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Access to justice in the promotion and protection of the rights of indigenous peoples

Study by the Expert Mechanism on the Rights of Indigenous Peoples

Summary

In resolution 21/24, the Human Rights Council requested the Expert Mechanism on the Rights of Indigenous Peoples to prepare a study on access to justice in the protection and promotion of the rights of indigenous peoples. This study outlines the right to access to justice as it applies to indigenous peoples, including analysis of its relationship to the rights of indigenous peoples to self-determination, non-discrimination and culture. It examines access to justice issues relevant to indigenous women, children and youth and persons with disabilities, as well as the potential of truth and reconciliation processes to promote access to justice for indigenous peoples. The study concludes with Expert Mechanism advice No.5.

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1–2	3
II. Access to justice for indigenous peoples	3–7	3
III. Access to justice under international law	8–18	4
A. Legal recognition and remedies	11–15	4
B. Regional human rights jurisprudence	16–18	6
IV. The relationship between access to justice and other rights of indigenous peoples	19–31	6
A. Self-determination	19–23	6
B. Non-discrimination	24–27	7
C. Cultural rights	28–31	8
V. Key areas for advancing the right of indigenous peoples to access to justice	32–48	9
A. Advancing access to justice through national courts	32–34	9
B. Issues relating to the rights of indigenous peoples to lands, territories and resources	35–40	9
C. Issues relating to the administration of criminal justice in relation to indigenous peoples.....	41–48	10
VI. Indigenous peoples' legal systems	49–61	12
A. International and State recognition of indigenous peoples' justice systems ...	53–57	13
B. Linking indigenous peoples and State justice systems	58–61	14
VII. Access to justice for specific groups	62–77	15
A. Women.....	62–65	15
B. Indigenous children and youth.....	66–70	16
C. Indigenous persons with disabilities	71–77	17
VIII. Access to justice, truth and reconciliation and indigenous peoples.....	78–100	18
A. Indigenous peoples and transitional justice processes	78–85	18
B. Truth commissions.....	86–89	19
C. Challenges to truth-seeking to address injustices experienced by indigenous peoples	90–95	20
D. Ways that truth commissions can effectively address the rights and concerns of indigenous peoples	96–100	21
 Annex		
Expert Mechanism advice No. 5 (2013): Access to justice in the promotion and protection of the rights of indigenous peoples.....		23

I. Introduction

1. In resolution 21/24, the Human Rights Council requested the Expert Mechanism on the Rights of Indigenous Peoples to prepare a study on access to justice in the protection and promotion of the rights of indigenous peoples and to present it to the Human Rights Council at its twenty-fourth session.

2. The Expert Mechanism called for submissions from States, indigenous peoples, non-State actors, national human rights institutions and other stakeholders to assist it in the study. The submissions received are, where permission was granted, publicly available on the Expert Mechanism's website.¹ The study also benefited from contributions made at the international expert seminar on indigenous peoples' access to justice, including truth and reconciliation processes, held from 27 February to 1 March 2013, organized by the Office of the United Nations High Commissioner for Human Rights, the Columbia University Institute for the Study of Human Rights and the International Center for Transitional Justice. The Expert Mechanism appreciates the submissions and is informed by them.

II. Access to justice for indigenous peoples

3. Access to justice requires the ability to seek and obtain remedies for wrongs through institutions of justice, formal or informal, in conformity with human rights standards.² It is essential for the protection and promotion of all other human rights. The United Nations has committed itself to taking all necessary steps to provide access to justice for all.³

4. 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. Overrepresentation of indigenous peoples in incarceration is a global concern."⁴ It raises issues of both procedural fairness and substantive justice, including fair, just and equitable remedies for violations of human rights. Access to justice cannot be examined in isolation from other human rights issues, including structural discrimination, poverty, lack of access to health and education, and lack of recognition of rights to culture and lands, territories and resources.

5. In conformity with the right to self-determination, indigenous peoples must have access to justice externally, from States, and internally, through indigenous customary and traditional systems.⁵ Indigenous peoples must have access to justice both individually and collectively.

6. A particular dimension of access to justice relates to overcoming long-standing historical injustices and discrimination, including in relation to colonization and dispossession of indigenous peoples' lands, territories and resources. Injustices of the past that remain unremedied constitute a continuing affront to the dignity of the group. This

¹ See www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/AccessToJustice.aspx.

² See, for example, Human Rights Committee, General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties, and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147 of 16 December 2005, annex).

³ See General Assembly resolution 67/1.

⁴ Report of the Expert Mechanism on its fifth session (A/HRC/21/52), p. 4.

⁵ Special Rapporteur on the rights of indigenous peoples, at the Human Rights Council panel discussion on access to justice for indigenous peoples, 18 September 2012.

contributes to continued mistrust towards the perpetrators, especially when it is the State that claims authority over indigenous peoples as a result of that same historical wrong.

7. Harm associated with historical injustices continues today and thus must be taken into account. Many of the contemporary challenges faced by indigenous peoples are rooted in past wrongs.

III. Access to justice under international law

8. As the most comprehensive international instrument elaborating the rights of indigenous peoples, the United Nations Declaration on the Rights of Indigenous Peoples is a key starting point for any consideration of their individual and collective rights, including their right to access to justice. The Declaration's overarching provision on remedies – a key component – is article 40:

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

9. The Declaration 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.

10. The Declaration's numerous relevant provisions include rights to effective mechanisms for the prevention of, and redress for, inter alia: deprivation of cultural rights, dispossession of lands, territories and resources, and forced assimilation and integration (art. 8, para. 2); redress through effective mechanisms with respect to their cultural, intellectual, religious or spiritual property taken without their free, prior and informed consent (art. 11, para. 2); just and fair redress where deprived of their means of subsistence and development (art. 20); processes to recognize and adjudicate the rights of indigenous peoples related to their lands, territories and resources (art. 27); right to redress with respect to lands, territories and resources confiscated, taken, occupied, used or damaged without their free, prior and informed consent (art. 28); effective mechanisms for redress in connection with the development, utilization or exploitation of mineral, water or other resources (art. 32, para. 3); the right to develop and maintain their institutional structures, inter alia, and their juridical systems or customs (art. 34); recognition, observance and enforcement of treaties (art. 37); and access to and prompt decisions through procedures and remedies vis-à-vis infringements of indigenous peoples' individual and collective rights (art. 40). Many provisions provide for redress for historical wrongs, for example, article 28.

A. Legal recognition and remedies

11. The provisions of the Declaration should guide the interpretation of international human rights treaties in relation to access to justice for indigenous peoples. Elements of access to justice include the right to an effective remedy, procedural fairness and the need for States to take positive measures to enable access to justice.

12. The Declaration is consistent with, and elaborates upon, the rights of indigenous peoples to access to justice as expressed in International Labour Organization (ILO) Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries, which include rights, inter alia, to have access to legal proceedings for the

protection of their human rights (art. 12) and to retain their own customs and institutions (art. 8). The Convention further requires that, when applying national laws to indigenous peoples, their customs and customary laws be regarded (art. 8), and that adequate procedures be established to resolve land claims (art. 14).

13. The right to a remedy and related procedural and substantive rights essential to securing a remedy are protected in a wide range of international instruments.⁶ The United Nations treaty bodies have found that, when providing for remedies, they should be adapted so as to take account of the special vulnerability of certain categories of persons.⁷ Moreover, without the provision of reparations, the duty to provide remedies has not been discharged.⁸ Reparations can take the form of restitution, rehabilitation and measures such as public apologies, public memorials, guarantees of non-repetition and changes in the relevant laws and practices and bringing to justice the perpetrators of human rights violations.⁹ The Expert Mechanism has recommended previously that, in providing redress to indigenous peoples for the negative impacts of State laws and policies, States should prioritize the views of indigenous peoples on appropriate forms of redress (A/HRC/21/53, para. 23).

