

**We were born here,
We did not come here**

**Aquí hemos nacido,
no hemos venido**

**Machiwar kayopá temeyum
Iranon kuxpon tará**



**Indigenous peoples' rights
and hydro-electric projects
in Guatemala: The case of
the Ch'orti' in Chiquimula**

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The expert delegation meeting with Ch'orti' community members

The fact-finding team acted pro bono and without remuneration.

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EXECUTIVE SUMMARY

- 1 The indigenous Maya Ch'orti' community in Chiquimula, Guatemala, is in conflict with the companies *Las Tres Niñas* and *Jonbo* which plan to build hydro-electric dams on the Jupilingue river (also known as Río Grande). The Ch'orti' claim that these projects will affect their livelihoods and threaten their way of life. The stalemate has lasted 7 years and escalated into conflict with the local authorities and members of the community being criminalized.
- 2 The present report has been prepared by an independent delegation at the request of the Guatemalan non-governmental organization *Nuevo Día*, which works with the Ch'orti' communities. The delegation was invited to review the human rights impacts of the two proposed hydro-electric dams on the Maya Ch'orti' communities and in so doing meet with and received information from all parties and interests. This has included a wide range of community members, local and national representatives of the hydro-electric company, local and national government officials, actors of civil society and international diplomacy.
- 3 The key findings of the mission are as follows:
 - 3.1 Indigenous communities have collective rights under the Guatemalan constitution (Article 67) and under international instruments including ILO Convention 169 and the American Convention on Human Rights, which are binding on Guatemala, and part of its legal system (see sections I and J of this report). However, the delegation consistently found that the collective rights of the Ch'orti' as indigenous peoples were ignored, by key actors in the conflict such as the hydro-electric companies, as well as local and national government (see section O).
 - 3.2 The Maya Ch'orti', as an indigenous group, collectively hold the right to property to their ancestral lands irrespective of delimitation, demarcation or formal registration of the title to their lands. Their right to property includes rights to their land, territory and natural resources found therein (see section K). However, the right of the Maya Ch'orti' to their land has not been implemented but rather denied in practice in Guatemala. Indigenous communities have tried to find creative legal avenues to obtain recognition of their rights, with some modest success so far. Implementation of these rights is essential as the current practice in Guatemala is potentially in breach of the American Convention on Human Rights in light of the jurisprudence of the Inter-American Court of Human Rights (see section P).
 - 3.3 Guatemala is under an obligation, by virtue of its constitution and international conventions, "to consult with indigenous peoples and guarantee their participation regarding any measure that affects their territory" (see section L). This goes hand in hand with the rights of indigenous people to self-determination and the right to determine their own development (see section M). Consultation is not an aspiration or a mere soft law principle; it is a right.
 - 3.4 The delegation found that existing laws, such as the Law on Electrification in their current state, do not fulfil Guatemala's obligation to establish appropriate mechanisms to consult with indigenous peoples regarding projects that may affect their lands and natural resources. Existing mechanisms could usefully be expanded to help Guatemala meet required standards. Approval of any project for granting concessions for the exploration and exploitation of natural resources on indigenous people's land require certain mandatory conditions, among them: (i) non-approval of any project that would threaten the physical or cultural survival of the group; and (ii) approval only after good faith consultation- and, where applicable, consent. Good faith consultation implies a prior environmental and social impact assessment conducted with indigenous participation in conformity with their customs and traditions, and reasonable benefit-sharing (see section L).
 - 3.5 Moreover, the delegation found that in the Ch'orti' case the right to consultation was not observed because the principle of good faith has not been met. No such combined environmental and social impact assessment has been made. The delegation equally notes that no informed consultation has taken place as a result, since the precise information on the nature and consequences of the project on the natural environment together with the identification of the direct or indirect impact that this may have upon the ways of life of the Ch'ortis (who depend on their land and the resources therein (water) for their subsistence), was not made available. One of the facts such environmental and social impact assessment should address is the cumulative impact of existing and proposed projects in the

territory of the Maya Ch'orti. (sections L and Q)

