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土著问题

人权与土著问题

土著人民人权和基本自由情况特别报告员

鲁道夫·斯塔文哈根先生的报告**

增编

关于土著人民与司法问题的专家研讨会的结论和建议

* 本报告的内容提要以所有正式语文分发。报告本身载于内容提要的附件，仅以原文、英文和法文分发。

** 根据大会第 53/208 B 号决议第 8 段规定说明如下，本文件迟交是为了列入最新资料。

内容提要

人权委员会第 2003/56 号决议请土著人民和基本自由情况特别报告员继续探讨其第一份报告所载专题，尤其是影响土著人民人权和基本自由情况的专题，因为它们会有助于推进有关《联合国土著人民权利宣言草案》基本问题的辩论。根据这一决议，特别报告员谨在此向委员会递交于 2003 年 11 月 12 日至 14 日在马德里举行的关于土著人民与司法问题的专家研讨会的结论和建议。

特别报告员认为，司法对土著人民而言极其重要，《联合国土著人民宣言草案》问题工作组最近的讨论即表明了这一点，因此特别报告员在其主要报告(E/CN.4/2004/80)中专门分析了这个问题。这也是特别报告员将研讨会讨论的问题的提要以及通过的结论和建议递交委员会供其参考的原因。

专家研讨会是由联合国人权事务高级专员办事处与国立远程教育大学和远程教育大学政治学和法律学院合作根据上述决议举办的。总共有 100 多位司法方面的专家、政府代表、学术界人士和非政府组织代表出席了研讨会。

Summary

The Commission on Human Rights, in its resolution 2003/56, requested the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to continue working on the topics included in his first report, in particular, those that impact on the situation of the human rights and fundamental freedoms of indigenous people, which may contribute to advancing the debate on fundamental issues of the draft United Nations declaration on the rights of indigenous peoples. In accordance with this resolution, the Special Rapporteur herewith transmits to the Commission the conclusions and recommendations of the Expert Seminar on Indigenous Peoples and the Administration of Justice held in Madrid from 12 to 14 November 2003.

The Special Rapporteur believes that the administration of justice is of great importance to indigenous peoples, as became evident in the latest discussions in the Working Group on a draft United Nations declaration on the rights of indigenous peoples, and has therefore concentrated on analysing this issue in his main report (E/CN.4/2004/80). This is also why the Special Rapporteur is transmitting to the Commission, for its information, a summary of the issues discussed and the conclusions and recommendations adopted at the seminar.

The expert seminar was organized by the Office of the United Nations High Commissioner for Human Rights in accordance with the above-mentioned resolution, in cooperation with the National University for Distance Education (UNED) at the UNED Faculty of Political Science and Law in Madrid. It was attended by over 100 experts on the administration of justice, government representatives, academics and representatives of non-governmental organizations.

Annex

**REPORT ON THE EXPERT SEMINAR ON INDIGENOUS PEOPLES
AND THE ADMINISTRATION OF JUSTICE**

(Madrid, 12 to 14 November 2003)

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>	
Introduction	1 - 5		4
I. CONCLUSIONS	6 - 11		4
II. RECOMMENDATIONS.....	12 - 45		6
Appendix: List of participants			11