14. The right to equality before courts and tribunals requires procedural fairness. In facing criminal charges, this includes being informed promptly and adequately in an appropriate language of the charges; communication with counsel of one's own choosing; and the free assistance of an interpreter. In particular, measures are to be taken to ensure that indigenous peoples can understand and be understood in legal proceedings.¹⁰ Access to legal aid, including assistance of counsel, is often an essential element in ensuring access to courts, and the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination have been construed by their respective treaty bodies as encompassing rights to counsel in civil and criminal cases.¹¹

15. Under international law, States must take positive measures to enable realization of human rights, including through the removal of economic, social and cultural barriers to access to justice.¹² In addition to the adoption of legislative measures, such measures may include administrative, financial, educational and social measures,¹³ the provision of judicial remedies,¹⁴ and the establishment of national commissions or other appropriate bodies.¹⁵ The Committee on Economic, Social and Cultural Rights has found that positive

⁶ Such as the International Covenant on Civil and Political Rights. Human rights treaty bodies have outlined the need for access to effective remedies to guarantee the realization of many human rights. See, for example, Committee on Economic, Social and Cultural Rights general comment No. 9 (1998); and Committee on the Elimination of Discrimination against Women, communication No. 18/2008, views adopted on 16 July 2010.

⁷ Human Rights Committee, general comment No. 31 (2004), para. 15.

⁸ *Ibid.*, para. 16; Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010), para. 32.

⁹ Human Rights Committee, general comment No. 31, para. 16.

¹⁰ ILO Convention No. 169, art. 12.

¹¹ See Human Rights Committee, general comment No. 32 (2007), and Committee on the Elimination of Racial Discrimination, general recommendation No. 31 (2005).

¹² International Covenant on Civil and Political Rights, art. 2, para. 2; International Covenant on Economic, Social and Cultural Rights, art. 2, para. 1; Convention on the Elimination of All Forms of Discrimination against Women, art. 2; Convention on the Rights of Persons with Disabilities, art. 4.

¹³ Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), para. 7.

¹⁴ *Ibid.*, para. 5.

¹⁵ Committee on the Elimination of Racial Discrimination, general recommendation No. 17 (1993), para. 1.

measures to be taken by States in relation to the fulfilment of economic, social and cultural rights include making available and accessible appropriate remedies and establishing appropriate venues for redress such as courts, tribunals or administrative mechanisms that are accessible to all on an equal basis, including the most disadvantaged men and women.¹⁶ In the light of the historic abuses experienced by indigenous peoples, the International Convention on the Elimination of All Forms of Racial Discrimination is particularly noteworthy, as it recognizes the need for special measures to deal with discrimination.

B. Regional human rights jurisprudence

16. Regional human rights conventions, including the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, include the right to a remedy. The African Charter on Human and Peoples' Rights provides that every individual has the right to have his or her cause heard, which necessarily requires provision of a remedy. The Inter-American Commission on Human Rights has required positive State action to remove barriers to access to justice.¹⁷

17. Indigenous peoples have sought justice under international law and associated processes, especially within human rights frameworks. International human rights bodies have developed human rights jurisprudence to provide substantive justice for indigenous peoples and to expand their access points of justice.

18. Positive examples of international human rights jurisprudence include decisions that expand on domestic protection of the rights of indigenous peoples.¹⁸ Examples include the decision of the Inter-American Court of Human Rights in *Saramaka People v. Suriname* and that of the African Commission on Human and Peoples' Rights in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*. They provide a platform for further action by the indigenous peoples. As noted about *Saramaka*, "it is platform of identity, constituted by formal recognition (the Saramaka are the bearers of international indigenous rights) and by substantive recognition (they possess title to their territory, and participation, resource-sharing and impact assessment rights)".¹⁹

IV. The relationship between access to justice and other rights of indigenous peoples

A. Self-determination

19. The right to self-determination is a central right for indigenous peoples from which all other rights flow. In relation to access to justice, self-determination affirms their right to maintain and strengthen indigenous legal institutions, and to apply their own customs and laws.

¹⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 16 (2005), para. 21.

¹⁷ See Inter-American Commission on Human Rights, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights* (OEA/Ser.L/V/II. 129 Doc 4, 2007).

¹⁸ Seminar on access to justice: Patrick Macklem.

¹⁹ *Ibid.* "The closer the attention and the more specific the descriptions international law offers of what changes are needed in domestic law, the more the intervention translates relatively abstract international human and indigenous rights into concrete legal entitlements cognizable to the domestic legal order in question in a programmatic way, the firmer the foundation that an international legal decision will provide to indigenous political mobilization." (*Ibid.*)

20. Simultaneously, indigenous peoples have the right “to participate fully, if they so choose, in the political, economic, social and cultural life of the State”.²⁰ Here, the right to self-determination requires recognition of the legal standing of indigenous peoples as collectives, and of their representative institutions, to seek redress in appropriate forums.²¹ Moreover, in these cases, remedies must be collective.

1. Barriers

21. Indigenous peoples have faced considerable challenges in obtaining international and national respect for their self-determination, in part due to State fears that such recognition could undermine States’ own legal, economic, cultural and other forms of authority.

22. The Expert Mechanism is aware of long-standing complaints from indigenous peoples that they lack standing to bring complaints relating to loss of sovereignty and self-determination under international law or to enforce treaties between indigenous peoples and States, for example standing as States before the International Court of Justice.

2. Remedies

23. To address instances of non-recognition, reference should be made to jurisprudence at all levels where there has been recognition of the collective legal personality of indigenous peoples and their communities.²² Another solution identified was the development of a voluntary “optional protocol” to the United Nations Declaration on the Rights of Indigenous Peoples.²³ Notably, the draft American Declaration on the Rights of Indigenous Peoples includes a provision that, where disputes regarding treaties, agreements and other constructive arrangements cannot be resolved, these shall be submitted to competent bodies, including regional and international bodies, by States or indigenous peoples.²⁴

B. Non-discrimination

24. The pre-emptory norm of non-discrimination, a fundamental pillar of international human rights law, requires that indigenous peoples have access to justice on an equal basis to the general population.

1. Barriers

25. In all regions, often as a result of structural discrimination, indigenous peoples are disproportionately more likely to experience poor economic and social conditions, including poverty and lack of equal access to appropriate education, health services, employment, vocational training and housing. These factors contribute to social problems among indigenous peoples such as alcoholism and violence, which bear directly upon indigenous peoples’ access to justice and on the adequacy of justice services they receive.

²⁰ United Nations Declaration on the Rights of Indigenous Peoples, art. 5.

²¹ See, for example, the submission of Natural Justice: Lawyers for Communities and the Environment.

²² For example, Committee on the Elimination of Racial Discrimination, general recommendation No. 23 (1997).

²³ Seminar on access to justice: Dalee Sambo.

²⁴ Permanent Council of the Organization of American States, “Record of the current status of the draft American Declaration on the Rights of Indigenous Peoples” OEA/Ser.K/XVI/GT/DADIN/doc.334/08 rev. 7), May 2012.

All of the above are contributing factors that bear on the ability of indigenous individuals and peoples to gain access to justice.

26. Challenges also include discriminatory laws and practices, lack of funding necessary to seek justice, including legal aid,²⁵ insufficient numbers of indigenous judges and lawyers, and biases against indigenous peoples and individuals involved in legal proceedings.

