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Indigenous Women and Girls as Victims of Gender-based Violence: The UN Recent Work and Initiatives on Their Right to Justice and Reparation

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1. *Introduction.* – The establishment of the mandate of the UN Special Rapporteur on violence against women and girls, its causes and consequences, as the first independent human rights mechanism on this theme, which dates back to 4 March 1994,[1] has marked a watershed within the global women's rights movement. The recent report[2] elaborated in April 2022 by the current holder, Ms. Reem Alsalem's,[3] addresses the main challenges posed by gender-based violence against indigenous women and girls, shedding light on its main causes, manifestations and consequences. On a preliminary basis, it is important to remark that the whole spectrum of practices through which such type of violence can take form, including domestic and sexual violence, as well as femicide, has often a considerable impact not only on women and girls as individuals but also on indigenous peoples as a community, as they are capable of heavily influencing their collective rights and jeopardizing their cultural identity. The effects of violence can in fact permeate all aspects of indigenous women's lives and affect their right to dignity, security and health, among others. At the same time, according to the Report, considering that indigenous women and girls have been so far subjected to eugenically imposed birth control, forced sterilization and forced attempts to have children with non-indigenous men, in these cases «the violation of their collective rights is particularly pronounced through the denial of dignified and culturally sensitive enjoyment of their sexual and reproductive health and rights».[4] Violence acts whose perpetrators can be both State agents and non-State actors, such as private companies or armed groups, can exacerbate their effects in the context of migration or conflict where cases often go underreported. These aspects, which the work of the UN Special Rapporteur highlights, have been dealt with by other UN monitoring mechanisms as well in the course of last years, triggering important developments in this field.

[1] Office of the High Commissioner for Human Rights, *Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women*, 4 March 1994. Since March 2006, the Special Rapporteur reports to the Human Rights Council, as per Human Rights Council's decision 1/102.

[2] Human Rights Council, *Violence against indigenous women and girls - Report of the Special Rapporteur on violence against women, its causes and consequences, Reem Alsalem*, A/HRC/50/26, 21 April 2022. The report submission needs to be read in connection with Human Rights Council Resolution 41/17, which extended the Special Rapporteur's mandate while encouraging further work in the area: ID., *Accelerating efforts to eliminate all forms of violence against women and girls: preventing and responding to violence against women and girls in the world of work*, A/HRC/RES/41/17, 19 July 2019. The mandate was most recently renewed in 2022 by Resolution 50/7: ID., *Mandate of Special Rapporteur on violence against women and girls, its causes and consequences*, A/HRC/RES/50/7, 18 July 2022.

[3] Ms. Reem Alsalem was appointed by the Human Rights Council as Special Rapporteur on violence against women, its causes and consequences in July 2021 for a three-year term (which officially started on 1 August 2021).

[4] Human Rights Council, *Violence against indigenous women and girls - Report of the Special Rapporteur on violence against women, its causes and consequences, Reem Alsalem*, cit., para. 30.

2. *Judicial systems plurality and international human rights*. – Generally speaking, in the case of particularly vulnerable categories of indigenous individuals, such as women, children and persons with disabilities, accessing justice may be very complex and, as such, it requires States to adopt a holistic approach to address the intersectional forms of human rights challenges to which they are exposed also as a community, including poverty, racial discrimination, marginalization, scarce allocation of healthcare services, lack of recognition of lands, territories and resources and poor access to legal aid in judicial proceedings. In addition to that, some States do not recognize the peculiarities that characterize violence against indigenous women and girls. These often result in further barriers to access to justice, given the association of a high level of stigma with being a victim that usually deters them from reporting abuses either within the community, for fear of being ostracized, or to public authorities to escape from other potential forms of violence, including acts perpetrated by law enforcement officials, which ultimately feed distrust in the judicial system at large. This aspect, highlighted in Ms. Reem Alsalem's Report, found a more-in depth analysis in the earlier work of the another UN Special Procedure, the Rapporteur on the Rights of Indigenous people (2015).[5]

