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INTERNATIONAL DECADE OF THE WORLD'S INDIGENOUS PEOPLE

**Report on the Expert Seminar on Indigenous Peoples and the
Administration of Justice (Madrid, 12-14 November 2003)***

Chairperson-Rapporteur: Mr. Tomás Alarcón

Summary

This document includes the narrative report of the Expert Seminar on Indigenous Peoples and the Administration of Justice, which was held in Madrid from 12 to 14 November 2003. The participants discussed discrimination against indigenous peoples in judicial systems, and analysed indigenous peoples' own legal systems and their relationship with national systems of justice. The Seminar was attended by over 100 persons, including 24 indigenous law experts, 9 government representatives, representatives of non-governmental organizations and teaching staff and students from a number of universities.

* The annexes to this report will be distributed in the original language only.

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
Introduction	1 - 4	3
I. ORGANIZATION OF THE SEMINAR	5 - 8	3
II. THEME I: DISCRIMINATION AGAINST INDIGENOUS PEOPLES IN THE JUDICIAL SYSTEM - EXAMPLES, EXPERIENCES AND GOVERNMENTAL, ADMINISTRATIVE AND JUDICIAL MEASURES TO ENSURE FAIRNESS IN THE JUDICIAL SYSTEM	9 - 26	4
III. THEME II: THE LEGAL SYSTEMS OF INDIGENOUS PEOPLES - EXAMPLES, EXPERIENCES AND GOVERNMENTAL, ADMINISTRATIVE AND JUDICIAL MEASURES TO COMBINE CUSTOMARY LAW WITH NATIONAL JUDICIAL SYSTEMS	27 - 40	8
IV. CONCLUSIONS	41 - 46	11
V. RECOMMENDATIONS	47 - 80	13
Annex I. List of participants		18
Annex II. List of documents		23

Introduction

1. In its resolution 2003/56, the Commission on Human Rights took note of the intention of the Office of the High Commissioner for Human Rights to organize, making use of voluntary contributions, a seminar on indigenous peoples and the administration of justice, with the participation of governmental, indigenous, non-governmental and independent experts, to assist the Special Rapporteur in examining the principal subject of the report he submitted to the Commission at its sixtieth session (E/CN.4/2004/80 and Add.1-4). The United Nations Voluntary Fund for Indigenous Populations decided to include among its projects for indigenous communities and organizations for the year 2003 a seminar on indigenous peoples and the administration of justice, to be organized by the Office of the High Commissioner. Meanwhile, at its twenty-first session, held in July 2003, the Working Group on Indigenous Populations decided to include the report on the seminar organized by the High Commissioner's Office on the administration of justice in the agenda of its twenty-second session in order to consider appropriate follow-up.

2. In pursuance of the above-mentioned resolution, the Office of the High Commissioner invited Governments, United Nations bodies and specialized agencies, representatives of indigenous peoples and researchers and academics working in the field to attend the seminar. The list of participants appears in annex I below.

3. The Expert Seminar on Indigenous Peoples and the Administration of Justice, organized by the Office of the High Commissioner in cooperation with the National University for Distance Education (UNED), was held from 12 to 14 November 2003 at the UNED Faculty of Political Science and Law in Madrid.

4. At the seminar, the experts discussed issues related to discrimination against indigenous peoples in the judicial system (describing examples, experiences and governmental, administrative and judicial measures to ensure fairness in the judicial system) and indigenous peoples' own legal systems (describing examples, experiences and governmental, administrative and judicial measures to combine customary law with national judicial systems), and drew up a set of conclusions and recommendations. The experts attending the seminar asked the Special Rapporteur to take account of their conclusions and recommendations in preparing his report and to transmit them to the relevant United Nations bodies for their information. The experts submitted a total of 28 working papers. The list of documents appears in annex II below.

I. ORGANIZATION OF THE SEMINAR

A. Agenda

5. The Seminar adopted the following agenda:

1. Opening of the Seminar.
2. Election of the Chairman, introduction of participants and adoption of the agenda.
3. Theme I: Discrimination against indigenous peoples in the judicial system - examples, experiences and governmental, administrative and judicial measures to ensure fairness in the judicial system.

4. Theme II: Indigenous peoples' own legal systems - examples, experiences and governmental, administrative and judicial measures to combine customary law with national judicial systems.
5. Conclusions, recommendations and evaluation of the Seminar.
6. Closure of the Seminar.

