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Continuation of the study on access to justice in the promotion and protection of the rights of indigenous peoples

Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities

Study by the Expert Mechanism on the Rights of Indigenous Peoples

Summary

In resolution 24/10, the Human Rights Council requested the Expert Mechanism on the Rights of Indigenous Peoples to continue its study on access to justice in the promotion and protection of the rights of indigenous peoples, with a focus on restorative justice and indigenous juridical systems, particularly as they relate to achieving peace and reconciliation, including an examination of access to justice related to indigenous women, children and youth, and persons with disabilities. Building upon the Expert Mechanism's first study on access to justice, the present study addresses indigenous juridical systems and their role in facilitating access to justice. It examines barriers and remedies in access to justice for indigenous women, children and youth, and persons with disabilities. Finally, the study addresses restorative justice and its role in achieving peace and reconciliation. The study concludes with Expert Mechanism Advice No. 6.

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Contents

I. Introduction

1. In resolution 24/10, the Human Rights Council requested the Expert Mechanism on the Rights of Indigenous Peoples to continue its study on access to justice in the promotion and protection of the rights of indigenous peoples, with a focus on restorative justice and indigenous juridical systems, particularly as they relate to achieving peace and reconciliation, including an examination of access to justice related to indigenous women, children and youth, and persons with disabilities, and to present it to the Council at its twenty-seventh session.

2. The Expert Mechanism called for submissions from States, indigenous peoples, non-State actors, national human rights institutions and other stakeholders to inform the study. The submissions are, where permission was granted, publicly available on the Expert Mechanism's website.[1] The study also benefits from contributions made at the United Nations Expert Seminar on Restorative Justice, Indigenous Juridical Systems and Access to Justice for Indigenous Women, Children and Youth and Persons with Disabilities, held on 17 and 18 February 2014, organized by the Office of the United Nations High Commissioner for Human Rights and the University of Auckland Faculty of Law. The Expert Mechanism appreciates the submissions and is informed by them.

II. Access to justice for indigenous peoples

3. The Expert Mechanism carried out a study on access to justice in the promotion and protection of the rights of indigenous peoples, which was presented to the Human Rights Council at its twenty-fourth session (A/HRC/24/50). This study outlined the right to access to justice as it applies to indigenous peoples. It examined the international and regional legal frameworks, with special emphasis on the United Nations Declaration on the Rights of Indigenous Peoples. The study analysed the relationship between access to justice and other rights. It proposed key areas for advancing the right to access to justice, including the role of national courts and criminal justice systems and the recognition of indigenous peoples' justice systems. It gave special consideration to issues relevant to indigenous women, children and youth, and persons with disabilities. The study also examined the important role of truth and reconciliation processes to promote access to justice for indigenous peoples.

4. One of the conclusions of the previous study was the need for further analysis of three specific aspects of access to justice in the promotion and protection of the rights of indigenous peoples, which prompted the need for the current study. First, there was an identified need to examine the role of indigenous juridical systems, building upon past work on international and State recognition of these systems. Second, this study will also expand the Expert Mechanism's analysis of barriers and remedies in access to justice for indigenous women, children and youth, and persons with disabilities. Finally, while the previous study addressed the issue of truth and reconciliation, with a focus on transitional justice and truth commissions, this study will examine the broader concept of restorative justice, linking it to self-determination, peace and reconciliation.

5. As the Expert Mechanism expressed in its 2013 study, "[a]ccess to justice requires the ability to seek and obtain remedies for wrongs through institutions of justice, formal or

[1] www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Followupstudyonaccesstojustice.aspx.

informal, in conformity with human rights standards. It is essential for the protection and promotion of all other human rights" (*ibid.*, para. 3). The Expert Mechanism noted that access to justice is of particular importance "given the gravity of the issues facing indigenous peoples, including discrimination in criminal justice systems, particularly for indigenous women and youth" (A/HRC/21/52, p. 4). It also underlined the importance of examining the issue in a holistic manner, taking into account other human rights challenges faced by indigenous peoples, such as structural discrimination, poverty, lack of access to health and education, and lack of recognition of lands, territories and resources. In keeping with the Expert Mechanism's broad understanding of access to justice, in addition to addressing formal State systems, the study will also examine the role of indigenous juridical systems in facilitating access to justice.

III. Indigenous juridical systems

6. Indigenous peoples have always utilized their own framework of juridical systems and laws based on their conceptions of justice and as an inherent right.[2] Despite the historical injustices that indigenous peoples have faced, the values and ideals of their legal systems have survived thanks to the resilience of the peoples themselves, and the close relationship between indigenous law and the land.[3] Over centuries, these laws and norms have provided a context sufficient for creating and managing harmonious relationships among indigenous peoples and between indigenous peoples and their lands and territories.

7. Indigenous juridical systems often comprise both legislative and judicial aspects, usually maintained by traditional institutions. They can be exercised at local and subregional levels, or within a specific group of communities. Customary laws, which form the basis for indigenous juridical systems, are mostly handed down through oral tradition, but they may also be legislated through existing traditional institutions. Customary law can be seen as having two components: personal law and territorial law. Personal law addresses aspects including property, customs and traditions, family issues and inheritance. Territorial law refers to lands and natural resources.

8. The traditional justice systems of indigenous peoples have largely been ignored, diminished or denied through colonial laws and policies and subordination to the formal justice systems of States. However, law is a complex notion arising in explicit and implicit ideas and practices. It is grounded in a people's worldview and the lands they inhabit, and is inextricably linked to culture and tradition. As such, a narrow view of justice that excludes the traditions and customs of indigenous peoples violates the cultural base of all legal systems. Without the application and understanding of traditional indigenous conceptions of justice, a form of injustice emerges that creates inaccessibility and is based on unacceptable assumptions.[4]

9. The Expert Mechanism has therefore recognized the importance of giving due regard to the customary laws and traditions of indigenous peoples in its previous work. In its study on the right of indigenous peoples to education, the Expert Mechanism highlighted the link between traditional education and lands, territories and natural resources, calling for the legal recognition and protection of such lands "with due respect for indigenous peoples' customs, customary law and traditions" (A/HRC/12/33, Annex, para. 11). In its

[2] United Nations Declaration on the Rights of Indigenous Peoples, preambular para. 7.

[3] Expert Seminar on Restorative Justice, Indigenous Juridical Systems and Access to Justice for Indigenous Women, Children and Youth and Persons with Disabilities: Moana Jackson.

[4] John Borrows, *Canada's Indigenous Constitution* (Toronto, University Press, 2010), pp. 6–9.

study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples, the Expert Mechanism underlined that indigenous justice systems and their practice constitute a key element of the right to culture (A/HRC/21/53, para. 21) and called for the "recognition of indigenous peoples' governance structures, including their laws and dispute resolution processes" as a form of redress (*ibid.*, Annex, para. 23).