In any case, one of the most contentious issues linked to this matter deals with States' recognition of indigenous traditional justice systems. With no doubt, in several instances, the latter can provide better access to justice by offering different advantages to community members, including a certain level of familiarity with the internal institutions, in addition to a shared language that everyone can understand, as well as proximity, which is especially useful in rural and remote areas. In this respect, the applicable international legal instruments provide useful guidance on how States should deal with indigenous' justice traditions. ILO Convention no. 169 on Indigenous and Tribal Peoples in Independent Countries (1989)[6] affirms that the integrity of their values, practices and institutions shall be respected (Article 5.b). However, the only specific reference to women is contained in Article 20.3.d, which refers to equal opportunities, equal treatment and protection from sexual harassment; no other provision concerning prevention of or protection from violence exists in the Convention. On the other hand, the more recent 2007 United Nations Declaration on the Rights of Indigenous Peoples (hereinafter 'UNDRIP'),[7] strengthens the normative basis for indigenous justice by emphasizing their right to maintain their distinct political, legal, economic, social and cultural institutions (Article 5) while also spelling out a specific obligation in relation to indigenous women and other subjects with special needs, such as elders, children and persons with disabilities. In particular, under the Declaration, States are called upon to take all the necessary measures to ensure that they enjoy full protection against all forms of violence and discrimination (Article 22 of the UNDRIP). Nevertheless, although representing one of the most important global framework for driving States' efforts towards the advancement of indigenous' rights, one must bear in mind that the

[5] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples*, Victoria Tauli Corpuz, A/HRC/30/41, 6 August 2015, para. 71.

[6] International Labour Organization, *Indigenous and Tribal Peoples Convention*, no. 169, 27 June 1989.

[7] UN General Assembly, *United Nations Declaration on the Rights of Indigenous People*, A/RES/61/295, 2 October 2007.

Declaration is not technically binding. All in all, both instruments underline that States must respect indigenous justice systems as a manifestation of their right to self-determination.

At the same time, it is important to observe that indigenous women face obstacles within this context, too. As such mechanisms rule on the basis of customary laws, which often mirror a patriarchal social model (as it happens at the level of national formal mechanisms as well), women may have limited voice and participation. One of the examples reported by Ms. Reem Alsalem concerns Palestine: in the country, cases of gender-based violence tend to be first referred to *mukhtars*, who are the male community leaders. In this respect, Article 34 of the UNDRIP affirms that, if indigenous peoples have the right to «promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices, and in the cases where they exist, juridical systems or customs», however, this should happen «in accordance with international human rights standards».[8] Similarly, Article 8.2 of the ILO Convention reiterates that indigenous' customs shall not be incompatible with fundamental rights as defined by the national legal system and with internationally recognized human rights as well, stating that: «Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle». At the same time, according to the Study elaborated by the Expert Mechanism on the Rights of Indigenous Peoples in 2014, if these critiques may hold true in some cases, the risk of using these arguments to invalidate indigenous juridical systems under the generalized pretext of non-compliance with international human rights norms should be avoided carefully.[9]

With no doubt, plural justice systems entail the coexistence of multiple source of laws, whether formal or informal, that women may encounter when seeking to exercise their right to access to justice. The recent practice of UN treaty bodies clarifies that respect for international human rights is required at the level of non-indigenous justice systems as well. As a result, when discrepancies with international human rights arise, States' action may be required in order to ensure full compliance with their obligations. In 2013, in its *Concluding Observations on the Third Periodic Report of the Plurinational State of Bolivia*, the Human Rights Committee expressed some concern with respect to the absence of an explicit prohibition concerning corporal punishment as a disciplinary measure in home and institutional settings. It thus requested the State of Bolivia to put an end to its use in all domains based on Articles 7, 24 and 27 of the International Covenant on Civil and Political Rights, while also encouraging the adoption of non-violent forms of discipline as alternatives. Since the existence of such practice as a form of judicial remedy was also detected in the community-based system, Bolivia was called upon to organize public information campaigns to raise awareness of its harmful effects among

[8] Interestingly, Article 27 explicitly recognizes indigenous peoples' laws and land tenure systems in processes to adjudicate rights pertaining to lands, territories and resources.

