



## **International human rights perspectives on access to justice for indigenous peoples in Mexico**

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for the *Forum on Access to Justice for Indigenous Persons and Peoples*  
*Federal Judiciary Council***

Mexico City, 15 October 2018.

### **Introduction**

Dear ladies and gentlemen present here today. I would like to thank the Federal Judiciary Council for inviting me to speak before this important seminar on the issue of access to justice for indigenous peoples.

I want to give my respect to the indigenous peoples of this country whose right to access to justice is the subject of discussion in this seminar.

As Special Rapporteur on the Rights of Indigenous Peoples, I am tasked to look into the obstacles, challenges, barriers and good practices of States in protecting, respecting and fulfilling the rights of indigenous peoples. It was in the context of this mandate that I was invited by the Government of Mexico to undertake an official country mission from 8 to 17 November 2017. My mission had the two-fold purpose of assessing the implementation of the recommendations that my predecessor Special Rapporteur Rodolfo Stavenhagen made in 2003 and to evaluate how Mexico has implemented its international commitments on indigenous peoples' human rights.

As my final visit report states, indigenous peoples face great challenges in the exercise of human rights. Among the main human rights concerns identified by indigenous peoples were issues related to access to justice, self-determination and autonomy in the context of a grave situation of violence, impunity and criminalization.<sup>1</sup> My report also mentions positive developments such as indigenous peoples' own proposals and initiatives for self-government, autonomy and justice administration. These are also important elements to enable indigenous peoples' access to justice.

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<sup>1</sup> See generally, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Mexico, A/HRC/39/17/Add. 2 (28 June 2018).

In my presentation, I will begin by providing an overview of international human rights standards related to indigenous peoples' access to justice and their own juridical systems. Secondly, I will provide an overview of the findings made after my official visit to Mexico regarding access to justice, indigenous systems of justice and self-determination. I will then conclude with a discussion of further areas of work in the areas of indigenous justice systems and autonomy based on the recommendations I made in my country report.

### **Access to justice and indigenous juridical systems under international standards**

International human rights treaties and instruments ratified and supported by Mexico affirm the obligation of States to guarantee the ability of indigenous peoples to access justice within the national legal system. According to Convention 169 on Indigenous and Tribal Peoples, ratified by Mexico in 1990, indigenous peoples have the right to “be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of [their] rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means” (art. 12). Convention 169 also emphasizes that in situations where members of indigenous peoples face criminal penalties under general law, “account shall be taken of their economic, social and cultural characteristics” and methods of punishment other than prison shall be given preference (art. 10).

Mexico played a leading role in the approval by the United Nations General Assembly of the Declaration on the rights of indigenous peoples in 2007. As an official General Assembly resolution voted favorably by the vast majority of State members of the UN, the Declaration is the most authoritative instrument on the current international consensus on the rights of indigenous peoples which is also grounded in fundamental human rights in widely ratified international treaties.<sup>2</sup>

The Declaration affirms the right of indigenous peoples 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” and said decisions should consider the customs, traditions and legal systems of indigenous peoples and international human rights (art. 40).

Obligations also derive from the American Convention on Human Rights and the interpretive jurisprudence of the Inter-American Court of Human Rights. Regarding indigenous peoples' right to judicial protection, the Inter-American Court has stated that States must take into account indigenous peoples' “specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law,

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<sup>2</sup> See, Report of the Special Rapporteur on the rights of indigenous peoples James Anaya to the General Assembly, A/64/338 (4 September 2009), paras. 43-49.

values and customs.”<sup>3</sup> The Court specified that to enable indigenous peoples to access justice within national courts without obstacles or discrimination, “the State must ensure they understand and are understood in the legal proceedings started, thus offering them interpreters or other effective means for said purpose” and shall also guarantee they “do not have to make excessive or exaggerated efforts to access the centers for the administration of justice in charge of the investigation of [their] case.”<sup>4</sup>

The above international sources reflect the need for States to address disadvantages indigenous peoples face due to language, cultural, economic and other barriers within national legal systems. Without consideration to those barriers, members of indigenous peoples before the criminal justice system may face violations of due process if they do not understand the legal procedures instituted against them. It also presents limits for indigenous individuals, communities and peoples seeking to assert their rights in national legal systems. Without accessible courts or other legal mechanisms through which they can protect their rights recognized under national and international normative instruments, indigenous peoples are vulnerable to actions by others that threaten their lands, natural resources, cultures, sacred sites or economic livelihoods.