B. Opening of the Seminar

6. The Seminar was opened by Ms. Araceli Macia Antón, Rector of UNED, Ms. Fanny Castro-Rial Garrone, Deputy Rector for International Relations, and Ms. Concepción Escobar Hernández, Dean of the Faculty of Law, on behalf of UNED, Mr. Julian Burger, Coordinator of the Indigenous and Minorities Team, on behalf of the Office of the United Nations High Commissioner for Human Rights, and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen. Mr. Tomás Alarcón, an indigenous lawyer from the Juridical Commission for Auto-Development of First Andean Peoples (CAPAJ), Peru, was elected Chairperson-Rapporteur of the Seminar.

7. The Special Rapporteur introduced the two principal themes for the Seminar, "Discrimination against indigenous peoples in the judicial system - examples, experiences and governmental, administrative and judicial measures to ensure fairness in the judicial system", and "Indigenous peoples' own legal systems - examples, experiences and governmental, administrative and judicial measures to combine customary law with national judicial systems". The Special Rapporteur pointed out that the Seminar papers and discussions, as well as the information provided to the High Commissioner's Office by Governments, indigenous organizations, non-governmental organizations, United Nations bodies and academics would form valuable inputs for his report on the administration of justice to be submitted to the Commission at its sixtieth session.

8. In his introduction, the Special Rapporteur emphasized three main issues in the discussion. First, he urged the participants to study specific cases and examples of how existing legislation left room for discrimination. Secondly, he suggested an analysis of the application of existing laws against discrimination and in favour of equality before the law, as well as a study of their effectiveness in protecting the rights of indigenous peoples. Thirdly, the Special Rapporteur called on the participants to consider whether it was desirable to adopt special legislation designed to protect the specific and group rights of indigenous peoples, or whether it was better to focus on the enforcement and strengthening of existing rules.

II. THEME I: DISCRIMINATION AGAINST INDIGENOUS PEOPLES IN THE JUDICIAL SYSTEM - EXAMPLES, EXPERIENCES AND GOVERNMENTAL, ADMINISTRATIVE AND JUDICIAL MEASURES TO ENSURE FAIRNESS IN THE JUDICIAL SYSTEM

9. During the first session of the Seminar, a number of indigenous experts presented papers on discrimination against indigenous peoples in the judicial system. Mr. Hassan Id Balkassm, an indigenous lawyer from Morocco, drew attention to the fact that Moroccan law prohibited the

inclusion of children with Amazigh names in the register of births. Mr. Id Balkassm said that the practice formed part of the Arabization process in the country. He also emphasized the need for legal recognition of indigenous rights and culture in the Moroccan Constitution, the reclaiming of traditional indigenous legal systems and effective machinery to protect collective indigenous rights in Morocco.

10. Mr. Shankar Limbu, an indigenous lawyer from Nepal, referred to various practices in his country which were regarded as discriminatory, such as the non-use of indigenous languages and cultural symbols specific to indigenous people in premises used for the administration of justice, and the lack of personnel in the system for administration of justice who were familiar with indigenous customs. He also mentioned other factors hampering access to the system for the administration of justice where indigenous people were concerned, such as cultural stereotypes, the rejection of indigenous customary rules and certain policies which preclude equality between indigenous and non-indigenous people.

11. Mr. James Zion, a member of the National Indian Youth Council of the United States, highlighted the need to distinguish between the equality proclaimed by the law and its practical application, since in many cases the practical application of the law did not treat indigenous people fairly vis-à-vis non-indigenous people. In this context, Mr. Zion said that discrimination against indigenous people in the systems for the administration of justice was often very subtle, which made it difficult to identify the real obstacles.

12. Mr. Bruce Ellison, of the United States of America, a lawyer from the Defense Committee for Leonard Peltier (a Native American rights activist who has been in prison for over 20 years), said that the existing treaties between the Government and the country's indigenous peoples were not properly taken into account by the authorities. According to Mr. Ellison, the failure to respect these treaties was causing a physical and spiritual separation between the indigenous peoples and their lands.

13. The general debate covered, among other topics, the various forms of discrimination against indigenous peoples which were encountered in the systems for the administration of justice. It was pointed out that the laws incorporated deep-rooted discrimination which was difficult to counter if major legislative changes were not effected. Reference was made to the various factors hindering access to justice for indigenous peoples, which ranged widely from language barriers to differences in value systems, corruption, stereotypes, mutual ignorance, the high cost of trials and poor physical access to judicial bodies. Mention was made of the need for recognition of the legal systems of indigenous peoples in the Constitutions of States and in their legislation as a factor which could facilitate efforts to combat discrimination. According to the participants, those responsible for the administration of justice, and particularly judges, should be made more aware of such issues and should be familiar with existing customary rules where appropriate. In that context, the importance of appropriate training of judicial officials was emphasized.

