83.

### Right to a fair trial

21. Among the rights to due process and a fair trial enshrined in article 14 of the International Covenant on Civil and Political Rights, are that all persons are equal before the courts, entitled to a fair and public hearing by a competent, independent and impartial tribunal and have the right to be presumed innocent until proved guilty. Everyone has the right to be tried without undue delay, to legal counsel and to the free assistance of an interpreter if they cannot understand the language used in court.

22. As mentioned above, the United Nations Declaration on the Rights of Indigenous Peoples underlines the obligation to provide interpreters in indigenous languages in judicial proceedings.

23. With regard to members of indigenous peoples who face criminal penalties under the general law, the Indigenous and Tribal Peoples Convention states that “account shall be taken of their economic, social and cultural characteristics”, and “methods of punishment other than prison shall be given preference” (art. 10).

### C. Indigenous concepts of law and justice

24. The customs, laws and judicial institutions of indigenous peoples are as diverse as the many distinct indigenous peoples, communities or nations and cultural groups that inhabit the globe. A general characteristic of indigenous justice systems that is fundamentally different from ordinary justice systems is that the sources of law applied do not derive from codified laws or tribunal decisions, but rather from oral histories, world views, spiritual and other cultural traditions, family or clan relations and obligations, and their close relationship with their traditional lands. In many respects, notions of justice or law are not seen as separate from spiritual, religious, cultural or other aspects of indigenous societies and cultures that bring coherence to their communities and are accepted by their members. Customary practices are an integral part of everyday life and play a key role in resolving disputes between indigenous individuals and communities, such as land disputes, conflicts between communities, management of natural resources and protection of the environment.

25. While exhibiting many levels of diversity and complexity across the globe, indigenous justice systems in general seek the restoration of harmony within the community, family or clan relations as an ultimate goal and emphasize the reintegration of offenders rather than retribution (see A/HRC/42/37/Add.2).<sup>9</sup> It is of their essence that the offender provides reparation for the harm caused. The resolution of conflict is situated in a broader social context and considers future relationships and cohesion in the community.<sup>10</sup> Procedurally, indigenous justice systems are less formal and adversarial than ordinary justice systems.<sup>11</sup> The proceedings are generally led by traditional elders and often provide for the participation of not only the specific parties in a case, but also relatives of both parties and other members of the community. Compliance with indigenous justice sanctions tends to be strong and is ensured by the sense of spiritual duty and the importance of community belonging.

26. It is important to note that with the passage of time and contact with outside and dominant cultures, various indigenous customary norms and justice systems have undergone change and may have incorporated outside practices and concepts, but still constitute norms that derive from and are considered legitimate by indigenous communities. Indigenous justice systems generally are more flexible precisely because of

<sup>9</sup> See also Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters* (Abingdon, United Kingdom of Great Britain and Northern Ireland, Routledge, 2014), pp. 29–32.

<sup>10</sup> See International Development Law Organization, “Navigating complex pathways to justice: engagement with customary and informal justice systems” (2019), p. 13.

<sup>11</sup> See Ada Pecos Melton, “Indigenous justice systems and tribal society” in *Justice as Healing: Indigenous Ways*, Wanda D. McCaslin, ed. (St. Paul, Minnesota, Living Justice Press, 2005), pp.108–120.

their mostly oral character and adaptation to changing social, economic and other circumstances. Indigenous justice systems must not therefore be understood as systems that are static in a particular place or time, and incapable of evolving within their own distinct social, cultural and institutional context.

27. Experiences with colonialism and externally imposed influences have caused the weakening of the justice systems, institutions and traditions of many indigenous people. Nevertheless, there are active efforts by indigenous peoples worldwide to recover their traditional knowledge and systems of justice as part of their cultural revitalization efforts to strengthen their autonomy and governance.

#### **D. Challenges faced by indigenous peoples in the ordinary justice system**

28. In most countries, the ordinary justice system is the only recognized avenue by States for indigenous peoples to seek legal redress for violation of their individual and collective rights, such as those involving land rights or protection of their traditional knowledge, or to address accusations of criminality against them. Even if indigenous courts and informal customary mechanisms exist in many countries, they are frequently not recognized by the State legal system.

29. Two overarching questions must be considered when looking at the experience of indigenous peoples in the ordinary justice system. First is the question of whether indigenous peoples are legally recognized as such in their country and therefore recognized as having specific and collective rights inherent in their link to traditional lands and natural resources and their right to self-determination.

30. A second question is whether States proactively monitor and take measures to correct any direct or indirect discriminatory impacts of their justice system on indigenous peoples. That requires the collection of disaggregated data regarding the number, frequency and nature of interaction of indigenous individuals with the system and observing whether human rights violations in the administration of justice disproportionately affect indigenous peoples. Analysis of disaggregated data serves to develop policies to ensure equitable treatment in the system for anyone engaged in it. Many countries rely on the formal principle of equality before the law to justify the lack of collection of such data (A/HRC/30/41/Add.1, para. 31).<sup>12</sup> However, this means that actual discrimination in treatment of indigenous peoples within the legal system may not be detected, let alone addressed.

31. The situation of indigenous peoples around the world and within particular countries is diverse. They may encounter different experiences of and challenges in the ordinary justice system, depending on whether they live in urban areas or within rural communities, and whether they depend on traditional livelihoods on land, in forests or at sea.

32. In addressing the challenges faced by indigenous peoples in the ordinary justice system, the impact of intersecting grounds of discrimination in relation to sex, age, disability, or sexual orientation and gender identity, among others, must also be addressed.

#### **Limited access to justice and remedy**

33. Access to ordinary justice continues to be severely limited for indigenous peoples across all the countries visited by the Special Rapporteur. Geographic obstacles are major concerns in many countries. The Expert Mechanism on the Rights of Indigenous Peoples and the treaty bodies have made similar findings.<sup>13</sup> Furthermore, indigenous peoples are often less likely to receive favourable rulings than non-indigenous litigants and even in cases where courts rule in favour of an indigenous person or community, the judgments are far less likely to actually be enforced ( A/HRC/39/17/Add.2, para. 69 and

<sup>12</sup> See also the contributions to the present report from Denmark, Finland, Mexico and Norway.

