Principles on Indigenous and other Customary or Traditional Justice Systems, Human Rights, and the Rule of Law

International Commission of Jurists

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BACKGROUND TO THE PRINCIPLES

These Principles were developed by the International Commission of Jurists (ICJ) based on consultations, including through annual global and regional sessions of the ICJ Geneva Forum of Judges & Lawyers held between 2017 and 2020 in Geneva, Bangkok, Nairobi, and online, as well as the ICJ's global research, experience and expertise.[1]

While the Principles have benefited from the experience and insight of the many practitioners and other experts consulted through these meetings, they have been authored by the ICJ alone and do not necessarily reflect or represent the views of every or any individual participant in the consultations.

The Principles aim to assist actors within indigenous and other traditional or customary systems, together with State institutions, civil society and international development and other agencies, to better secure equal access to justice for all, legal protection of human rights, and the rule of law.

The Principles should be further secured by a broader framework of laws, policies, and practices that guarantee and implement human rights and the rule of law within States at the regional and international level.

The Principles are intended to complement and provide guidance for the implementation of existing international instruments, including as compiled in the ICJ publication, *Indigenous and Other Traditional or Customary Justice Systems: selected international sources*.[2] The Principles are part of a larger international effort to promote equal access to justice for all, including in pursuit of United Nations Sustainable Development Goal (SDG) 16,[3] with a view to ensuring that all legal systems operate in a manner compliant with international human rights law and the rule of law more generally.

[1] Reports of the Geneva Forum sessions are available at https://www.icj.org/themes/cijl/geneva-forum/.

[2] Available at: https://www.icj.org/wp-content/uploads/2019/11/Universal-Trad-Custom-Justice-Compil-updated-Publications-2019-ENG.pdf

[3] See Transforming our world: the 2030 Agenda for Sustainable Development, UN General Assembly resolution 70/1 (25 September 2015), Goal 16 and Target 16.3. http://undocs.org/A/RES/70/1.

PART I: THE RULE OF LAW, LEGAL PROTECTION FOR HUMAN RIGHTS, AND ACCESS TO JUSTICE

1. Every State must respect, protect and fulfil the human rights of all persons within its jurisdiction, without discrimination.

Respect for and the promotion of the rule of law and equal access to justice for all are essential to the effective implementation of human rights.

Commentary:

- Under international law, every State has an obligation to respect, protect and fulfil the human rights of all persons within its jurisdiction. This obligation is recognized in a wide range of instruments, including among others the Universal Declaration of Human Rights,[4] the International Covenant on Civil and Political Rights (ICCPR),[5] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[6] and regional human rights treaties.

- In the 2012 United Nations Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, all States reaffirmed their solemn commitment to promoting and protecting human rights and fundamental freedoms for all, and acknowledged the interconnected and mutually reinforcing nature of human rights and the rule of law.[7]

- The rule of law is a dynamic concept subject to progressive development. Key elements of the rule of law include but are not limited to: the independence of judges, lawyers, and prosecutors, as well as their integrity and accountability; equality, equal protection of the law, and non-discrimination; the right to a fair trial by a competent, independent, and impartial tribunal established by law; legality and legal certainty; transparency in governance and the administration of justice; and the right to an effective remedy and reparation for human rights violations.[8]

2. Equal and effective access to justice for all must be guaranteed by law and ensured in practice, including particularly the right to an effective remedy and reparation for human rights violations and abuses, and in relation to other similar crimes and civil wrongs.

[4] UN General Assembly Resolution 217(III) (10 December 1948), https://undocs.org/A/RES/217(III).

[5] 999 UNTS 171, https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf.

[6] 993 UNTS 3, https://treaties.un.org/doc/Publication/UNTS/Volume%20993/v993.pdf.

[7] UN General Assembly Resolution 67/1 (24 September 2012), https://undocs.org/A/RES/67/1.

[8] See the 2019 ICJ Tunis Declaration on Reinforcing the Rule of Law (https://www.icj.org/wp-content/uploads/2019/04/Universal-ICJ-The-Tunis-Declaration-Advocacy-2019-ENG.pdf), and declarations and outcomes of other ICJ Congresses and major conferences since 1952 (compiled in https://www.icj.org/wp-content/uploads/2019/04/Universal-ICJ-Congresses-Publications-Reports-2019-ENG.pdf)

Commentary:

- UN Sustainable Development Goal 16 calls for "access to justice for all" and the promotion of "effective, accountable and inclusive institutions."[9]

- The right to equal access to justice and to an effective remedy and reparation for violations of human rights without discrimination, is a specific legal obligation under human rights treaties, including for example ICCPR articles 2(3), 14 and 26.[10] It is also a general norm applicable to all States, for example as recognized in the UN 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.[11] Remedies, to be effective, must be prompt, accessible, available before a competent, independent and impartial authority, and lead to the cessation of the violation and to reparation.[12]

- The right to equal access to justice for other similar crimes and civil wrongs is inherent in the non-discrimination clauses of human rights treaties and in instruments such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[13]

- States must ensure that everyone has effective access to official State justice systems, regardless of their geographic, economic, social or cultural situation, identity or status.

- The right to an effective remedy includes victims' access to the courts, access to legal advice and representation, and equal treatment in the processes of investigation and adjudication.

- The obligation to provide for equal and effective access to justice and the right to effective remedy and reparation for human rights violations and abuses is increasingly recognized by governments. Nonetheless, in certain countries, accessible and affordable justice is in practice unavailable to many people, including due to geographic, political, economic, procedural and legal barriers. In many countries, lack of independence, impartiality and integrity of the legal system, whether through interference by governments or political actors, or corruption by private actors, further undermines access to justice and effective remedy and reparation. States should take prompt action to dismantle such barriers. Possible measures include circuit or mobile courts, legal aid

[9] See Transforming our world: the 2030 Agenda for Sustainable Development, UN General Assembly resolution 70/1 (25 September 2015), Goal 16 and Target 16.3. http://undocs.org/A/RES/70/1.

[10] See ICJ, Practitioners Guide no 2 on the Right to a Remedy and Reparation for Gross Human Rights Violations (revised 2018), https://www.icj.org/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/).

[11] UN General Assembly Resolution 60/147 (16 December 2005), https://undocs.org/A/RES/60/147.