10. In the Expert Mechanism's Comment on the Human Rights Council's Guiding Principles on Business and Human Rights as related to Indigenous Peoples and the Right to Participate in Decision-Making with a Focus on Extractive Industries, it calls on both States and business enterprises to utilize conflict resolution procedures that "take into account the customs, traditions, rules and legal systems of Indigenous peoples concerned", including "traditional mechanisms like justice circles and restorative justice models where indigenous elders and other traditional knowledge keepers may be helpful" (A/HRC/EMRIP/2012/CRP.1, paras. 46 and 55).

A. Indigenous juridical systems under international law

11. As the Expert Mechanism has previously pointed out, the United Nations Declaration on the Rights of Indigenous Peoples is "an instrument for achieving justice and is an important foundational framework for the realization of the rights of indigenous peoples. Its implementation can support the attainment of access to justice for indigenous peoples" (A/HRC/24/50, para. 9). The Declaration affirms the right of indigenous peoples to maintain and strengthen their own juridical systems. Several of its articles promote recognition and respect for indigenous juridical systems, in particular article 34, which states: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."

12. Article 5 refers to indigenous peoples' right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining the right to participate fully in the political, economic, social and cultural life of the State. Article 27 refers to the recognition of indigenous peoples' laws and land tenure systems in processes to adjudicate rights pertaining to lands, territories and resources. Article 40 addresses the right to access conflict resolution procedures and effective remedies, including "due consideration to the customs, traditions and legal systems of the indigenous peoples concerned and international human rights".

13. The Indigenous and Tribal Peoples Convention (No. 169) of the International Labour Organization also elaborates on the right of indigenous peoples to maintain their customs and customary laws. Article 8 (2) recognizes the right of indigenous and tribal peoples to retain their customs and institutions, adding the proviso "where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights". Again with the same proviso, article 9 (1) states that "the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected".

B. Recognition of indigenous juridical systems

14. The level of recognition afforded to indigenous juridical systems varies widely among regions and countries. In Latin America, many national constitutions recognize

indigenous juridical systems and the jurisdiction of indigenous authorities. There is a growing recognition of legal pluralism in the region, through which indigenous legal systems co-exist with State-based systems. The Constitutions of Colombia (1991), Peru (1993), the Bolivarian Republic of Venezuela (1999), Ecuador (2008) and the Plurinational State of Bolivia (2009) all recognize legal pluralism to varying degrees. In other countries, such as Guatemala and Mexico, acceptance of indigenous peoples' right to exercise their own forms of dispute resolution in their communities has increased.[5] In Guatemala, for example, measures are being taken by the Public Ministry and the Supreme Court to improve coordination with indigenous juridical systems, and indigenous conflict resolution mechanisms are increasingly being respected.[6]

15. In Asia, the situation of indigenous juridical systems and the strategies adopted by States or advocated by indigenous peoples varies. In Thailand, for example, customary law is not recognized by the Government. Indigenous peoples' customary law is only applied at the village level. In Nepal, indigenous legal systems were suppressed by the national legal system, and efforts to revitalize them have been hindered by the fact that they are not documented. Communities are in varying situations with respect to the implementation and recognition of their legal systems from the State and within the communities themselves. In Bangladesh, traditional institutions such as the Three Circle Chiefs in the Chittagong Hill Tracts are recognized by the State and have the authority to adjudicate disputes, but their powers are limited. In Malaysia, native courts are legally recognized in Sabah and Sarawak, but several problems exist, notably unclear jurisdictions with Syariah courts and the lack of full recognition of customary laws in the Constitution.[7]

16. The continued use and support of customary law systems alongside Western justice systems is a characteristic of the legal systems of the Pacific. The level of support of customary law systems or *kastom* is recognized in many constitutions, including those of Papua New Guinea, the Solomon Islands and Vanuatu,[8] and continues to be a feature of everyday life, especially in relation to certain areas of conflict, including traditional lands.[9] Explanations for this level of legal pluralism include the limited influence of Western law in some areas along with the continued operation of *kastom.* Postcolonial independence is a feature of many Pacific societies and there are examples of these societies (like the highlands of Papua New Guinea) reverting to older, familiar justice systems after independence. In Australia and New Zealand, formal systems of law appear to be more dominant, although there are many examples in New Zealand of the incorporation of *tikanga Māori* (Māori law) into justice processes.[10]

17. In general, the laws of the Russian Federation do not refer to indigenous customary law as such, but allow for indigenous legal practices to be taken into account when concrete cases with indigenous peoples are considered. Nonetheless, the Federal Law regarding the general principles of organization of indigenous communities allows the resolution of

[5] Rachel Sieder, "The challenge of indigenous legal systems: beyond paradigms of recognition", *Brown Journal of World Affairs*, vol. XVIII, No. 11 (Spring/Summer 2012).

[6] Submission from Guatemala.

[7] Asia Indigenous Peoples Pact, "Asia indigenous peoples' perspectives on development" (2011). Available from http://www.aippnet.org/images/stories/ID-Report-web-20101130150441.pdf.

[8] Sinclair Dinnen, "Restorative justice in the Pacific Islands," in *A Kind of Mending: Restorative Justice in the Pacific Islands*, Sinclair Dinnen, Anita Jowitt and Tess Newton Cain, eds. (Canberra, Pandanus Books, 2003).

[9] Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law*, 2nd ed. (London, Routledge-Cavendish, 2007).

[10] For example, the observance of local protocol during Waitangi Tribunal hearings.

"local issues" by applying customary law. However, in practice these provisions are rarely used by judges and lawyers due to a lack of specialized courses in law faculties and in the occupational training system. Judicial officials often ignore indigenous legislation, leading to its incorrect interpretation and enforcement, without considering the cultural specificities of indigenous peoples of the north.[11]

18. Human rights treaty bodies, including the Committee on the Elimination of Racial Discrimination, have addressed indigenous juridical systems and the role they can play in increasing access to justice. In its concluding observations on Guatemala, for example, the Committee urged the State party to "recognize the indigenous legal system and to ensure respect for, and recognition of, the traditional systems of justice of indigenous peoples, in conformity with international human rights law" (CERD/C/GTM/CO/12-13, para. 8).

19. The Special Rapporteur on the rights of indigenous peoples has also repeatedly emphasized the need for recognition of indigenous juridical systems. For example, in the report from his country visit to the Republic of the Congo, the Special Rapporteur called for the acknowledgement of "traditional dispute resolution as a legitimate form of justice".[12]

C. The role of indigenous juridical systems in facilitating access to justice

20. Indigenous juridical systems can play a crucial role in facilitating access to justice for indigenous peoples, particularly in contexts where access to the State's justice system is limited due to, among other factors, distance, language barriers and systematic discrimination. Informal justice institutions can provide better access to justice because they may reduce the need for travel if they are conducted in the local area, may cost less, may be less prone to corruption and discrimination and can be conducted by trusted people in a language that everyone understands and in a culturally accessible manner.[13] This is particularly true in contexts where State justice systems are plagued by inefficiency and corruption.

D. The relationship between indigenous juridical systems and international human rights law

21. A central issue in relation to the use and implementation of indigenous justice systems is the potential for conflict with international human rights norms. While affirming the right of indigenous peoples to promote, develop and maintain their juridical systems or customs, article 34 of the United Nations Declaration on the Rights of Indigenous Peoples states that this must be done "in accordance with international human rights standards". Three allegations that are frequently made against indigenous juridical systems are that

[11] Vladimir Kryazhkov "Development of Russian legislation on northern indigenous peoples", *Arctic Review on Law and Politics*, vol. 4, No. 2 (2013).