An important avenue to guarantee access to justice for indigenous peoples is the recognition and promotion of their own juridical systems. This would be an important response to the needs of indigenous peoples to access justice systems that are suited to their social, cultural, economic needs and particularities.

Convention 169 recognizes the rights of indigenous peoples to exercise their customs, customary laws and methods for dealing with penal matters subject to fundamental human rights principles recognized in domestic and international legal sources. Any conflicts in the application of these principles call for the establishment of procedures to resolve said conflicts (arts. 8,9).

The Declaration on the rights of indigenous peoples recognizes indigenous peoples’ own customary legal institutions which are linked to their rights to self-governance and self-determination. It affirms indigenous peoples’ right to self-determination by which they freely determine their political status and freely pursue their economic, social and cultural development (art. 3). Article 4 of the Declaration specifies that “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” In addition, it provides for the right of indigenous peoples to maintain and strengthen their political, legal, economic, social and cultural

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<sup>3</sup> IA Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005, para. 63; and IA Court H.R., Case of the Sawhoyamaya Indigenous Community v. Paraguay, Judgment of March 29, 2006, paras. 82,83.

<sup>4</sup> IA Court H.R., Case of Tiu Tojín v. Guatemala, Judgment of November 26, 2008, para. 100.

institutions (art. 5) and to promote, develop and maintain their institutional structures, including their juridical systems or customs (art. 34).

### **Main findings of official visit to Mexico**

#### *Challenges in access to the national justice system*

During my visit, I was able to hear of the problems indigenous peoples face in obtaining justice and reparations for violations of their human rights. This is aggravated by the presence of organized crime in indigenous territories and the overall situation of impunity afflicting the country.

According to official information received from authorities, impunity in the country is nearly absolute. There is a “black number”/ *cifra negra* of cases that are not reported due to lack of trust in the national justice system. For indigenous peoples, there continue to be economic, cultural, language and geographic barriers along with racism and discrimination that limit indigenous peoples’ ability to defend their rights before the national legal system. The information I received indicated problems in the respect of due process rights of indigenous individuals before the criminal justice systems due the shortage of indigenous language interpreters, lawyers, public defenders and justice operators who speak indigenous languages. For example, I was informed that there were only 25 bilingual public defenders operating nationally. I also noted concerns over abuses experienced by indigenous individuals including arbitrary arrests and excessive use of pretrial detention for indigenous men and women.

I took note of programs by institutions like the National Commission of Human Rights (CNDH) and the Federal Public Defense Institute to promote due process rights through the provision of indigenous language speaking interpreters and attorneys, specialized public defenders, anthropological expert reports, and for the prerelease of indigenous defendants in pretrial detention.

I consider that these are important programs that need to be continued and strengthened. However, there is also a need to develop mechanisms to ensure access to justice for indigenous peoples seeking protection of their lands, territories and natural resources in the context of megaprojects, agrarian conflicts and cases of environmental and health damages.

Indigenous peoples have experienced limited results in obtaining recognition and protection of their land rights through the use of the agrarian legal procedures. Numerous cases were submitted to me indicating that these procedures are neither simple or accessible and could involve lengthy proceedings. Efforts at obtaining land recognition can be hindered due to boundary disputes with other communities and private landowners or where agrarian and other authorities or third parties promote natural resource development activities in indigenous territories. Results can also be limited when lands that are recognized through these procedures do not correspond with their own traditional boundaries and concepts of territory. Delays in the resolution of land cases before agrarian tribunals have led to prolonged and often violent inter and intra communal conflicts. I found that access to

justice for indigenous peoples using the agrarian legal system could be seriously limited if current international standards on indigenous peoples' rights to lands, territories, natural resources and other human rights are not adequately incorporated and applied by agrarian authorities.