[12] See ICJ, Practitioners Guide no 2 on the Right to a Remedy and Reparation for Gross Human Rights Violations (revised 2018), https://www.icj.org/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/); see also https://www.icj.org/wp-content/uploads/2013/02/Congress-Declaration-adoptedFINAL.pdf.

[13] UN General Assembly Resolution 40/34 (29 November 1985), https://undocs.org/A/RES/40/34.

programmes, greater investment of resources, strengthening of legal and institutional guarantees and procedures for securing independence and integrity,[14] and coordination with and enhancement of the role of indigenous and other traditional or customary justice systems, as elaborated in Principle 3.

- State authorities, including judges, lawyers, prosecutors, law enforcement, as well as non-state authorities in indigenous or traditional communities, must ensure that persons who exercise their right to equal access to justice and effective remedy do not face retaliation as a consequence of asserting their rights.

[14] See for example: ICJ Practitioners Guide no 1 on International principles on the independence and accountability of judges, lawyers and prosecutors (2005), https://www.icj.org/no-1-international-principles-on-the-independence-and-accountability-of-judges-lawyers-and-prosecutors/; ICJ Practitioners Guide no 13 on Judicial Accountability (2016), https://www.icj.org/icj-launches-new-practitioners-guide-on-judicial-accountability/; and other "International standards on the independence and accountability of judges, lawyers and prosecutors" compiled at https://www.icj.org/themes/cijl/international-standards/.

3. All individuals and organs of society should be aware of and promote respect for universal human rights and freedoms, and strive to progressively secure their universal and effective recognition and observance, including in the context of indigenous and other traditional or customary justice systems.

Commentary:

- The Preamble to the Universal Declaration of Human Rights concludes as follows:[15]

  > …The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

- The 1993 Vienna Declaration and Programme of Action affirms:[16]

  > Considering the importance of the promotion and protection of the rights of indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.

- The UN Declaration on the Rights of Indigenous Peoples provides, among other things:[17]

  > 1. Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law
  > …
  > 34. Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions,

[15] https://undocs.org/A/RES/217(III) (10 December 1948). See also the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, https://undocs.org/A/Res/53/144 (9 December 1998).

[16] https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx

[17] https://undocs.org/A/RES/61/295 (13 September 2007).

procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

…

46. (2) In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

(3) The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

- The Human Rights Committee has affirmed, in relation to article 2 of the ICCPR:[18]

  [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.

- The UN Special Rapporteur on the rights of indigenous peoples, mandated by the Human Rights Council, concluded in a 2019 report on Indigenous Peoples and Justice:[19]

[18] Human Rights Committee, General Comment no. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, http://undocs.org/CCPR/C/21/Rev.1/Add.13 (26 May 2004), para 8.

[19] https://www.undocs.org/A/HRC/42/37 (2 August 2019), paras 103-104.

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

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

PART II: ROLES AND RESPONSIBILITIES WITH RESPECT TO INDIGENOUS AND OTHER TRADITIONAL OR CUSTOMARY JUSTICE SYSTEMS

4. State institutions and other stakeholders should recognize, including formally, that indigenous justice systems and other traditional or customary justice systems can play an important role in the national legal order, including that such systems have the potential to contribute to equal access to justice and the legal protection of human rights and to securing the rule of law.

Indigenous justice systems must be given formal recognition in this regard, and such recognition should be considered for other traditional or customary justice systems where appropriate.

5. Judges, prosecutors, lawyers and others working within official State justice systems should be aware of, and seek to understand on their own terms, any indigenous or other traditional or customary justice systems that exist within or concurrent to their jurisdiction. They should consider whether procedural or other adaptations to their own practices could promote equal access to justice for all, in respect of any such communities.

Judges and other decisionmakers working within indigenous or other traditional or customary justice systems should be generally aware of national and international legal frameworks that may be relevant to the matters they may be called upon to decide, particularly as regards constitutional rights and human rights, and consider whether adaptations to their own practices would promote equal access to justice for all, and the equal enjoyment by all persons of all their human rights.

Commentary:

- In many States, the majority of legal disputes, particularly in rural areas, are resolved by indigenous or other traditional or customary justice systems, which are not necessarily recognized by national law as part of the official State court system. In some situations, local populations have little choice but to use such systems because official State courts are absent. In others, persons from local populations may actively prefer to take their disputes to indigenous or other traditional or customary justice systems despite the availability of official State systems. Indigenous and other traditional or customary justice systems tend to be more accessible because of geographic proximity, relative cost, and cultural considerations including language and degree of trust. Community perceptions of the legitimacy of indigenous or other traditional or customary justice systems may be particularly pronounced where there is a history of State efforts to destroy, suppress or otherwise violate the rights of indigenous and other marginalized communities, or where discrimination systematically excludes members of these communities.

- Indigenous and other traditional or customary justice systems can, in principle, make an important contribution to ensuring access to justice and the promotion and respect for the rule of law. There is increasing acceptance of the potential for these justice systems to fulfil this role when operating in accordance with internationally recognized human rights law. The UN General Assembly, for instance, affirmed in its 2012 UN Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels: "We acknowledge that informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution".[20]

- The 1989 Indigenous and Tribal Peoples Convention (International Labour Organization (ILO) Treaty no 169),[21] in its articles 8 and 9, requires States parties to give due regard and respect to indigenous peoples' customary laws, institutions and processes for dealing with offences by their members. Only twenty-three States have ratified the Convention to date; however, other international and regional instruments and bodies have similarly affirmed a right to recognition of indigenous justice systems:

    - The 2007 UN Declaration on the Rights of Indigenous Peoples provides the most comprehensive and widely accepted global standard on indigenous rights, which includes:

        - the right to maintain and strengthen distinct legal institutions, while retaining the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State (article 5);

        - the right to promote, develop and maintain indigenous institutional structure and distinctive customs, spirituality, traditions, procedures, practices, and when present, juridical systems or customs, in accordance with international human rights standards (article 34);

        - 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 individual and collective rights, with all such decisions required to give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and to international human rights (article 40).

    - The need for State legal systems and institutions to engage with indigenous and other traditional or customary justice systems and institutions, to ensure that legal recognition is given in a manner consistent with human rights, has been recognized by UN human rights treaty bodies, including the Human Rights Committee, the Committee on the Elimination of

[20] https://undocs.org/A/RES/67/1 (24 September 2012), para 15.