Introduction

1. In its resolution 2003/56, the Commission on Human Rights took note of the intention of the Office of the United Nations High Commissioner for Human Rights to organize, making use of voluntary contributions, a seminar on the administration of justice to assist the Special Rapporteur in examining one of the issues of greatest interest to indigenous peoples, which was identified as important in the discussions of the Commission's Working Group on a draft United Nations declaration on the rights of indigenous peoples. This issue has been analysed by the Special Rapporteur and is the main topic of the report he submitted to the Commission at its sixtieth session.
2. Pursuant to the above-mentioned resolution, the Office of the High Commissioner invited Governments, United Nations bodies and specialized agencies, indigenous peoples and researchers and academics working in the field to attend the seminar.
3. The Expert Seminar on Indigenous Peoples and the Administration of Justice, organized by the Office of the High Commissioner in cooperation with the National University for Distance Education (UNED), was held from 12 to 14 November 2003 at the UNED Faculty of Political Science and Law in Madrid. It was attended by over 100 experts in the administration of justice, government representatives, academics and representatives of non-governmental organizations. The list of participants is contained in the appendix to this report.
4. At the seminar, the experts discussed issues related to discrimination against indigenous peoples in the judicial system (describing examples, experiences and governmental, administrative and judicial measures to ensure fairness in the judicial system) and indigenous peoples' own legal systems (describing examples, experiences and governmental, administrative and judicial measures to combine customary law with national judicial systems), and drew up a set of conclusions and recommendations.
5. The experts attending the seminar asked the Special Rapporteur to take account of their conclusions and recommendations in preparing his report and to transmit them to the relevant United Nations bodies for their information. Accordingly, the Special Rapporteur herewith transmits to the Commission the conclusions and recommendations adopted at the seminar. The full report on the seminar will be submitted at the twenty-second session of the Working Group on Indigenous Populations.

I. CONCLUSIONS

6. **Experts meeting at the Seminar on Indigenous Peoples and the Administration of Justice agreed on the following conclusions and recommendations.**
7. **The experts welcomed the opportunity provided by the United Nations seminar to discuss the question of indigenous peoples and the administration of justice. They identified a range of concerns relating to the treatment of indigenous peoples within judicial systems, noting that indigenous persons were overrepresented in all areas of the criminal justice system, including the courts and prisons. They also pointed out that indigenous women and children in particular were negatively affected by**

current judicial practices and that, unfortunately, the human rights of indigenous peoples were often violated within judicial systems. They pointed out, for example, that while indigenous people were themselves the victims of crime and violence, their high death rates in custody were alarming.

8. The experts recognized that progress had been made at both the national and the international level in relation to indigenous peoples and the administration of justice. This progress includes formal recognition by States of indigenous peoples in national constitutions and legislation, the growing numbers of indigenous people employed in judicial systems, recognition of indigenous peoples' own legal traditions and practices, efforts to provide interpretation for indigenous persons in courts and the steps taken by the authorities to ensure that the cultures of indigenous peoples are respected and taken into consideration. However, the experts noted that, despite these positive developments, measures to improve the administration of justice for indigenous peoples were not always implemented and that urgent action by States was needed to remedy that situation.

9. The experts expressed concern that indigenous peoples were the victims of discrimination and racism in the administration of justice, and identified the following causes:

(a) The historical and ongoing denial of the rights of indigenous peoples and the growing imbalance and inequality affecting their enjoyment of their civil, political, economic, social and cultural rights;

(b) The failure of ordinary systems of justice to recognize and protect the special relationship that indigenous peoples have with their ancestral lands, and to prevent violations of rights stemming from treaties, agreements and other constructive arrangements;

(c) Discrimination by the authorities in the judicial system, including both the police and the courts, with the result that indigenous people are more likely to be arrested and held in custody while awaiting trial and more likely to be given a custodial sentence rather than some other, lesser punishment;

(d) Culturally inappropriate systems for the administration of justice that offer limited opportunities for indigenous people to work as police officers, lawyers, judges or officials within the judicial system;

(e) The failure to guarantee indigenous peoples' equality before the law, access to justice and the right to a fair trial as a result of the unavailability of translation services at all stages of the judicial process and an inability to provide adequate legal representation;

(f) The weakening or destruction of indigenous legal systems as a result of acculturation, displacement, forced migration, urbanization, political violence and the murder of indigenous leaders;

(g) The criminalization of indigenous cultural and legal practices, and State persecution of indigenous leaders who administer justice;

(h) The lack of official recognition for indigenous law and jurisdiction, including indigenous customary law;

(i) The subordination of indigenous law and jurisdiction to national or federal jurisdiction, and restricting indigenous authorities to hearing minor cases;

(j) The failure to introduce adequate mechanisms and procedures that would allow indigenous legal systems to be recognized and to complement national systems of justice;

(k) The non-recognition by States bodies of decisions taken by indigenous authorities;

(l) The non-recognition of indigenous law, culture and legal traditions by judges and other judicial officers;

(m) The weakness of indigenous legal systems in dealing with new issues such as children's and women's issues.