Indigenous peoples have also utilized the *amparo* mechanism brought about by the 2011 constitutional reform to seek protection of their rights in the context of megaprojects carried out in their lands without prior consultation. This is significant as the 2011 reform also facilitates the full incorporation and application of international human rights instruments ratified and adhered to by Mexico. However, this procedure may be very costly for indigenous peoples. Although the Supreme Court has decided on *amparo* actions related to these cases, it has not yet led to the development of binding jurisprudence on the States' obligation to consult indigenous peoples. The lack of implementation of various judgments favorable to indigenous peoples has also undermined the effectiveness of the national justice system. This needs to be addressed through actions by the Supreme Court and other relevant tribunals to step up existing mechanisms to ensure enforcement of those judgments.

In my report, I also pointed to the need for prompt investigation and criminal sanction of persons responsible for threats, aggressions and deaths of indigenous peoples. This would also include crimes committed by police and military agents against indigenous civilians, which must be brought before civilian jurisdictions. Paramilitary and other armed groups committing human rights violations in indigenous territories should be dismantled, disarmed and criminally sanctioned.

Furthermore, measures need to be adopted so that the criminal justice system is not used to criminalize indigenous peoples, or those that assist them, when engaging in the legitimate defense of their rights.

#### *Challenges in exercising indigenous justice systems, self-government and self-determination*

Article 2 of the Mexican Constitution makes an important recognition of indigenous peoples' rights to autonomy and self-determination, including their internal forms of coexistence, their social, economic, political and cultural organization and the application of their own legal systems to resolve internal conflicts. However, Special Rapporteur Stavenhagen noted this same article "hems it round with restrictions which make it difficult to implement it in practice." Article 2 adds that the laws of each federal entity will determine the "elements of self-determination and autonomy that may best express the conditions and aspiration of indigenous peoples in each State."

There is considerable variation among the states and at the federal level with respect to the recognition of the rights of indigenous peoples to elect their own authorities according to their own traditions. State legislation and federal electoral court decisions have reaffirmed the rights of indigenous peoples in states like Oaxaca, Michoacan, Morelos and Guerrero to elect local and municipal authorities according to their usages and customs.

Regarding the recognition of indigenous normative and juridical systems, some states have recognized indigenous community police, indigenous courts and other forms of conflict resolution systems. The National Criminal Procedure Code provides that in cases dealing with crimes affecting the legal interests of an indigenous person or people, and where the parties accept the resolution provided by the community's normative system, then federal criminal action would cease, except when it affects the dignity of persons and the rights of women and children. Nevertheless, there is no comprehensive national mechanism for coordination or interface between indigenous and ordinary jurisdictions.

On the other hand, indigenous peoples throughout Mexico have developed numerous proposals to promote their autonomy, self-determination and justice administration, especially where federal and state responses have been inefficient or non-existent. This includes Indigenous community-based police in Guerrero and Michoacan. However, recent efforts in Guerrero to undercut these advances could increase incidents of criminalization of these community-based practices. In Chiapas, the creation and promotion of autonomous municipalities and good-governance councils have responded to the needs of indigenous peoples in the areas of health, education, justice and other rights without creating dependence on government aid. These different actions taken by indigenous peoples have contributed to the reduction of crime at the local level.

### **Recommendations for further action in the promotion of indigenous justice systems**

The recommendations in my report emphasize the need to promote and strengthen indigenous autonomy, self-government and juridical systems. I pointed out the importance of indigenous peoples to continue developing and strengthening their own legal, policy and self-determination initiatives. As article 4 of the Declaration states, indigenous peoples have the right to ways and means for financing their autonomous functions. I consider that indigenous peoples' efforts in these areas offer great contributions to national debates and discussions on matters relating to security, justice administration and good governance. Therefore, avenues of dialogue, coordination and collaboration are needed between State authorities and indigenous autonomous institutions (such as community police, indigenous courts, good governance councils and autonomous municipalities) in areas of mutual interest.