14. Various speakers highlighted situations in which, despite the existence of correct and appropriate laws, their application and enforcement gave rise to discriminatory practices against indigenous peoples in many cases. A number of participants suggested measures to combat discrimination, including the possibility of setting up courts in the territory occupied by the

communities so as to grant easier access to indigenous people. Also underlined was the desirability of consulting indigenous peoples and ensuring their participation in formulating the rules which would affect them - which would require an increase in the numbers of indigenous representatives in the institutions of State. The participants agreed on the need for a change in the approach followed by judicial officials so as to overcome the "paternalistic and traditionalist" attitude that many States sometimes adopted vis-à-vis indigenous peoples.

15. The participants also specifically addressed the situation of women in the system for the administration of justice. First, Mr. William Jonas, an Australian expert in social justice, expressed his concern at the fact that Australian aboriginal women, who made up 2 per cent of the country's population, constituted 80 per cent of the number of women prisoners. Mr. Jonas said that most of those women were in prison accused of minor offences, whereas the courts did not treat non-indigenous women accused of similar offences in the same way. The expert also said that there was a link between domestic violence and lawbreaking by women in Australia, which should be analysed and dealt with. In that regard, the expert called for systematic research and review of laws which involved indirect discrimination.

16. Ms. Marcia Esparza, a professor in the John Jay College of Criminal Justice, drew attention to the situation of indigenous women in prison in Oaxaca, Mexico. Ms. Esparza said that most of them had been involved in criminal proceedings as a result of offences committed because of the poverty in which they lived. The expert said that for both indigenous women and non-indigenous women deprivation of liberty posed many problems as to the future of their children, but that in the case of indigenous women the problem extended to the community in many cases.

17. Like Ms. Esparza, Mr. MacKenzie, an indigenous lawyer from the Innu Council of Nitassinan in Canada, spoke about the large numbers of (Innu) women involved in judicial proceedings arising from offences committed as a result of their poverty. He added that there were major gaps and shortcomings in the system for the administration of justice in responding to such problems. Lastly, he singled out the lack of political will on the part of Governments in properly respecting the rights of indigenous peoples, which was displayed both in laws and in institutions. He also criticized the high cost of justice and poverty among indigenous peoples as an obstacle to equal access to justice.

18. The participants reiterated their concern at the conditions facing imprisoned indigenous women, who in many cases were forced to share space with men who abused them. In the same way, the disturbing use of indigenous women by the large drug mafias was emphasized. In the light of this specific problem affecting indigenous women, it was suggested that specific measures of protection should be adopted during trials, and that such cases should be heard by women judges.

19. Another issue raised during the seminar was the situation of indigenous children. Mr. Armand MacKenzie read a paper on the subject focusing on the discrimination suffered by indigenous children in the system for the administration of justice. In that context, Mr. MacKenzie cited examples of how, despite the existence of impartial judicial systems which

were supposed to protect children, indigenous children were victims of acts of discrimination. Mention was made of the deplorable situation facing many indigenous children held in child detention centres throughout the world, and speakers expressed regret that in certain countries, prejudice on the part of the police generated certain errors which led to unfair trials.

20. On the two issues, in relation to both indigenous women and children, mention was made of the need to adopt a multidisciplinary approach to the problem of the discrimination suffered, taking into account their social and family situation, the problem of alcoholism and drug abuse. There was a call for separate courts and for the revision of legislation which had a disproportionate impact on indigenous people, such as the criminalization of persons who consume alcohol. The participants emphasized that very often social problems were entrusted to the penal system when other responses were possible, such as the creation of social programmes for indigenous people, who could be involved in their design and implementation. In the area of good practice, mention was made of Venezuela, where some judges had considered the status of indigenous women as a generic mitigating factor when imposing punishments in criminal cases.

21. Ms. Sandra Aragón, of the anti-discrimination unit in the High Commissioner's Office, indicated the provisions relating to the administration of justice which had been adopted by the World Conference against Racism, held in Durban, South Africa, in 2001. Ms. Aragón pointed out that the Declaration expressed a profound repudiation of racism in the functioning of penal systems and in the application of the law, in the actions and attitudes of institutions and individuals responsible for law enforcement, especially where this had contributed to certain groups being overrepresented among persons under detention or imprisoned. She also mentioned that the Durban Programme of Action underlined the importance of fostering awareness and providing training to the various agents in the criminal justice system to ensure fair and impartial application of the law.