2. Remedies

27. States must provide remedies, reparations and, where appropriate, public apologies, public memorials and guarantees of non-repetition for violations of indigenous peoples' right to freedom from discrimination.²⁶

C. Cultural rights

28. The cultural rights of indigenous peoples include recognition and practice of their justice systems (A/HRC/21/53, para. 21), as well as recognition of their traditional customs, values and languages by courts and legal procedures.²⁷ Cultural rights are interrelated with the right to self-determination of indigenous peoples, and therefore, to access to justice, as set out by numerous provisions of the United Nations Declaration on the Rights of Indigenous Peoples, specifically articles 8, 11, 12, 13, 15, 25, 31 and 36.

1. Barriers

29. Cultural rights often go unrecognized. In the case of linguistic rights, for example, challenges include a lack of bilingual interpreters and training in indigenous languages informing people about mechanisms that facilitate access to justice.²⁸ A 2012 study in Guatemala found that the majority of indigenous inmates in selected prisons had not been offered language-appropriate legal services or information in indigenous languages regarding their detention.²⁹

2. Remedies

30. Positive examples include measures to ensure the use of indigenous languages in courts,³⁰ as well as providing for training of officials on indigenous history, legal traditions and customs.³¹

31. A notable example of efforts to ensure culturally appropriate justice is the Cree Court, a circuit court handling criminal and child protection matters established by the Saskatchewan Provincial Court of Canada. The Cree Court conducts hearings entirely or partially in Cree and encourages the participation of community leaders in the criminal justice system, recognizing the community's role in supporting both the victims and the

²⁵ See, for example, Human Rights Committee, concluding observations on Australia (CCPR/C/AUS/CO/5).

²⁶ Committee on the Elimination of Discrimination against Women, general recommendation No. 28, para. 32.

²⁷ See Expert Mechanism advice No. 3 (2012).

²⁸ See, for example, the report of the Special Rapporteur on the independence of judges and lawyers on her mission to Mexico (A/HRC/17/30/Add.3), paras. 80–81.

²⁹ Procurador de los Derechos Humanos, "Los derechos humanos de personas indígenas privadas de libertad en el marco de pluralismo jurídico" (2012).

³⁰ See, for example, the submissions of Finland and Norway.

³¹ Submission: Canadian Human Rights Commission.

accused. The Court further incorporates more culturally responsive traditional values into sentencing.³²

V. Key areas for advancing the right of indigenous peoples to access to justice

A. Advancing access to justice through national courts

32. At the national and regional levels, strategic litigation, education, outreach and advocacy can help to expand access to justice and protections for the rights of indigenous peoples.³³ One example is the Maya Joint Programme in Guatemala, which seeks to empower indigenous organizations to use litigation to demand recognition of their rights. It includes training and has focused on cases addressing indigenous rights to lands and territories; bilingual intercultural education; identity; and the promotion of indigenous languages. Positive outcomes have included a court ruling restoring the property of 4,185 hectares to the Kaqchikel Maya community of Chuarrancho. The decision provides a legal basis for recognition of ancestral lands and indigenous forms of organization.

33. The Working Group on Indigenous Populations of the African Commission on Human and Peoples' Rights has noted, in the context of a successful case brought against the Government of Uganda by the Benet people on eviction from their lands, that successful litigation helps to expand access points to justice for indigenous peoples and encourages them to fight for their rights through legal means.³⁴

34. There is support for the participation of victims in trials at the International Criminal Court.³⁵ The Expert Mechanism encourages indigenous peoples to pursue this as an option where relevant, along with the principles of universal jurisdiction.

B. Issues relating to the rights of indigenous peoples to lands, territories and resources

35. The Declaration affirms that States are to establish and implement processes to recognize and adjudicate the rights of indigenous peoples as related to their lands, territories and resources (art. 27). The Inter-American Court of Human Rights has held that States must provide indigenous peoples with an effective and efficient remedy for resolving claims to their ancestral territories and that failure to do so can amount to violation of the rights to a fair trial and to effective judicial protection.³⁶

1. Barriers

36. Indigenous peoples face difficulties in obtaining adequate access to justice with respect to their rights as related to lands, territories and resources, especially where these are or have been claimed by States, private owners, businesses or others. Challenges include lack of access to legal services and collusion between private sector entities and

³² See www.sasklawcourts.ca/index.php/home/provincial-court/cree-court-pc.

³³ Abraham Korir Sing'Oei, at the Human Rights Council panel discussion on access to justice.

³⁴ See "Report of the African Commission's Working Group on Indigenous Populations/Communities, research and information visit to the Republic of Uganda" (2006).

³⁵ Seminar on access to justice: John Washburn.

³⁶ See *Case of the Indigenous Community Yakye Axa v. Paraguay*, judgement of 17 June 2005.

Governments to deprive indigenous peoples of access to justice for their lands.³⁷ Where indigenous peoples have won land rights cases in courts, States must implement these decisions.

37. Despite the responsibility of businesses to respect international human rights law, indigenous peoples face difficulties in seeking reparations for human rights violations caused by business. Moreover, redress mechanisms for issues arising from development and private sector projects may not be in place, resulting in impunity for serious human rights abuses.³⁸

38. Indigenous leaders and individuals have been subjected to various forms of abuse, including harassment, physical violence and extrajudicial executions, in instances where they have supported campaigns against commercial activities on indigenous territories.³⁹ Furthermore, criminal processes in some instances are lodged against indigenous organizations seeking to defend their rights, and the media are used to characterize indigenous peoples as delinquents or even criminals.

2. Remedies

39. Some States have established specific mechanisms for the investigation of indigenous land rights, such as the Specific Claims Tribunal Act of Canada and the Finnmark Commission of Norway.

40. The Inter-American Court of Human Rights has found that, in the case of violation of land rights, restitution is the ideal form of reparation.⁴⁰ Where indigenous peoples have been deprived of lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, the Committee on the Elimination of Racial Discrimination has found that the State should take steps to return those lands and territories. Only when this is for factual reasons impossible should the right to restitution be substituted by the right to just, fair and prompt compensation, which should, as far as possible, take the form of lands and territories.⁴¹

C. Issues relating to the administration of criminal justice in relation to indigenous peoples

41. Available data indicates that indigenous peoples are often overrepresented in all contact with the criminal justice system: they are more likely to be victims of crimes,⁴² often committed by non-indigenous perpetrators; and they are more likely to have contact with the police and be charged with offences, convicted of offenses and receive harsher sentences.⁴³

³⁷ See, for example, E/C.19/2007/CRP.6.

³⁸ The Working Group on the issue of human rights and transnational corporations and other business enterprises will present a report to the General Assembly in 2013 on the implementation of the United Nations Guiding Principles on Business and Human Rights in the context of business activities that have an impact on indigenous peoples.

³⁹ Asian Legal Resource Center, at the Human Rights Council panel discussion on access to justice.

⁴⁰ See *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, judgement of 29 March 2006.

⁴¹ Committee on the Elimination of Racial Discrimination, general recommendation No. 23, para. 5.

⁴² For example, in the United States of America, Native Americans are more than twice as likely as members of the general population to be the victims of violent crime. (United States Department of Justice, "American Indians and Crime: a BJS Statistical Profile, 1992-2002" (2004)).

⁴³ See, for example, Office of the Correctional Investigator of Canada, "Spirit matters: aboriginal people and the Corrections and Conditional Release Act", 2012.

1. Barriers

42. Where indigenous peoples are victims of crimes, in some cases, the response is inadequate, including as a result of insufficient State support for appropriate policing,⁴⁴ or where there is a lack of impartiality on the part of law enforcement agencies.⁴⁵ Access to justice can be blocked where law enforcement is not available or its officers fail to act appropriately, including by not recording complaints or undertaking genuine investigations. In some instances, State authorities decline to prosecute in cases involving indigenous victims.⁴⁶ Further, indigenous victims are also less likely to report crimes committed against them.