#### *Coordination between indigenous and national justice system*

In Mexico, as in other countries, the recognition of indigenous juridical systems would also involve the establishment of mechanisms for harmonization and interface with the national or ordinary jurisdiction. Various countries in and outside of the Latin American region have developed legislation or jurisprudence seeking to establish parameters of coordination between the two systems of justice following constitutional or legislative recognition of indigenous jurisdiction and juridical systems. This has presented certain challenges and consequences for indigenous justice systems.

In Bolivia, constitutional recognition of indigenous jurisdiction was followed by legislation to enable coordination with the ordinary justice. However, by focusing on specific

competencies for indigenous justice authorities and areas where indigenous jurisdiction does not apply, the legislation resulted in significant restrictions on the jurisdictional powers of indigenous authorities.<sup>5</sup>

In my country, the Philippines, indigenous peoples' rights are recognized in the Constitution and in 1997 (10 years before the adoption of the UN Declaration on indigenous peoples) it became the first Asian country to adopt a law on indigenous peoples. The Philippine law recognizes the right of indigenous peoples "to use their own commonly accepted justice systems, conflict resolution institutions, peace building processes or mechanisms and other customary laws and practices within their respective communities and as may be compatible with the national legal system and with internationally recognized human rights." However, despite this law, the implementation of these rights also faces challenges due to the lack of clear mechanisms for the interplay between indigenous and ordinary justice authorities. A decision by the Supreme Court held that the National Commission on Indigenous Peoples could not adjudicate cases where one of the parties involved is not an indigenous person or does not belong to the same ethno-linguistic group as the other party, thus limiting the understanding of indigenous justice. While the National Commission is not an indigenous justice system, as it is the government machinery mandated to implement the Indigenous Peoples' Rights Act, limiting its quasi-judicial powers will have implications on how indigenous justice systems are recognized and utilized.

Efforts at creating mechanisms for interface between indigenous and justice systems need to provide a certain degree of flexibility in addressing the competencies of indigenous jurisdictional authorities. There should not be predetermined assumptions that indigenous jurisdictional functions have to be limited to only minor infractions, that it should only apply to members of the same community or people, or to only cases occurring within an indigenous peoples' territory. An important starting point is ascertaining and validating the jurisdictional powers that indigenous peoples already exercise *de facto*. An intercultural dialogue between indigenous and State justice authorities regarding the areas that indigenous justice operators consider they should adjudicate should be promoted with a view to guaranteeing a maximum level of autonomy for the indigenous peoples concerned. It is also necessary to recognize indigenous peoples' justice systems as dynamic in character, thus allowing them to evolve and adapt to future situations and contexts, in a manner that is consistent with their social, political and cultural precepts.<sup>6</sup>

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<sup>5</sup> See, Ley No. 073 de Deslinde Jurisdiccional (2010), art. 10. The matters in which indigenous jurisdiction was deemed not to reach included, inter alia, crimes against international law; crimes against humanity; crimes against internal and external security of the State; terrorism; drug-trafficking; trafficking of persons; crimes against children; rape and homicide; and matters dealing with labor, mining, oil and gas, and forestry laws.

<sup>6</sup> See, "Human rights, indigenous jurisdiction and access to justice: Towards intercultural dialogue and respect", Presentation by Victoria Tauli-Corpuz, United Nations Special Rapporteur on the rights of indigenous peoples for the International Seminar on investigative techniques and indigenous issues – Bogotá, Colombia (February 2016); and Informe del Relator Especial sobre pueblos indígenas, James Anaya,

### *Promoting an intercultural understanding of human rights*

Domestic and international legal sources state that the exercise of the right by indigenous peoples of customary justice practices must also respect fundamental human rights. In this regard, there needs to be a dynamic and intercultural understanding that takes into account the diverse manifestations of human rights.