[12] A/HRC/18/35/Add.5, para. 87. See also A/HRC/15/37/Add.2 and A/HRC/15/37/Add.4.

[13] Tilmann J. Röder, "Informal justice systems: challenges and perspectives,", in *Innovations in Rule of Law: a Compilation of Concise Essays*, Juan Carlos Botero *et al.*, eds. (HiiL and the World Justice Project, 2012); Rachel Sieder and María Teresa Sierra, "Indigenous women's access to justice in Latin America", Christian Michelsen Institute Working Paper, No. 2010:2 (Bergen, CMI, 2010). Available from http://www.cmi.no/publications/publication/?3880=indigenous-womens-access-to-justice-in-latin.

they are gender biased and thus do not provide equal access to justice for women;[14] that indigenous justice systems often do not follow due process;[15] and that remedies may include the use of corporal punishment.[16] Although these critiques hold true in some cases, they should not be used as an argument to invalidate indigenous juridical systems altogether under the pretext of non-compliance with international human rights norms. Furthermore, indigenous justice systems, despite sharing certain characteristics, are highly diverse and context-specific.

22. The treaty bodies have highlighted some cases where differences may arise between indigenous juridical systems and international human rights law. In its concluding observations on Mexico, for example, the Committee on the Elimination of Discrimination against Women noted its concern about "cultural practices within the Indigenous legal systems that are based on gender-stereotyped roles for men and women, such as the 'bride price', and that perpetuate discrimination against indigenous women and girls" (CEDAW/C/MEX/CO/7-8, para. 34). In the same vein, the Human Rights Committee expressed concern at the use of corporal punishment in the community-based justice system in the Plurinational State of Bolivia, and requested the State party to "conduct public information campaigns in the native indigenous *campesino* and other jurisdictions in order to raise awareness among the general public of the prohibition and harmful effects of corporal punishment" (CCPR/C/BOL/CO/3, para. 16).

23. There is a commonly held notion that indigenous juridical systems are static and unchanging. Indigenous juridical systems are in fact highly dynamic, and examples show that respect for both the legal autonomy of indigenous peoples and international human rights law are by no means mutually exclusive. As Sieder and Sierra argue, "[t]he norms, authorities and practices of indigenous justice systems reflect the changing relationships of indigenous peoples with dominant society, but they also reflect changes and tensions within indigenous communities and movements themselves".[17] The example of the *alcaldía indígena* in Santa Cruz del Quiché, Guatemala is illustrative of how some indigenous juridical systems are increasingly incorporating human rights norms and discourse. The *alcaldía*, "a supracommunal coordination of indigenous communal authorities[,] … works to mediate disputes and reduce the incidence of lynchings of suspected criminals, drawing on discourses about Mayan identity but also paradigms of universal human rights and the collective rights of indigenous peoples".[18] Gender discrimination issues are also being addressed within the *alcaldía*, with an increasing number of women being selected as *alcaldes*. This can be seen as a consequence of increasing participation of indigenous women in Mayan social movements, "but also of demands within indigenous communities that women's dignity and physical integrity be respected".[19]

24. Another possible source of tension is the collective nature of the rights of indigenous peoples, which could potentially conflict with the needs and rights of individuals within the community. The Committee on the Rights of the Child states clearly that "[i]n the case of

[14] 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), p. 105.
[15] For example, there may be no mechanism by which to appeal a decision.
[16] Inksater, *loc. cit.* (see footnote 14 above), p. 120.
[17] Sieder and Sierra, *loc. cit.* (see footnote 13 above), p. 4.
[18] Sieder, *loc. cit.* (see footnote 5 above), p. 106.
[19] *Ibid*.

children, the best interests of the child cannot be neglected or violated in preference for the best interests of the group".[20]

25. Some commentators suggest that various conceptions of legal pluralism will allow for the coexistence of the two systems.[21] Fromherz also argues that egalitarian juridical pluralism is an appropriate expression of the right to self-determination as described in article 34 of the United Nations Declaration on the Rights of Indigenous Peoples.[22] Some authors go further and suggest that this pluralism should be transformative in that both the State and indigenous systems should be modified so that customary law conforms to international norms[23] and State justice systems demonstrate respect for cultural difference and do not interfere with the decisions of indigenous peoples' juridical authorities.[24]

E. Barriers and remedies

26. The challenges faced by indigenous peoples in freely exercising their juridical rights and pursuing juridical development within their societies are diverse and complex. In situations where State law recognizes a high degree of autonomy, the major challenges are in properly implementing these constitutionally recognized rights. In most cases, there is a gap between what international and national frameworks proclaim and the situation on the ground, as indigenous juridical systems continue to be subordinated despite legal recognition. In the Plurinational State of Bolivia, for example, the Constitution grants ordinary jurisdiction and indigenous native *campesino* jurisdiction (*jurisdicción indígena originaria campesina*) equal status. However, a law for interlegal coordination (*ley de deslinde jurisdiccional*), adopted in December 2010 has been criticized by indigenous organizations for subordinating indigenous jurisdiction to the ordinary jurisdiction of the State, both in terms of where indigenous law can be applied and in what domains.[25]

27. In situations where an interface between State and indigenous institutions has developed, even to the degree of legal pluralism, the jurisdiction of indigenous courts may not have the same standing as the State system. For example, the native courts of Sabah and Sarawak in Malaysia are perceived as inferior, and some of their decisions are not respected by the civil and Syariah courts as an exercise of judicial authority. In situations of conflict of law, indigenous laws must be fully recognized, especially at the local community level.

28. Often, the major challenge that remains is the formal recognition of indigenous juridical systems and indigenous peoples' right to promote, develop and maintain them.

29. Protecting specific groups, including women and children, from discrimination within indigenous juridical systems also remains a challenge. Improving the gender balance in indigenous peoples' collective leadership structures and juridical bodies is one strategy that has been pursued. Certain communities in Asia have established quota systems for women representatives in the elders' councils and are moving towards transforming the

[20] Committee on the Rights of the Child, General Comment No. 11, para. 30.
[21] See, for example, Inksater, *loc. cit.* (see footnote 14 above), p.17.
[22] Christopher J. Fromherz, "Indigenous peoples' courts: egalitarian juridical pluralism, self-determination, and the United Nations Declaration on the Rights of indigenous Peoples", *University of Pennsylvania Law Review*, vol. 156 (2008).
[23] See, for example, Inksater, *loc. cit.* (see footnote 14 above).
[24] *Ibid.*, p. 108.
[25] See, for example, CONAMAQ, "Fundamentos para la adecuación Constitucional de la ley de deslinde jurisdiccional", 2012.

male-dominated traditional leadership.[26] In Ecuador, women's participation and decision-making in the jurisdictional functions of indigenous authorities is protected by the Constitution.[27]

30. In Asia, some communities have had to deal with the challenges that come with the codification of their customary laws. With codification, the judicial freedom to interpret customary laws and understand indigenous juridical concepts can become curtailed. For instance, the Sabah Native Court Rules of 1995 were identified by native chiefs as a stumbling block in administering justice, as they were overprescriptive in terms of penalties for various offences.