10. Particular concern was expressed at the fact that discrimination against indigenous peoples in the administration of justice could in many instances be the indirect result of applying apparently neutral laws that nevertheless had a disproportionate impact on indigenous peoples.

11. Concern was also expressed at incidents of violence against indigenous persons by the police and in the prison system. It was noted that in many States there was also an absence of constitutional or legal protection and recognition of the rights of indigenous peoples and that this was a contributory factor in the vulnerability of indigenous peoples in judicial systems.

II. RECOMMENDATIONS

1. Recommendations to Governments

12. States should ensure equality before the law and non-discrimination for indigenous peoples in the observance of all universally recognized human rights in the field of the administration of justice.

13. States should recognize that an essential component of ensuring equality before the law and non-discrimination is the legal recognition and protection of the cultural diversity of indigenous peoples.

- 14. States should take special measures to address the historical bias against indigenous peoples that is an underlying cause of discrimination against them in judicial systems.**
- 15. States should establish and maintain systems for the collection of qualitative data on indigenous peoples and the administration of justice, including on levels of arrest, convictions, incarceration and capital punishment. The data should be disaggregated by indigenous status, gender and age and should be published and made available to the public to make it possible to identify situations in which indigenous peoples are discriminated against and overrepresented in judicial systems; they should also include information on indigenous people subjected to capital punishment, where applicable.**
- 16. States should imprison indigenous persons as a last resort and should, in conjunction with the indigenous communities themselves, examine alternatives based on equality and non-discrimination, including non-custodial alternatives.**
- 17. States should help to restore indigenous legal practices, in cooperation with indigenous legal experts, where these might contribute to the development of an impartial system of justice that is in full compliance with international human rights law, particularly in relation to women's rights.**
- 18. States should undertake studies on laws that disproportionately affect indigenous peoples and take the necessary measures to eliminate discrimination resulting from such laws.**
- 19. States should take into consideration the fact that indigenous women who have been imprisoned may be the victims of extreme poverty and discrimination based on gender, poverty or ethnic origin, and should thus consider developing special programmes to address the causes that led to their imprisonment. It is also recommended that they should carry out research into the situation of indigenous women in prison, bearing in mind the long-term consequences for their children, families and communities, monitor the observance of their human rights in prison and review the rehabilitation programmes designed to reintegrate indigenous women in their families and communities.**
- 20. States should take steps, including in the areas of education, training and recruitment policy, to increase the number of indigenous persons working within judicial systems.**
- 21. States should promote training and educational courses for officials in judicial systems, such as the police, magistrates and judges, social workers and others, as well as for law students, on the cultures, customs and legal practices of indigenous peoples, as a way to combat discrimination and promote respect for cultural diversity.**

22. **States should take steps to ensure that indigenous peoples, either individually or collectively, can understand and be understood in legal proceedings, by providing interpretation or some other effective procedure.**
23. **States should recognize indigenous peoples' own systems of justice and develop mechanisms to allow these systems to function effectively in cooperation with the official national systems. These mechanisms should be based on constructive arrangements with the peoples concerned.**
24. **Both States and indigenous peoples should incorporate internationally recognized human and indigenous rights into their systems of justice.**
25. **States should take into account the mechanisms used by indigenous peoples to settle disputes, their regulatory and legal capacity and their authority to develop their own procedures without outside interference.**
26. **National legal systems should incorporate the use of the relevant indigenous customs, traditions, symbols and customary law in cases involving indigenous peoples or individuals. This can be achieved by means of special procedures involving indigenous leaders and dispute settlement methods.**
27. **States should follow a plan of action and develop a strategy to implement the decisions, conclusions and recommendations submitted with a view to improving the administration of justice as it affects indigenous peoples.**
28. **States should establish a separate indigenous juvenile justice system that fully incorporates in their legislation, policies and practices the provisions of the Convention on the Rights of the Child, particularly articles 3, 5, 20, 30, 37, 39 and 40, and other relevant international standards in this area, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty and the Guidelines for Action on Children in the Criminal Justice System.**
29. **States should ensure that no indigenous person under the age of 18 is treated as an adult without taking into account the circumstances and gravity of his or her offence, that the views of indigenous children are heard and respected in all cases brought before the courts and that the necessary measures (for example, alternatives such as conditional release) are taken to reduce considerably the number of indigenous children in detention and to ensure that detention is a last resort and is kept as short as possible. States should also respect the responsibilities, rights and duties of parents, family members and the community in accordance with local customs in order to provide guidance for indigenous children involved in court proceedings, and should take into consideration indigenous peoples' laws, traditions and customs relating to criminal matters.**