<sup>13</sup> See, for example, A/HRC/24/50 and Corr.1; A/HRC/27/65; CEDAW/C/CRI/CO/7 para. 8 (d); CERD/C/CMR/CO/19-21, para. 17; CEDAW/C/THA/CO/6-7, para. 10; and CERD/C/FRA/CO/20-21, para.12.

E/C.12/IND/CO/5, para. 13) or the compensation or remedy may be non-existent (A/HRC/30/41/Add.1, para. 32) or not culturally adapted to their needs.<sup>14</sup>

34. Several factors come into play against indigenous peoples seeking justice. Indigenous peoples commonly express deep alienation from systems of justice that appear to them foreign and inaccessible. Judicial structures frequently reflect those of former colonial powers without sensitivity to indigenous culture.<sup>15</sup> Lack of confidence in the ordinary justice system may arise from a long history of impunity, marginalization, discrimination and stigmatization and procedures that do not accommodate or even recognize their cultural specificities.

35. Discrimination and racism impair indigenous access to justice in many countries. For example, the African Commission reports that denial of justice for indigenous communities and individuals is evident in many instances in Africa.<sup>16</sup> In the Republic of the Congo, access to justice and police protection for indigenous peoples is often circumvented, particularly when the offender belongs to the dominant non-indigenous group.<sup>17</sup>

36. In Guatemala, in spite of the existence of institutions, services and policies specifically designed to increase the access of indigenous peoples to ordinary and customary justice, the Special Rapporteur observed the discrimination and racism suffered by indigenous peoples, when they applied to the ordinary courts at the local level (A/HRC/39/17/Add.3, para. 82).

37. Effective participation of indigenous people in the ordinary justice system depends in part on the environment they encounter in the courtroom, as well as prosecutors' offices, police stations, and victim services. Measures can and should be taken to make these spaces and processes more culturally familiar.<sup>18</sup>

38. Increasing the representation of indigenous peoples within the staff of judiciaries and court services, prosecution services, and police forces is not only a measure against discrimination in access to those professions, it can also enhance cultural confidence of other indigenous persons in the system as a whole (A/HRC/33/42/Add.2, para. 33).

39. It should be stressed that the intersecting discrimination faced by indigenous women who are victims of crimes or other breaches is particularly pronounced. In Canada, the final report of the National Inquiry on missing and murdered indigenous women concluded that the Canadian criminal justice system failed to effectively hold accountable those who commit violence against indigenous women and girls, including in cases of murder.<sup>19</sup> In cases of domestic violence or other gender-based violence, some indigenous women may feel that ordinary justice will better protect their rights as a woman, while others may feel the indigenous system offers better protection.

40. Language barriers are a further major obstacle to access to justice for indigenous peoples. Lack of knowledge of rights and insufficient legal advice also reduce the chance of indigenous peoples seeking redress for violations. Where free legal aid programmes are available, they are rarely culturally adapted and in most instances not adequately funded. Access to legal assistance often determines whether a person can participate in court proceedings in a meaningful way. The cost of ordinary justice systems, particularly for

<sup>14</sup> See Human Rights Committee, general comment No. 31, para. 15.

<sup>15</sup> Markus Weilenmann, "Legal pluralism: a new challenge for development agencies" in *Access to Justice in Africa and Beyond. Making the Rule of Law a Reality* (London, Penal Reform International, 2007).

<sup>16</sup> *Report of the African Commission's Working Group on Indigenous Populations/Communities* (2005).

<sup>17</sup> International Fund for Agricultural Development and International Work Group for Indigenous Affairs, "Congo: country technical note on indigenous peoples' issues" (October 2014).

<sup>18</sup> See, for example, *Final Report of the Royal Commission and Board of Enquiry into the Detention and Protection of Children in the Northern Territory* (2017), A/HRC/42/37/Add.1, A/HRC/33/42/Add.2, para. 32, A/HRC/36/46/Add.2 and the contribution of Ecuador to the present report.

<sup>19</sup> See *Reclaiming Power and Place. The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a (2019), p. 717.



persons living in a situation of socioeconomic vulnerability,<sup>20</sup> and the perceived lack of perspective for redress of their rights, are also deterrent factors.

41. Effective and equal access to courts and remedies for indigenous peoples is essential for realization of both individual and collective rights beyond fair trial and equality before the law. Even where indigenous peoples have the possibility to resort to their traditional mechanisms to resolve a dispute, they should be able to choose the ordinary justice system instead in order to seek recognition of their collective rights by the wider society (A/HRC/24/50, paras. 32–34).

### **Overrepresentation and discrimination against indigenous peoples in ordinary criminal justice systems**

42. Indigenous peoples are overrepresented in every stage of criminal justice processes, from arrest through the serving of prison sentences, in every region of the world. Among the factors contributing to this are direct or indirect discrimination in legislation, policies, law enforcement strategies, and other practices;<sup>21</sup> long-term dispossession, socioeconomic marginalization and poverty, intergenerational trauma; individual and institutional racism and discrimination; overpolicing of indigenous communities; insufficient access to legal counsel; lack of effective judicial review; limited access to information; and language barriers.<sup>22</sup>

43. Reports of arbitrary arrests and excessive use of force against indigenous individuals are pervasive in all regions of the world.<sup>23</sup> In Asia and Africa, imprisonment is often enforced against indigenous peoples living in forest areas who are accused of encroachment on State lands or illegal logging in national parks.<sup>24</sup> For example, in the Democratic Republic of the Congo the Batwa peoples have faced beatings and attacks from forest wardens and in Kenya the Samburu, Maasai and Turkana peoples have been subject to arbitrary arrests by the police.<sup>25</sup> In Thailand, evicted Karen have faced counter-criminal charges when seeking remedy in the justice system.<sup>26</sup>

44. In Chile, police raids and operations have led to excessive use of force against members of the Mapuche community.<sup>27</sup> In Guatemala the Special Rapporteur observed an escalation of criminalization against numerous indigenous community members. Her thematic report to the Human Rights Council in 2018 was dedicated to an analysis of the increasing attacks against and criminalization of indigenous human rights defenders (see A/HRC/39/17 and Add.3).