31. The danger of indigenous legal systems and institutions being co-opted to serve the interests of the State is another considerable challenge. An additional crucial hurdle is the financing of indigenous juridical systems. Without sufficient resources, these systems are not sustainable and their contribution to ensuring access to justice is compromised.

IV. Access to justice for specific groups

A. Overarching issues

32. The United Nations Declaration on the Rights of Indigenous Peoples places special emphasis on indigenous women, children and youth, and persons with disabilities. Article 22 (1), for example, reads as follows: "Particular attention should be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration." Article 22 (2) requires States and indigenous peoples to ensure that indigenous women and children are protected against all forms of violence and discrimination.

33. Indigenous women, children and youth and persons with disabilities face discrimination on multiple grounds, which often puts them in a particularly disadvantaged situation. There is a need to pay particular attention to the situation of these specific groups, who face cumulative discrimination.[28]

34. Access to justice, in addition to being a right in itself, is also of paramount relevance as a means to obtain remedies. Barriers to this right and related remedies exist for indigenous women, children and youth and persons with disabilities, who face challenges including discrimination in the criminal justice system and overrepresentation among the incarcerated population.

35. The situation of indigenous women, children and youth, and persons with disabilities with regards to access to justice must also be viewed from a holistic perspective, as access to justice is inextricably linked to other human rights challenges that indigenous peoples face, including poverty, lack of access to health and education and lack of recognition of their rights related to lands, territories and resources.

[26] Asia Indigenous Peoples Pact, "Tilting the balance: indigenous women, development and access to justice" (2013). Available from http://www.aippnet.org/images/stories/IW-HR-Repor-May-17-ALL-BOOK-small-20130530160656.pdf.

[27] Constitution of Ecuador, article 171.

[28] Committee on Economic, Social and Cultural Rights, General Comment No. 20, para. 17.

B. Indigenous women

1. Barriers

36. Numerous barriers exist for indigenous women in accessing justice on an equal basis to others. These barriers exist within society (particularly related to high levels of violence, discrimination and marginalization), within State criminal justice systems and within indigenous juridical systems.

37. Indigenous women are disproportionately at risk of experiencing all forms of violence, compounded by multiple forms of discrimination based on race, gender and other forms of identity, including disability and sexual orientation. Forms of violence facing indigenous women include physical, emotional and sexual violence against women and girls (usually perpetrated by men) through interpersonal relationships (domestic or family violence), leading to high levels of assault and murder. Sexual violence is a serious issue of concern. For example, indigenous women in Papua New Guinea still endure forced marriage, exchange of a bride price and polygamy. In North America as well as many other regions of the world, indigenous women and girls are at high risk of being murdered or being sexually exploited in the sex trade. Trafficking of indigenous women and girls is also a serious human rights concern. Violence has a negative impact on the sexual and reproductive health and rights of indigenous women, including the right to decide the number and spacing of one's children, the right to sexual health information, the right to access reproductive health products and services and the right to access culturally sensitive health services and products, including traditional medicines and trauma-informed healing services (E/C.19/2012/6, pp. 5–6). All of these forms of marginalization play a part in limiting indigenous women's access to justice.

38. Remote or rural location is a further barrier to justice experienced by indigenous women. Discriminatory practices related to land ownership also impact indigenous women's access to justice. Some customary laws do not permit women to inherit property nor do they allow women to hold leadership positions within indigenous justice institutions.

39. Extractive industries operating near or on indigenous territories often increase the risk of violence (from workers) and health-related problems of indigenous women, such as cancer from contaminated water (E/C.19/2012/6, p. 8). State laws have too often fallen short of adequately protecting against corporate human rights violations, or providing adequate redress mechanisms (A/HRC/21/55).

40. Indigenous women are overrepresented in national criminal justice systems. In the case of New Zealand, for example, while Māori comprise approximately 15 per cent of the population, 58 per cent of women in prison are Māori.[29] This negative trend is present in other nations as well, as the proportion of indigenous women in prison increases. The examples of disproportionate representation of indigenous women in justice systems often result from systemic biased use of discretionary powers, poverty, marginalization and violence against indigenous women.[30]

41. Reporting of violence against indigenous women is often lacking, for numerous reasons. Where discrimination and bias exist in criminal justice systems, indigenous

[29] Statistics New Zealand, "New Zealand's prison population", available from www.stats.govt.nz/browse_for_stats/snapshots-of-nz/yearbook/society/crime/corrections.aspx.

[30] Expert Seminar: Hannah McGlade.

women may not feel comfortable filing complaints. Other times, they may be unaware of the available services and protections, particularly those living in rural or remote areas, where services may simply not exist. Lack of options to leave abusive relationships may lead to indigenous women recanting initial reports of violence, and then being charged with making false allegations. Crimes committed against indigenous women that are reported are often downplayed or have the penalties reduced, leading to unequal legal protection.[31] Indigenous women often experience marginalization, disbelief and bias in the legal system, and may be discriminated against and harassed by police when reporting abuse.

42. Traditional justice systems can increase access to justice for indigenous women by providing access to justice in a culturally relevant form. Yet in many instances these systems are male dominated and discriminatory against women. Traditional justice systems need to be strengthened in their ability to protect indigenous women from violence, and advocate for fair and equal treatment.

2. Remedies

43. Amelioration of social and economic barriers to full, effective and meaningful participation of indigenous women in society in general would greatly enhance indigenous women's ability to access justice. Programmes that disseminate information on available programming and law reform can help protect indigenous women.

44. Fundamental to ensuring that the rights of indigenous women are represented in State legal systems is increasing the appointments of indigenous women to the judiciary.[32] It is very important to appoint women magistrates for cases where women do not want to appear before a male justice; this can be a method of improving indigenous women's comfort with, and access to, the justice system.[33] This is notwithstanding inaccurate criticism that such policies lead to lesser penalties or sentences.

45. Gender sensitization training of justice and law enforcement officials should be pursued, as well as awareness-raising on the cultural specificities of working with indigenous women. Criminal justice institutions should also be encouraged to become more open and accepting of indigenous women leaders, and their role in decision-making.

46. Indigenous and State legal institutions can benefit from dialogue on rights-based notions of equality, centring on women's rights and fair and equal treatment. The promotion of equality rights of indigenous women within all aspects of State and indigenous juridical systems is integral to removing barriers to accessing justice (A/HRC/24/50, para. 65).

47. Where they do not exist, increasing development of community systems to provide justice will have a positive impact. When improving access to justice for indigenous women, their children and families, law reform processes must include holistic and healing-based responses. These solutions must address the underlying role of patriarchy caused by the imposition of colonial cultures. The participation of indigenous women as leaders within traditional indigenous juridical systems should be facilitated through targeted efforts.

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[31] *Ibid*.