43. Existing data demonstrates that indigenous persons often experience disproportionately high rates of detention. In Australia, for example, indigenous adults are 14 times more likely to be imprisoned.⁴⁷ Such figures demonstrate discrimination in all stages of criminal justice systems.⁴⁸

44. In detention, indigenous peoples may face a higher likelihood of segregation and maximum security designation, and may be held in substandard conditions with inadequate access to basic services. In addition, imprisonment can cause particular challenges because of separation from family, community and culture.

45. The ability of indigenous persons to effectively participate in domestic criminal proceedings, either as victims or defendants, can be questioned on the basis of a number of cultural and socioeconomic factors. In addition, until discriminatory aspects of criminal laws and their enforcement are themselves corrected, access to justice systems alone will not be sufficient to ensure access to justice.⁴⁹

2. Remedies

46. Many of these inequalities have been addressed by the United Nations human rights treaty bodies. For example, in relation to administration of justice, the Committee on the Elimination of Racial Discrimination has called on States to ensure equal access to justice for all communities by providing legal aid, facilitating group claims, encouraging NGOs to defend community rights; to ensure that judicial authorities and officials take the protections in the Convention into account; and to encourage descent-based communities to become police and other law enforcement and justice officials.⁵⁰ In their submissions to the Expert Mechanism, a number of States, including Japan, Finland and Norway, noted measures to help overcome such inequalities.

47. In terms of sentencing, international law provides that, in imposing penalties on indigenous persons, their economic, social and cultural characteristics should be

⁴⁴ Asian Legal Resource Center, Human Rights Council panel discussion (footnote 39).

⁴⁵ See, for example, Permanent Forum on Indigenous Issues “Mission to Bolivia: report and recommendations” (2009).

⁴⁶ United States Government Accountability Office, “U.S. Department of Justice declinations of Indian country criminal matters” (13 December 2010), p. 3.

⁴⁷ Australian Bureau of Statistics, “Prisoners in Australia”, p. 8. Available from [www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/7B05CD44A0E2FC8ACA25795F000DBD0F/\\$File/45170_2011.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/7B05CD44A0E2FC8ACA25795F000DBD0F/$File/45170_2011.pdf).

⁴⁸ See, for example, Moana Jackson, “The Maori and the criminal justice system” (1987).

⁴⁹ Submission: National Indian Youth Council (United States), p. 4.

⁵⁰ Committee on the Elimination of Racial Discrimination, general recommendation No. 29 (2002), paras. 21, 22 and 24.

considered, and preference should be given to methods of rehabilitation other than prison.⁵¹ In some cases, States have passed laws or undertaken initiatives in this regard.

48. The Penal Code of Peru includes a number of provisions intended to ensure consideration of indigenous peoples' cultural rights, including a reduction or exemption of sentences in cases where an indigenous defendant has committed a crime under different cultural parameters.⁵² In Canada, efforts to address high incarceration levels include the Gladue sentencing principles, which seek to address overrepresentation of indigenous persons in custody, where possible, by compelling judges to pay particular attention to the unique circumstances of indigenous peoples and their social histories in determining suitable sentence for indigenous offenders.⁵³

VI. Indigenous peoples' legal systems

49. Tribal justice systems are diverse. In some cases, indigenous justice systems employ adversarial processes while others conduct traditional dispute resolution. Many indigenous courts apply written or positive law and others are guided by unwritten customary laws, traditions and practices that may be learned primarily by example and through oral teachings.⁵⁴ Indigenous justice systems often reflect closely the cultures and mores of the peoples concerned, contributing to their legitimacy. In some cultures, indigenous women play an important role, such as the Naga women in north-east India.⁵⁵

50. For many indigenous peoples, customary norms and laws that govern relationships are accepted as correct and beneficial for generating harmonious relationships and communities.⁵⁶ Customary justice mechanisms are often more accessible than domestic State systems, because of their cultural relevance, availability and proximity.

51. Despite their long usage, there may also be challenges associated with the administration of traditional justice. These include the difficulties of applying complex norms that may vary considerably among local communities. This may also include processes that give collective concerns paramount importance over individual rights, such as in the context of domestic or sexual violence against women and girls.

52. Forms of restorative justice have been practiced in many regions. In contrast to many mainstream criminal justice practices, restorative justice often focuses on healing the harm caused by events or criminal acts and, in working towards this goal, involving all of those impacted by the event, including the parties, families and members of the community. The purpose of restorative justice may go beyond the immediate dispute to also heal the relationships of those involved. Indigenous restorative justice practices have contributed to restorative approaches more generally, demonstrating alternatives to punitive or retribution-based approaches.⁵⁷

⁵¹ ILO Convention No. 169.

⁵² Submission: Peru.

⁵³ See Native Women's Association of Canada, "What is Gladue?", available from www.nwac.ca. The Gladue principles have been eroded by recent legislative amendments. However, the Supreme Court of Canada recently reinforced the principles and expanded their application to the residential school legacy (see *R v. Ipeelee*, judgement of 23 March 2012).

⁵⁴ See, for example, Ada Pecos Melton, "Indigenous justice systems and tribal society," available from www.aidainc.net/Publications/ij_systems.htm.

⁵⁵ Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples (A/HRC/18/42), para. 38.

⁵⁶ Seminar on access to justice: Ramy Bulan.

⁵⁷ Ibid.

A. International and State recognition of indigenous peoples' justice systems

53. United Nations bodies, including human rights treaty bodies and special procedures, as well as regional mechanisms, have highlighted the need for recognition of indigenous peoples' justice mechanisms in legal systems. A key priority in reports of the special procedures has been indigenous peoples' right to practice their own legal systems.⁵⁸ For example, issues of concern have included: limitations on the jurisdiction of indigenous judicial authorities; requirements that persons who administer traditional justice have formal legal training; certification of expert elders; subordination of indigenous justice systems to ordinary justice systems; and the failure to raise awareness among judicial officials about the rights of indigenous peoples to administer their own justice (A/HRC/17/30/Add.3, paras. 80–81).

54. State recognition of indigenous justice systems and their jurisdiction over criminal matters also varies. At the domestic level, some States formally recognize traditional justice systems.⁵⁹ In Latin America, many national constitutional frameworks, including nearly all of the countries of the Andean region,⁶⁰ recognize the jurisdiction of indigenous authorities and their authority to apply customary laws. The Canadian Human Rights Act requires that the Canadian Human Rights Commission and Tribunal and courts consider First Nations' legal traditions and customary laws when applying the Act.⁶¹

55. Indigenous peoples often continue to struggle to have their institutions and systems, including legal systems, traditional laws and approaches to justice, recognized. In some cases, customary laws are recognized in legislation but often with limitations, subject to jurisdictional limitations or so-called repugnancy clauses, which provide that customary laws are recognized where they do not conflict with domestic laws.⁶² Such provisions undermine and discriminate against indigenous peoples' legal systems. However, there may be a growing recognition of the need for greater tribal authority over criminal matters, as evidenced, for example, by the 2013 re-enactment of the United States Violence against Women Act, which included landmark provisions reducing federal restrictions on tribal jurisdiction and empowering Native American tribal authorities to prosecute non-Native Americans for abuses committed on tribal lands.

56. In some cases, States themselves challenge indigenous judicial practices, often based on arguments that customary systems are discriminatory or inconsistent with domestic or international standards. It is important to note that the United Nations Declaration on the Rights of Indigenous Peoples requires compliance with international human rights standards but does not include a similar provision regarding national systems.⁶³

⁵⁸ See, for example, A/HRC/17/30/Add.3, as well as Committee on the Elimination of Racial Discrimination, concluding observations on Cameroon (CERD/C/CMR/CO/15-18), para. 17, and on Guatemala (CERD/C/GTM/CO/12-13), para. 8.