[9] Human Rights Council, *Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities, Study by the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/27/65, 7 August 2014, para. 21. The submission of the study was requested by the Human Rights Council with Resolution 24/10 of 26 September 2013. The Expert Mechanism provides the Human Rights Council with advice on the rights of Indigenous Peoples, while also assisting Member States in achieving the goals of the UN Declaration on the Rights of Indigenous Peoples.

the native indigenous campesino people.[10] The Committee on the Elimination of Discrimination Against Women (hereinafter 'CEDAW') has also contributed in different ways to define the scope of women's access to justice in the field. In 2012, in its *Concluding Observations* regarding the advancement of women's rights in Mexico, the CEDAW, after having noted the existence of information indicating that the country's public security policy against organized crime had had a negative impact on indigenous rural women, who had experienced higher levels of violence since then, including femicide by the security forces, recommended the State guarantee effective and prompt access to justice to them, including appropriate redress mechanisms, and adopt measures to make the army and law enforcement officials respect indigenous women's human rights in the country.[11] In 2015, in its General Recommendation no. 33 on Women's Access to Justice,[12] the CEDAW reported several documented cases concerning the negative impact of intersective forms of discrimination on access to State-based justice for indigenous women, highlighting the fact that when complaints are lodged before public authorities, these often fail to act with due diligence to investigate, prosecute and punish perpetrators or to provide remedies.[13]

On a more general basis, General Recommendation no. 33 also clarifies that in addition to the obligations emerging from the Convention on the Elimination of All Forms of Discrimination Against Women,[14] which do not specifically focus on access to justice, there exist further ones that can be inferred from the text of the instrument directly. Such obligations all depart from the acknowledgment of the existence of the victims' right to a remedy, which the international community has referred to as an essential element for ensuring the effective realization of human rights following a violation.[15] All States' obligation depicted in the General Recommendation no. 33[16] can be traced back to this assumption. All in all, they are aimed at ensuring (i) that women have access to education about their rights; (ii) that they can lodge their complaints before competent and gender-sensitive dispute resolution systems; as well as (iii) that they can benefit from equal, effective and timely solutions of redress,[17] mirroring the victim's rights to truth, justice

[10] Human Rights Committee, *Concluding Observations on the Third Periodic Report of the Plurinational State of Bolivia*, CCPR/C/BOL/CO/3, 6 December 2013, para. 16.

[11] Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women, Mexico*, CEDAW/C/MEX/CO/7-8, 7 August 2012, para. 35 (e).

[12] ID., *General Recommendation no. 33 on Women's Access to Justice*, CEDAW/C/GC/33, 3 August 2015.

[13] *Ibid*., para. 10. This was based on its experience in considering the reports of States parties, its analysis of individual communications and its inquiries conducted under the Optional Protocol Convention on the Elimination of All Forms of Discrimination against Women.

[14] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979.

[15] See Human Rights Committee, *General Comment no. 29, States of Emergency (Article 4)*, UN doc. CCPR/C/21/Rev.1/Add.11 of 31 August 2001. In this General Comment focused on Article 4 of the International Covenant on Civil and Political Rights, the Committee considered the obligation of State Parties to provide remedies for any violation of the Covenant as non-derogable in state of emergency. See also F. LENZERINI, *Reparations for Indigenous Peoples in International and Comparative Law: An Introduction*, in F. LENZERINI (ed.), *Reparations for Indigenous Peoples, International and Comparative Perspectives*, Oxford, 2008, p. 7.