[32] See, for example, Committee on the Elimination of Discrimination Against Women, General Recommendation No. 23.

[33] Expert Seminar: Ipul Powaseu.

C. Indigenous children and youth

1. Barriers

48. Although the available data is limited, several studies show that indigenous children and youth are disproportionately represented in criminal justice systems. As the Committee on the Rights of the Child has pointed out, disproportionately high rates of incarceration of indigenous children "may be attributed to systematic discrimination from within the justice system and/or society".[34] In Australia, for example, indigenous youth aged 10–17 are 15 times more likely than non-indigenous youth to be under community-based supervision and almost 25 times as likely to be in detention.[35] In New Zealand, Māori youth appear in court at a rate more than double the rate for all young people.[36]

49. Another area in which persistent barriers remain is access to justice for indigenous children who have been victims of domestic violence or sexual abuse.

2. Remedies

50. The Committee on the Rights of the Child listed a series of barriers and remedies to access to justice for indigenous children in its General Comment No. 11 (2009). Paragraph 23 underlines that States parties must ensure that the application of the principle of non-discrimination can be "appropriately monitored and enforced through judicial and administrative bodies". States are also reminded that effective remedies for non-discrimination should be "timely and accessible".

51. There is a considerable lack of data on indigenous children and youth in the justice system, which, in addition to making it difficult to ascertain the magnitude of the challenges at hand, also hinders the design and implementation of adequate policies to address their overrepresentation in the justice system. The Committee on the Rights of the Child highlighted the need for disaggregated data collection pertaining to indigenous children in order to identify discrimination,[37] indicating that States should make efforts to improve disaggregation of data within their juvenile justice systems. Furthermore, the Committee stressed the need for positive measures to eliminate conditions that lead to discrimination, such as access to culturally appropriate juvenile justice services.[38]

52. Article 40 (3) of the Convention on the Rights of the Child requires States to undertake measures to deal with children alleged as, accused of or recognized as having infringed penal law without resorting to judicial proceedings, whenever appropriate. Furthermore, the Committee has repeatedly pointed out that "the arrest, detention or imprisonment of a child may be used only as a measure of last resort".[39] In the case of indigenous children, traditional restorative justice systems consistent with international law could be used to address cases involving children and youth. The Committee also recommends the development of community-based programmes and services that consider

[34] Committee on the Rights of the Child, General Comment No. 11, para. 74.
[35] Australian Institute of Health and Welfare, "Youth justice in Australia 2011–12: an overview", *Bulletin 115* (April 2013), p. 10. Available from http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129543208.
[36] Submission: New Zealand Human Rights Commission, Te Kāhui Tika Tangata.
[37] Committee on the Rights of the Child, General Comment No. 11, para. 24.
[38] *Ibid.*, para. 25.
[39] *Ibid.*, para. 74.

the needs and cultures of indigenous children, their families and communities.[40] In Australia, for example, the Indigenous Justice Program funds programmes that focus on case management and diversionary activities for children and youth.[41]

53. States should design and implement programmes to train law enforcement and judicial personnel, as well as other relevant civil servants, on indigenous children's rights, special protection measures for indigenous children and youth, and culturally sensitive approaches.[42] It is also crucial that the law enforcement and judicial workforce is trauma informed, and able to deal sensitively with issues including violence and sexual abuse.[43]

54. Another principle that must be respected at all times is that of respect for the views of the child. Article 12 of the Convention on the Rights of the Child upholds the right of children to be heard in judicial and administrative proceedings that affect them. In the case of indigenous children, measures to fulfil the right to be heard in judicial or criminal proceedings include providing an interpreter free of charge and guaranteeing legal assistance in a culturally sensitive manner.[44] In Guatemala, the judiciary established the Centre for Indigenous Translation and Interpretation with the purpose of facilitating access to justice for indigenous peoples, and, in particular, indigenous women and children. The centre has legal translators and interpreters, with national coverage and expertise in the 22 Mayan languages spoken in the country.[45]

55. As highlighted above, it is crucial to adopt a holistic approach when addressing access to justice for indigenous children. One area that deserves particular attention is education. Quality education can play an enabling role for the exercise of human rights, benefitting both individual children and their communities. More specifically, human rights education for indigenous children and youth should be pursued as a means to empower them as individuals and to achieve the self-determination of their communities.

D. Indigenous persons with disabilities

1. Barriers

56. Indigenous persons with disabilities face numerous and compounded barriers in accessing justice. These barriers exist within society (particularly related to violence, poverty, marginalization and discrimination), within State criminal justice systems and within indigenous juridical systems.

57. Indigenous persons with disabilities are disproportionately at risk of experiencing all forms of violence and neglect, compounded by discrimination based on race, gender, identity and sexual orientation. These forms of violence include physical, emotional and sexual violence. Violence against indigenous persons with disabilities often originates within their own families.[46] Fearing abandonment and often unable to seek alternative care

[40] *Ibid.*, para. 75.
[41] Submission: Australia.
[42] Committee on the Rights of the Child, General Comment No. 11, paras. 33 and 77.
[43] Expert Seminar: Hannah McGlade.
[44] Committee on the Rights of the Child, General Comment No. 11, para. 76.
[45] Submission: Guatemala.
[46] United Nations Population Fund (UNFPA) Pacific Sub-Regional Office, *A Deeper Silence: the Unheard Experiences of Women with Disabilities – Sexual and Reproductive Health and Violence against Women in Kiribati, Solomon Islands and Tonga* (Suva, Fiji, 2013), p. 41.

or communicate with outside sources, indigenous persons with disabilities can be forced to remain in abusive situations,[47] or, when successful in obtaining care, are often violently abused by the caregivers who are meant to protect them.

58. Lack of culturally appropriate and accessible systems of assessment reduces access to justice by indigenous persons with disabilities. Also, due in large part to poverty, isolation and marginalization, indigenous persons with disabilities are unable to receive proper assessment, care or treatment. In many cases, the first contact indigenous persons with disabilities, particularly intellectual disabilities, have with disability services is after they have come into contact with the criminal justice system.[48]

59. Indigenous persons with disabilities also face high rates of incarceration and suffer further barriers while incarcerated, including arbitrary or indefinite detention in long-stay institutions, particularly where mental health issues or intellectual disabilities are present (E/C.19/2013/6, p. 9). Indigenous persons with disabilities face barriers within the justice system which prevent them from accessing support and services. For example, in Australia, indigenous persons with intellectual disabilities are often detained and assessed as unfit for trial. When this occurs, their detentions often become indefinite. The reports received by the Expert Mechanism suggest that indigenous persons are often incarcerated in inappropriate conditions, such as in maximum security prisons in Australia, which have held indigenous persons with intellectual disabilities and have been reported to subject them to excessive mechanical and chemical restraint (*ibid.*).

60. The limited availability of information in accessible formats creates a substantial barrier for indigenous persons with disabilities. Accessing information on rights and other legal and educational material is often difficult without the necessary assistive technology and materials in alternative formats, including within State, indigenous and United Nations institutions. In rural or remote areas, such access is often non-existent.