[21] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

Discrimination against Women, the Committee on the Elimination of Racial Discrimination, and the Committee on the Rights of the Child.[22]

- The right to recognition of indigenous justice systems is also reflected in regional instruments, for example, in the 2016 American Declaration on the Rights of Indigenous Peoples, article XXII.[23]

- The UN Special Rapporteur on the rights of indigenous peoples has said that States should give explicit recognition, in constitutional or other legal provisions, of the right of indigenous peoples to maintain and operate their own legal systems and institutions. The Special Rapporteur also called on the United Nations, its Member States, and other stakeholders to support indigenous peoples in their advocacy for the recognition of their justice systems.[24]

- Articles 34 and 46(2) of the UN Declaration on the Rights of Indigenous Peoples affirm that in promoting, maintaining, and developing their justice systems, indigenous peoples must ensure such justice systems operate in a manner consistent with international human rights standards.

- Other traditional or customary justice systems that are not of an indigenous character do not necessarily enjoy a similar right to recognition. Nevertheless, States in consultation with members of relevant communities and other stakeholders should consider whether the recognition of such systems, where appropriate, would enhance access to justice for all, and in certain circumstances, would fulfil or promote relevant social and cultural rights.

- The recognition by a State of indigenous or other traditional or customary justice systems, or their de facto existence, must not be invoked by the government as a reason for failing to ensure that all persons in their territory also have access to the other justice institutions of the State, including by properly funding such institutions and removing geographic, juridical and financial barriers to access by rural and other populations.

The UN Special Rapporteur on the rights of indigenous peoples has recommended that:[25]

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[22] Human Rights Committee, General Comment no 32 on Article 14 and the Right to equality before courts and tribunals and to a fair trial, https://undocs.org/CCPR/C/GC/32 (23 August 2007), para 24; Committee on the Elimination of Discrimination against Women, general recommendation No. 33 on women's access to justice, https://undocs.org/CEDAW/C/GC/33 (3 August 2015), para 64; Committee on the Elimination of Racial Discrimination, general recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para 5(e), included in https://undocs.org/A/60/18(SUPP); and Committee on the Rights of the Child, general comment No. 11 on indigenous children and their rights under the Convention, https://undocs.org/CRC/C/GC/11 (12 February 2009), para 75, and General comment No. 24 on children's rights in the child justice system, https://undocs.org/CRC/C/GC/24 (18 September 2019), paras 102 to 104.

[23] Included in http://scm.oas.org/doc_public/ENGLISH/HIST_17/AG07239E03.doc.

[24] https://www.undocs.org/A/HRC/42/37 (2 August 2019), para 106.

[25] https://www.undocs.org/A/HRC/42/37 (2 August 2019), para 121.

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

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

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

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

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

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

120. Indigenous authorities should ensure safe and inclusive spaces for all in the community to discuss the appropriateness of norms and practices and their consistency with constitutional or international human rights, and to argue for their reform or modification. They should give due consideration to the arguments presented in such discussions. Other stakeholders may support such

internal discussions, as well as offering relevant capacity-building or other awareness-building activities both to indigenous leaders and other members of indigenous communities. Any engagement by non-indigenous actors with indigenous communities and leadership on such issues should be sensitive to the social, cultural, political and historical context and cohesion of indigenous peoples and the risk that outside interventions may be perceived as perpetuating actions and attitudes reminiscent of colonialist eras and related historically oppressive connotations.

6. States, in coordination with indigenous and other traditional communities, should seek to establish legal clarity over the areas of concurrent, overlapping, or exclusive jurisdictional authority of indigenous and other traditional or customary justice systems, while respecting the internationally recognized rights of indigenous peoples.

Commentary:

- The scope of jurisdiction of indigenous and other traditional or customary justice systems varies around the world. Some such justice systems have exclusive jurisdiction over all matters that occur within their traditional territory, while others have jurisdiction only over members of the indigenous or other community in question.

- The Human Rights Committee, in its 2007 General Comment on the State obligation to ensure the right to a fair trial pursuant to Article 14 of the ICCPR, stated:[26]

  > Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.

- The Human Rights Committee's assertion that the scope of jurisdiction must be restricted to "minor civil and criminal matters" may well be appropriate with regard to other traditional and customary justice systems, but it does not appear to be entirely consistent with the provisions of the UN Declaration on Rights of Indigenous Peoples. The Committee has been called upon to review or clarify its guidance in this respect, in consultation with relevant UN mechanisms on the rights of indigenous peoples and indigenous peoples themselves.[27]

- The UN Special Rapporteur on rights of indigenous peoples has said:[28]

[26] Human Rights Committee, General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial, https://undocs.org/CCPR/C/GC/32 (23 August 2007), para 24.

[27] See the recommendation of the UN Special Rapporteur on Rights of Indigenous Peoples, https://www.undocs.org/A/HRC/42/37 (2 August 2019), para 110; ICJ, *Indigenous and other Traditional or Customary Justice Systems in the Asia-Pacific Region: Report of the 2018 Geneva Forum of Judges and Lawyers*, https://www.icj.org/wp-content/uploads/2019/06/Universal-Trad-Custom-Justice-GF-2018-Publications-Thematic-reports-2019-ENG.pdf, pp. 9-10.

[28] https://www.undocs.org/A/HRC/42/37 (2 August 2019), paras 112-115.

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

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

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

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

7. Indigenous and other traditional or customary justice systems should operate in harmony with internationally recognized human rights and the rule of law in the broadest possible sense, particularly in relation to proceedings that constitute, or are analogous to, criminal adjudication and punishment, or otherwise affect fundamental interests of the parties.