- 3.6 The failure to recognize and respect Maya Ch'orti' collective rights to their land and to be consulted with regard to the use of natural resources on their land is at the root of the conflict unfolding in Chiquimula (see section S and T).
- 3.7 The business sector has come under increasing pressure to consider and integrate human rights and the environment in their practices (see section N). While not necessarily representative of all business in Guatemala, the hydro-electric companies showed no awareness of their obligations to respect in human rights or of the scope of indigenous rights. The current business model, which does not take account of human and indigenous rights, is ineffective, costly, and exposes business to legal action, as well generating social conflict (see section R).
- 3.8 The resistance of the Maya Ch'orti' to the construction of dams on their land, and to a form of development which they do not espouse, has led to chronic social conflict. Of significant concern to the delegation have been the pattern of criminalization of community members for protest, coupled with a failure to protect them from criminal acts. The delegation also noted reports of political exclusion of those active in resisting the dams, an approach counter-productive to the resolution of the conflict (see section U).
- 4 Much can be done to resolve the current position, both that of the Maya Ch'orti' of Chiquimula, as well as the wider issues at national level which this case epitomizes. The delegation has made a number of recommendations (see section V). By way of overview among other measures,

 - 4.1 The report recommends that the government ensure that an independent social and environmental study is undertaken with the full participation of all actors and in particular the indigenous communities likely to be impacted through their own decision-making bodies.
 - 4.2 The report calls upon the company to re-engage with the communities, address their concerns through open dialogue, and respect the outcomes of the consultations.
 - 4.3 The report recommends that steps be taken to recognize formally the indigenous identity of the Ch'orti' communities self-identifying as such.
 - 4.4 It recommends that the government and local authorities consult with the indigenous communities to clarify the extent of their ancestral lands and resources and accord them the protections set out in ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples.
 - 4.5 With regard to longer term measures, the delegation considers that a key step would be the drafting of a law and regulation on the right to consultation which follow principles reflected in the jurisprudence of organs such as the Inter-American Court of Human Rights in its interpretation of the rights of indigenous peoples under the American Convention.
 - 4.6 Finally, the delegation considers that a national review of policy regarding indigenous peoples is needed so that laws and practice align themselves with the rights established in international law to which Guatemala is a signatory.
- 5 The report considers that these confidence-building measures are urgently required to prevent further deterioration of the human rights situation of the Ch'orti' communities and social conflict. More widely, these steps would reduce social conflict across the country, create safer and more certain conditions for business and investment, and help raise the standard of living for the poorest communities of Guatemala. In engaging with such a wide-ranging venture, Guatemala will no doubt be able to count on the assistance and support of the international community.
- 6 As a new administration is taking up office as this report goes to press, the delegation expresses the hope that the government will place indigenous peoples' rights at the centre of its programme.

I BACKGROUND

A Purpose and scope of the mission

- 7 The indigenous Maya Ch'orti' community of the Chiquimula department in Guatemala is in conflict with the companies *Las Tres Niñas* in Jocotán and *Jonbo* in Camotán which plan to build hydro-electric dams in the area. Whilst *Las Tres Niñas* plans to build the *Orégano* Hydroelectric, *Jonbo* plans to build the *Cajón del Río* Hydroelectric on the Jupilingue river (also known as Río Grande).¹ The Ch'orti' claim that these projects will affect their livelihoods. The community's protests have led to conflict with the local authorities and the prosecution of a number of community members for alleged offences committed in resistance to the dam project. The community, company and local authorities have been locked in a stalemate for the last 7 years.
- 8 An independent fact-finding delegation was formed to investigate and report on the conflict. It was invited to Guatemala by the non-governmental organization *Nuevo Día* which advocates on behalf on the Maya Ch'orti' community. The mission was facilitated by *Peace Brigades International UK*, a UK-based non-governmental organization (NGO) which provided logistical support funded by the *Open Society*.
- 9 The three members of the delegation are independent experts in the field of human rights, indigenous peoples' rights and corporate social responsibility. They were Dr. Julian Burger, Visiting Professor at the Human Rights Centre, University of Essex and Fellow of the Human Rights Consortium at the School of Advanced Studies, University of London; Monica Feria-Tinta, barrister at 20 Essex Street; and Claire McGregor, barrister at 1 Crown Office Row.
- 10 The purpose of the mission was to investigate and record observations and findings regarding the conflict and make recommendations relating to any issues identified.
- 11 During the mission to Guatemala from 2 to 9 May 2015, the delegation met the relevant actors to the conflict and other organizations able to inform its understanding of underlying, systemic issues. These included:

Mayan Ch'orti' communities

- 11.1 The Mayan Ch'orti' communities, via representatives of their indigenous council (*consejo indígena*) and through larger meetings with the community;²
- 11.2 Two members of the community convicted of manslaughter (who are appealing the conviction) and held at Zacapa prison;
- 11.3 Representatives of the NGO *Nuevo Día*;

The Companies and supporters of the project

- 11.4 The CEO and local management of the companies *Las Tres Niñas SA* and *Jonbo SA*, which plan to build the hydro-electric dams;
- 11.5 Two local community representatives (*Cocodes*)³ who are supportive of the dam project;

The State: Local and National authorities

- 11.6 The Mayor of the Municipality of Camotán;
- 11.7 Officials from the Ministry of Energy and Mines;

¹ A third hydro-electric project known as "El Puente" on the same river, has also been planned.

² The mission met with representatives of the communities of Escobillal, Guareluche, Pelillo Negro, Matasano, Guahiquel, Las Flores, and Ingenio Guaraquiche in Jocotán and with representatives of the communities of Cajón del Río, Rodeo, Shupá, Lela Chancó, Lela Obraje, Pilincas, and Palo Verde in Camotán.

³ Community Coordinators from Caperjón and Shupá. On the Institution of *Cocodes* see para. 33.

International intergovernmental organizations and civil society;

- 11.8 Representatives of the Office of the United Nations High Commissioner for Human Rights in Guatemala (OHCHR);
- 11.9 Representatives of the International Commission of Jurists branch in Guatemala;
- 11.10 Lawyers at the Maya Programme, an NGO promoting strategic litigation with funding from the UN;

Embassies

- 11.11 The British ambassador in Guatemala and her staff;
 - 11.12 Representatives from the embassies of Canada, Germany, Italy, Mexico, Spain, Sweden, Switzerland, and the USA.
- 12 The delegation acknowledges at the outset that its investigation and findings are limited by the short period of time during which it was able to make observations. Not all of the actors were able to be interviewed, and it is certain that there may be a greater plurality of views than perhaps were able to be ventilated during our meetings. Further, the delegation was not a direct witness to some of the grievances raised by the parties, be it the community, local authorities or company. The delegation is grateful for the information provided by the relevant actors and organizations involved.

B Political context

- 13 As the human rights fact-finding mission to Guatemala took place, the country was shaken by public protests against corruption at the highest level of the state. On 9 May 2015, President Otto Perez Molina accepted the resignation of the country's Vice-President, Roxanna Baldetti, following allegations of corruption, and the ministers of environment, interior and energy as well as the heads of the intelligence services and the central bank were arrested on corruption charges. President Perez Molina was also called upon to resign, accused of corruption as well as of committing crimes against humanity during the civil war. The political crisis taking place during the visit together with the multitudinous and populist campaigns for the presidential, legislative and municipal elections due to take place in September 2015, only served to underline to the members of the mission the ongoing challenges facing Guatemala in terms of its weak democratic institutions, the limited independence of the judiciary, the endemic corruption and the enduring climate of impunity.
- 14 In the period 1960 to 1996, Guatemala endured 36 years of civil war. Under the auspices of the United Nations, peace was negotiated between the government and the Unidad Revolucionaria Nacional Guatemalteca (URNG) in 1996. The 1996 Accord for a Firm and Lasting Peace brought an end to the civil war, addressed issues such as the resettling of returned refugees and internally displaced, the recognition and promotion of the rights of indigenous peoples, the lawful role of civil society organizations, and covered issues such as impunity and human rights violations, land distribution and measures to strengthen democracy and the rule of law. The Commission for Historical Clarification set up to investigate and take testimonies from victims of human rights violations concluded that some 200,000 people were murdered or forcibly disappeared, mostly indigenous peoples. 83% of the total amount of victims during the armed conflict were Mayans.⁴ More than 90% of the crimes committed during the war were committed by the state or paramilitary groups under its control. The Commission concluded that acts of genocide were committed against the Maya Ixil people in the period 1980 and 1983 when General Rios Montt was President and the present President Perez Molina was Director of Military Intelligence.⁵
- 15 The underlying causes that led to the conflict remain largely unaddressed. Despite some reforms and efforts to address matters such as impunity, judicial independence, fairer land distribution and poverty, the country remains largely under the control of an unaccountable military and private sector with little of the Peace