61. Some indigenous languages do not have concepts or words for disability. Stories of indigenous persons with disabilities are often covered up and hidden by indigenous communities.[49] These realities are a direct result of stigmatization of persons with disabilities, often based on the imposition of Western models of development, where communities have failed to recognize and accept indigenous persons with disabilities. Persons with disabilities are often marginalized and suffer from violence and abuse. Lack of support for families of children with disabilities too often leads to separation of children from their families into the child welfare system. This is more likely where historical trauma of indigenous peoples has occurred, such as through the imposition of residential school systems (E/C.19/2013/6, pp. 6 and 11–12).

62. The sexual health and reproductive rights of indigenous persons with disabilities, particularly women, are frequently violated through sexual violence, forced contraception and sexual and reproductive stigma.[50] This can be compounded for indigenous persons with disabilities who are also LGBT (lesbian, gay, bisexual and transgender) persons, suffering

[47] Expert Seminar: Ipul Powaseu.

[48] Submission: Aboriginal Disability Justice Campaign. See also Mindy Sotiri *et al.*, "No end in sight: the imprisonment, and indefinite detention of indigenous Australians with a cognitive impairment", Aboriginal Justice Campaign, Sydney, September 2012. Available from www.pwd.org.au/documents/project/2012ADJC-NoEndInSight.docx.

[49] Expert Seminar: Ipul Powaseu.

[50] UNFPA Pacific Sub-Regional Office, *op. cit.* (see footnote 46 above), p. 42.

discrimination because of their sexual orientation or gender identity, and thus experiencing compounded discrimination and isolation.[51]

2. Remedies

63. The United Nations Declaration on the Rights of Indigenous Peoples specifically provides that the rights and special needs of indigenous persons with disabilities should be promoted through measures aimed at improving their economic and social conditions and the implementation of the Declaration, including justice-related articles (articles 21 and 22, respectively). The Convention on the Rights of Persons with Disabilities provides a general framework for promoting the rights of persons with disabilities, including accommodations to ensure non-discrimination and equality in relation to access to justice (article 13 (1)) and training for justice administrators (article 13 (2)). Preambular paragraph (p) expresses a concern regarding indigenous persons with disabilities.

64. Education on a number of levels would help increase access to justice for indigenous persons with disabilities – including education on disabilities for the general public and those involved in the administration of criminal justice, as well as education on human rights for persons with disabilities, the general public and those involved in the criminal justice system.[52]

65. If greater support were available to families of persons with disabilities – who are often the primary caregivers – this would assist in reducing intrafamily violence. Often, family members are untrained and lack the capacity, support and funding necessary to fulfil the role of caregiver.[53]

66. Increased access to legal counsel could lead to improvements, for example, where appropriate free legal aid is needed, but not offered, or where available counsel is not appropriately trained to address the legal and other needs of indigenous clients with disabilities. Moreover, indigenous persons with disabilities may face transportation-related barriers to obtaining legal or related services due to a lack of accessible transportation.

67. Involving persons with disabilities by providing them a role in criminal justice systems would empower and protect them to a greater degree. Particular measures should be taken to expand judicial support and protection of indigenous persons with disabilities, to decrease their vulnerability.

IV. Restorative justice

A. Towards a definition of restorative justice

68. The continued development and application of restorative justice processes means that it is impossible to give a single comprehensive definition of the term. Processes that are identified as restorative may differ in important ways such as the necessity or desirability of retribution and punishment, the extent to which affected parties should participate and interact, and the degree of focus on victims. Despite these differences, several features are commonly associated with restorative justice processes. These include

[51] *Ibid*.
[52] Expert Seminar: Ipul Powaseu; E/C.19/2013/6, p. 9.
[53] UNFPA Pacific Sub-Regional Office, *op. cit.* (see footnote 46 above), p. 41.

the provision of an opportunity to share experiences, a focus on restoring relationships, a requirement of an apology and/or reparation, active participation by the parties in negotiating a just resolution and an emphasis on creating a dialogue between the parties.[54]

69. Although it appears that many modern restorative justice processes were initially developed in the context of criminal law and that much of the literature focuses on this area, a feature of restorative justice processes is that they may be applied in a broad range of contexts. Therefore, in determining the scope and nature of restorative justice, it is useful to consider the various uses of these processes and to compare these with others arising from different traditions, such as indigenous legal systems and customary law. Restorative justice processes can address a wide range of issues, from matters affecting entire peoples and communities (such as colonization and forced assimilation; for example, the Indian Residential School systems in North America) to disputes between individuals at the community level.

70. Some restorative justice processes are usually associated with particular types of use. For example, sentencing circles are commonly used in the criminal sphere and truth commissions are often used in post-conflict societies.[55] The distinction between practices and the contexts in which they are used is not always clear-cut. For example, in a criminal context, there is a focus on using restorative justice in relation to the victim, offender and those affected by the crime. However, the use of these processes may also facilitate peace and reconciliation within broader society by reducing rates of recidivism,[56] increasing community autonomy and fostering understanding between the parties.[57]

71. Another factor in considering restorative justice processes is their role in facilitating access to justice in relation to large-scale issues, such as gross violations of human rights and past injustices towards indigenous peoples by a State. When used in this way, restorative justice processes again demonstrate that this type of use is not completely distinct from that involving criminal acts of individuals. For example, although a truth commission may be designed to address injustice experienced by the wider community, its operation will affect how justice is accessed, administered and delivered to individuals. Other examples include national land inquiries related to systemic dispossession of indigenous peoples' lands such as that conducted by the National Human Rights Commission of Malaysia.

B. The relationship between restorative justice, customary law and indigenous juridical systems

72. The relationship between restorative justice processes and those originating from indigenous and customary systems of law helps to define the scope of restorative justice.

[54] For a detailed introduction to restorative justice, including definitions and key features of restorative justice programmes, see United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (United Nations publication, Sales No. E.06.V.15).

[55] See, for example, OHCHR, *Transitional Justice and Economic, Social and Cultural Rights* (HR/PUB/13/5) and OHCHR, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions* (HR/PUB/06/01).

[56] James Bonta *et. al*. "Restorative justice and recidivism: promises made, promises kept?" in *Handbook of Restorative Justice: a Global Perspective*, Dennis Sullivan and Larry Tifft, eds. (Abingdon, Routledge, 2007).

[57] This effect is discussed in relation to truth-telling and sharing of experiences through the Truth and Reconciliation Commission in Canada, available from www.trc.ca/websites/trcinstitution/index.php?p=7.

This is particularly relevant because restorative justice processes are often used by or in relation to indigenous peoples.[58] There are several facets to this relationship, including the level of commonality between indigenous or customary law and restorative justice processes, the manner in which restorative processes are introduced (such as whether they are imposed on or derived from the community) and the appropriateness of transferring restorative justice processes that have been influenced by customary or indigenous law to other societies.

73. Systems of customary law are used in many parts of the world and frequently exist alongside more formal systems of law. They may share characteristics and objectives with restorative justice processes, such as an aspiration to achieve reconciliation between the parties, negotiate an outcome and involve the community in the delivery of justice. In some cases, restorative justice systems may adopt features of indigenous systems and in this way form a connection with the community. Despite these similarities, restorative justice processes and customary/indigenous law are distinct processes in that they differ in their origins. Furthermore, many indigenous peoples, tribes and Nations view their customary and indigenous laws as originating from inherent rights.