30. **In applying national laws and regulations to indigenous peoples, States should pay due regard to their customs or customary law and should respect the methods customarily practised by indigenous peoples in dealing with offences, including criminal offences, committed by their members. They should also take into account the economic, social and cultural characteristics of indigenous peoples when imposing the penalties laid down by general law.**

31. **Taking into consideration the number of cases brought to the attention of the Special Rapporteur during the seminar, the experts invite Governments to examine all cases relating to imprisoned indigenous human rights defenders in which there is evidence that the trials were politically motivated or procedurally defective.**

32. **States should ensure that new anti-terrorist measures are not used in such a way as to violate the human rights of indigenous peoples and, in particular, that they are not used as a means of intimidation in the context of legitimate civil protest.**

2. Recommendations to United Nations bodies, specialized agencies and human rights mechanisms

33. **The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people is requested to include the information and analysis provided by the seminar in his report to the Commission on Human Rights at its sixtieth session, and to annex thereto the conclusions and recommendations adopted at the seminar.**

34. **The Working Group on Indigenous Populations is invited to consider preparing a study on indigenous peoples and the administration of justice, which should include an analysis of obstacles to achieving justice for indigenous peoples, examples of good practice in promoting egalitarian and culturally appropriate justice, and examples of legal pluralism in States.**

35. **The Office of the United Nations High Commissioner for Human Rights is requested to transmit the report on the seminar to the Working Group on Indigenous Populations at its twenty-second session, to the Working Group on a draft United Nations declaration on the rights of indigenous peoples, to the Permanent Forum on Indigenous Issues and to the relevant human rights treaty-monitoring bodies and special procedures.**

36. **The Office of the High Commissioner is requested to consider organizing further seminars, as well as technical cooperation projects, on indigenous peoples and the administration of justice, in order to continue the in-depth discussions, exchange experiences and develop guidelines in areas such as legal pluralism. It is also requested to promote training and support or other forms of assistance for professionals in the field of indigenous law.**

37. **The Office of the High Commissioner is invited to raise the issues discussed at the seminar with the relevant United Nations bodies and agencies and specialized agencies, national human rights institutions and non-governmental and indigenous organizations and to seek their support in promoting dialogue and action in this area.**

38. **The Working Group on Indigenous Populations is invited to include the subject of “indigenous peoples and the administration of justice” as a permanent item on its agenda and to make it the main theme of one of its future sessions.**

39. **The Office of the High Commissioner is invited to circulate copies of these recommendations to national human rights institutions and to request their support in promoting the principles contained therein.**

3. Recommendations to indigenous peoples

40. **Indigenous peoples are invited to provide the Special Rapporteur with information and data on the administration of justice, with particular reference to the situation of indigenous women and children.**

41. **Indigenous peoples are encouraged to make positive contributions as champions of change by participating directly, fully and effectively in developments that help improve the administration of justice as it affects indigenous peoples.**

4. Other recommendations

42. **In those countries where there are indigenous peoples, bar associations should consider promoting a dialogue with their indigenous members in order to study ways of promoting a better understanding of indigenous values, cultures and legal systems within their associations.**

43. **Universities should consider developing curricula and training in law and related subjects that include modules on indigenous laws and rights.**

44. **The experts, participants and indigenous organizations are invited to help make these recommendations widely available.**

45. **The experts express their appreciation to the Office of the United Nations High Commissioner for Human Rights and the National University for Distance Education and recommend the continuation of this type of initiative to support the Special Rapporteur.**

Appendix

List of participants

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Ms. Fanny Castro-Rial Garrone
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