EMPOWERING INDIGENOUS PEOPLES TO CLAIM THEIR RIGHTS BEFORE NATIONAL COURTS, AN EXPERIENCE FROM GUATEMALA

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Introduction

As the United Nations advances towards a better understanding of what elements are central in ensuring that the development assistance it provides is effective and results in tangible changes for the lives of the people it seeks to assist, it has recently began to recognize the need to work in strengthening the capacity of rights-holders to demand their rights, as much as it works in strengthening the capacity of duty-bearers to meet their obligations; a key notion in the human rights-based approach to development the United Nations now promotes.[2]

Yet, development assistance programmes, even at the United Nations, still overwhelmingly focus on the duty-bearer's role, with fewer programmes devoted to working with rights-holders. The Office of the United Nations High Commissioner for Human Rights' (OHCHR) results framework for 2012–2013 for example, devotes five of its technical assistance global objectives (or "expected

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2 United Nations Development Group, UN Statement of Common Understanding on Human Rights-Based Approach to Development, Cooperation and programming (HRBA Portal, 2003), http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies

accomplishments") to duty-bearers, four to the international community's role, and only two focused on rights-holders.[3]

There are surely several reasons for this, but one element that I suspect contributes to this imbalance is the reduced number of experiences gathered in working with rights-holders, in comparison to the number of experiences gathered in working with duty-bearers; and the even fewer experiences, if we circumscribe our interest specifically to integrating Indigenous Peoples' rights into development assistance programmes.[4]

The present article seeks to describe one such experience, highlighting key elements that could be of use to other similar programmes, to promote greater attention to the potential this form of international assistance has in empowering Indigenous Peoples to claim their rights.

Indigenous Peoples' Rights in Guatemala

Guatemala is home to more than 25 different Indigenous Peoples, including the K'iche, Q'eqchi', Kaqchikel, and Mamm-speaking Mayans who represent about 5 million, other less numerous Maya groups, and the non-Maya Garifunas and Xincas. While exact estimations differ, all figures place Guatemala's Indigenous population above 40% of the general population.[5]

The country's Constitution has a chapter devoted to "Indigenous Communities" that calls for the protection of Indigenous ways of life, customs, traditions, social organisations, and languages (Article 66),[6]

3 Office of the United Nations High Commissioner for Human Rights, OHCHR Report 2012. Annex I – OHCHR's Results Framework (EAs and GMOs) (Geneva: OHCHR, 2013), http://www2.ohchr.org/english/ohchrreport2012/web_en/allegati/25_Annex_I_OHCHR_results_framework.pdf

4 Secretariat of the UN Permanent Forum on Indigenous Issues, *Indigenous Peoples and the MDGs: We Must Find Inclusive and Culturally Sensitive Solutions*, (2007) 4 UN Chronicle. http://www.un.org/esa/socdev/unpfii/documents/MDGs_article_in_UN_Chronicle.pdf

5 Secretaría de Planificación y Programación de la Presidencia, Guatemala un país pluricultural. http://www.segeplan.gob.gt/index2.php?option=com_content&do_pdf=1&id=85.

6 República de Guatemala, *Constitución de 1985 con las reformas de* 1993 (2011) Base de Datos Políticos de las Americas. http://pdba.georgetown.edu/Constitutions/Guate/guate93.html

but the country is far from being a pluricultural state, with 73% of the Indigenous population living in poverty, widespread discrimination of Indigenous Peoples in the cultural, economic, political, and social spheres,[7] and the Indigenous population greatly underrepresented in government posts.[8]

Despite advances in the investigation and prosecution of human rights violations committed during the internal armed conflict, including the conviction of former head of state Rios Montt for genocide in May 2013 (despite it being later overturned), and the convictions of other high-level officials for cases of massacre, rape and other crimes against humanity committed against the Indigenous population,[9] justice is still an aspiration to be met.