22. Various governmental measures to combat discrimination were also examined under the first theme. In this context, a number of indigenous experts and government representatives gave examples of situations, good practice and future challenges in various countries. In particular, Mr. Jimai Montiel, an indigenous public defender from Venezuela, said that his country's Constitution recognized indigenous justice and that the law on indigenous peoples and communities, which outlined the legal regime governing indigenous peoples, was currently under discussion on the National Assembly. He also said that the Supreme Court appointed public defenders for indigenous people in order to effectively guarantee such groups the right to a defence and due process in the administration of justice. Other issues examined during the discussions were the stigmatization suffered by indigenous people in the media and problems in the recruitment of indigenous people as security officers in certain parts of the public sector because of height requirements, for example.

23. Ms. Francisca Macliing, an indigenous lawyer from the Philippines, described problems arising in the application of the Indigenous People Rights Act which the Government of the Philippines had adopted in 1997. This new law allowed for the issue of titles over the ancestral lands of indigenous peoples, and also recognized the need for indigenous peoples to freely give their prior informed consent before any organization embarked on the exploitation of natural

resources on their land. The expert said that the Act suffered from the inherent weakness that, under the Constitution, all land and resources were owned by the State. The expert expressed the view that the effective enforcement of the Act could put an end to the conflict affecting the indigenous peoples of the country.

24. Ms. Maureen Tong, a South African lawyer, drew attention to a recent decision of the Constitutional Court in the case *Richtersveld Community v. Alexkor*, in which it had been established that indigenous law was an integral part of, and presupposed a source independent of, South African law. The decision was also said to have established that indigenous laws and the conception of the law of property, for example communal ownership and use of land, should be respected. Ms. Tong said that the Constitutional Court had returned land and mineral (diamond) rights to the Richtersveld community, which had been dispossessed of its land by the British Crown in 1847 in a process regarded as discriminatory and racist. The expert added that she was sure that South Africa's example in this case could be followed by other countries in the region.

25. Mr. Daniel Watson, a representative of the Government of Canada, highlighted his country's great ethnic, cultural, linguistic and geographical diversity and referred to the Prime Minister's inaugural speech in 2001, in which the Government set the objective of significantly reducing the percentage of aboriginal people entering the criminal justice system. To achieve that objective, Mr. Watson said there was a need for dialogue with all the country's ministries at the federal level, the provincial and territorial governments and the aboriginal communities. In that context, Mr. Watson said that various areas of cooperation had been established which were operating where necessary. As an example of such areas of cooperation, mention was made of various non-judicial community programmes which were run by the aboriginal communities themselves, allowing criminal charges to be handled outside the traditional context of the courts.

26. Mr. Wilton Littlechild, an indigenous lawyer from Canada, cited some examples of good practice in his country. In particular, Mr. Littlechild referred to the Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform, which had been set up to review the system of justice and its effects on the first nations and Métis peoples. The expert mentioned that in an effort to improve the situation of the aboriginal people, the Commissioners had at an early stage sought the views of groups of beneficiaries, adopting an inclusive approach and basing the dialogue on the indigenous culture and the advice of elders. The Commission's final report, which would cover such matters as youth, racism, victimization and violence, policing, restorative justice, governance and community development, justice institutions and crime prevention, would be submitted in 2004.

III. THEME II: THE LEGAL SYSTEMS OF INDIGENOUS PEOPLES - EXAMPLES, EXPERIENCES AND GOVERNMENTAL, ADMINISTRATIVE AND JUDICIAL MEASURES TO COMBINE CUSTOMARY LAW WITH NATIONAL JUDICIAL SYSTEMS

27. The second theme at the Seminar was focused on the legal systems of indigenous peoples, including examples, experiences and governmental, administrative and judicial measures to combine customary law with national judicial systems. The experts presented examples and experience in their own countries relating to efforts to combine indigenous customary law with national judicial systems.

28. Ms. Roseana Hudson, of the Thunder Bay Indian Friendship Centre Aboriginal Community Council Program of Canada, described the operation of her organization's programme of assistance to aboriginal young offenders, and said that her organization's experience in this field had led it to call for changes to existing laws and procedures. She also expressed the need for opportunities which would encourage the indigenous peoples to develop their own system of justice and administration.