⁵⁹ See, for example, the submissions of the Bolivarian Republic of Venezuela and Peru.

⁶⁰ Colombia (1991), Peru (1993), Plurinational State of Bolivia (1994, 2009), Ecuador (1998, 2008) and Bolivarian Republic of Venezuela (1999).

⁶¹ Submission: Canadian Human Rights Commission.

⁶² Submission: Natural Justice: Lawyers for Communities and the Environment.

⁶³ Alexandra Xanthaki, "The UN Declaration on the Rights of Indigenous Peoples and collective rights: what's the future for indigenous women?" in Stephen Allen and Alexandra Xanthaki, eds., *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford, Hart Publishing, 2011), p. 413. See also Alexandra Xanthaki, "Multiculturalism and international law: discussing universal standards", *Human Rights Quarterly*, vol. 32, No. 1 (2010), p. 40.

57. Where indigenous persons are subject to both indigenous peoples' laws and also State-based justice systems for the same alleged actions, they run the risk of being subject to prosecution under two legal systems. The problem is exacerbated where the State-based system does not recognize the indigenous peoples' system. In such cases, the tribal system should be paramount.

B. Linking indigenous peoples and State justice systems

58. Some positive examples exist of States' recognition of and cooperation with indigenous justice systems. In New Zealand, where Maori youth comprise 20 per cent of the youth population but 54 per cent of young people appearing in court,⁶⁴ youth may be diverted from the conventional justice system to Marae-based courts, which aim to reconnect young Maori with their culture and encourage the meaningful involvement of families and iwi in the youth justice process to contribute to reduced risk of reoffending.⁶⁵

59. After studying the peacemaking processes practiced by the Navajo Nation and other tribes across the United States and Canada, the Center for Court Innovation, a federally funded NGO, invited Navajo peacemakers to contribute to the initiation of a peacemaking programme by non-indigenous individuals in Red Hook, Brooklyn in the United States. The programme is now applying principles of peacemaking to resolve disputes.⁶⁶

60. In some cases, States have sought to codify the customary laws of indigenous peoples. In Greenland, until 2010, criminal justice was conducted on the basis of the 1954 Act on the Criminal Code. The Act was rooted in indigenous Greenlandic perceptions of justice, which focused greatly on rehabilitation. As a result, Greenland did not have conventional prisons but rather open institutions where the offender, after sentencing, had to stay and perhaps undergo treatment, while able to pursue employment or training opportunities. As of 2010, a new and revised law on the administration of justice in Greenland entered into force which, although maintaining the principle of rehabilitation, also made it possible to sentence criminal offenders to so-called semi-closed institutions.⁶⁷

61. Sarawak, Malaysia, established the Majlis Adat Isti Adat (Council for the Preservation of Customs) for the purpose of preserving native customs. Through a process of consultation with the elders and members of indigenous communities, the Council codified customary law, selecting versions that were the common practice in all the communities to ensure credibility and acceptability. Codification may facilitate the linking of State and customary justice systems and have benefits, for example, by making complex systems accessible and understood by younger generations and the general public. It can also contribute to greater local acceptance for decisions made, for example, by Elder Senates or Councils. At the same time, codification can affect the fluid and informal nature of the original and living customary laws.⁶⁸

⁶⁴ Submission: New Zealand Human Rights Commission, Te Kahui Tika Tangata.

⁶⁵ Ibid.

⁶⁶ See www.courtinnovation.org/project/peacemaking-program.

⁶⁷ Seminar on access to justice: Mille Sovndahl Pedersen.

⁶⁸ Seminar on access to justice: Ramy Bulan.

VII. Access to justice for specific groups

A. Women

1. Barriers

62. Multiple discrimination, structural violence and poverty are among the root causes of indigenous women's lack of access to justice. Indigenous women are disproportionately represented in the criminal justice system and, in some cases, the numbers are growing. In Canada, for example, in 2010/11, Aboriginal women accounted for over 31.9 per cent of all federally incarcerated women, representing an increase of 85.7 per cent over the previous decade.⁶⁹ Reference can be made to the recently published report *Breaking the Silence on Violence against Indigenous Girls, Adolescents and Young Women* produced by the United Nations Children's Fund (UNICEF), the United Nations Population Fund (UNFPA), the ILO, UN-Women and the Special Representative of the Secretary-General on Violence against Children.

63. In many regions, indigenous women face significant barriers to criminal justice at all stages. They can experience a higher incidence of violence, including sexual violence, and an increased risk of violations to their sexual and reproductive health and rights, including an increased risk of HIV/AIDS in prisons. The ability of indigenous justice systems to address violence experienced by indigenous women is sometimes limited by State-imposed jurisdictional restrictions. In some cases, there may also be a need for tribal justice systems to strengthen their willingness and ability to protect indigenous women and girls from violence.⁷⁰ Moreover, in some instances, traditional justice systems are male dominated,⁷¹ and may not adequately address indigenous women's access to resources.

64. Where traditional justice systems are unable to address violence against indigenous women, they must turn to the national justice system. However, in some instances, allegations of police abuse, including excessive use of force and physical and sexual assault, exist,⁷² leaving indigenous women in a precarious situation with few options in terms of reporting abuse. For those living in remote regions, law enforcement may not be on hand to respond to reports or to conduct a prompt investigation, and women may not have access to forensic examinations often used to gather physical evidence of sexual violence.

2. Remedies

65. International human rights law requires that States take all measures to ensure equality before the law.⁷³ States are also to ensure women's equal right to conclude contracts and administer property.⁷⁴ The Committee on the Elimination of Discrimination against Women has noted with concern the lack of women, including indigenous women,⁷⁵

⁶⁹ Office of the Correctional Investigator of Canada, "Spirit matters" (footnote 43), para. 17.

⁷⁰ Report on the international expert group meeting on combating violence against indigenous women and girls (E/C.19/2012/6), para. 35.

⁷¹ See, for example, the submission of the Asia Indigenous Peoples Pact.

⁷² See, for example, Human Rights Watch, "Those who take us away: abusive policing and failures in protection of indigenous women and girls in northern British Columbia, Canada" (2013).

⁷³ Convention on the Elimination of All Forms of Discrimination against Women, art. 15.

⁷⁴ Ibid.

⁷⁵ See Committee on the Elimination of Discrimination against Women, communication No. 19/2008, views adopted on 28 February 2012.

appointed to the judiciary⁷⁶ and has called for gender-sensitization training of justice officers.⁷⁷ The Committee has further noted that laws or customs that limit a woman's access to legal advice or ability to seek remedy before courts, or accord lesser value to a female testimony, violate the right to equality before the law.⁷⁸

B. Indigenous children and youth

1. Barriers

66. While little systematic data exists regarding indigenous youth, existing statistics point to their overrepresentation throughout the justice system.⁷⁹ In its general comment No. 11 (2009), the Committee on the Rights of the Child noted with concern such disproportionately high rates of incarceration, observing that, in some instances, these may be attributed to systematic discrimination within the justice system and society (para. 74).

67. Indigenous youth may be more likely to be detained as a result of laws with discriminatory effect, such as curfew breaching and "move on" laws, which disproportionately affect indigenous youth who make greater use of public space as a cultural space and for congregation and socialization due to lower levels of property ownership.⁸⁰ Once in custody, indigenous youth may be less likely to benefit from non-custodial sentencing options or restorative justice measures, and more likely to receive the most punitive measures⁸¹ and to be subjected to the harshest treatments, such as being placed in secure confinement.⁸²

2. Remedies

68. The Committee on the Rights of the Child has called upon States to both take measures to address juvenile crimes without resorting to judicial proceedings wherever possible and also to support traditional restorative justice systems to the extent they promote the best interests of the child.⁸³ The Committee has also called on States to develop juvenile justice systems in consultation with indigenous peoples and has further identified the need for access to culturally appropriate services in juvenile justice.⁸⁴

69. Some appropriate measures are under way. For example, the Expert Mechanism received information about the Marae-based court system (New Zealand) described above. For youth in detention, Maori Focus Units aim to reduce the risk of re-offending in part by

⁷⁶ Committee on the Elimination of Discrimination against Women, general recommendation No. 23.