The 1996 Peace Accords that ended 36 years of conflict included numerous provisions to ensure an independent and well-functioning judiciary, and grant Indigenous Peoples true access to justice (including, for example, measures for customary law and traditional norms to be recognized, for Indigenous languages to be used in court proceedings, for the establishment of agrarian courts, and for conflict resolution mechanisms). For the most part, however, these provisions are yet to be implemented.[10]

7 OHCHR, Annual report of the United Nations High Commissioner for Human Rights. Addendum: Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala, 19th Sess., UN Doc. A/HRC/19/21/Add.1 (2012), http://www.ohchr.org.gt/documentos/informes/InformeAnual2011(eng).pdf

8 United Nations Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by Parties Under Article 9 of the Convention, 68th Sess., UN Doc. CERD/C/GTM/CO/11 (2006), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.GTM.CO.11.En

9 OHCHR, Annual report of the United Nations High Commissioner for Human Rights. Addendum: Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala, 22nd Sess., UN Doc. A/HRC/22/17/Add.1 (2013), http://www.ohchr.org.gt/documentos/informes/InformeAnual2012(eng).pdf

10 Oficina de Derechos Humanos del Arzobispado de Guatemala, Informe sobre su cumplimiento a 10 años de su
Vigencia: Acuerdo de Identidad y Derechos de los Pueblos Indígenas. (Ciudad de Guatemala: Centro Impresor Piedra Santa, 2007), http://www.odhag.org.gt/pdf/Informe_10_anios_AIDPI.pdf

Similarly, the strong foundation Guatemala has established for meeting Indigenous Peoples rights, through the ratification of instruments like the ILO Convention 169 on Indigenous and Tribal Peoples' Rights or the International Convention on the Elimination of All Forms of Racial Discrimination; through the invitations made for United Nations experts (such as the Special Rapporteur on the Rights of Indigenous Peoples, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance) to visit the country; and, through its collaboration with other human rights mechanisms like the Universal Periodic Review and the mechanisms of the Inter-American System, has provided the country with hundreds of precise recommendations on how to improve the situation of Indigenous Peoples in the country that still require attention.[11]

Access to Justice for Indigenous Peoples in Guatemala

As part of these efforts to strengthen the international framework for human rights in the country, in 2005 Guatemala invited the United Nations High Commissioner for Human Rights to establish an Office in the country with a broad mandate to observe human rights and provide technical advice on how to improve the human rights situation in the country[12] (one of only 13 countries that have done so).[13]

Based on this mandate, OHCHR and local think tank ASIES (Asociación de Investigación y Estudios Sociales) conducted a study in 2008 into the conditions Indigenous Peoples in Guatemala found in accessing justice, both in the application of ordinary and customary

11 *Supra* note 9, http://www.ohchr.org.gt/documentos/informes/InformeAnual2012(eng).pdf

12 United Nations, Acuerdo entre la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos y el Gobierno de la República de Guatemala relativo al establecimiento de una oficina en Guatemala, 16th Sess., UN Doc. A/HRC/16/20/Add.1 (2005), http://www.ohchr.org.gt/documentos/Mandato.pdf

13 OHCHR, OHCHR Report 2012: OHCHR's Approach to Field Work, (Geneva: OHCHR, 2013), http://www2.ohchr.org/english/ohchrreport2012/web_en/allegati/14_OHCHR_approach_to_field_work.pdf

law.[14] The study found four main factors that impede Indigenous persons from accessing justice before the ordinary court system:

a. The geographic and economic barriers caused by insufficient coverage of the ordinary law system, both in terms of location and number of justice operators; judicial processes before ordinary courts becoming especially costly to Indigenous Peoples, given that they often have to travel long distances to access justice operators, and when they do so, are faced with uncertainty over how long they will have to stay there or how many times they will have to return, given the delays that are common place in judicial processes. This, in addition to the onerous costs that litigation before ordinary courts already entails by requiring the person to hire a lawyer, and cover numerous legal costs throughout the process.

b. The language and cultural barriers caused by the general lack of recognition by justice operators of the ethnic and cultural diversity of the country; evident in the common refusal by justice operators to recognize customary law, but also in the refusal by the ordinary legal system to integrate Indigenous languages and cultures into its proceedings, with the impossibility of submitting written documents in other languages than Spanish for example, a scarce availability, if any, of interpreters and experts to testify on Indigenous cultures, and a general refusal to recognise Indigenous authorities and worldviews in court proceedings. A problem compounded by the limited number of judges and justice operators of Indigenous origin, or knowledgeable of Indigenous cultures and customary laws.