45. Indigenous peoples are overrepresented in prison and detention centres and indigenous persons with disabilities are particularly at risk of being imprisoned (CRPD/C/CAN/CO/1, para. 31). Programmes that address the gender-specific needs of indigenous women and their cultural, spiritual and religious requirements are lacking in the large majority of prison systems.<sup>28</sup>

<sup>20</sup> See, for example, A/HRC/39/17/Add.3, para. 82; A/HRC/39/17/Add.2, para. 64;

A/HRC/21/47/Add.2, para. 51; E/C.12/IND/CO/5, para. 13; CERD/C/KEN/CO/5-7, para. 15.

<sup>21</sup> See, for example, Stefania Errico, *The Rights of Indigenous Peoples in Asia. Human rights-based overview of national legal and policy frameworks against the backdrop of country strategies for development and poverty reduction* (Geneva, ILO, 2017), p. 38; CCPR/C/CHL/CO/6, para. 7; communications CHL 2/2018 and PHL 5/2018; and A/HRC/36/46/Add.2, para. 68.

<sup>22</sup> See, for example, A/HRC/36/46/Add.2, para. 67; CERD/C/COL/CO/15-16, para. 39; and A/HRC/36/28, para. 18.

<sup>23</sup> See, for example, A/HRC/39/17 and Add.2, para. 65, and CCPR/C/CAN/CO/6, para. 11.

<sup>24</sup> Stefania Errico, “The rights of Indigenous peoples in Asia”, p. 38.

<sup>25</sup> See communications from special procedures mandate holders KEN 5/2018 and COD 1/2018; and *Report of the African Commission’s Working Group on Indigenous Populations/Communities*, p. 38.

<sup>26</sup> See communication THA 2/2019.

<sup>27</sup> See communication CHL 3/2017 and CERD/C/CHL/CO/19-21, para. 15.

<sup>28</sup> See rules 54 and 55 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders.

46. In Australia, the Special Rapporteur observed that while Aboriginal and Torres Strait Islanders represent only around 3 per cent of the national population, nearly one third of the prison population is indigenous. More than 50 per cent of Australian children in detention, some as young as 10, are Aboriginal and Torres Strait Islanders, and in certain detention centres where 90 per cent of the detainees are indigenous children, racist abuse and solitary confinement of children has been documented (see A/HRC/36/46/Add.2).<sup>29</sup>

47. Appropriate policing is a key issue. Proximity policing in indigenous communities, whether urban or remote, should be adapted. Policing strategies should be elaborated and implemented with the participation of the communities themselves.

48. Language barriers constitute or lead to further violations of rights of indigenous peoples in ordinary criminal justice systems. Indigenous persons who are arrested and prosecuted may face violations of their liberty, the right to a fair trial, or other rights if their lawyers, defenders or justice officials do not speak indigenous languages or know about indigenous cultures, and interpretation and translation services are not accessible or adequate.<sup>30</sup>

49. Access to an interpreter is one essential guarantee of a fair trial for any accused person who does not understand the language in which the proceedings will be conducted.<sup>31</sup> The right to an interpreter is not, however, always fully implemented or respected in practice. In Mexico, the Special Rapporteur for instance observed a severe shortage of interpreters and an insufficient number of bilingual public defenders in courts, jeopardizing the right of indigenous defendants to a fair trial (A/HRC/39/17/Add.2, para. 65). In Guatemala, the Public Criminal Defence Institute lacks resources, especially in respect of its programme on setting up offices for the defence of indigenous rights (A/HRC/39/17/Add.3, para. 83).

## **E. Indigenous justice systems**

### **Right to indigenous justice**

50. As noted above, indigenous justice systems are integral to the internationally recognized rights of indigenous peoples to self-determination and to their own culture. The right of indigenous peoples to autonomous legal institutions and processes must be placed in a historical, territorial and cultural context, including the fact that indigenous peoples were present before colonialism and prior to the formation of States.

51. The ordinary justice system may be seen by indigenous communities as the continuation of illegitimately imposed alien institutions and laws, and demands to maintain and legitimize distinct indigenous legal institutions are part of the resistance by those communities to domination and assimilation.<sup>32</sup>

### **State recognition of indigenous legal systems**

52. Recognition of the traditional justice systems and customary laws of indigenous peoples varies throughout the world, but remains generally limited (A/HRC/27/65, paras. 14–17). Numerous countries in Latin America have in recent decades embraced legal

<sup>29</sup> See also communication AUS 6/2016 and *Final Report of the Royal Commission and Board of Enquiry into the Detention and Protection of Children in the Northern Territory*.

<sup>30</sup> See, for example, A/HRC/39/17/Add.2, para. 65; A/HRC/39/17/Add.3, para. 103; CERD/C/COL/CO/14, para. 21; and CERD/MAR/CO/17-18, para. 19.

<sup>31</sup> See International Covenant on Civil and Political Rights, article 14 (3) (f); Committee on the Elimination of Racial Discrimination, general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 30; Standard Minimum Rules for the Treatment of Prisoners (revised 2015), rule 55 (1)

<sup>32</sup> John L. Hammond, “Indigenous community justice in the Bolivian Constitution of 2009”, *Human Rights Quarterly*, vol. 33, No. 3 (2011); Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters*, ch. 1; and “Indigenous and other traditional or customary justice systems in the Asia-Pacific region”, pp. 6 and 19.

plurality, including at the constitutional level. In Ecuador and Colombia the right of indigenous peoples to exercise juridical functions following their own customary laws is recognized in the Constitution, as long these do not contradict constitutional or internationally recognized human rights standards. In Mexico, indigenous mechanisms and the jurisdiction of indigenous authorities are officially recognized in some states (A/HRC/39/17/Add.2, para. 70). In practice however, the interaction between systems frequently remains ad hoc and is strained by discriminatory attitudes and a lack of acknowledgement of the potential contribution of indigenous juridical systems to equal access to justice (A/HRC/42/37/Add.1, para. 49 and A/HRC/30/41/Add.1, para. 31).