Commentary:

- Indigenous and other traditional or customary justice systems should operate so as to ensure and uphold human rights and the rule of law.[29] The UN Special Rapporteur on the rights of indigenous peoples has emphasized that "[b]oth indigenous and ordinary justice processes and institutions have the responsibility and the potential to fully respect, protect and fulfil human rights", and that, among other things:

> States should acknowledge that indigenous laws and juridical institutions change and develop over time. Any codification of indigenous laws should be designed to avoid freezing those laws as they currently exist, with a particular concern not to entrench any norms or practices that could otherwise develop in a more harmonious direction in accordance with international human rights.
> …
>
> States and indigenous leaders share the responsibility for ensuring that processes and decisions by indigenous justice authorities accord with international human rights, particularly in the context of possible conflicts between the rights and interests of individual indigenous members and the collective rights and interest of an indigenous people or community. Dialogue, cooperation, consultation, and consent are crucial. No unilateral or coercive interventions should take place.
>
> Indigenous authorities should ensure safe and inclusive spaces for all in the community to discuss the appropriateness of norms and practices and their consistency with constitutional or international human rights, and to argue for their reform or modification. They should give due consideration to the arguments presented in such discussions. Other stakeholders may support such internal discussions, as well as offering relevant capacity-building or other awareness-building activities both to indigenous leaders and other members of indigenous communities. Any engagement by non-indigenous actors with indigenous communities and leadership on such issues should be sensitive to the social, cultural, political and historical context and cohesion of indigenous peoples and the risk that outside interventions may be perceived as perpetuating actions and attitudes reminiscent of colonialist eras and related historically oppressive connotations. [30]

[29] See also the sources cited under Principle 3 above.

[30] https://www.undocs.org/A/HRC/42/37 (2 August 2019), paras 104, 116, 119, 120.

- With regard to certain proceedings, such as those that are essentially criminal in character and may impose sanctions or punishments similar to those provided for in criminal proceedings before ordinary courts, the responsibility to uphold human rights, including for instance guarantees of impartiality and fairness, is particularly important.

- All justice systems, including official State systems, include a range of proceedings across a spectrum of coercive power. The need for indigenous or other traditional or customary justice systems to be aware of and implement international human rights standards is particularly important when the system is granted legal authority to issue binding judgements or when that system is exercising coercive and adjudicative powers akin to a court or tribunal adjudicating a criminal charge.

- When a proceeding before an indigenous or other traditional or customary justice system is more akin to a mediation or other consensual alternative dispute resolution, in which the parties are free to accept or reject the suggested settlement of the dispute, international fair trial standards may not apply or not apply to the same extent. In this regard, it would be discriminatory to subject indigenous dispute resolution systems to a set of requirements or expectations that would not be applied to a similar non-indigenous mediation or consensual alternative dispute resolution proceeding. However, in all circumstances any procedures for mediation or for consensual or other forms of alternative dispute resolution, whether or not of an indigenous or other traditional or customary character, should more generally aim to adopt processes and produce outcomes that are consistent with human rights.

- The parties, or victim and alleged perpetrator of a criminal offence, generally may freely consent to an indigenous or other traditional or customary justice process that does not fully implement certain international human rights standards that would otherwise apply to the proceedings, such as those relating to the fairness of proceedings or independence or impartiality of the decision-maker. Care must be taken in such circumstances to ascertain whether the consent of the relevant persons is fully informed and truly voluntary.

8. In certain circumstances when an indigenous or other traditional or customary justice system operates in a manner inconsistent with international human rights standards, State institutions may be permitted or even required by international human rights law to intervene.

The unilateral abolition of or unjustified interference with an indigenous justice system by the authorities of a State is inconsistent with international human rights standards, including particularly the UN Declaration on the Rights of Indigenous Peoples.

Commentary:

- International human rights law applies to all States regardless of any legal pluralism within the State, and, in general, neither requires nor prohibits any specific forms of legal pluralism within a State. The Human Rights Committee has evaluated and made findings and recommendations to States concerning the human rights performance of their traditional and customary justice systems, indicating State responsibility to ensure that such justice systems uphold human rights.[31] To meet the State's obligations under international human rights law, a State may in some circumstances be specifically permitted or even required to engage with and potentially intervene in the operations of indigenous or other traditional or customary justice systems.

- Such intervention could take many forms, and preferred methods include consultation and dialogue, detailed further in Principle 13.

- The UN Special Rapporteur on the rights of indigenous peoples has stated that:[32]

> 109. Discriminatory attitudes that assume that indigenous justice systems are necessarily more prone to violations or abuses of human rights than State systems should be rejected and countered. The engagement of State authorities with indigenous justice actors should be based on the principle of respect and dialogue and not unilateral and discriminatory subordination or interference. States must ensure their own justice systems fully respect human rights, including the rights of indigenous peoples, recognizing that cultural or other adaptations of the State system may be necessary to this end.
>
> 113. States and indigenous authorities should consider establishing joint mechanisms for cooperation and coordination between indigenous and State justice systems. While recognizing that each context is different, consideration should be given to models whereby decisions from both indigenous and non-indigenous systems are subject to review or appeal by an integrated judicial body comprised of both indigenous and non-indigenous judicial authorities.

[31] See ICJ, Compilation of International Sources on Indigenous and other Traditional or Customary Justice Systems (29 November 2019), https://www.icj.org/traditional-customary-justice-systems-updated-and-expanded-icj-compilation-of-standards-launched/.

[32] https://www.undocs.org/A/HRC/42/37 (2 August 2019).

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

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

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

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

- Under the UNDRIP, indigenous justice systems enjoy particular protection from interference by the State, and even when there are human rights concerns with regard to indigenous justice systems, States may not simply abolish them. The UN Special Rapporteur has affirmed that "[h]uman rights standards should not be invoked as a justification to deny the right of indigenous peoples to promote and maintain their systems of justice and self-governance." Further, "States and other actors must ensure that any measure to address human rights concerns in relation to indigenous justice

systems complies with the requirements of article 19 and article 46 (2) of the United Nations Declaration on the Rights of Indigenous Peoples."[33]

- Any individual who credibly alleges that the operations of an indigenous justice system has resulted in a violation of their human rights must be afforded the opportunity to seek a remedy from a court with jurisdiction to decide and remedy such violations.[34] At the same time, the UN Declaration on the Rights of Indigenous Peoples recognizes that "[i]ndigenous peoples have the right to 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", including in relation to their right to promote, develop and maintain their juridical systems under article 34 of the Declaration. In determining such a dispute or conflict, "[s]uch a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights."[35]

- As regards non-indigenous traditional or customary justice systems, although consultation and dialogue may be generally preferred methods of intervention, States may in certain circumstances apply coercive measures to ensure respect for human rights and the rule of law, which in some circumstances could include the abolition of the relevant justice system altogether. Any such abolition should itself be subject to judicial review by a Constitutional or other high court in order to ensure respect for human rights and the rule of law. Moreover, in deciding upon appropriate action, the State must also consider the impact that such an abolition would have on other human rights concerns, including minority rights[36] and effective and equal access to justice for all.

[33] https://www.undocs.org/A/HRC/42/37 (2 August 2019), para 117.