C. Restorative justice and self-determination

74. An important and contentious issue for indigenous peoples and postcolonial nations today is that of indigenous peoples' self-determination and what this may mean in terms of juridical systems. The right to self-determination is enshrined in the United Nations Declaration on the Rights of Indigenous Peoples, which gives a strong normative directive to provide for indigenous control and participation in the justice processes by which they are affected. As highlighted above, several articles, in particular article 34, affirm that the use of indigenous juridical systems is an expression of, or contributes to, self-determination.[59]

75. The flexible and participatory nature of restorative justice processes, along with their inherent similarities to customary law, mean that they may provide a vehicle to support the use of indigenous justice systems and hence facilitate indigenous self-determination. Practices such as mediation are useful tools that can bridge the gap between formal legal systems and grass-roots justice work. However, features of some restorative justice processes may undermine their ability to support access to justice and self-determination, including "top-down" imposition and the possible politicization of these processes.[60]

76. Confusion between those practices that are truly indigenous and those that merely adopt some features of customary law poses a threat to the facilitation of indigenous self-determination through restorative justice, as there is an increased risk that processes may be co-opted to by States or other actors.[61]

[58] For example, sentencing initiatives that seek to incorporate indigenous justice practices and provision for the sharing of histories during Waitangi Tribunal hearings.

[59] For example, articles 3, 4, 11.1 and 33.

[60] See, for example, Eduardo R. C. Capulong, "Mediation and the neocolonial legal order: access to justice and self-determination in the Philippines", *Ohio State Journal on Dispute Resolution*, vol. 27, No. 3 (September 2012).

[61] Stephanie Vieille, "Frenemies: restorative justice and customary mechanisms of justice", *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*, vol. 16, No. 2 (2013).

D. Restorative justice for peace and reconciliation

77. Restorative justice for the broader purposes of peace and reconciliation has been utilized in multiple contexts, including indigenous-related truth commissions in Australia, Canada, Chile, Guatemala, Peru, the Australian Apology and subsequent reconciliation initiatives, the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission, the Waitangi Tribunal in New Zealand, and the use of customary law both in peaceful and post-conflict indigenous societies.[62]

78. Truth commissions have varying purposes and modes of operation, yet many display features that align with or support restorative justice principles. For example, truth commissions may make a contribution to restoration by illuminating the truth of what occurred, identifying institutions responsible for abuses, recognizing victims and providing a forum in which they can share their experiences and tell their stories, as well as making recommendations on how to provide remedies and prevent future violations.[63] They may also allow for, or be influenced by, customary practices. For example, Archbishop Desmond Tutu has described the South African Truth and Reconciliation Commission (SATRC) as having been influenced by *ubuntu* (traditional African concepts of healing and well-being).[64] Further, truth commissions may facilitate access to justice in situations where this would otherwise be very difficult to achieve, such as in the context of past treatment of indigenous peoples.[65]

79. Although it was not established to align with the principles of restorative justice, the operation of the SATRC has been described as "restorative".[66] For example, through the use of both an Amnesty Committee (for perpetrators) and a Human Rights Committee (for victims), the process was able to include both the perpetrators and victims of injustice in the process.[67] However, this feature has also been criticized as it maintained separation between the parties.[68] The SATRC has also been criticized for its limited ability to make reparations, a power that was reserved for the Government.[69]

80. The Truth and Reconciliation Commission of Canada, established in 2008, is aimed at achieving peace and reconciliation by addressing the legacy of the residential school system imposed on indigenous children in Canada. It has a mandate to hear the truth, promote healing and facilitate reconciliation. It is restorative in its role of seeking out truth-telling in the form of sharing and recording of information, leading to greater understanding of individuals and communities. The methodology of the Commission is based on indigenous customs, such as healing circles, traditional counselling provided to participants and other customary and spiritual ceremonies. Through this process, new relationships will be established based on mutual recognition and respect. Under the court-monitored Indian

[62] For a detailed discussion of the use of truth commissions and the rights of indigenous peoples, see the study of the United Nations Permanent Forum on Indigenous Issues on the rights of indigenous peoples and truth commissions and other truth-seeking mechanisms on the American continent (E/C.19/2013/13).

[63] Jennifer Llewellyn, "Truth commissions and restorative justice", in *Handbook of Restorative Justice*, Gerry Johnstone and Daniel W. Van Ness, eds. (Cullompton, Willan Publishing, 2007), p. 358.

[64] Michael King *et al.*, *Non-Adversarial Justice* (Annandale, Federation Press, 2009), p. 61.

[65] Llewellyn, *loc. cit.* (see footnote 63 above), p. 352.

[66] King *et al.*, *op. cit.* (see footnote 64 above), p. 61.

[67] Llewellyn, *loc. cit.* (see footnote 63 above), p. 362.

[68] Audrey R. Chapman, "Truth commissions and intergroup forgiveness: the case of the South African Truth and Reconciliation Commission", *Peace and Conflict: Journal of Peace and Psychology*, vol. 13, No. 1 (March 2007), pp. 66–67.

[69] Llewellyn, *loc. cit.* (see footnote 63 above), p. 365.

Residential Schools Settlement Agreement, financial redress is provided outside the Commission through a modest common experience payment to all former students and a separate independent assessment process for abuse claims.

81. The Waitangi Tribunal in New Zealand, established in 1975, is an example of a restorative justice process to facilitate reconciliation derived from the needs of the community, including the Māori and Pākehā.[70] The Tribunal broadly fit the ideals of restorative justice through the provision of a forum for grievances by participants, the validation of claimants' experiences through research and the incorporation of Māori tradition through a focus on restoring the *mana* (authority) of the victims, their families and the offenders' families.[71]

82. The Australian Apology in 2008 officially recognized the harm caused by its policy of removal of indigenous children from their families.[72] The context and purpose of the Apology demonstrate similarities with aspects of restorative justice process in that it was intended to help heal the damage of the past and prepare for the future.

83. The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission is mandated to consider the widespread transfer of indigenous children from their families to non-indigenous families precipitated by the Indian Child Welfare Act. The Commission gives a voice to the Wabanaki people, promising to practice equal State/indigenous involvement in order to achieve peace and reconciliation through a restorative justice model.

84. As these cases illustrate, restorative justice must be understood as a process, not an event. Robert Andrew Joseph suggests eight "giant steps" in the process of achieving reconciliatory justice:

- Recognition: finding truth and describing injustices;
- Responsibility: the acknowledgement of responsibility for injustices;
- Remorse: a sincere apology for injustices;
- Restitution of lands and resources, and the power to determine their use;
- Reparation for injustices in financial terms, recognizing that many harms are untouched by this compensation;
- Redesigning State political-legal institutions and processes to empower indigenous participation in self-government and State governance;
- Refraining from future injustices by assuring past and present injustices will not be repeated;

[70] Joe Williams (citing Edward Durie), "Conflict resolution: the role of the Waitangi Tribunal", in *Turning the Tide: a New Approach to Conflict Resolution*, Peter Greener, ed. (Auckland University of Technology, 2001), p. 9.