In Colombia, the Constitutional Court has used cultural expert testimonies (*peritajes culturales*) in cases before them in order to understand a particular indigenous people's own precepts of justice, due process and the meaning of sanctions imposed. The Court considered there to be an "intercultural consensus" on the minimum human rights requirements that indigenous authorities were to respect in their decisions. These are the right to life, the prohibition against slavery and torture, and the right to due process. Due process would depend on the particular laws and procedures of the indigenous community concerned based on its social and political organization.<sup>7</sup>

I was informed of the use of cultural experts in certain legal proceedings in Mexico. This can be a useful practice to facilitate an intercultural dialogue which should be expanded in further debates and cases related to indigenous juridical systems. At the same time, it would be important to encourage the participation of indigenous elders and traditional cultural authorities as experts, in addition to academics.<sup>8</sup>

When there are legitimate concerns about the observance of human rights in a decision made by an indigenous authority or about the suitability of indigenous jurisdiction for a particular matter, specialized review bodies could be devised in addition to domestic courts. This could include an intercultural review body made of representatives of indigenous and ordinary justice authorities. Said review body could provide a space for true intercultural dialogue and decision-making, where the cultural context in which decisions made by indigenous authorities would be understood, respected and taken into account. These review bodies would need to contribute constructively to the respect and strengthening of indigenous jurisdictional powers.<sup>9</sup>

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Adición: Observaciones sobre los avances y desafíos en la implementación de las garantías de la Constitución Política del Ecuador sobre los derechos de los pueblos indígenas (2010), A/HRC/15/37/Add.7, paras. 10, 12.

<sup>7</sup> Sentencia T-523 de 1997.

<sup>8</sup> "Human rights, indigenous jurisdiction and access to justice: Towards intercultural dialogue and respect", Presentation by Victoria Tauli-Corpuz, United Nations Special Rapporteur on the rights of indigenous peoples for the International Seminar on investigative techniques and indigenous issues – Bogotá, Colombia (February 2016).

<sup>9</sup> See, *Ibid*; Informe del Relator Especial sobre pueblos indígenas, James Anaya, Adición: Observaciones sobre los avances y desafíos en la implementación de las garantías de la Constitución Política del Ecuador sobre los derechos de los pueblos indígenas (2010), A/HRC/15/37/Add.7, paras. 17, 54(d).

There needs to be an ongoing process of exchange of information, understanding and capacity-building between State and indigenous justice authorities. This would be a way for State authorities to learn about indigenous cultures, languages, customs, laws and procedures in order to prevent prejudicial attitudes against indigenous systems of justice. Indigenous peoples could also be informed about the functions and procedures of the ordinary justice system. Such exchanges could also help promote further knowledge of international human rights standards by both types of authorities.<sup>10</sup>

## **Conclusion**

The findings in my mission report on Mexico point to the existence of significant challenges in the areas of access to justice for indigenous peoples. This includes challenges in obtaining justice and reparations for human rights violations through the national justice systems, as well as exercising their rights to their own systems of justice and related rights to autonomy and self-government.

As detailed in my report, legal and institutional reforms need to be implemented to better respond to the needs indigenous peoples have in obtaining justice for violations of their rights to lands and territories, to be consulted regarding measures and activities affecting them, as well as for acts of violence, threats and intimidation that they face.

Said legal and institutional reforms need to incorporate the international human rights standards on the rights of indigenous peoples mentioned in this presentation. These efforts would need to ensure that mechanisms within the national justice systems are accessible and culturally adequate.

Access to justice also requires the respect and promotion of indigenous peoples' usages, customs, juridical systems, autonomy and self-governance initiatives, also recognized in the abovementioned international instruments. These international standards should guide the necessary processes of intercultural dialogue between indigenous and national justice authorities in order to devise ways of collaboration and coordination in areas of mutual interest, including security, justice administration, governance and the fight against impunity.

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<sup>10</sup> Ibid, para. 9; Human rights, indigenous jurisdiction and access to justice: Towards intercultural dialogue and respect", Presentation by Victoria Tauli-Corpuz, United Nations Special Rapporteur on the rights of indigenous peoples for the International Seminar on investigative techniques and indigenous issues – Bogotá, Colombia (February 2016).