In addition to these four barriers, the study found Indigenous persons seeking to access the ordinary or formal legal system often faced

14 OHCHR & Asociación de Investigación y Estudios Sociales, Acceso de los pueblos indígenas a la justicia desde el enfoque de derechos humanos: Perspectivas en el derecho indígena y en el sistema de justicia oficial, (OHCHR & ASIES, 2008), http://www.asies.org.gt/sites/default/files/articulos/publicaciones/200805accesopueblosasiesoacnudh.pdf

lack of information as to how to access the judicial institutions; justice operators with racist and discriminatory attitudes; discretion in the application of the law; widespread corruption and lack of transparency; lengthy processes with very low levels of conviction and sanction of perpetrators; and other problems that have translated in a significant number of Indigenous persons avoiding the ordinary law system as a mechanism to seek redress to the abuses committed against them.

In terms of the Indigenous customary law systems, the study found that both ordinary system judicial authorities and Indigenous customary law justice operators lack knowledge and understanding of the other system, due to the lack of coordination and dialogue between Indigenous authorities and authorities of the State legal system. The study also found Indigenous authorities exercised customary law without any formal state recognition, public funds, or even recognition of the customary laws they apply. In addition, the study found that the following are common: threats, coercion, and intimidation against Indigenous authorities exercising justice; and interference from State law operators who often do not recognize rulings by Indigenous authorities, or ask Indigenous authorities to withhold knowing certain cases, rather than discuss with Indigenous authorities how to coordinate legal jurisdictions in these type of cases. The study also determined that the customary law systems often lacked fundamental human rights principles for due process, such as the right to legal recourse when decisions involve punishment.

Notably, the study found that Indigenous women and girls are the least able to claim their rights and get protection from either justice system, as Indigenous authorities often inhibit themselves of knowing cases of domestic and sexual violence, and women and girls are re-victimized, suffering discrimination and stigmatization (both from their communities and from justice operators), when accessing the State legal system.

Advancing Access to Justice for Indigenous Peoples through National Courts

Based on these findings, the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Guatemala, initiated a pilot programme in 2009 to train Indigenous organisations in strategic litigation before the national State legal system, and provide them with technical assistance in presenting pilot cases before national courts. In this sense, the "Maya Programme" (as it came to be known within OHCHR) took a middle-of-the-ground approach to capacity-building, in an attempt to avoid two extremes: what we could call a "detached approach" to supporting Indigenous organisations, through the provision of trainings and funds only, on the one hand, and what could be called an "intrusive approach", through the establishment of a new organisation to undertake strategic litigation to substitute earlier efforts by other Indigenous organisations to do so, on the other hand.

The combination of support to Indigenous organisations through trainings, funds and accompaniment throughout the litigation process, in the end proved to be the right choice, as four years after its implementation, an evaluation of the Maya Programme shows it has succeeded in promoting the use of litigation before the ordinary legal system as a tool for Indigenous Peoples to seek recognition of their rights, and has succeeded in testing the State legal system's response to these demands, pressing it to advance its recognition of Indigenous Peoples' rights beyond the specific litigation cases.

By succeeding in these two aspects, the Maya Programme has helped shape the wider dialogue between Guatemala's Indigenous Peoples and the Government, on the State's duty to fulfil Indigenous Peoples' rights. Each of the 18 cases presented by Indigenous organisations before national State courts in Guatemala, with the Maya Programme's accompaniment, helped advance one or more aspects of the Indigenous rights that are recognized by the international community and the State in human rights instruments like the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169.