[71] Donna Durie Hall and New Zealand Māori Council, "Restorative justice: a Māori perspective", in *Restorative Justice: Contemporary Themes and Practice*, Helen Bowen and Jim Consedine, eds. (Lyttelton, Ploughshares Publications, 1999), p. 26.

[72] Australia, Department of Social Services, "Apology to Australia's indigenous peoples", available from www.dss.gov.au/our-responsibilities/Indigenous-australians/programs-services/recognition-respect/apology-to-australias-Indigenous-peoples.

- Reciprocity in the obligation on the harmed to do unto others as they would have done unto them.[73]

85. An issue with restorative justice has been that sometimes the mechanisms put in place by States are insufficient to adequately address past grievances. Though beneficial, actions such as apologies and processes such as truth and reconciliation commissions are only fully effective when comprehensively supported by indigenous participation. Furthermore, in order to provide redress, the views of indigenous peoples on its appropriate forms should be prioritized.

[73] Robert Andrew Joseph, "A jade door: reconciliatory justice as a way forward citing New Zealand experience," in *Speaking My Truth: Reflections on Reconciliation and Residential Schools*, vol. I, *From Truth to Reconciliation* (Ottawa, Aboriginal Healing Foundation, 2008), pp. 212–213.

Annex

Expert Mechanism Advice No. 6 (2014): Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities

A. General

1. The United Nations Declaration on the Rights of Indigenous Peoples should be the basis for all action, including at the legislative and policy levels, on the protection and promotion of indigenous peoples' right to access to justice. The implementation of the Declaration should be used as a framework for reconciliation and as a means of implementing indigenous peoples' access to justice.

2. Indigenous juridical systems can play a crucial role in facilitating access to justice for indigenous peoples. The Declaration affirms indigenous peoples' right to promote, develop and maintain their juridical systems or customs, in accordance with international human rights standards (article 34). The Declaration also upholds indigenous peoples' right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining the right to participate fully in the political, economic, social and cultural life of the State (article 5).

3. Access to justice, in addition to being a right in itself, is of paramount importance to indigenous women, children and youth, and persons with disabilities, as a means of obtaining remedies. It must be viewed holistically, since access to justice is inextricably linked to other human rights challenges faced by indigenous peoples, including their status in society as indigenous women, children and youth, and persons with disabilities, as well as poverty, lack of access to health and education, and lack of recognition of their lands, territories and resources.

B. Advice for States

4. In accordance with the Declaration, States must recognize indigenous peoples' right to maintain, develop and strengthen their own juridical systems, and must value the contribution that these systems can make to facilitating indigenous peoples' access to justice. In this regard, States must allocate resources to support the adequate functioning and sustainability of indigenous juridical systems and help ensure that they meet the needs of communities, in accordance with article 39 of the Declaration.

5. In States in which legal pluralism is recognized, the jurisdiction of indigenous juridical systems should be adequately clarified, recognizing that indigenous justice systems are highly diverse and context-specific. State justice systems should demonstrate respect for customary laws (which can be a means to increasing access to justice) and customary laws should respect international human rights norms.

6. States have an obligation to protect and support the work of indigenous human rights defenders in the promotion of access to justice for indigenous peoples, in accordance with Human Rights Council resolution 22/6.

7. States should adopt a holistic approach to access to justice for indigenous women, children and youth, and persons with disabilities, and take measures to address the root causes of multiple discrimination facing these groups, including systemic biased use of discretionary powers, poverty, marginalization and violence against indigenous women.

8. States should make greater effort to disaggregate data regarding their criminal justice systems so that a clearer picture of indigenous women, children and youth, and persons with disabilities currently in detention can emerge. Such data would permit the improved development and implementation of policies to better address the situation of indigenous women, children and youth, and persons with disabilities deprived of their liberty.

9. States should ensure that indigenous women, children and youth, and persons with disabilities have access to an interpreter where required, in all legal and administrative proceedings. In the case of indigenous persons with disabilities, States should take measures to ensure all forms of accessibility.

10. States should work with indigenous peoples to develop alternatives for indigenous children in conflict with the law, including the design and implementation of culturally appropriate juvenile justice services and the use of restorative justice approaches. Arrest, detention or imprisonment should only be used as a measure of last resort.

11. Together with indigenous peoples, States should promote human rights education and training among indigenous women, children and youth, and persons with disabilities as a means for empowerment. Furthermore, links between indigenous and State legal institutions can benefit from dialogue on rights based notions of equality, centring on awareness of the rights of indigenous women and persons with disabilities. This can lead to improved gender balance and participation of indigenous persons with disabilities in juridical systems and indigenous peoples' juridical systems.

12. Particular attention should be paid to ensuring adequate protection against corporate violations of the human rights of indigenous peoples, and particularly vulnerable groups, including indigenous women.

C. Advice for indigenous peoples

13. Indigenous peoples should strengthen advocacy for the recognition of their juridical systems; increased development of such systems can improve access to justice. Together with States, indigenous peoples should in particular raise awareness about their right to administer their own justice among policymakers and judicial and law enforcement officials.

14. Indigenous peoples must also ensure that these systems respond to the needs of the community, in particular indigenous women, children and youth, and persons with disabilities.

15. Reforms and strategies are critical to ensure traditional indigenous juridical systems and leadership are efficient and independent. This includes making more resources available to the indigenous leadership, supporting indigenous juridical systems and ensuring they perform their duties with independence and integrity. The participation of indigenous women as leaders within traditional indigenous juridical systems should be facilitated through targeted efforts, based on holistic and healing-based approaches.

16. Indigenous juridical systems should ensure that indigenous women, children and youth, and persons with disabilities are free from all forms of discrimination. The participation of indigenous women, children and youth, and persons with disabilities in indigenous justice institutions should be respected and promoted. Accessibility should be ensured for indigenous persons with disabilities.

17. Indigenous peoples should ensure that knowledge regarding their juridical systems and customary laws is transferred across generations, enabling every member of the community to understand indigenous concepts of justice.

D. Advice for international organizations

18. The Declaration should guide the efforts of United Nations system entities in the promotion of indigenous peoples' rights to maintain their juridical systems and in their work on the rights of indigenous women, children and youth, and persons with disabilities.

19. The United Nations should dedicate resources to the development and implementation, in cooperation with indigenous peoples, of training on the rights of indigenous peoples, and particularly indigenous women, children and youth, and persons with disabilities, for law enforcement officials and members and staff of the judiciary. In addition to indigenous peoples' rights, training should also address cultural sensitivity issues and trauma.

E. Advice for national human rights institutions

20. National human rights institutions can play a catalytic role in the promotion of access to justice for indigenous peoples. Jointly with indigenous peoples, they can encourage recognition of and provide support to indigenous juridical systems. They can also provide training on human rights to both State and indigenous judicial authorities. National human rights institutions can bring together indigenous peoples and States, acting as facilitators in restorative justice processes.