53. Recognition of indigenous customary law and jurisdiction also varies greatly across Asia. In a number of countries, indigenous peoples are granted constitutional recognition or are the subject of special laws. Article 18 B (2) of the Indonesian Constitution provides that: “The State recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.”

54. In the Philippines, section 15 of the Indigenous Peoples’ Rights Act 1997 provides that indigenous peoples “shall have the right to use their own commonly accepted justice systems, conflict resolution institutions, peace building processes or mechanisms and other customary laws and practices within their respective communities and as may be compatible with the national legal system and with internationally recognized human rights”.

55. The sixth schedule of the 1950 Indian Constitution (arts. 371 A and 371 G) protects the customary law of certain tribes in several states in north-east India and gives constitutional guarantees to indigenous peoples in the States of Nagaland and Mizoram for their customary law and traditional justice systems (A/74/149, para. 57). Section 2 (4) of the Constitution of Timor-Leste provides that: “The State shall recognise and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law” (A/HRC/42/37/Add.2, para. 18).

56. In Bangladesh, the definition of “law” in the Constitution includes “custom or usage” and laws that were in existence before the adoption of the Constitution (art. 152). The Chittagong Hill Tracts Regulation of 1900 recognizes the customary land and resource rights of the indigenous peoples under the custodian role of traditional chiefs and headmen.<sup>33</sup>

57. Few African countries offer legal recognition of the existence of indigenous peoples in their countries in their national constitutions or legislation.<sup>34</sup> For the Tuareg in Mali, that translates into a lack of recognition as peoples entitled to particular collective rights. Similarly, the Constitution of Botswana refers to the eight main tribes that make up the Batswana peoples, but does not recognize the San as one of those tribes/communities. The Republic of the Congo is one of the few countries in Africa that recognizes the rights of indigenous peoples and guarantees their right to resort to their customary laws to solve internal disputes in accordance with national law.<sup>35</sup>

58. Traditional or customary justice systems, however, have legal or de facto legitimacy in several African countries, although national laws tend not to recognize them as indigenous in character. The 1996 Constitution of South Africa includes recognition of the status, functions and role of traditional chiefs according to customary law and allows for traditional authorities to function within the framework of the South African legal system.

<sup>33</sup> See Devasish Roy, “Asserting customary land rights in the Chittagong Hill Tracts, Bangladesh: challenges for legal and juridical pluralism” in *Divers Paths to Justice: Legal Pluralism and the Rights of Indigenous Peoples in Southeast Asia*, Marcus Colchester and Sophie Chao, eds. (Chaing Mai, Thailand, Forest Peoples Programme and Asia Indigenous Peoples Pact, 2011).

<sup>34</sup> *Report of the African Commission’s Working Group on Indigenous Populations/Communities*, p. 47.

<sup>35</sup> See Loi No 5-2011 du 25 février 2011 portant promotion et protection des droits des populations autochtones, art. 11.

It also states that the courts must apply customary law when applicable, subject to the Constitution and relevant domestic legislation (see A/74/149, para. 63).

59. In northern Europe, countries only recognize a single State justice system, but seek to accommodate indigenous cultures in judicial procedures where courts are based in areas of indigenous peoples.<sup>36</sup> A cross-border Nordic Sami Convention has been elaborated and is currently being considered by the three Sami parliaments and the Governments of Finland, Norway and Sweden. The Convention requires States to show respect for the Sami conception of law, legal traditions and custom, consideration of Sami legal customs in the elaboration and application of legislation and seek harmonization of legislation and other regulations of significance for Sami activities across national borders (arts. 9 and 10).

60. In New Caledonia, the Nouméa Agreement (1998) recognized Kanak customary authority over civil matters such as marriage, adoption, inheritance and some land issues. While exercise of customary criminal justice is not permitted under French law, “customary assessors” can help judges to understand customary law and its role in settling disputes, and judges can consider the social context in criminal sentencing, including customary justice that has already been applied.

61. The Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child have referred to the right of indigenous peoples to recognition of their systems and institutions.<sup>37</sup> Treaty body jurisprudence on indigenous justice systems is however limited. Committees have mainly referred to such systems in calling on States to ensure that traditional and indigenous mechanisms are compliant with international human rights law or with the national constitution.

#### **A primary source of justice for indigenous peoples**

62. Even where the ordinary justice system is the only process the State recognizes, in practice indigenous peoples still resort to customary justice mechanisms in the vast majority of instances. They are generally perceived as more accessible, culturally appropriate and often constitute the primary source of dispute resolution for indigenous communities.<sup>38</sup> In some countries, around 90 per cent of all cases are directed to indigenous justice systems. In Timor-Leste, where the vast majority of disputes are settled in the customary justice system, a reliance on spiritual traditions of sacred practice has for many centuries regulated community relationships (A/HRC/42/37/Add.2, para. 27).

63. Indigenous justice mechanisms tend to be closer geographically, less costly and use languages understood by all in the communities they serve. The fact that the decision maker is someone familiar to the disputants may inspire trust, or at least be less intimidating than the formal setting of a State court.

64. Ordinary justice systems frequently offer extremely limited prospects for indigenous peoples to obtain redress for human rights violations and indeed often pose an increased risk of directly or indirectly discriminating against them in their rights to access to justice, to a fair trial and to physical integrity. Their rights to enjoy their own culture and use their own language are more likely to be fulfilled in justice processes that are in harmony with their social and cultural practices, which for many indigenous peoples continue to be regulated by their traditional and customary law.