The cases accompanied by the Maya Programme covered issues such as the Indigenous Peoples' rights: to practise and revitalize their

distinct cultural traditions and customs; to have access to their religious and cultural sites; to have their educational institutions provide education in their own languages, in a culturally appropriate manner; to establish their own media in their own languages; to be free from exploitation, and enjoy fully all rights established under applicable international and domestic labour law; to participate in decision-making in matters which affect their rights, and maintain their own Indigenous decision-making institutions; to be secure in the enjoyment of their own means of subsistence and development; to be actively involved in developing and determining the economic and social programmes affecting them; to their traditional lands, territories and resources, or to restitution or compensation, when these lands, territories and resources are occupied, used or damaged without their free, prior and informed consent; to the conservation and protection of the environment and the productive capacity of their lands, territories and resources; and to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.

One case, for example, led to the establishment of a policy to recognize traditional territories within protected areas; another led the Court to demand the Government to review the Mining Law in light of the commitments acquired by the country when it ratified ILO Convention No. 169; a third case resulted in the reinstatement of a Q'eqchi' representative in a Departmental Development Council, after she had been barred from participating in their discussions of the budget; a fourth case resulted in the recognition of Indigenous communal property rights over four thousand hectares that a Kaqchikel community had occupied since pre-Columbian times; a fifth case resulted in the State modifying the rules of the National ID document, to conform to the Q'anjobal forms of name structure; a sixth case resulted in a ruling from the Court exhorting Congress to legislate a norm that would recognize Indigenous community radios. Other cases have advanced communities' demands for bilingual education in their schools, for access to sacred sites, and others. The list could continue, but the length of the article impedes citing each case's achievements in detail. I hope the above examples, however, illustrate the potential strategic litigation has to advance Indigenous Peoples' rights.

Some Difficulties in Advancing Access to Justice for Indigenous Peoples through Litigation

To be fair however, one should note that each of these achievements required overcoming considerable obstacles, beyond the four general barriers outlined above, as each right carries specific challenges when litigating for its recognition, such as the need to present documentary proof of Indigenous Peoples' territories or authorities, when claiming recognition of Indigenous lands and territories. In the case of the Indigenous community of Chuarrancho for example, the elders had kept titles from colonial times showing they had re-bought their land from the Spanish Crown, but even though they could prove the community had land titles, the elders did not have the documentary evidence to demonstrate their role as authorities in the community, so they had to first form as a legally-recognized organisation, before having the 4,185 hectares that had been mistakenly assigned to the municipal government, restored to them by the court.

In other cases, the main challenge has been to respond to counter suits brought against Indigenous organisations litigating for Indigenous rights, as some of the interests touched by Indigenous Peoples' litigation—especially those related to land and consultation in extractive industry projects—touch powerful interests, with much larger economic and political resources, which can resort to opening counter suits, in civil or criminal courts, against Indigenous organisations, or use the media to qualify these as delinquents or even criminals. As OHCHR has observed, defenders of Indigenous rights in Guatemala have been accused in the past of "activities against national security", "radical groups" or "groups that are seeking to destabilize the system," and even sentenced to prison for claiming their right to consultation.[15]

Finally, because of the same asymmetry of power, Indigenous organisations litigating on behalf of Indigenous rights have found an added obstacle in translating their legal victories into the changes in public policy sought. In the case of Indigenous community radios claiming the right to promote their languages, Indigenous

15 *Supra* note 7, http://www.ohchr.org.gt/documentos/informes/InformeAnual2011(eng).pdf

organisations obtained a Constitutional Court sentence exhorting the National Congress to legislate a law that would cover the current vacuums on the promotion of Indigenous languages through media, but the sentence was ignored by Congress and the State, despite efforts at the national and international level for the sentence to be applied. In October 2012, Norway recommended Guatemala to follow up on the "decision that urges the legislative power to reform the legislation concerning access of Indigenous People to radio frequencies to promote, develop and diffuse their languages, traditions and other cultural expression" in the framework of the United Nations Universal Periodic Review.[16] Guatemala accepted the recommendation, re-establishing hopes that the sentence will be applied before Guatemala's next review in 2017.