[16] Committee on the Elimination of Discrimination Against Women, *General Recommendation no. 39 (2022) on the Rights of Indigenous Women and Girls*, CEDAW/C/GC/39, 31 October 2022, para. 27. The Recommendation follows an earlier one issued in 2017, which has replaced historical General Recommendation no. 19 of 1992. ID., *General Recommendation no. 35 (2017) on Gender-based Violence Against Women, Updating General Recommendation No. 19 (1992)*, CEDAW/C/GC/35, 26 July 2017.

[17] ID., *General Recommendation no. 33 on Women's Access to Justice*, cit., para. 11.

and reparation in case of gross violations of international human rights law which are listed in the UN Principles on Reparation adopted with General Assembly Resolution no. 60/147 of 2005.[18]

Last but not least, with Recommendation no. 33, the CEDAW has carried out a detailed analysis of what are considered the fundamental interrelated components of access to justice in order to provide guidance to State Parties and other stakeholders on how to establish, maintain and monitor well-functioning justice systems, also specifying that when applied to the case of indigenous women and girls, the matter would require an approach tailored for their needs. The more recent General Recommendation no. 39 of 31 October 2022 on the Rights of Indigenous Women and Girls[19] has gone further by defining the details of such approach, which entails adopting a gender-oriented perspective, respectful of sex differences, while also taking into account from an intercultural point of view, the diversity of Indigenous Peoples, «including their cultures, languages, beliefs and values», as well as considering from a multidisciplinary view, the multifaceted identity of women and girls and how «law, health, education, culture, spirituality, anthropology, economy, science and work», among other aspects, have shaped and continue to shape their social experience.[20] Finally, General Recommendation no. 39 has clarified that integral reparations for human rights violations, including consideration for spiritual and collective harm, shall represent a key component of the administration of justice at all levels, both in the indigenous and non-indigenous system.

3. *Transitional justice for indigenous women and girls: truth seeking as a form of reparation.* – In the international legal discourse, the founding principles governing reparation following the breach of a State's obligation[21] provide that its aim must be to «wipe-out all the consequences of the illegal act and re-establish the situation, which would, in all probability, have existed if that act had not been committed».[22] Reparation can manifest in several different ways. In addition to restitution, compensation, rehabilitation and guarantees of non-repetition, it can lead to satisfaction through all the possible means by which redress can be symbolically granted to the victim of a human rights violation, including public apologies, commemorations, tributes to the victims, and verification of the occurred facts. Transitional justice mechanisms, whose activities are

[18] See UN General Assembly, *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*, Resolution 60/147 of 16 December 2005.

[19] Committee on the Elimination of Discrimination Against Women, *General recommendation No. 39 (2022) on the rights of Indigenous women and girls*, CEDAW/C/GC/39, 31 October 2022, para. 27. The Recommendation follows an earlier one issued in 2017, which has replaced historical General Recommendation no. 19 of 1992. ID., *General recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19 (1992)*, CEDAW/C/GC/35, 26 July 2017.

[20] ID., *General recommendation No. 39 on the rights of Indigenous women and girls*, cit., para. 5.

[21] B. STERN, *The Obligation to Make Reparation*, in J. CRAWFORD, A. PELLET, S. OLLESON, K. PARLETT (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 563.

[22] Permanent Court of International Justice, *Factory at Chorzów, Merits*, 1928, in *PCIJ Reports, Series A.* no. 17, p. 4, at 47. The Court has defined the secondary obligation to make reparation for the injury caused, which would arise following the breach of a primary obligation, as part of the general conception of law. See D. SHELTON, *Righting Wrongs: Reparations in the Articles on State Responsibility*, in *The American Journal of International Law*, 2002, pp. 833-856, p. 835, and for a more recent overview, ID., *Remedies in International Human Rights Law*, Oxford, 2015.

endorsed by the UN[23] and which are called upon to respond to the legacies of massive and systemic human rights violations, have often resorted to these type of reparation measures. The so-called Truth and Reconciliation Commissions (TRCs) represent a prominent example in this respect. TRCs have been active following historical periods of conflicts since the mid-1970's. Among them, those operating in Chile (1990-1991), Guatemala (1997-1999), Kenya (established in 2008 to investigate on what happened between 1963 and 2008 with respect to gross violations of human rights and other abuses), and Peru (2001-2003), have detected several gender-based violence acts committed against indigenous women ang girls.