65. Indigenous justice plays a crucial role in areas where State institutions are generally weak or absent. For example, the Special Rapporteur was informed by the Attorney-

<sup>36</sup> See the contributions of Denmark, Finland and Norway to the present report and the text of the Nordic Saami Convention, available from [www.sametinget.se/105173](http://www.sametinget.se/105173).

<sup>37</sup> See Committee on the Elimination of Racial Discrimination, general recommendation No. 31, para. 5 (e), and Committee on the Rights of the Child, general comment No. 11 (2009) on indigenous children and their rights under the Convention, para. 75.

<sup>38</sup> See *Human Rights and Traditional Justice Systems in Africa* (United Nations publication, Sales No. E.16.XIV.1), p. 17.

General of Guatemala that only about 10 per cent of the indigenous peoples in Guatemala are reached by the ordinary justice system.<sup>39</sup>

66. Indigenous justice systems can also play a role in transitional justice processes following armed conflicts. In Colombia, the peace accord between the Government and the Revolutionary Armed Forces of Colombia contains a specific provision calling for respect for the jurisdictional functions of traditional authorities and for the establishment of a coordination mechanism between the Special Jurisdiction for Peace and the Indigenous Special Jurisdiction.<sup>40</sup> In Timor-Leste, indigenous customary practices were incorporated into transitional justice measures by the Commission on Reception, Truth and Reconciliation through the concept of *Nahe Biti*, community meetings held on a rolled-out mat (A/HRC/42/37/Add.2, paras. 37 and 83).

67. On a global scale, recognizing and supporting indigenous justice systems can contribute to better equal and effective access to justice for all, in line with Sustainable Development Goal 16, and result in better implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

### **Prejudicial attitudes about indigenous justice**

68. Lack of understanding of indigenous justice concepts and discriminatory attitudes, including in the media, have led to attacks on the legitimacy of indigenous justice systems. That has translated into failures to promote or refer cases to indigenous justice and has sometimes even resulted in the criminalization of indigenous justice officials for the exercise of their jurisdictional functions, for example subjected to criminal charges of usurpation of public office, kidnapping or extortion (A/HRC/42/37/Add.1, para. 52).

### **Consistency with international human rights principles**

69. As with ordinary State justice systems, certain procedures and outcomes of indigenous customary justice systems can come into conflict with international law and standards on human rights and the rule of law. Many indigenous justice systems operate without written records of rules or rulings, which can increase the risk of arbitrary or biased decisions.

70. Indigenous systems are extremely diverse, but concerns have been raised in relation to due process and fair trial, women's and children's rights, physical integrity and corporal punishment.<sup>41</sup> A collective approach to justice may be problematic for individual rights, particularly in relation to women victims of domestic or sexual violence or in cases involving children.

71. Indigenous justice systems may offer limited space for women's voices or participation, while the ordinary justice system may in practice be inaccessible for indigenous women.<sup>42</sup> As a consequence, indigenous women often lack access to justice and reparation in both the ordinary and indigenous justice systems. The Committee on the Elimination of Discrimination against Women has raised concerns over certain customary practices as being inconsistent with women's rights, including forced marriages, discriminatory practices in relation to inheritance; practices of forced reconciliation in the community for cases of domestic or sexual violence; and restrictions on women owning land.<sup>43</sup>

<sup>39</sup> "Human rights, indigenous jurisdiction and access to justice: towards intercultural dialogue and respect", presentation by the Special Rapporteur.

<sup>40</sup> Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, section 6.2.3.e.

<sup>41</sup> See "Traditional and customary justice systems", report of the 2017 Geneva Forum of Judges and Lawyers (February 2018), p. 7.

<sup>42</sup> See Asia Indigenous Peoples Pact, "Indigenous women in Southeast Asia: challenges in their access to justice" (2013).

<sup>43</sup> See CEDAW/C/PHL/CO/7-8, para. 49 (c); CEDAW/C/FJI/CO/5, para. 27 (d); and CEDAW/C/COG/CO/7, para. 47 (a), respectively.

72. Indigenous justice systems may subordinate consideration of the best interests of the individual child to other perceived communal interests or may not distinguish between children and adults in accordance with the Convention on the Rights of the Child.

73. Most if not all of these inconsistencies with international human rights norms may also be present in ordinary State justice systems and in certain countries may be more pronounced in the State system than in the indigenous system. So although consistency with international human rights is an important concern for both indigenous and non-indigenous justice systems, the mere existence of human rights concerns in indigenous justice systems should not in itself constitute a valid argument to reject their legitimacy.

74. At the same time, international law, standards and research have produced detailed guidance on how ordinary justice systems should address such concerns, as well as corruption, abuse of power or other forms of judicial misconduct, and many countries have specific procedures and institutions for addressing these issues in a consistent and systematic manner. Indigenous justice systems tend to lack formal processes and mechanisms for making decision makers accountable. However, giving State authorities the primary responsibility for ensuring the integrity of indigenous justice actors risks undermining the autonomy of the indigenous system.

### **Limitation of jurisdiction**

75. Even when States give legal recognition to indigenous justice systems, relevant laws frequently impose restrictions on the scope of indigenous jurisdiction, often limiting the competency to minor offences and restricting jurisdiction to material, personal and territorial elements which have occurred within the territorial boundaries of an indigenous community.<sup>44</sup> Indigenous jurisdiction thus tends to be interpreted by many domestic State and legislative authorities as limited to internal matters of relatively minor scale such as inter- or intra-familial disputes and small-scale thefts of property where both accused and victim are indigenous persons. Indigenous organizations have criticized this as an attempt to subordinate indigenous justice to State justice (A/HRC/27/65, para. 25).

76. The Human Rights Committee in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial has similarly referred to limited jurisdiction, holding that States must ensure that “courts based on customary law ... cannot hand down binding judgments recognized by the State, unless ... proceedings before such courts are limited to minor civil and criminal matters, ... and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant”.