[34] See e.g. Human Rights Committee, General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial, https://undocs.org/CCPR/C/GC/32 (23 August 2007), para 24.

[35] UN Declaration on the Rights of Indigenous Peoples, https://undocs.org/A/RES/61/295 (13 September 2007), article 40.

[36] See e.g. ICCPR article 27; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, General Assembly Resolution 47/135 (18 December 1992), https://undocs.org/A/RES/47/135; Report of the Special Rapporteur on minority issues, 30 July 2015, https://undocs.org/A/70/212, paras 35-36.

PART III: FAIR TRIAL RIGHTS, JUDICIAL INDEPENDENCE AND IMPARTIALITY

9. Indigenous and other traditional or customary justice systems must respect and ensure fundamental guarantees of fairness comprising the right to fair trial when a party's involvement with the justice system is non-consensual or akin to a criminal adjudication.

Commentary:

- As outlined in the commentary to Principle 5, international fair trial standards may be applicable when a proceeding before an indigenous or other traditional or customary justice system is analogous to a civil or criminal trial or is otherwise non-consensual and exercising coercive powers similar to those exercised in State judicial proceedings, and is either recognized or knowingly permitted to operate by the State.
    - The Human Rights Committee, elaborating on the scope of State obligations under article 14 of the ICCPR, has taken the position that "where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks", such courts must not "hand down binding judgments recognized by the State", unless, among other things, "proceedings before such courts … meet the basic requirements of fair trial and other relevant guarantees of the Covenant".[37] As noted above, it has been suggested that the Committee should give further consideration to whether and how its position on customary or religious courts applies to indigenous justice systems, in light of the standards reflected in the UN Declaration on the Rights of Indigenous Peoples and other instruments.

- At the same time, it is important to distinguish proceedings that are analogous to a civil or criminal trial, from other dispute resolution processes, including all consensual alternative dispute resolution and mediation-like proceedings. Just as for official State justice systems, the specific standards of fairness that apply to a civil or criminal trial will not necessarily apply to other forms of dispute resolution by indigenous or other traditional or customary justice systems.

- The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that "[t]raditional courts, where they exist, are required to respect international standards on the right to a fair trial" and affirms a number of specific fair trial safeguards that are applicable to such courts.[38]

[37] General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial, https://undocs.org/CCPR/C/GC/32 (23 August 2007), para 24.

[38] African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), https://www.achpr.org/public/Document/file/English/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf, Part Q.

- With regard to all justice systems, including indigenous and other traditional or customary justice systems, the right to consult with a lawyer prior to hearings should not be denied for any reason.[39] As for all justice systems, a person may choose to represent themselves without the assistance of a lawyer, or otherwise waive the right to be represented by a lawyer at hearings, subject to legitimate voluntariness of the decision to forego legal assistance. In some circumstances, consensual entrance into an indigenous or other traditional or customary justice system that precludes representation by a lawyer may itself be viewed as such a waiver.

[39] See generally, the UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by UN General Assembly Resolution 45/166 (1990), https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx; and see specifically as regards traditional courts, African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), https://www.achpr.org/public/Document/file/English/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf, paragraph Q(b)(viii).

10. All kinds of justice systems, including those that are indigenous, traditional or customary in character, should meet international standards of independence and impartiality when taking decisions on a non-consensual basis with consequences similar to a civil or criminal trial.

All kinds of justice systems face various challenges in fully realizing, and can improve their consistency with, international standards of independence and impartiality; relevant decision-makers and authorities from within all justice systems should, in cooperation with and with support from other actors as appropriate, adapt their practices towards greater harmony with such standards.

Commentary:

- Across all kinds of justice systems, whether official State courts, indigenous or other traditional or customary justice systems, inconsistencies or non-compliance with international standards of independence and impartiality can and too frequently do impede equal access to justice. Many indigenous and other traditional or customary justice systems see the pre-existing relationships between decision-makers and the individuals they are making decisions about as a strength of such systems; at the same time, in any justice process that is analogous to a civil or criminal trial, if mechanisms are not in place to prevent and respond to inappropriate bias and conflicts of interest, the risk of arbitrary and discriminatory procedures and outcomes increases.

- To best ensure the protection of human rights and the rule of law, all justice systems should act to better realize international standards on independence and impartiality set out in authoritative international instruments, such as the UN Basic Principles on the Independence of the Judiciary[40] and the Bangalore Principles of Judicial Conduct.[41]

- The pervasive and systematic lack of impartiality reflected in the long history and continuing reality of discrimination against indigenous peoples and other marginalized communities by official State justice systems must be urgently and effectively addressed.[42]

- When indigenous or other traditional or customary justice systems are conducting processes and imposing sanctions or punishment analogous to a civil or criminal trial,

[40] UN Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of and endorsed by General Assembly resolutions 40/32 (29 November 1985) and 40/146 (13 December 1985), https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx.

[41] Bangalore Principles of Judicial Conduct, adopted by the Judicial Integrity Group in 2002 and recognized by, among other sources, ECOSOC resolution 2006/23 (27 July 2006), https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2000-2009/2006/ECOSOC/Resolution_2006-23.pdf.

[42] See Report of the UN Special Rapporteur on the rights of indigenous peoples, https://www.undocs.org/A/HRC/42/37 (2 August 2019), paras 28 to 49.

with the recognition or acquiescence of the State, international human rights obligations, including as regards independence and impartiality, are directly engaged.

- The Human Rights Committee has said in relation to article 14 of the ICCPR, that "where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks", such courts must not "hand down binding judgments recognized by the State", unless, among other things, "proceedings before such courts … meet the basic requirements of fair trial and other relevant guarantees of the Covenant", which is normally understood to entail the independence and impartiality of the decision-maker.[43] As noted above, further consideration and clarification by the Committee may be warranted, in consultation with indigenous peoples, of how this general position applies to indigenous justice systems in light of the norms reflected in the UN Declaration on the Rights of Indigenous Peoples and other instruments.