⁴ OEA/Ser.L/V/II.118 Doc. 5 rev. 1, 29 December 2003. Inter-American Commission on Human Rights' Thematic Report on Guatemala, Justice and Social Inclusion: The Challenge of Democracy in Guatemala, at para. 216.

⁵ In 2013, Rios Montt was found guilty of the genocide of indigenous peoples and condemned to 80 years of prison. Two weeks later the country's constitutional court overturned the verdict on technical grounds and ordered a retrial. In the retrial set for January 2015, Montt was deemed too unwell to attend.

Accord implemented in practice.⁶ Guatemala is positioned at 132 of countries on the Human Development Index, after Haiti the lowest ranking in terms of human development in the Latin American and Caribbean region. It is also a country that has the lowest public spending compared to its GDP and a notoriously low taxation base inevitably affecting delivery of health, education and social programmes. Given the fact that Guatemala has one of the fastest growing populations in the region and a young population – 50% are 19 years old or younger – the low investment in education and vocational training means that one of the core causes of poverty remains unaddressed. More than 50% of the country's population is poor and in rural areas poverty levels reach over 70% and among indigenous peoples the figure is nearer 75%. Guatemala scores 52.4 on the Gini index, effectively meaning inequality is high even in a continent characterised by high disparities in income distribution. For example, while more than half the population of the country survive on less than 2 dollars a day, 0.003% of Guatemalans own 50% of bank deposits in the country.⁷

- 16 According to Transparency International, Guatemala is ranked at 115 of countries in terms of perceived corruption. Efforts to address corruption have been frustrated as noted in the most recent report of the Office of the UN High Commissioner for Human Rights.⁸ In 2014, a senior judge presiding over High Risk Tribunal A overseeing the trial of Rios Montt was barred from practising law for a year. The Attorney General Claudia Paz y Paz who had begun to tackle impunity, corruption and organized crime was forced to step down. The October 2014 elections for Supreme Court and Appeals judges were criticised internationally for not being independent to the extent that commentators consider the judicial system co-opted by interest groups.⁹ The perception that the justice system protects the interests of the rich and powerful was repeatedly commented upon in indigenous peoples' testimonies to the fact-finding team.
- 17 The country is also beset with high levels of violence and high rates of homicide averaging 16 murders a day. In 2014, 156 cases of lynching had been recorded as citizens took justice into their own hands.¹⁰ Guatemala has also become a major transit country for cocaine destined for Mexico and the USA, one reason why the homicide rate has doubled from 20 to 40 per 100,000 between 2001 and 2011.¹¹ A Guatemalan-UN body, the International Commission against Impunity in Guatemala (CICIG) has taken up a number of high-impact cases involving organized crime.¹² On a positive note, the Commission has been renewed for a further two years.

c Economic context

- 18 Guatemala is a predominantly agricultural country with half of the population living in rural areas in contrast to the trend in the rest of the region where urbanisation is 80%. Most of the people living in rural areas are indigenous.¹³ The predominantly rural character of Guatemala signifies that large numbers of people continue to be dependent on the land for subsistence and survival. However, in recent years there have been significant changes to the economy which is increasingly favouring the expansion of mono-cultures of coffee, sugar cane, palm oil and rubber to the detriment of food crops for domestic consumption which are estimated to have declined by nearly 40%.¹⁴ In 2014, serious food shortages were experienced in the area of Chiquimula and Zacapa (the area visited by the fact finding team), the so-called dry corridor, following a severe drought that placed more than a quarter of a million families in a situation of food insecurity. Corn production fell by 80% and bean production by over 60%. Despite emergency food supplies being ordered by Congress more than 100,000 families were left without food.
- 19 The development of export crops has been accompanied by the expansion of mining, oil and gas exploitation, hydro-electricity and other mega-projects. Such activities have had disproportionate impacts on indigenous