⁷⁷ Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992), para. 24 (b).

⁷⁸ Committee on the Elimination of Discrimination against Women, general recommendation No. 21 (1994), para. 8.

⁷⁹ See United Nations Permanent Forum on Indigenous Issues, concept note presented at the international expert group meeting on indigenous children and youth in detention, custody, adoption and foster care (2009), p. 3. Available from <http://social.un.org/index/IndigenousPeoples/MeetingsandWorkshops/EGM2010IndigenousChildrenandYouth.aspx>.

⁸⁰ Submission: National Aboriginal and Torres Strait Islander Legal Services.

⁸¹ See Christopher Hartney, "Native American youth and the juvenile justice system", Views from the National Council on Crime and Delinquency (2008).

⁸² See, for example, Terry L. Cross, "Native Americans and juvenile justice: a hidden tragedy", *Poverty & Race*, vol. 17, No. 6 (November/December 2008).

⁸³ Committee on the Rights of the Child, general comment No. 11, paras. 74–75.

⁸⁴ *Ibid.*, para. 75.

helping participants understand and value their Maori culture, as well as understanding how it influences themselves, their families and their communities.

70. The Expert Mechanism also received information on the importance of including indigenous youth, who may experience systemic violence without understanding historical and policy-related causes, in truth-seeking processes. Such engagement can help youth to participate in broader processes of seeking justice. This can validate the experiences of elders who have survived historical injustices and abuse.⁸⁵

C. Indigenous persons with disabilities

1. Barriers

71. Indigenous persons with disabilities experience multiple forms of discrimination based on their indigenous status and also on disability, and often face barriers to the full enjoyment of their rights.

72. Indigenous persons with disabilities face considerable obstacles, such as physical inaccessibility to domestic or traditional courts. In relation to family law, indigenous parents with disabilities may face a heightened risk of having their children apprehended.⁸⁶

73. While data is scarce, that available suggests that indigenous persons with disabilities also experience disproportionately high rates of incarceration.⁸⁷ Concerns exist regarding their treatment in prisons where, among other challenges,⁸⁸ there may be no access to necessary services, including psychological and psychiatric assistance.⁸⁹

74. Disproportionate representation of indigenous persons with mental health disabilities in detention raises concerns that indigenous persons with mental illness or intellectual or cognitive disabilities are not receiving needed attention. This implicates other human rights, including access to adequate health services, housing and care and support services. It also points to the need for increased training and awareness on mental health disabilities, including foetal alcohol spectrum disorder, by justice system officials.⁹⁰

2. Remedies

75. The Declaration calls for specific attention to the rights and special needs of indigenous persons with disabilities (arts. 21 and 22). The situation of persons with disabilities who are subject to multiple forms of discrimination is addressed by the Convention on the Rights of Persons with Disabilities, which establishes that States parties are to ensure effective access to justice for persons with disabilities on an equal basis with others (art. 13).

⁸⁵ Seminar on access to justice: International Centre for Transitional Justice.

⁸⁶ For additional information, see Women Enabled, letter to the Committee on the Elimination of Discrimination against Women dated 1 February 2013. Available from www.womenenabled.org/pdfs/Feb2013_CEDAW.pdf.

⁸⁷ Submission: National Aboriginal and Torres Strait Islander Legal Services, citing Edward Heffernan et al., "Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons" (2012).

⁸⁸ United Nations Office on Drugs and Crime, *Handbook on Prisoners with Special Needs*, pp. 43 ff (2009).

⁸⁹ See, for example, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, report on its visit to Greenland (CPT/Inf (2013) 3), p. 9.

⁹⁰ Submission: National Aboriginal and Torres Strait Islander Legal Services.

76. The Committee on the Rights of Persons with Disabilities has commented in its concluding observations on the situation of indigenous persons with disabilities and their access to justice. Its relevant observations to date have focused on ensuring equality and non-discrimination,⁹¹ the importance of disaggregated data and statistics;⁹² and the need to consider the situation of indigenous children.⁹³

77. Furthermore, indigenous and State systems should ensure accessibility of their systems to indigenous persons with disabilities (i.e. by providing sign language, accessible premises and information available in alternative formats). The United Nations system can ensure that websites and reports are accessible by using web content accessibility guidelines (WCAG standards) and posting documents in Microsoft Word. The report entitled “Study on the situation of indigenous persons with disabilities, with a particular focus on challenges faced with regard to the full enjoyment of human rights and inclusion in development” by the Permanent Forum on Indigenous Issues is insightful.⁹⁴

VIII. Access to justice, truth and reconciliation and indigenous peoples

A. Indigenous peoples and transitional justice processes

78. An avenue to explore with a view to attaining indigenous peoples’ access to justice are the processes and mechanisms associated with transitional justice, which are concerned with how societies emerging from conflict or repressive rule address the legacy of violations of human rights.

79. The objectives behind transitional justice and the measures implemented in their pursuit can resonate with indigenous peoples’ objectives and conceptions of appropriate means to achieve justice, and peace, in the long term. Transitional justice processes and mechanisms in conformity with international human rights norms and standards should strive to take account of the root causes of conflict and address the related violations of all rights. In the case of indigenous peoples, this includes human rights violations arising in situations of conflict, where indigenous peoples often figure prominently among victimized populations, as well as grievances associated with indigenous peoples’ loss of sovereignty, lands, territories and resources and breaches of treaties, agreements and other constructive arrangements between indigenous peoples and States, as well as their collective experiences of colonization.

80. The international normative and operational framework utilized by the United Nations for a human rights-based approach to transitional justice is found in two documents: the updated set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁹⁵

⁹¹ Committee on the Rights of Persons with Disabilities, concluding observations on Argentina (CRPD/C/ARG/CO/1) and Peru (CRPD/C/PER/CO/1).

⁹² See CRPD/C/ARG/CO/1, CRPD/C/PER/CO/1.

⁹³ See CRPD/C/PER/CO/1.

⁹⁴ E/C.19/2013/6.

⁹⁵ General Assembly resolution 60/147, annex.

81. The updated set of principles promotes a broad concept of justice based on the right to know (also known as the right to the truth), the right to justice, the right to reparation and guarantees of non-recurrence. These rights are underpinned by international legal obligations that have been explicitly recognized in several international and regional human rights treaties and instruments (including the International Convention for the Protection of All Persons from Enforced Disappearance).

82. The right to the truth provides that all persons have the right to know the truth about past events concerning the commission of heinous crimes and about the circumstances and reasons that led to the perpetration of those crimes. In particular, victims and their families have the right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate. The duty to provide guarantees to give effect to the right to know requires States, *inter alia*, to ensure the independent and effective operation of the judiciary, and may include the creation of truth commissions that complement the role of the judiciary.

83. The right to justice refers to the duties of States with regard to the administration of justice; in particular, States must ensure that those responsible for serious crimes under international law are prosecuted, tried and duly punished. The right to reparation implies a State duty to make reparations and the possibility for the victim to seek redress from the perpetrator. The right to reparation includes measures of restitution, compensation, rehabilitation and satisfaction.

84. Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecutions, truth-seeking, reparations programmes, institutional reform, or an appropriate combination thereof.⁹⁶ These mechanisms are interlinked and one does not replace another. While the present study focuses largely on truth commissions, other relevant measures to guarantee the rights to truth and justice include international criminal tribunals, national criminal proceedings, commissions of inquiry, official archives and historical projects. For example, the Human Rights Commission of Malaysia is currently conducting a National Inquiry into the Land Rights of Indigenous Peoples in Malaysia, focused on root causes of problems associated with customary rights to land.

85. To address the needs and rights of indigenous peoples, transitional justice processes should be adapted to ensure cultural appropriateness and consistency with customary legal practices and concepts concerning justice and conflict resolution. Such processes will be enriching to transitional justice procedures. Regarding cases of mass atrocity against indigenous peoples, such as genocide, war crimes and crimes against humanity, the design and implementation of transitional justice policies should use customary practices as appropriate.

B. Truth commissions

86. Truth commissions have on many occasions been established in nations where there are indigenous peoples and, in some instances, have addressed issues facing indigenous peoples even where they have not been the specific focus. The involvement of indigenous peoples in these processes has varied, ranging from not being included at all, to more recent instances of truth commissions established specifically to address rights violations experienced by indigenous peoples, where indigenous peoples have led the processes from their initiation.

⁹⁶ Guidance note of the Secretary-General on the United Nations Approach to Transitional Justice, March 2010, p. 2.

87. Examples of the latter include the Truth and Reconciliation Commission of Canada and, in the United States, the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission. The Canadian Commission, led by indigenous peoples, is examining State-sponsored institutional harm done to indigenous children and their families over 150 years, perhaps the longest duration examined by a truth commission. The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission is working to document what happened to Wabanaki children in the State child welfare system; to give Wabanaki people an opportunity to share their experiences and begin the healing process; and to issue a report that includes recommendations on best child welfare practice for Wabanaki children and families.

88. There are numerous instances in which truth commissions have addressed, though not focused specifically on, the violation of rights experienced by indigenous peoples, including in Argentina, Chile, Guatemala, Nigeria, Paraguay and Peru, among others. In the case of the Guatemalan Commission for Historical Clarification, in operation from 1997 to 1999, given the magnitude of the sufferings experienced by Mayan peoples as a result of the internal armed conflict between 1960 and 1996, the Commission's work ultimately focused considerably on their situation, describing the State as having committed acts of genocide against indigenous peoples.

89. In many cases, however, truth commissions have failed to address the needs of indigenous peoples in any significant ways. In such instances, indigenous peoples are completely ignored, excluded from the narrative created and not consulted or included as participants.

C. Challenges to truth-seeking to address injustices experienced by indigenous peoples

90. Challenges faced by truth commissions include ensuring the independence and credibility of the commission; political interference; inadequate funding; and ensuring continued participation of marginalized groups, civil society and victims' organizations.

91. Truth commissions have also been criticized for weak outcomes, and lack of implementation of their recommendations or adequate follow-up. Implementation of these recommendations has generally been weak even where recommendations are strong. For example, the strong recommendations of the Commission for Historical Clarification have not been duly implemented, resulting in a "truth that is not embraced as a truth".⁹⁷ In the case of the Waitangi Tribunal of Aotearoa/New Zealand, criticisms, including by the Special Rapporteur on the rights of indigenous peoples, included that the Government had rejected its findings in some significant cases.⁹⁸

92. Lack of implementation demonstrates a wider problem, related not to the final outcome or report of a Commission, but rather inadequacies in the process leading up to it and the process of engagement. Ultimately, truth commissions will not lead to recognition of indigenous peoples' self-determination or transform a country by themselves. However, the processes around them, including the building of platforms, can have transformative potential. For this reason, while the quality of the recommendations of truth commissions is important, it is insufficient. To be implemented, truth commissions need to be part of a larger political process that builds alliances and consensus.⁹⁹

⁹⁷ Seminar on access to justice: Alvaro Pop.

⁹⁸ Report of the Special Rapporteur on his mission to New Zealand (E/CN.4/2006/78/Add.3), para. 26.

⁹⁹ Seminar on access to justice: Eduardo González.

93. In terms of their suitability for indigenous peoples, there are also challenges related to how truth commissions have been conducted, including their tendency to focus mostly on recent violations and a discourse of national unity and reconciliation. In the case of national reconciliation, which is often a goal of truth commissions, some observers have questioned whether current understandings of reconciliation are appropriate in the context of indigenous peoples, as there is the danger of strengthening the dominant national identity at the expense of others.¹⁰⁰

94. Concerns also exist regarding the dominant views represented by truth-seeking processes. Indigenous peoples have their own world views, which include understandings of justice and truth that may differ from that of the dominant society. In addition, truth processes have generally not been adequately inclusive of indigenous peoples, who must be included from the earliest stages, throughout the work of the commission and in the implementation of their outcomes.

95. Challenges exist even in instances where truth processes are indigenous led. For example, criticisms of the Truth and Reconciliation Commission of Canada include that the scope of its mandate is very limited, excluding, for example, the examination of issues associated with day students at residential schools and broader harms suffered by Aboriginal peoples in Canada.¹⁰¹ Some have argued that the Commission regarding schools should extend to include collective and cultural harms suffered by communities, including historical grievances.

D. Ways that truth commissions can effectively address the rights and concerns of indigenous peoples

96. There are a number of advantages to truth commissions, including that they might be more consistent with indigenous peoples' conceptions of justice and cultures; they can inspire political commitment to the resolution of grievances;¹⁰² and they can enhance understandings of and public support for indigenous peoples' claims to politically sensitive rights such as self-determination. Generally, truth commissions are still young institutions, and therefore offer great scope for their enrichment with and adaptation to indigenous practices.

97. However, to best address the rights and concerns of indigenous peoples, transitional justice processes and mechanisms must take account of indigenous peoples' context and the root causes of the injustices experienced.

98. As a starting point, the participation of indigenous peoples is essential at all stages. A positive example of indigenous engagement comes from the Truth, Justice and Reconciliation Commission of Kenya. Although not specifically focused on indigenous peoples, the Commission provided an explicit forum for the expression of indigenous issues regarding historical injustices, marginalization and ethnic tension. While the Commission has faced challenges in other respects, in relation to the participation of indigenous peoples, successes included the engagement of indigenous peoples' organizations from the early stages. The Commission: hired indigenous people as part of its staff; conducted public hearings allowing testimony in different languages, including Maasai; and conducted

¹⁰⁰ International Centre for Transitional Justice (ICTJ), *Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource* (2012), p. 3.

¹⁰¹ Paige Arthur, "Indigenous self-determination and political rights: practical recommendations for truth commissions", in ICTJ, *Strengthening Indigenous Rights*, p. 39.

¹⁰² Deborah J. Yashar, "Indigenous rights and truth commissions: reflections for discussion", in ICTJ, *Strengthening Indigenous Rights*, p. 11.

outreach to indigenous communities and organizations that addressed their rights.¹⁰³ In Colombia, where there are ongoing debates regarding how to provide reparations for the victims of human rights abuses committed during the country's internal armed conflict, indigenous peoples have taken a leading role in the development of a decree to address the issue of reparations for indigenous and Afro-Colombian communities.

99. Additional requirements for transitional justice in the indigenous context include that truth-seeking processes should not be viewed as a tool to legitimize the current governance structures but rather should proceed on a nation-to-nation basis.¹⁰⁴ In addition, they should be designed to focus on historical as well as contemporary grievances suffered collectively.¹⁰⁵ They should also be considered as part of a much broader strategy to address ongoing human rights abuses suffered by indigenous peoples, including, for example, political empowerment, and implementation of economic, social and cultural rights. Truth commissions must be accessible to indigenous peoples, which can include ensuring processes in indigenous languages and/or interpretation, and must ensure the participation of indigenous women and youth. Because the sharing of traumatic experiences can lead to retraumatization, culturally appropriate support services must be provided.