29. Mr. Darren Dick, from the office of Australia's Aboriginal and Torres Strait Islander Social Justice Commissioner, emphasized the need to provide the aboriginal authorities with a better understanding of the country's overall system for the administration of justice in order to enable them to integrate their own aboriginal systems in it. Mr. Dick said that the two systems of justice should be harmonized, and recommended the organization of joint decision-making processes by the governmental authorities and the aborigines, as well as the parallel monitoring of the process and the establishment of the aborigines' own courts.

30. Mr. Mikhail Todyshev, of the RAIPON organization in the Russian Federation, described his organization's experience in the development of legislation relating to the indigenous peoples in Russia. In that context, he highlighted the need to incorporate into the law the main aspects of the specific way of life of the indigenous communities, who were highly dependent on ecological factors. Mr. Todyshev identified this phenomenon as "legal ethnology". He also referred to agreements between a variety of governmental bodies and indigenous authorities, despite the fact that the latter had no representation in the Parliament.

31. Mr. Aucan Huilcaman, of the Consejo de Todas las Terras in Chile, expressed his concern at the lack of constitutional recognition of the rights of Chile's indigenous people and the failure of its Government to ratify International Labour Organization Convention No. 169 on indigenous and tribal peoples. The expert specifically recommended that the indigenous peoples of Chile should be granted constitutional recognition in respect of land, territory, machinery for participation and self-determination, that ILO Convention No. 169 should be ratified and that the implementation of the Anti-Terrorist Act should be reviewed, since, according to the paper, it was in many cases applied to indigenous people in general and to Mapuches in particular.

32. Ms. Elia Avendaño, Director for the Promotion of Justice in the Commission for the Development of Indigenous Peoples in Mexico, said that the latest constitutional reform on indigenous issues had not satisfied all the expectations of the indigenous people. She also mentioned the frequent conflicts between the internal value systems of the indigenous communities and the laws and judicial system of Mexico, particularly in Chiapas and Guerrero. Ms. Avendaño expressed support for a more thoroughgoing constitutional reform, as well as legislative changes which would satisfy all the parties involved.

33. The subsequent discussions revealed a variety of situations in relation to the coexistence of national legal systems and indigenous customary systems. Three scenarios were identified: no recognition of the indigenous communities, mere general openness to recognition of the legal systems of the indigenous peoples, or explicit recognition of their systems of rules, although such recognition might not have any practical impact.

34. The Seminar continued with various statements on indigenous legal systems and their relationship with national legal systems. Ms. Mariana Yumbay, an indigenous lawyer from the Bolívar Peasants' Federation in Ecuador, described the problems encountered in the country at the interface of the indigenous and non-indigenous legal systems. For example, she highlighted the failure of the Ecuadorian authorities to respect the legal decisions adopted by the indigenous authorities. She also supported a cultural interpretation of the concept of punishment imposed by indigenous people and the various types of such punishments. Lastly, she called for greater awareness on the part of States so as to permit the effective exercise of the rights of indigenous peoples, and the need to enhance the coverage of such rights in legislation.

35. Mr. James Anaya, a law professor at the University of Arizona, explained that in the United States of America, the relationship between the federal system and the various indigenous systems was based on the primacy of federal law. Consequently, while State law acknowledged the autonomy and jurisdiction of the indigenous authorities, they were limited and residual. Mr. Anaya supported the concept of equality - not merely formal - between the legal systems, which took account of the cultural context of the individual and instituted compatibility between the different legal systems on the basis of fundamental equality. Regarding the need to reconcile individual rights with the existence of an indigenous legal system, he said that the latter was subordinate to the norms of international human rights law. Lastly, he said that an ideal model of coordination between indigenous and non-indigenous legal systems was a practical impossibility because of the variability of existing circumstances. However, he supported three basic principles to be borne in mind where coordination was concerned: the principle of non-discrimination, the principle of cultural integrity and the principle of self-determination.

36. Mr. Francisco Raymundo, an indigenous expert from the Mayan Defence Organization in Guatemala, said that a documented and systematic study of experience in the Mayan legal system had been carried out in his country. The purpose of the customary system was to prevent crime, compensate victims and restore harmony among the affected parties. In order to develop legal pluralism, it was not only necessary to carry out legal reforms, but it was also essential to set up machinery for coordination between the traditional system and the national legal system.