⁶ The Agreement on Identity and Rights of indigenous Populations, which represented the historical opportunity to ending exclusion and discrimination of Indigenous populations in Guatemala, among them.

⁷ *Hungry for Justice, Fighting Starvation in an age of plenty*, Christian Aid, Report, May, 2011.

⁸ Report of the United Nations High Commissioner for Human Rights on the activities of his office in Guatemala, 12 January 2015, A/HRC.28/3/Add.1 ("OHCHR report")

⁹ Comisión Internacional de Juristas, *Obstáculos y desafíos del derecho de acceso a la justicia en Guatemala*, Julio 2014.

¹⁰ OHCHR report para 10.

¹¹ International Crisis Group, *Latin America Report No.39*, 11 October 2011.

¹² OHCHR para 23

¹³ OEA/Ser.L/V/II.118 Doc. 5 rev. 1, 29 December 2003. Inter-American Commission on Human Rights' Thematic Report on Guatemala, Justice and Social Inclusion: The Challenge of Democracy in Guatemala, at para. 215.

¹⁴ OHCHR report para 65.

peoples, given rise to social conflicts and have been criticized for their long-term damage to the environment and the capacity of local communities to maintain their subsistence way of life and undermining their right to food.¹⁵ Since the 1990s, the government has taken a number of measures to facilitate foreign investment and mining and oil and gas exploration and exploitation including by requiring low or even no royalties from foreign companies. A subsidiary of the Canadian mining company Goldcorp, for example, was exempted from paying taxes on its Marlin mine.¹⁶ The decision by the Perez Molina government to raise royalties from 1% to 10% in December 2014 set off a barrage of complaints from foreign companies threatening to legally challenge the new law.¹⁷

- 20 Finally, mention needs to be made of the Mesoamerican Integration and Development Project (MIDB) launched in 2009 with the aim of integration of the Central American region through a series of infrastructural projects. The Project replaces the proposed Plan Puebla Panama (PPP) established to bring investment, regional integration and development through road, electrification, port and other construction activities. The PPP was vehemently opposed by civil society organizations as well as by the Zapatista movement in Chiapas, Mexico claiming that the project favoured multinationals over local communities and the environment. Its replacement, the MIDB, includes the Interoceanic Corridor which consists of a 370 km long and 100 metre wide highway to link the Atlantic and Pacific Oceans and will include a 4 lane highway and parallel rail, oil and gas pipelines. The proposed corridor, due to be completed in 2020, would run through the Guatemalan provinces of Chiquimula and Zacapa where the Ch'orti' people live.¹⁸

D Indigenous peoples of Guatemala

- 21 According to the 2011 National Census of Guatemala, indigenous peoples number 5.8 million, approximately 40% of the total population in the country of 14.4 million.¹⁹ Other sources estimate that the indigenous people constitute more than 50% of the national population. According to the Inter-American Commission on Human Rights, "the majority of the Indigenous population in Guatemala is Maya."²⁰ There are 21 distinct indigenous peoples of Mayan descent which are the Achi', Akateco, Awakateco, Chalchiteco, Ch'orti', Chuj, Itza', Ixil, Jacalteco, Kaqchikel, K'iche', Mam, Mopan, Poqomam, Poqomchi', Q'anjob'al, Q'eqchi', Sakapulteco, Sipakapense, Tektiteko, Tz'utujil and Uspanteko. There are also two non-Mayan peoples: the Xinca and Garífuna.
- 22 Inter-governmental organs both at UN level and at regional level in the Americas, have acknowledged that there is a history of discrimination since colonial times against the indigenous populations in Guatemala.²¹ The Inter-American Commission on Human Rights in particular has pointed out that discrimination of indigenous populations is "undeniable" in Guatemala.²² As in other Latin American countries, the indigenous population is notably poorer than the non-indigenous population. The 2008 Human Development Report estimates that 73% of indigenous peoples are poor as opposed to 35% for the population as a whole and 26% are extremely poor. Life expectancy of indigenous peoples is 13 years less than the non-indigenous population. Indigenous peoples have less access to education and are disproportionately underrepresented in secondary and tertiary education. According to one study, only 14% of indigenous girl children attend primary school.²³ Further intergovernmental reports note that 70% of indigenous children in Guatemala are malnourished.²⁴