Such commissions have always had significant potential to help strengthen their rights by recovering the 'historical memory' of what occurred through investigation, recognizing the dignity of victims and providing a forum in which they could share their experiences and tell their stories, as well as making recommendations on how to prevent future violations.[24] As quasi-judicial bodies, despite the limitations in adjudicating on the violations, they represent the first historical signal of States assuming their responsibility. Indeed, their establishment has marked States' official recognition of their obligations under international human rights and humanitarian law in several countries and the emersion of the strong will to create a sound basis for a new democratic order.

In any case, although their mandate is limited to specific objectives and they cannot take binding decisions, they can be enabled to access and investigative evidence without political restrictions. The findings of their final reports, normally containing recommendations on institutional reforms and reparations for victims, have stimulated further interesting developments in this area. In Canada, following the recommendations of the national Truth and Reconciliation Commission contained in the 2015 final report (and those formulated by the CEDAW after conducting a country visit in 2013), a three-year National Inquiry on Missing and Murdered Indigenous Women and Girls was launched. The final report published in 2019 found that a genocide driven by the disproportionate level of violence faced by indigenous women and girls occurred in the country through State's actions and inactions rooted in colonial ideologies. The report listed 231 imperative calls for justice supposed to address a range of interrelated issues concerning all forms of violence against indigenous women and girls in a holistic manner through the contribution of governments at all levels, social service providers, industry, and Canadian citizens, for the purpose of implementing transformative legal and social changes capable of ensuring justice to the victims.[25] In Peru, the national Truth and Reconciliation Commission called attention to the fact that underreporting regarding gender-based violence was assumed to be severe, shedding light on one of the most challenging issues that stands in the way of developing evidence-based policies and

[23] For an overview of transitional justice mechanisms, see UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General*, S/2004/616, 23 August 2004.

[24] F. LIBRIZZI, *Challenges of Truth Commissions to Deal with Injustice Against Indigenous People*, in *Indigenous Peoples' Access to Justice, Including Truth and Reconciliation Processes*, Institute for the Study of Human Rights, New York, 2014.

[25] Native Women's Association of Canada, *Transitional justice measures to address the legacy of serious violations of human rights and humanitarian law committed in colonial contexts, Submission to the UN Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-recurrence*, 7 May 2021.

national prevention plans.[26] In some other cases, the outcome of TRCs' work led to increased advocacy for indigenous women and girls' rights. In Guatemala, the lack of legal consequences stemming from the findings on sexual violence of the Commission for Historical Clarification's final report made several feminist civil society organizations set up a popular Tribunal of Conscience in March 2010, laying the groundwork for bringing legal cases before public authorities. Such unofficial tribunal, structured as a mock trial, provided space for sexual violence survivors to talk about their personal experience, an opportunity they had not been given in the official process.[27]

The importance of truth disclosure in case of serious human rights violations has been confirmed by the Inter-American Court of Human Rights' case *Fernández Ortega et al. v. Mexico*,[28] stating that the State's obligation to carry out a serious and effective investigation to verify the facts and identify the perpetrators of a sexual violation committed against an indigenous girl arises as soon as authorities become aware of the commission of the violation. In its reasoning, the Court emphasized the fact that the State did not take any measure on its own initiative to establish the truth of what happened.[29] Ultimately, it ordered to disseminate the results of the proceedings with the consent of the victim «so that Mexican society learns the truth about the incident».[30]

All in all, the effectiveness of truth commissions and commissions of inquiry's decisions may be jeopardized by a lack of action by States in implementing them. When not followed by changes to the legal framework, or by, at least, by the adoption of a strong policy program, they may result in mere empty proposals not leading to tangible results. Last but not least, especially in post-conflicts scenarios, truth seeking initiatives should also be combined with other justice mechanisms, capable of ensuring that the multiple expectations of a society emerging from an abusive past are met, including through the punishment of perpetrators and the provision of redress to the victims, as it may only happen in proper judicial processes or, if at all, in out-of-court reparation programs specifically conceived for victims.