37. Ms. Mille Pedersen, a district judge and indigenous expert from Greenland, described the legal system in operation in Greenland, explaining that in the district courts of first instance, presided over by local judges with no legal training, legal cases had been settled, which helped to settle disputes in a manner which was close to the community. Ms. Pedersen said that there were two levels of appeal, to which the most complex cases could be referred - the Supreme Court of Greenland and the Supreme Court of Denmark. Access to the courts in Greenland was also facilitated by the fact that no court fees of any kind were charged.

38. Mr. Ricardo Colmenares, a judge of the Zulia State Appeal Court on Venezuela, focused on the compatibility of indigenous justice and the national judicial system. The Venezuelan Constitution of 1999 acknowledged the collective rights and indigenous courts of the indigenous peoples. Mr. Colmenares emphasized that those participating in judicial proceedings must interpret legal principles from an intercultural standpoint, and that specific supervisory machinery would have to be set up.

39. Ms. Raquel Yrigoyen Fajardo, an expert in indigenous law, said that in recent years the Andean region had shifted from a monocultural situation to recognition of the various cultures, from guardianship to integrationism, from an exclusive democracy to an inclusive democracy, and finally, in certain genuinely advanced cases, from legal monism to recognition of legal pluralism. In highlighting these changes, Ms. Yrigoyen said that this period had seen recognition of indigenous peoples incorporated in the constitutions of almost all the countries of the region. However, she also pointed out that these changes had coincided with a reinforcement of rules designed to undermine collective and group rights which have undoubtedly protected the interests of extreme neoliberalism and have strengthened the rights of the multinationals which have enhanced their presence and activity in traditionally indigenous areas. The expert drew attention to the need to join forces for institutional implementation and the importance of adopting policies aimed at restoring and strengthening indigenous law.

40. Mr. Tomás Alarcón, an Aymara indigenous lawyer from Peru, cited various examples from the indigenous courts of the Aymara people which illustrated the relationship not only between individuals, but also between individuals and the environment, including the indigenous cosmology. He also called on States to include in their periodic reports on compliance with the various human rights treaties specific references to steps taken to combat discrimination between national systems of justice and indigenous systems.

IV. CONCLUSIONS

41. **Experts meeting at the Seminar on Indigenous Peoples and the Administration of Justice agreed on the following conclusions and recommendations.**

42. **The experts welcomed the opportunity provided by the United Nations seminar to discuss the question of indigenous peoples and the administration of justice. They identified a range of concerns relating to the treatment of indigenous peoples within judicial systems, noting that indigenous persons were overrepresented in all areas of the criminal justice system, including the courts and prisons. They also pointed out that indigenous women and children in particular were negatively affected by current judicial practices and that, unfortunately, the human rights of indigenous peoples were often violated within judicial systems. They pointed out, for example, that while indigenous people were themselves the victims of crime and violence, their high death rates in custody were alarming.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. RECOMMENDATIONS

1. Recommendations to Governments

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

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

49. States should take special measures to address the historical bias against indigenous peoples that is an underlying cause of discrimination against them in judicial systems.

50. States should establish and maintain systems for the collection of qualitative data on indigenous peoples and the administration of justice, including on levels of arrest, convictions, incarceration and capital punishment. The data should be disaggregated by indigenous status, gender and age and should be published and made available to the public to make it possible to identify situations in which indigenous peoples are discriminated against and overrepresented in judicial systems; they should also include information on indigenous people subjected to capital punishment, where applicable.

51. States should imprison indigenous persons as a last resort and should, in conjunction with the indigenous communities themselves, examine alternatives based on equality and non-discrimination, including non-custodial alternatives.

52. States should help to restore indigenous legal practices, in cooperation with indigenous legal experts, where these might contribute to the development of an impartial system of justice that is in full compliance with international human rights law, particularly in relation to women's rights.