77. The previous Special Rapporteur emphasized the need for flexibility in delineating the spheres of competency of indigenous authorities. He recommended that indigenous jurisdiction not necessarily be limited to cases occurring within a particular indigenous community’s territory, or involving members of the same indigenous community or people (A/HRC/15/37/Add.7, para. 12). States should recognize the dynamic character of indigenous customary law and the ability of indigenous justice systems, like other justice systems, to change and adapt to contemporary situations and contexts, and adjudicate new types of issues or disputes, in a manner that is consistent with their social, political and cultural precepts (ibid., para. 10).

78. State authorities should consider recognizing the jurisdiction of indigenous justice authorities to adjudicate matters involving non-indigenous persons and entities present in their lands. The impunity of perpetrators should always be a concern, particularly in areas where State institutions are practically absent. This need not be an “all or nothing” choice: cooperative mechanisms could see initial investigation of a non-indigenous person committing a criminal infraction in indigenous territory carried out by indigenous justice authorities, followed by transfer to the ordinary system.

<sup>44</sup> See, for example, the Law on Jurisdictional Demarcation, (Ley No 073 de Deslinde Jurisdiccional), Plurinational State of Bolivia (2010).

### **Judicial review: balancing rights to self-determination and other human rights**

79. Domestic and international legal instruments provide that the right of indigenous peoples to apply their customary justice practices are subject to the limitation that they respect human rights. The Committee on the Elimination of Discrimination against Women and the Human Rights Committee stipulate the availability of judicial review by a State court as a safeguard against violations of human rights.<sup>45</sup>

80. A dynamic and intercultural interpretation of human rights in the context of non-discrimination against indigenous peoples would be an important element for State judicial authorities reviewing indigenous justice processes (A/HRC/15/37/Add.7, para. 15). Stronger links between State and indigenous laws and institutions, based on mutual respect and understanding, or even integrated review or appeal bodies with equal representation of indigenous and non-indigenous judges, could contribute to ensuring respect for human rights in both indigenous and State legal systems.

81. The Constitutional Court of Colombia has held that when reviewing the constitutionality of a decision by indigenous justice mechanisms, fundamental human rights must be observed by indigenous authorities, including the rights to life, personal integrity, freedom from torture and slavery and the right to due process. In case of conflict between the jurisdictional rights of indigenous peoples and the rights and interests of individuals, the Court decided that the restriction of indigenous autonomy would only be constitutionally valid if there were reasoned and well-founded arguments that the impact on individual rights in indigenous justice processes would be particularly grave. The Court presented an approach whereby internal dialogue within a community could be fostered to resolve conflicts within the framework of their cultural world view and avoid imposing decisions from outside the community's customary law.

## **F. Towards harmonization between ordinary and indigenous justice systems**

82. Under the United Nations Declaration on the Rights of Indigenous Peoples, States have the responsibility to recognize and strengthen the distinct legal institutions of indigenous peoples (art. 5). At the same time, there is a requirement that indigenous justice systems will themselves act consistently with international human rights norms (art. 34). State and indigenous authorities have to work together to achieve these ends in a harmonious way. How they can most effectively do so and what can be done when one or the other side does not engage remains to be addressed in most countries.

83. The Special Rapporteur, on the basis of her country visits and research, is convinced that indigenous and non-indigenous justice systems should be seen as complementary and necessary to guarantee effective and equal access to justice for indigenous peoples.

84. In its general recommendation No. 33, the Committee on the Elimination of Discrimination against Women recommended constructive dialogue and formalized links between plural justice systems, including through the adoption of procedures for sharing information between them. The Committee on the Rights of the Child has encouraged support for the traditional restorative justice systems of indigenous peoples, as long as they are in accordance with the rights set out in the Convention, and has called on States to provide adequate resources to juvenile justice systems, including those developed and implemented by indigenous peoples.<sup>46</sup>

### **State engagement and collaboration**

85. A key starting point for any engagement with indigenous justice is thorough research and consultation with indigenous leaders and communities in order to better

<sup>45</sup> See, for example, Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women's access to justice, para. 64.

<sup>46</sup> See Committee on the Rights of the Child, general comment No. 11 (2009) on indigenous children and their rights under the Convention, para. 75.

understand their system, and to subsequently design, jointly with indigenous representatives, engagement and coordination strategies.

86. In Timor-Leste, the Government has committed to developing a hybrid justice system, inclusive of cultural traditions, and intends to undertake consultations with communities across the country on how the formal and customary justice systems can harmonize their coexistence and strengthen their contribution to ensuring access to justice for all (A/HRC/42/37/Add.2, para. 38).

87. In Yukon, Canada, the Teslin Tlingit Council agreement established a community peacemaker court, which relies on clan processes for resolving disputes and includes provisions relating to enforcement and correction. The agreement also outlines the interaction between the peacemaker court and the ordinary justice system.

88. In Bolivia, an intercultural protocol for judges was adopted in 2017 with the aim of improving coordination and cooperation with indigenous authorities within the indigenous jurisdiction.<sup>47</sup> Indigenous authorities may request the assistance of the State authorities to advance the interests of their community, such as for example, seeking the support of State law enforcement officials to help with enforcement of an indigenous justice decision.<sup>48</sup>

89. The Navajo Nation court system in Arizona, United States of America, has contributed to the rediscovery and revitalization of Navajo justice and relies on customary laws and Navajo values to hand down decisions. The Navajo Nation courts try criminal and civil matters within the Navajo Nation territorial jurisdiction.

90. Review or appellate bodies that bring together judicial authorities from both indigenous and ordinary justice systems can have a mandate to jointly resolve any question related to human rights concerns or to the adequacy of indigenous jurisdiction, through a process of true intercultural dialogue and decision-making (A/HRC/15/37/Add.7, paras. 17 and 48 (d)).

#### **Cultural adaptation of ordinary justice systems**

91. As part of the effort towards harmonization, State justice systems should seek to accommodate the needs of indigenous peoples. Human rights mechanisms have called on States to recognize the access to justice and effective remedies of indigenous peoples through their institutional structures and the collective and legal personality of indigenous and tribal peoples in their legal and judicial systems.