4. *Concluding remarks.* – If the work undertaken in the field of gender-based violence by the UN at different levels may pave the way for interesting legal and institutional developments, there is still a long way to go. Indigenous women and girls are subjected to a complex web of acts of violence systemically occurring within the community-based system and outside, which further exacerbate its effects when intersecting with forms of structural discrimination to which they are exposed due to race, age, migration status and other characteristics. Several recent UN initiatives shed light on the

[26] The final report is available at www.cverdad.org.pe/ingles/ifinal/conclusiones.php#up. See J. SARKIN, S. ACKERMANN, *Understanding the Extent to Which Truth Commissions are Gender Sensitive and Promote Women's Issues: Comparing and Contrasting These Truth Commission Roles in South Africa, Guatemala, Peru, Sierra Leone and Liberia*, in *Georgetown Journal of International Law*, 2019, pp. 463-516, p. 512.

[27] A. CROSBY, M. BRINTON LYKES, *Mayan Women Survivors Speak: The Gendered Relations of Truth Telling in Postwar Guatemala*, in *The International Journal of Transitional Justice*, 2011, pp. 456-476.

[28] Inter-American Court of Human Rights, *Fernández Ortega et al. v. Mexico*, 30 August 2010.

[29] *Ibid*., para. 186.

[30] *Ibid*., para. 230.

barriers they may encounter in seeking access to justice, recommending that States enhance their commitment towards the protection of the rights of this particularly vulnerable category of subjects. In particular, plurality of judicial systems poses many challenges. As pointed out by the CEDAW: «Indigenous systems may be formally recognized by the State, operate with the acquiescence of the State, with or without any explicit status, or function outside of the State's regulatory framework».[31] While both the indigenous and State-based justice system offer some advantages to victims as long as they comply with internationally recognized human rights, improving the extent to which judicial protection can be offered to indigenous women and girls entails the incorporation of a gender, multicultural and interdisciplinary perspective with no distinction between the two. Against this backdrop, the efforts undertaken in some countries by transitional justice mechanisms have been particularly valuable. In Peru, the Truth and Reconciliation Commission attempted to determine whether sexual violence affected women differently from men. Nevertheless, a proper gender-based perspective was not adequately incorporated into the final Comprehensive Reparation Plan, with negative consequences on the implementation phase. The program was launched in 2007, focusing on individual and collective reparations following the national conflict (1980-2000), which primarily affected *Quechua*- and *Aymara*-speaking indigenous groups in the Andes Mountains, and the *Asháninka* people in the Amazonian forests. Whereas many communities benefitted from it, several advocacy groups have argued that women were not sufficiently represented in the agencies entrusted with its implementation and that, as a result, thousands of sexual violence survivors have not received reparation.[32] More generally speaking, such an approach would require indigenous women and girls' direct participation, to make them bring their perspective into the process. This should also be at the foundation of any legal or policy reform aimed at effectively preventing, investigating, and punishing acts that infringe their human rights that may accompany the initiatives aimed at pursuing a mere symbolic satisfaction. However, as observed by the Inter-American Commission on Human Rights, this still represents such an issue that the deployment of remarkable efforts by States is constantly required and strongly recommended in this respect to ingenerate a cultural change whose outcomes are far from being certain.[33]

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[31] Committee on the Elimination of Discrimination Against Women, *General Recommendation no. 33 on Women's Access to Justice*, cit., para. 5.

[32] UN Women, *Indigenous Women and the Women, Peace and Security Agenda*, 21 May 2016.

[33] Inter-American Commission on Human Rights, *Indigenous Women and Their Human Rights in the Americas*, OEA/Ser.L/V/II, Doc. 44/17, 17 April 2017, para. 166.