53. **States should undertake studies on laws that disproportionately affect indigenous peoples and take the necessary measures to eliminate discrimination resulting from such laws.**
54. **States should take into consideration the fact that indigenous women who have been imprisoned may be the victims of extreme poverty and discrimination based on gender, poverty or ethnic origin, and should thus consider developing special programmes to address the causes that led to their imprisonment. It is also recommended that they should carry out research into the situation of indigenous women in prison, bearing in mind the long-term consequences for their children, families and communities, monitor the observance of their human rights in prison and review the rehabilitation programmes designed to reintegrate indigenous women in their families and communities.**
55. **States should take steps, including in the areas of education, training and recruitment policy, to increase the number of indigenous persons working within judicial systems.**
56. **States should promote training and educational courses for officials in judicial systems, such as the police, magistrates and judges, social workers and others, as well as for law students, on the cultures, customs and legal practices of indigenous peoples, as a way to combat discrimination and promote respect for cultural diversity.**
57. **States should take steps to ensure that indigenous peoples, either individually or collectively, can understand and be understood in legal proceedings, by providing interpretation or some other effective procedure.**
58. **States should recognize indigenous peoples' own systems of justice and develop mechanisms to allow these systems to function effectively in cooperation with the official national systems. These mechanisms should be based on constructive arrangements with the peoples concerned.**
59. **Both States and indigenous peoples should incorporate internationally recognized human and indigenous rights into their systems of justice.**
60. **States should take into account the mechanisms used by indigenous peoples to settle disputes, their regulatory and legal capacity and their authority to develop their own procedures without outside interference.**
61. **National legal systems should incorporate the use of the relevant indigenous customs, traditions, symbols and customary law in cases involving indigenous peoples or individuals. This can be achieved by means of special procedures involving indigenous leaders and dispute settlement methods.**
62. **States should follow a plan of action and develop a strategy to implement the decisions, conclusions and recommendations submitted with a view to improving the administration of justice as it affects indigenous peoples.**

63. States should establish a separate indigenous juvenile justice system that fully incorporates in their legislation, policies and practices the provisions of the Convention on the Rights of the Child, particularly articles 3, 5, 20, 30, 37, 39 and 40, and other relevant international standards in this area, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty and the Guidelines for Action on Children in the Criminal Justice System.

64. States should ensure that no indigenous person under the age of 18 is treated as an adult without taking into account the circumstances and gravity of his or her offence, that the views of indigenous children are heard and respected in all cases brought before the courts and that the necessary measures (for example, alternatives such as conditional release) are taken to reduce considerably the number of indigenous children in detention and to ensure that detention is a last resort and is kept as short as possible. States should also respect the responsibilities, rights and duties of parents, family members and the community in accordance with local customs in order to provide guidance for indigenous children involved in court proceedings, and should take into consideration indigenous peoples’ laws, traditions and customs relating to criminal matters.

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

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

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

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

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

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

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

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

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

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

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

3. Recommendations to indigenous peoples

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

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

4. Other recommendations

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

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

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

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

Annex I

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Annex II

LIST OF DOCUMENTS

Theme 1: Discrimination against indigenous peoples in the justice system - examples, experiences and governmental, administrative and judicial measures to ensure fairness in the judicial system

Mr. James W. Zion (United States of America)

Discrimination against indigenous peoples in state justice systems: a case study from the southwest of the United States

HR/MADRID/IP/SEM/2003/BP.1 (*English*)

Mr. Jaime Madariaga (Chile)

Abuso en la aplicación de la ley antiterrorista en Chile en contra del pueblo mapuche

HR/MADRID/IP/SEM/2003/BP.6 (*Spanish*)

Mr. Jimai Montiel (Venezuela)

Defensa pública penal e indígena

HR/MADRID/IP/SEM/2003/BP.8 (*Spanish*)

Mr. Mikhail Todyshev (Russia)

Indigenous Peoples and the Justice System in Russia

HR/MADRID/IP/SEM/2003/BP.9 (*English*)

Mr. Shankar Limbu (Nepal)

Indigenous peoples and access on the justice system in Nepal

HR/MADRID/IP/SEM/2003/BP.10 (*English*)

Mr. Suhas Chakma (India)

Indigenous peoples and administration of justice in the war against terror

HR/MADRID/IP/SEM/2003/BP.11 (*English*)

Mrs. Sandra Aragón, Office of the High Commissioner for Human Rights

Paragraphs related to the administration of justice adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

HR/MADRID/IP/SEM/2003/BP.13 (*English and Spanish*)

Mr. Hassan Id Balkassm (Morocco)

Administration of justice in Morocco. Unjust - Case of Morocco

HR/MADRID/IP/SEM/2003/BP.15 (*English and French*)

Mrs. Mariana Yumbay (Ecuador)

El ejercicio de la administración de justicia indígena en el Ecuador. Un análisis desde la cosmovisión de los pueblos y nacionalidades indígenas del Ecuador

HR/MADRID/IP/SEM/2003/BP.17 (*Spanish*)