92. In Australia, the Children's Koori Court in Victoria involves Elders from the Koori community in adapting proceedings to be more culturally appropriate and in the identification of alternative sentencing options to reduce imprisonment (see A/HRC/36/46/Add.2).<sup>49</sup> In New Zealand, the Rehabilitation and Reintegration Service of the Department of Corrections provides a number of therapeutic programmes drawing on *tikanga* Maori (customary Maori) concepts and values, including programmes connecting prisoners to the various levels of the Maori social organization prior to release (A/HRC/18/35/Add.4, para. 63).

93. In Guatemala and Mexico, cultural experts, such as anthropologists, can be invited to participate in cases before the formal justice system, to explain indigenous culture to judges.<sup>50</sup>

94. In Canada, indigenous court staff play a role in providing information to Crown prosecutors and judges on the history and circumstances of the accused and on community based non-custodial options and alternatives. Canadian judges must recognize the adverse systemic and background factors faced by indigenous offenders before reaching any

<sup>47</sup> See contribution of Bolivia to the present report.

<sup>48</sup> See Kimberly Inksater, "Transformative juricultural pluralism: indigenous justice systems in Latin America and international human rights", *Journal of Legal Pluralism and Unofficial Law*, vol. 42, No. 60 (2010).

<sup>49</sup> See also contribution of Australia to the present report.

<sup>50</sup> See contributions of Guatemala and Mexico to the present report.



sentencing or bail decisions and propose alternatives to detention or imprisonment.<sup>51</sup> The indigenous justice programme in Canada also supports indigenous community-based justice programmes that offer alternatives to mainstream justice processes in appropriate circumstances.<sup>52</sup>

95. States have recognized the importance of training judges and judicial and other law enforcement officials in the customs and practices of indigenous peoples.<sup>53</sup> The inclusion of indigenous customary law and practical training in the law and judicial school curricula (such as dual law degrees in both legal systems) and continuing education (short courses, seminars, conferences, cultural immersion tours and site visits), delivered by indigenous representatives are examples of positive measures.<sup>54</sup>

#### **Technical and financial assistance**

96. The United Nations Declaration on the Rights of Indigenous Peoples recognizes the rights of indigenous peoples to technical and financial assistance from States and international cooperation for the enjoyment of their rights (art. 39), including assistance to finance their autonomous functions (art. 4). That is important because the historical and contemporary social, political and economic circumstances that indigenous peoples have faced have in many cases debilitated their own traditional institutions, norms and procedures in the areas of justice. There should be coordinated efforts between indigenous peoples, State authorities, international donors and other interested parties to help strengthen and promote indigenous justice systems. Such efforts should support indigenous peoples to value and, where necessary, recover their own knowledge and practices related to conflict resolution and the administration of justice (A/HRC/15/37/Add.7, para. 10).

97. Inadequate allocation of resources to indigenous justice systems is a recurring concern. Skills training and awareness-raising activities are often carried out by civil society organizations. For example, in Ecuador the lack of human resources and funding for indigenous justice are delaying capacity-building skills on due process and harmonization with international human rights law.

98. Funding is also necessary to research and evaluate community sanctions that can provide realistic alternatives to imprisonment for indigenous offenders and respond to the underlying causes of offending. Funding is also necessary to create accessible and culturally appropriate victim services and establish indigenous law institutes for the development, use and understanding of indigenous laws and access to justice.

#### **Restorative justice**

99. In the 2002 basic principles on the use of restorative justice programmes in criminal matters it is recognized that restorative justice initiatives “often draw upon traditional and indigenous forms of justice”.<sup>55</sup> The earlier Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power also states that: “Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.”

100. Restorative justice processes in State systems cannot however justify a failure to recognize right of indigenous peoples to maintain and develop their distinct juridical systems or be allowed to “freeze ... [the] indigenous cultural and political expression within parameters acceptable to the State”.<sup>56</sup> The United Nations Office on Drugs and

<sup>51</sup> See, for example *R v. Gladue* [1999] 1 S.C.R. 688 and *R v. Ipeelee* 2012 SCC 13.

<sup>52</sup> See contribution of Canada to the present report.

<sup>53</sup> See contribution of Bolivia to the present report; E/CN.4/2003/90/Add.3, para. 25, and CERD/C/ARG/CO/21-23, para. 30 (a) and (c).

<sup>54</sup> See, for example, joint degree programme in Canadian common law and indigenous legal orders, University of Victoria, Canada.

<sup>55</sup> For elements of a definition of restorative justice, see A/HRC/27/65, paras. 67–70.

<sup>56</sup> See Stephanie Vieille, “Maori customary law: a relational approach to justice”, *The international Indigenous Policy Journal*, vol. 3, No. 1 (March 2012).

Crime (UNODC) also highlights patterns of discrimination preventing indigenous and other vulnerable groups from accessing restorative justice options.<sup>57</sup>

#### **Changes in indigenous customary practices and rules**

101. Changes in the traditions and customs of indigenous people towards greater harmonization with international human rights should ideally come from within indigenous communities. Compliance with international human rights law can be strengthened by increasing knowledge of such issues with traditional elders and customary chiefs. Supporting positive changes within local systems while maintaining their overall integrity, is the most successful and desirable approach.<sup>58</sup>

102. State and indigenous leaders should work together to develop common strategies aimed at raising awareness of the importance of human rights, including the accountability of decision makers, the participation of women in dispute resolution and judicial decisions, the protection of the rights of women and children, the protection of persons with disabilities, the promotion of lesbian, gay, bisexual and transgender persons, knowledge of State constitutional law and international human rights law principles, and identification of minimum standards of rights protection.