100. Finally, it should be recognized that, for truth commissions to succeed, the process is as important as the outcome.¹⁰⁶ Commissions must include broad and ongoing consultations with indigenous peoples at all stages. Governments should consult in good faith and obtain the free, prior and informed consent of indigenous peoples for legislative or administrative measures that affect them.

¹⁰³ Laura Young, "A challenging nexus: transitional justice and indigenous peoples in Africa", submitted to the Africa Institute of South Africa (2012).

¹⁰⁴ Courtney Jung, "Transitional justice for indigenous peoples in a non-traditional society" (2009).

¹⁰⁵ Note also the submission from France on the role played by collectives in relevant proceedings.

¹⁰⁶ Seminar on access to justice: Florencia Librizzi.

Annex

[English only]

Expert Mechanism advice No. 5 (2013): Access to justice in the promotion and protection of the rights of indigenous peoples

A. General

1. The United Nations Declaration on the Rights of Indigenous Peoples should be the basis of 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 seen as a framework for reconciliation and as a means of implementing indigenous peoples' access to justice.

2. Access to justice concerns arise especially in the context of lands, territories and resources. In the promotion of peace, justice and harmonious and cooperative relations between States and indigenous peoples, the Declaration affirms the right to the integrity of their lands and territories (arts. 25–32). Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples (art. 7(2)). Such security includes, inter alia, cultural, environmental and territorial aspects.

3. Respect for the right to self-determination requires both recognition of indigenous peoples' systems and the need to overcome historic factors and related contemporary factors that negatively affect indigenous peoples in the operation of State systems. At the national and regional levels, strategic litigation, complemented by outreach and advocacy, can help to expand access to justice and protections for other rights of indigenous peoples.

4. Indigenous peoples' understanding of access to justice often differs from that of States and of businesses, in some cases informed by their own understandings of, and practices associated with, justice. This means that, at the outset, before undertaking activities to respect, promote and protect indigenous peoples' access to justice, common understandings of the meaning of justice and the best means to attain access to justice should be sought, in line with indigenous peoples' self-determination and related rights to participate in decision-making affecting them.

5. Historical injustices contribute to multiple contemporary disadvantages for indigenous peoples, which in turn increase the likelihood of indigenous peoples coming into contact with the justice system. The relationship of indigenous peoples with domestic criminal justice systems cannot, therefore, be considered in isolation from historical factors or the current economic, social and cultural status of indigenous peoples. Moreover, there are other areas of law, including family law, child protection law and civil law that have an impact on this relationship. Solutions include not only reforms to criminal justice systems themselves but also measures addressing the socioeconomic situation of indigenous peoples and all human rights of indigenous peoples which are interrelated, interdependent and indivisible.

B. States

6. Consistent with indigenous peoples' right to self-determination and self-government, States should recognize and provide support for indigenous peoples' own justice systems and should consult with indigenous peoples on the best means for dialogue and cooperation between indigenous and State systems.

7. States should accord recognition and assign legal validity to customary practices that are already carried out by indigenous authorities de facto. States should take a flexible approach to the establishment of jurisdictional boundaries and avoid overly restrictive limits to indigenous jurisdictional competencies over justice.

8. States should work with indigenous peoples to address the underlying issues that prevent indigenous peoples from having access to justice on an equal basis with others.

9. States should work in partnership with indigenous peoples, particularly indigenous women, to determine the most effective strategies for overcoming barriers to access to justice. This includes helping to revitalize traditional justice norms and institutions.

10. Moreover, States should facilitate and provide access to legal remedies for indigenous peoples and should support capacity development of indigenous communities to help them to understand and make use of legal systems.

11. States should consider the impact of law and policy on indigenous peoples' access to human rights processes and institute reform where such law and policy interferes with indigenous peoples' enjoyment of substantive equality in this regard.

12. States should recognize the rights of indigenous peoples to their lands, territories and resources in laws and should harmonize laws in accordance with indigenous peoples' customs on possession and use of lands (including laws and policies that affect the conduct of business on indigenous territories) and forms of justice. Where indigenous peoples have won land rights and other cases in courts, States must implement these decisions. The private sector and the Government must not collude to deprive indigenous peoples of access to justice.

13. Training and sensitization for law enforcement officials, judicial officials and other state agencies on the rights of indigenous peoples is recommended.

14. In relation to criminal justice, State authorities should consult and cooperate with indigenous peoples and their representative institutions to:

- Ensure that the criminal justice system does not become a self-promoting industry benefiting from the overrepresentation of indigenous peoples.
- Formulate plans of action to address both the high levels of indigenous victimization and the treatment of indigenous peoples in domestic criminal justice systems.
- Develop appropriate methodologies to obtain comprehensive data on (a) victimization of indigenous peoples, including information on the number of cases prosecuted, and (b) the situation of indigenous peoples in detention, disaggregated by age, gender and disability.
- Reduce the number of indigenous individuals in prison, including through the pursuit of non-custodial options, such as, inter alia, use of traditional restorative and rehabilitative approaches.

15. In relation to transitional justice mechanisms:

- Indigenous peoples and indigenous peoples' representative institutions should be consulted and involved in all stages of the establishment and implementation of transitional justice mechanisms.
- Truth commissions should be guided by and should make explicit reference to the United Nations Declaration on the Rights of Indigenous Peoples.
- Truth commissions should recognize and address the historical injustices experienced by indigenous peoples, as well as how failures to recognize indigenous peoples' self-determination historically and today have created conditions for human rights violations.
- Truth processes should be linked to larger outreach and education efforts. These efforts should include explaining important justice issues, such as self-determination, to the broader public.
- Truth processes and reparations programmes should be designed in a way that respects the cultures and values of indigenous peoples.

C. Indigenous peoples

16. Indigenous peoples should strengthen advocacy for the recognition of their justice systems. Indigenous peoples should strengthen their own organizations and local governance capacity to meet the challenges faced by their communities.

17. Indigenous peoples' justice systems should ensure that indigenous women and children are free from all forms of discrimination and should ensure accessibility to indigenous persons with disabilities.

18. Indigenous peoples should explore the organization and running of their own truth-seeking processes.

19. Indigenous peoples should strive for explicit inclusion of their particular interests in transitional justice initiatives in those cases where indigenous peoples are one among many groups that suffered human rights abuse.

20. Indigenous peoples should ensure that all persons are effectively represented in transitional justice processes, especially women.

D. International institutions

21. The Declaration should guide the efforts of United Nations system entities and mandates, including the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

22. The United Nations should dedicate resources to the development and carrying out, in cooperation with indigenous peoples, of training on the rights of indigenous peoples in relation to access to justice for law enforcement officials and members and staff of the judiciary.

23. The United Nations system should seek to expand programmes designed to support indigenous peoples to carry out strategic litigation to advance their rights and expand their access to justice.

24. The United Nations should work with indigenous peoples to contribute to further reflection on and capacity-building regarding truth and reconciliation procedures for indigenous peoples.

25. Relevant United Nations special procedures should monitor implementation of transitional justice processes to ensure that they respect the principles of the Declaration, and that States act in a timely way on truth commission recommendations and the implementation of reparations programmes for indigenous peoples.

E. National human rights institutions

26. National human rights institutions, in partnership with indigenous peoples, can play an important role in ensuring improved access to justice for indigenous peoples, including by encouraging recognition of and providing support for indigenous justice systems and promoting the implementation of the Declaration at the national level. National human rights institutions, in partnership with indigenous peoples, have the opportunity to provide training on the rights of indigenous peoples in relation to access to justice for judiciaries.