Mrs. Roseana Hudson (Canada)
Aboriginal Community Council Program
HR/MADRID/IP/SEM/2003/BP.18 (*English*)

Mrs. Marcia Esparza (Chile)
Between a rock and hard place: indigenous women incarcerated in Oaxaca, Mexico
HR/MADRID/IP/SEM/2003/BP.20 (*English*)

Mr. Daniel Watson (Canada)
Cultural Linguistic Diversity Aboriginal Population By Residence Setting The Context:
Aboriginal People Socio-Economic Status And The Justice System
HR/MADRID/IP/SEM/2003/BP.21 (*English*)

Mr. Armand MacKenzie (Canada)
Principles and Guidelines for Innu Justice
HR/MADRID/IP/SEM/2003/BP.23 (*English*)

Mr. Bill Jonas (Australia) - Aboriginal and Torres Strait Islander Social Justice Commissioner,
Human Rights and Equal Opportunity Commission of Australia
Overview of the current status in addressing Indigenous peoples contact with criminal justice
processes in Australia
HR/MADRID/IP/SEM/2003/BP.24 (*English*)

Mr. Bill Jonas (Australia) - Aboriginal and Torres Strait Islander Social Justice Commissioner,
Human Rights and Equal Opportunity Commission of Australia
Specific issues relating to the administration of justice - Indigenous women; public order
laws; mandatory sentencing schemes; and best practice for diversion of Indigenous juveniles
HR/MADRID/IP/SEM/2003/BP.25 (*English*)

Mr. Bill Jonas (Australia) - Aboriginal and Torres Strait Islander Social Justice Commissioner,
Human Rights and Equal Opportunity Commission of Australia
Recognizing Aboriginal customary law and developments in community justice mechanisms
HR/MADRID/IP/SEM/2003/BP.26 (*English*)

Mr. Aucan Huilcaman Paillama (Chile)
Los Derechos colectivos un desafío en la administración de justicia, un caso Mapuche
HR/MADRID/IP/SEM/2003/BP.28 (*Spanish*)

Theme 2: The legal systems of indigenous peoples - examples, experiences and governmental, administrative and judicial measures to combine customary law with national judicial systems

Mrs. Maureen Tong (South Africa)
Indigenous peoples and the administration of justice: the South African case study
HR/MADRID/IP/SEM/2003/BP.2 (*English*)

Mr. Tomás Alarcón (Perú)

Propuesta para vincular el derecho consuetudinario Aymara-Quechua al sistema nacional de justicia peruano

HR/MADRID/IP/SEM/2003/BP.3 (*Spanish*)

Mr. Robert Yazzie (United States of America)

Legal Pluralism and the Recognition of Indigenous Customary Law: Separate but Complementary

HR/MADRID/IP/SEM/2003/BP.4 (*English*)

Mrs. Mille S. Pedersen (Greenland)

The Historical Development of the Greenlandic Justice System

HR/MADRID/IP/SEM/2003/BP.5 (*English*)

Mr. James Anaya (United States of America)

Indigenous Justice Systems and Customary Law in the United States: Between Colonization and Self-Determination

HR/MADRID/IP/SEM/2003/BP.7 (*English*)

Mrs. Francisca Macliing (Philippines)

Governmental experiences in incorporating indigenous laws and practices into the justice system: the Philippine indigenous people rights act: focusing on title issuances and the free and prior informed consent (FPIC)

HR/MADRID/IP/SEM/2003/BP.12 (*English*)

Mrs. Raquel Yrigozen Fajardo (Perú)

Alcances, límites y retos del reconocimiento del derecho indígena y jurisdicción especial en los Países Andinos

HR/MADRID/IP/SEM/2003/BP.14 (*Spanish*)

Mr. Wilton Littlechild (Canada)

Commission on First Nations and Metis Peoples and Justice Reform

HR/MADRID/IP/SEM/2003/BP.16 (*English*)

Mr. Francisco Raymundo (Guatemala)

Documento indígena Maya

HR/MADRID/IP/SEM/2003/BP.19 (*Spanish*)

Mr. Ricardo Colmenares Oliva (Venezuela)

Aproximación al proceso de compatibilidad entre la justicia indígena y el proceso penal ordinario en Venezuela

HR/MADRID/IP/SEM/2003/BP.22 (*Spanish*)

Mrs. Elia Avendaño (Mexico)

PAPER: Situación de los derechos de los pueblos indígenas en México

HR/MADRID/IP/SEM/2003/BP.27 (*Spanish*)