## **IV. Conclusions and recommendations**

### **Conclusions**

103. **International human rights standards recognize the right of indigenous peoples to maintain and develop their own legal systems and institutions. In the context of Sustainable Development Goal 16, indigenous justice systems are receiving increasing attention globally as their potential role to promote the rule of law, achieve justice for all and promote effective, accountable and inclusive institutions in a manner consistent with human rights is gradually being recognized. The degree and specific methods of implementation by States of their relevant responsibilities vary around the world; while much remains to be done, many States are making significant progress in recognizing and enabling indigenous justice systems to fulfil that role, both autonomously and in cooperation and coordination with ordinary State systems.**

104. **The challenges currently being addressed include ensuring that Governments fully recognize the character and status of all indigenous peoples, overcoming prejudicial attitudes and stereotypes about indigenous systems of justice, achieving better coordination or integration of indigenous and ordinary justice systems and ensuring that the scope of indigenous jurisdictions is not unduly restricted. Both indigenous and ordinary justice processes and institutions have the responsibility and the potential to fully respect, protect and fulfil human rights.**

### **Recommendations**

105. **The Special Rapporteur makes the following recommendations.**

#### **The right to, and importance of, indigenous justice systems**

106. **States should explicitly recognize, in constitutional or other legal provisions, the right of indigenous peoples to maintain and operate their own legal systems and institutions. The United Nations, its Member States, and other stakeholders should**

<sup>57</sup> See UNODC, Education for Justice, module 8, available from [www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-8/key-issues/4--issues-in-implementing-restorative-justice.html](http://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-8/key-issues/4--issues-in-implementing-restorative-justice.html).

<sup>58</sup> Annika Kovar, "Customary law and domestic violence in Timor Leste", United Nations Development Programme, (January 2011), p. 34.

support indigenous peoples in their advocacy for the recognition of their justice systems.

107. States should include compulsory training on the status, concepts and methods of indigenous justice in formal training programmes for judges, lawyers, prosecutors and law enforcement officials, recognizing indigenous justice systems as a right.

108. States and indigenous justice systems should develop and institutionalize processes of exchange of information, understanding and mutual capacity-building, both within their countries and with their counterparts in other States with pluralistic systems (A/HRC/15/37/Add.7, para. 9).

109. Discriminatory attitudes that assume that indigenous justice systems are necessarily more prone to violations or abuses of human rights than State systems should be rejected and countered. The engagement of State authorities with indigenous justice actors should be based on the principle of respect and dialogue and not unilateral and discriminatory subordination or interference. States must ensure their own justice systems fully respect human rights, including the rights of indigenous peoples, recognizing that cultural or other adaptations of the State system may be necessary to this end.

110. In consultation with indigenous peoples and the United Nations mechanisms dedicated to the rights of indigenous peoples, the Human Rights Committee should consider reviewing the references in its general comment No. 32 to “courts based on customary law”, in light of the United Nations Declaration on the Rights of Indigenous Peoples.

111. Indigenous peoples, State authorities, international development actors, civil society and other interested parties should coordinate efforts to help strengthen and promote indigenous justice systems and provide them with the necessary funds and logistical support.

#### **Jurisdiction and judicial review**

112. In delineating jurisdictional relationships between indigenous and ordinary justice systems, the jurisdiction of indigenous systems should not be unduly restricted and indigenous justice systems should not be deemed inherently inferior to State systems. States must not allow situations of impunity to persist because of jurisdictional ambiguity.

113. States and indigenous authorities should consider establishing joint mechanisms for cooperation and coordination between indigenous and State justice systems. While recognizing that each context is different, consideration should be given to models whereby decisions from both indigenous and non-indigenous systems are subject to review or appeal by an integrated judicial body comprised of both indigenous and non-indigenous judicial authorities.

114. In countries where ordinary judicial authorities review decisions by indigenous justice authorities, ordinary courts cannot make fair and impartial decisions without an intercultural understanding of the particular context of indigenous peoples and their institutions and legal systems, which can be enabled, for example, through the participation of cultural experts. In particular, the participation of indigenous Elders, traditional cultural authorities or anthropologists as experts in State courts should be systematic when an indigenous defendant, victim or witness is involved.

115. Any processes of judicial or other review of the decisions of indigenous justice decisions must give due consideration and effect to the obligation of the State to respect and strengthen the rights of indigenous peoples to their juridical systems and customs.

#### **Indigenous justice and human rights**

116. States should acknowledge that indigenous laws and juridical institutions change and develop over time. Any codification of indigenous laws should be designed

to avoid freezing those laws as they currently exist, with a particular concern not to entrench any norms or practices that could otherwise develop in a more harmonious direction in accordance with international human rights.

117. Human rights standards should not be invoked as a justification to deny the right of indigenous peoples to promote and maintain their systems of justice and self-governance. States and other actors must ensure that any measure to address human rights concerns in relation to indigenous justice systems complies with the requirements of article 19 and article 46 (2) of the United Nations Declaration on the Rights of Indigenous Peoples.

118. When preparing legislation or other measures affecting indigenous peoples, States should consult indigenous peoples in good faith in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (art. 19 of the United Nations Declaration on the Rights of Indigenous Peoples).

119. States and indigenous leaders share the responsibility for ensuring that processes and decisions by indigenous justice authorities accord with international human rights, particularly in the context of possible conflicts between the rights and interests of individual indigenous members and the collective rights and interest of an indigenous people or community. Dialogue, cooperation, consultation, and consent are crucial. No unilateral or coercive interventions should take place.

120. Indigenous authorities should ensure safe and inclusive spaces for all in the community to discuss the appropriateness of norms and practices and their consistency with constitutional or international human rights, and to argue for their reform or modification. They should give due consideration to the arguments presented in such discussions. Other stakeholders may support such internal discussions, as well as offering relevant capacity-building or other awareness-building activities both to indigenous leaders and other members of indigenous communities. Any engagement by non-indigenous actors with indigenous communities and leadership on such issues should be sensitive to the social, cultural, political and historical context and cohesion of indigenous peoples and the risk that outside interventions may be perceived as perpetuating actions and attitudes reminiscent of colonialist eras and related historically oppressive connotations.

121. States, indigenous peoples and others should work cooperatively to address the special needs and concerns of indigenous women, children, youth, persons with disabilities and others who frequently face discrimination or other barriers in the areas of access to justice within both the ordinary and indigenous justice systems.

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