- The African Commission on Human and People's Rights has affirmed the need for impartiality of traditional courts, including the need to avoid situations where decision-makers have pre-existing connections or involvement with the case or a party to the case, or have a pecuniary or other interest linked to the outcome of the case. The African Commission also affirms that States must guarantee in law, and respect in practice, the independence of traditional courts from the executive branch of the State and from improper influence, threats or interference from any quarter.[44]

- At the same time, it is important to distinguish proceedings that are analogous to a civil or criminal trial from other dispute resolution processes that are more akin to consensual alternative dispute resolution and mediation. The standards of independence and impartiality that apply to a civil or criminal trial will not necessarily apply or apply in exactly the same way to other forms of dispute resolution, whether they are conducted by indigenous or other traditional or customary justice systems or by actors affiliated with official State justice systems.

[43] General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial, https://undocs.org/CCPR/C/GC/32 (23 August 2007), paras 24 and 19-21.

[44] African Commission on Human and People's Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), https://www.achpr.org/public/Document/file/English/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf, sections Q(c) and (d).

PART IV: PUNISHMENTS PROHIBITED BY INTERNATIONAL HUMAN RIGHTS LAW

11. International human rights law prohibits all torture and other cruel, inhuman or degrading treatment or punishment, irrespective of the nature of the justice system.

All justice systems, including indigenous and other traditional or customary justice systems, need to take effective action to prevent torture and other cruel, inhuman and degrading treatment or punishment.

Commentary:

- The ICCPR, the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and customary international human rights and humanitarian law, among other sources, absolutely prohibit all torture and other cruel, inhuman or degrading treatment or punishment, without exception.

- Other than in situations of armed conflict, where international humanitarian law applies more broadly, the prohibition of torture under international law applies primarily to acts "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".[45] However, the Human Rights Committee has held that it is implicit in ICCPR article 7 that States "have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power."[46]

- The ICJ opposes capital punishment in all cases without exception as a violation of right to life and to freedom from cruel, inhuman or degrading punishment. The UN Human Rights Committee has stated that, "The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights."[47] Citing article 6(2) of the ICCPR, the Committee has stated that it "does not consider courts of customary justice to constitute judicial institutions offering sufficient fair trial guarantees to enable them to try capital crimes."[48]

[45] See e.g. article 1 of the UN Convention against Torture.

[46] General Comment no 31, para 8.

[47] General Comment no 36, http://undocs.org/CCPR/C/GC/36 (3 September 2019), para 50. Paras 32 to 51 of the General Comment address a range of aspects of the death penalty in more detail, in relation to the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment.

[48] General Comment no 36, http://undocs.org/CCPR/C/GC/36 (3 September 2019), para 45.

PART V: NON-DISCRIMINATION AND THE RIGHTS OF WOMEN, CHILDREN AND OTHER MARGINALIZED GROUPS

12. All persons must be treated as equal before the law and receive equal protection of the law without discrimination.

Consistent with the principle of non-discrimination, equal enjoyment of the rights of those at heightened risk of discrimination or other human rights violations and abuses must be ensured at all times, including through positive measures and accommodations where necessary.

Commentary:

- Article 2 of the Universal Declaration of Human Rights (UDHR) provides that, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 7 provides that, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

- Article 2(1) of the ICCPR provides that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3 provides that "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." Article 14(1) provides in part that, "All persons shall be equal before the courts and tribunals." Article 26 provides that, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

- Non-discrimination provisions are also included in all universal and regional human rights treaties, including the International Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.

- Prohibited grounds of discrimination include, among other things, race, ethnicity or colour, sex, language, religion, political or other opinion, national or social origin, property or birth, disability, age, nationality, marital and family status, sexual

orientation and gender identity, health status, place of residence and economic and social situation.[49]

- Formal equality of treatment is not sufficient to meet this obligation. Discrimination must be counteracted both formally and substantively, including where necessary through the adoption and implementation of special measures to address conditions that perpetuate discrimination.[50] In addition, both direct and indirect discrimination must be addressed. Judges, decision-makers, and other responsible authorities should therefore take account of counteract the potential for formally neutral measures or standards to result in indirect discrimination in their actual impact.

- Discriminatory views and practices often also remain entrenched in official State judiciaries, despite such systems generally having historically been subject to more systematic scrutiny, recommendations for reform, and technical and resource assistance from regional and international bodies, to address such discrimination. All justice systems, including indigenous and other traditional or customary justice systems, should receive additional attention and assistance to uphold non-discrimination and internationally recognized human rights, including from national, international, and regional entities.

- All stakeholders should also be sensitive to the reality that many indigenous and other traditional or customary justice systems have historically been repressed by national authorities, including in situations of colonial domination, who claimed to be acting in the name of eliminating discrimination, while actually themselves acting on the basis of discriminatory or other improper motives. Furthermore, repressing or restricting an indigenous or other traditional or customary justice system in the name of countering discrimination, while failing to address a similar problem of discrimination in the official State system, can itself be a form of discrimination or other violation of indigenous or other human rights.

- The UN Special Rapporteur on the rights of indigenous peoples has recommended that:[51]

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

[49] See e.g. Committee on Economic, Social and Cultural Rights, General Comment 20, Non-Discrimination in Economic, Social and Cultural Rights), https://undocs.org/E/C.12/GC/20, paras 15-35.

[50] Ibid, paras. 7-10; Human Rights Committee General Comment 18, para. 10

[51] https://www.undocs.org/A/HRC/42/37 (2 August 2019), para 121.

13. The rights of women must be equally considered and protected in all kinds of justice systems, including indigenous or other traditional and customary justice systems, and judges, decision-makers and other relevant authorities should implement appropriate measures to ensure equality for women.

Women have the right to equal access to the opportunity to serve as decision-makers in all kinds of justice systems, including indigenous or other traditional or customary justice systems. All discriminatory barriers that prevent or limit participation of women in any justice system, including indigenous or other traditional or customary justice processes, whether as decision-makers, witnesses, parties, advocates or observers, must be removed.

Commentary:

- Recognizing that longstanding inequalities and discrimination against women has limited their effective access to justice, women must be ensured the opportunity to enjoy the benefits of the rule of law, to use the law to uphold their equal rights, and to enjoy full participation in all justice systems. In addition to the non-discrimination clauses of the Universal Declaration and the ICCPR (articles 2, 3, 14(1) and 26), article 21(2) of the Universal Declaration recognizes that, "Everyone has the right of equal access to public service in his [sic] country" and article 25 of the ICCPR provides that, "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives… (c) To have access, on general terms of equality, to public service in his [sic] country."

- The Convention on the Elimination of Discrimination against Women (CEDAW) provides, among other things, as follows:

    1. For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

    2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

        (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
…

5. States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; …

15. (1) States Parties shall accord to women equality with men before the law.