Lessons Learned from the Implementation of the Maya Programme

Regardless of these obstacles, of the cases that did not achieve the objectives sought by the litigation, or other difficulties in litigation that the Maya Programme's cases encountered, the final balance shows that strengthening Indigenous organisations' capacities to claim for Indigenous Peoples' rights through litigation was a worthwhile endeavour for OHCHR in Guatemala. OHCHR found that the mere act of litigating in favour of their rights is an empowering experience for Indigenous communities that can revitalize their social organisation, regardless of the results. The testimony provided (in her own language) before the Constitutional Court by Ana Isabel Caal Xi, representative of the Maya Q'eqchi that had been excluded from the Departmental Development Council in Petén for example, had an intrinsic value in itself for her community, even if the result had been different, and the Constitutional Court would not have upheld the community's rights, ruling that the Departmental Development Council should include her in their deliberations. This empowerment

16 OHCHR, Report of the Working Group on the Universal Periodic Review: Guatemala, 22nd Sess., UN Doc. A/HRC/22/8 (2012), http://www.upr-info.org/IMG/pdf/a_hrc_22_8_guatemala_e.pdf

is perhaps as important as the outcomes of the litigation, and should not be overlooked.

In hindsight however, OHCHR realized that efforts to empower rights-holders, needed to be accompanied by efforts to strengthen the capacity of judges and other justice operators, including lawyers and attorneys, to deal with Indigenous Peoples' rights, enhancing their understanding of Indigenous Peoples' structures, ways of life and worldviews, as well as the international norms and standards and jurisprudence that exist to protect these. OHCHR also realized that it could do more to promote an unintended result of its assistance: the sharing of information on best practices and lessons learned between the Indigenous organisations that were part of the Maya Programme, and other Indigenous organisations with similar claims.

With regards to the latter, an informal support network for Indigenous organisations litigating in favour of Indigenous Peoples' rights has begun to emerge out of specific instances of cooperation with academic institutions, non-governmental organisation, and professionals that had assisted as expert witnesses, land surveyors, had submitted amicus briefs, or assisted in other ways in the litigation cases, and the sharing of experiences with other Indigenous organisations that are pursuing similar cases at the national and international level. In the Second Phase of the Maya Programme, which is set to begin in 2014, OHCHR expects to assist Indigenous organisations in developing tools to consolidate this collaboration. In response to the observed need for greater capacity building efforts with duty-bearers, the Second Phase of the Maya Programme will also begin new areas of work with the Judiciary, the Attorney General's Office, and the Institute of Public Defenders, to enhance their capacities to respond to the growing demands from Indigenous organisations through litigation, for the State to meet its obligations related to Indigenous Peoples' rights.

Conclusion

As the Maya Programme enters its second phase, the ultimate effect of OHCHR's approach remains to be seen, namely the approach in combining: a) support to Indigenous organisations' capacities to

litigate for the recognition of Indigenous Peoples' rights (through training, financial assistance, and accompaniment in the presentation of cases before national courts); b) support to the development of tools for Indigenous organisations to share their experiences in litigating on behalf of Indigenous Peoples' rights and form their own support networks; and c) support to the State officials' (Judges and judicial clerks, State Attorneys, and Public Defenders) capacities to respond to the increased demand for attention by Indigenous organisations to the recognition of their rights through courts. The programme's pertinence, relevance, effectiveness, efficiency, and the sustainability of its efforts, will only be measurable in four more years' time. But the potential this form of international assistance has, to empowering Indigenous Peoples to claim their rights can already be seen from the some of the results the programme has achieved. It is my hope that this short description of the Maya Programme will encourage other actors to consider similar approaches to assisting Indigenous Peoples in their quest for greater access to justice.