(2) States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

- In its General Recommendation no 33 on Women's Access to Justice, the Committee on the Elimination of Discrimination against Women has set out a range of measures States should take to ensure, among other relevant aspects, the general availability and accessibility of justice systems to women, and to eliminate discriminatory laws, procedures and practices, as well as stereotyping and gender bias in the justice system.[52] As regards plural justice systems, including indigenous and other traditional or customary justice systems, the General Recommendation specifically provides:

[52] http://undocs.org/CEDAW/C/GC/33 (3 August 2015), paras 16, 17, 25, 29, among others.

61. The Committee notes that State laws, regulations, procedures and decisions can sometimes coexist, within a given State party, with religious, customary, indigenous or community laws and practices. This results in the existence of plural justice systems. There are, therefore, multiple sources of law that may be formally recognized as part of the national legal order or operate without an explicit legal basis. States parties have obligations under articles 2, 5 (a) and 15 of the Convention and under other international human rights instruments to ensure that women's rights are equally respected and that women are protected against violations of their human rights by all components of plural justice systems.

62. The presence of plural justice systems can, in itself, limit women's access to justice by perpetuating and reinforcing discriminatory social norms. In many contexts, the availability of multiple avenues for gaining access to justice within plural justice systems notwithstanding, women are unable to effectively exercise a choice of forum. The Committee has observed that, in some States parties in which systems of family and/or personal law based on customs, religion or community norms coexist alongside civil law systems, individual women may not be as familiar with both systems or at liberty to decide which regime applies to them.

63. The Committee has observed a range of models through which practices embedded in plural justice systems can be harmonized with the Convention in order to minimize conflicts of laws and guarantee that women have access to justice. They include the adoption of legislation that clearly defines the relationship between existing plural justice systems, the creation of State review mechanisms and the formal recognition and codification of religious, customary, indigenous, community and other systems. Joint efforts by States parties and non-State actors will be necessary to examine ways in which plural justice systems can work together to reinforce protection for women's rights.

64. The Committee recommends that, in cooperation with non-State actors, States parties:

(a) Take immediate steps, including capacity-building and training programmes on the Convention and women's rights, for justice system personnel, to ensure that religious, customary, indigenous and community justice systems harmonize their norms, procedures and practices with the human rights standards enshrined in the Convention and other international human rights instruments;

(b) Enact legislation to regulate the relationships between the mechanisms within plural justice systems in order to reduce the potential for conflict;

(c) Provide safeguards against violations of women's human rights by enabling review by State courts or administrative bodies of the activities of all components of plural justice systems, with special attention to village courts and traditional courts;

(d) Ensure that women have a real and informed choice concerning the applicable law and the judicial forum within which they would prefer their claims to be heard;

(e) Ensure the availability of legal aid services for women to enable them to claim their rights within the various plural justice systems by engaging qualified local support staff to provide that assistance;

(f) Ensure the equal participation of women at all levels in the bodies established to monitor, evaluate and report on the operations of plural justice systems;

(g) Foster constructive dialogue and formalize links between plural justice systems, including through the adoption of procedures for sharing information among them.

- The Human Rights Committee has observed that, "Inequality in the enjoyment of rights by women throughout the worlds is deeply embedded in tradition, history and culture, including religious attitudes" and that therefore, "State Parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights".[53]

- The UN Special Rapporteur on the rights of indigenous peoples has recommended:[54]

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

- All justice systems, including indigenous and other traditional or customary justice systems, must eliminate discriminatory practices, including, but not limited to:

    - rules that exclude women from being decision-makers;

    - rules precluding women from obtaining an inheritance;

    - the treatment of women effectively as a form of property awarded to settle certain legal disputes, such as compensation in the form of offering up a daughter for marriage;

    - impunity for men that order or commit violence against women, including through "honour killings" or other "honour" crimes.

[53] General Comment No. 28, UN Doc CCPR/C/21/Rev.1/Add.10, para 5.

[54] https://www.undocs.org/A/HRC/42/37 (2 August 2019), para 121.

- Women should be afforded participation in justice systems independently from male guardians, if desired, including through the opportunity to take a dispute before a justice system without male relatives; the right to be given their own legal advice; the opportunity to be interviewed privately and separately.

- When women do seek access to justice, they may find themselves facing a difficult ultimatum in which an appeal to State systems leads to withdrawal of community support, and an appeal to the traditional or customary system means that the State will not intervene to help them. Better coordination, awareness raising, and capacity building should be taken to eliminate this dilemma and to better promote and protect women's rights.

14. The rights of children must be protected in all justice systems, including indigenous and other traditional or customary justice systems.

In matters relating to children, judges, decision-makers and other relevant authorities in all kinds of justice systems must ensure that the best interests of the child is a primary consideration.

The right of the child to be heard in any proceedings affecting the child is of fundamental importance.

Commentary:

- The Convention on the Rights of the Child, to which nearly all States are party, includes the following among its many relevant provisions:
    - Article 1 provides that, "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."
    - Article 2(1) provides that, States "shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."
    - Article 3(1) provides that, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".
    - Article 12(1) provides that, "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". Article 12(2) provides that, "For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."
    - Article 40 provides for a range of specific rights and procedural protections for every child who is alleged or established to have infringed penal law.

- The Committee on the Rights of the Child has affirmed that, "The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. The Committee has identified article 12 as one of the four general principles of the Convention, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights." It has also emphasized that article 12(2) applies to judicial and administrative proceedings of all kinds, including any associated alternative dispute mechanisms such as mediation and arbitration. It has specifically referred to the participation rights of indigenous children, and has recommended that States should, provide training on article 12 and its application in practice, "for all professionals working with, and for, children", including among others lawyers, judges, and traditional leaders.[55]

- In its 2019 General Comment no. 24 on Children's Rights in the Child Justice System,[56] the Committee on the Rights of the Child addresses fair trial protections and other aspects of child rights in justice processes more generally, and in relation to "customary, indigenous and non-State forms of justice" in particular, has stated:

> 102. Many children come into contact with plural justice systems that operate parallel to or on the margins of the formal justice system. These may include customary, tribal, indigenous or other justice systems. They may be more accessible than the formal mechanisms and have the advantage of quickly and relatively inexpensively proposing responses tailored to cultural specificities. Such systems can serve as an alternative to official proceedings against children, and are likely to contribute favourably to the change of cultural attitudes concerning children and justice.
>
> 103. There is an emerging consensus that reforms of justice sector programmes should be attentive to such systems. Considering the potential tension between State and non-State justice, in addition to concerns about procedural rights and risks of discrimination or marginalization, reforms should proceed in stages, with a methodology that involves a full understanding of the comparative systems concerned and that is acceptable to all stakeholders. Customary justice processes and outcomes should be aligned with constitutional law and with legal and procedural guarantees. It is important that unfair discrimination does not occur, if children committing similar crimes are being dealt with differently in parallel systems or forums.
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> 104. The principles of the Convention should be infused into all justice mechanisms dealing with children, and States parties should ensure that the Convention is known and implemented. Restorative justice responses are often achievable through customary, indigenous or other non-State justice systems,

[55] Committee on the Rights of the Child, General Comment No 12 on the right of the child to be heard (2009), https://undocs.org/CRC/C/GC/12, paras 2, 32, 49, 87. See also General Comment No 11 on Indigenous children and their rights under the Convention (12 February 2009), https://undocs.org/CRC/C/GC/11, paras 75-76.

[56] http://undocs.org/CRC/C/GC/24, (18 September 2019)

and may provide opportunities for learning for the formal child justice system. Furthermore, recognition of such justice systems can contribute to increased respect for the traditions of indigenous societies, which could have benefits for indigenous children. Interventions, strategies and reforms should be designed for specific contexts and the process should be driven by national actors.

- The UN Special Rapporteur on the rights of indigenous peoples has recommended:[57]

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

- All justice systems should ensure that children are able to obtain justice and protection, and where necessary to achieve this end, judicial procedures should be adapted to the specific needs of children.

- The best interests of the child should be given primary consideration and not subordinated to other communal interests, and best practices should be developed in instances when the best interests of the child may conflict with the maintenance or reestablishment of social harmony.

- Justice systems should effectively distinguish between adults and juveniles in the administration of justice. When the age of the child is disputed, procedures should be developed to protect the rights of the child.

- Certain punishments for children should be prohibited, including corporal punishment and banishment. Justice systems should neither encourage nor tolerate the forced marriage of children.

- Like adults, children should be afforded the opportunity to seek justice through official State justice systems when they choose.

[57] https://www.undocs.org/A/HRC/42/37 (2 August 2019), para 121.

PART VI: COORDINATION BETWEEN JUDICIAL SYSTEMS

15. Official State justice systems and indigenous and other traditional or customary justice systems should pursue increased coordination with one another in order to ensure the protection of human rights and the rule of law.

The characteristics of such coordination should be carefully tailored to the particular social, cultural and institutional context.

Commentary:

- With the appreciation that indigenous and other traditional or customary justice systems have the potential to effectively contribute to the protection of human rights and the rule of law, all justice systems of all kinds should undertake efforts to increase mutual understanding, cooperation and coordination. This is particularly incumbent upon official State systems which tend to have greater capacity than the other systems. Research and consultation with indigenous and other leaders are key starting points from which both sides can jointly and subsequently design engagement and coordination strategies.

- Harmful stereotypes should be confronted, particularly regarding indigenous and other traditional or customary justice systems. Those systems should be understood not as static in a particular time or place but as systems which can and do allow for progressive development. Consideration should be given to approaches that support positive changes within particular systems while maintaining their overall integrity. Non-indigenous actors should be aware of, recognize, and act with sensitivity to the legacy of colonial repression of indigenous justice systems, which set in motion dynamics of distrust of State institutions that frequently continues to the present, all too often accompanied by other forms of continuing discrimination and lack of recognition of the rights of indigenous peoples.

- Learning opportunities and opportunities to exchange knowledge about international and national protections for human rights, as well as the national legal system, should be offered to decision-makers and other actors within indigenous and other traditional or customary justice systems. Judges, prosecutors, lawyers and others active within the official State justice system should be offered similar opportunities concerning international and national protections for human rights of indigenous peoples and other relevant communities, as well as about any indigenous or other traditional or customary justice systems operating in the country.

- Justice systems may consider efforts to codify oral or customary law prevalent in indigenous and other traditional or customary justice systems, providing a measure of predictability as to what the law requires. However, careful attention should be paid to the potential detriment of removing flexibility and associated benefits that allow customary law to evolve over time. If codification efforts are pursued, measures should

be taken to maintain flexibility and adaptability. The UN Special Rapporteur on the rights of indigenous peoples has stated:[58]

> States should acknowledge that indigenous laws and juridical institutions change and develop over time. Any codification of indigenous laws should be designed to avoid freezing those laws as they currently exist, with a particular concern not to entrench any norms or practices that could otherwise develop in a more harmonious direction in accordance with international human rights.

- Deeper integration through hybrid structures should also be jointly considered. Prosecutors could serve as a point of liaison in a scheme that involves referral or diversion between the systems.

- At the same time, States must ensure that official State systems are improved and fulfil their international human rights obligations to all people, rather than depend exclusively on indigenous and other traditional and customary system to deliver justice to those communities.

- The UN Declaration on the Rights of Indigenous Peoples recognizes the rights of indigenous peoples to technical and financial assistance from States and international cooperation for the enjoyment of their rights (article 39), and such assistance may be appropriate for certain other traditional or customary systems as well.

- Engagement with marginalized groups – both in the form of official State systems engaging with indigenous and other traditions communities, as well as the leaders of those indigenous and other traditional communities engaging with women, minorities and other disadvantaged persons within their communities – should be pursued to enable those marginalized persons to assert their rights.

- Ultimately, specific strategies should be tailored to the circumstances and characteristic of a particular system. Indigenous and other traditional or customary justice systems should not be viewed as a monolith and should not be overgeneralized. All engagement strategies must be context specific, sensitive to and based upon a sound assessment of the local situation and developed in conjunction with the leaders and other members of affected communities.

- The UN Special Rapporteur on the rights of indigenous peoples has recommended:[59]

> 108. States and indigenous justice systems should develop and institutionalize processes of exchange of information, understanding and mutual capacity-building, both within their countries and with their counterparts in other States with pluralistic systems.

[58] https://www.undocs.org/A/HRC/42/37 (2 August 2019), para 116.

[59] https://www.undocs.org/A/HRC/42/37 (2 August 2019).

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

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

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

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

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

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