¹⁵ See for example Comisión Internacional de juristas, *Empresas y violaciones a los derechos humanos en Guatemala: un desafío para la justicia*, diciembre 2014

¹⁶ The Marlin mine has been bedevilled with problems, social protests and criticisms by international bodies including the UN and ILO. See for example the publication "Metal mining and human rights: the Marlin Mine in San Marcos" Peace Brigades International, 2006.

¹⁷ For example see Mining.Com - <http://www.mining.com/miners-in-guatemala-to-pay-ten-times-more-royalties-75059/>.

¹⁸ The Corridor is being sold as an alternative to the Panama Canal which is unable to take the increased shipping of goods between the Pacific and Atlantic Oceans.

¹⁹ While the census identifies only 40% of the population as indigenous, indigenous organizations state that the figure is nearer 60%. Censuses on indigenous peoples are often unreliable and populations of indigenous peoples can be significantly different over 10 year periods if the formulation of the census question is changed. The latest estimate of the population of Guatemala is 15.5 million with an indigenous population of more than 6m.

²⁰ OEA/Ser.L/V/II.118 Doc, 5 rev. 1, 29 December 2003. Inter-American Commission on Human Rights' Thematic Report on Guatemala, *Justice and Social Inclusion: The Challenge of Democracy in Guatemala*, at para. 213.

²¹ Ibid. The Commission noted: "The present condition of the Indigenous populations in Guatemala is the result of the long colonial oppression process against the Mayan people as of the XVI Century, consolidated under the liberal national Government during the XIX Century, upon the constitution of a governing class that based its power on large rural land property and the exploitation of Indigenous labor, within the framework of authoritarian and patrimonial regimes." See also "Human Rights and Indigenous Issues: Mission to Guatemala" Report of the United Nations Special Rapporteur, Mr Rodolfo Stavenhagen. E/CN.4/2003/90/Add2, February 10, 2003, para. 5.

²² Ibid, at para. 214.

²³ Hallman et al, *Multiple Disadvantages of Mayan Females: The Effects of Gender, Ethnicity, Poverty and Residence on Education in Guatemala*, Population Council Report (2006), p 14.

²⁴ See Center for Economic and Social Rights (CESR), Fact Sheet No 3, p. 2. http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/CESR_Guatemala43_en.pdf

- 23 In addition to the generally disadvantaged situation of indigenous peoples in the country, there are major issues of human rights arising from large-scale projects, particularly in relation to resource extraction on indigenous peoples' lands. As noted by the UN Special Rapporteur on the rights of indigenous peoples:

*"... the business activities under way in the traditional territories of the indigenous peoples of Guatemala have generated a highly unstable atmosphere of social conflict, a situation recognized not only by the affected peoples but also by the public authorities, civil society and the companies themselves. It seems that this situation has not only had harmful repercussions on the indigenous peoples and communities but has also made it difficult for the Government and for business people themselves to promote investment and economic development in Guatemala."*²⁵

- 24 The legislation passed by Congress to facilitate investment in large-scale projects has not included any recognition of the particular situation of indigenous peoples, their interests with regard to their traditional lands, or their rights to be consulted. This is the case of the Mining Act, the Hydrocarbons Act, the Forestry Act and the Electricity Act. More will be said of the limited consultation requirements of the Electricity Act later.

- 25 In general, there is neither a recognition of indigenous peoples' rights over their traditional lands nor any procedure in place to ensure good faith consultations are undertaken. Furthermore, when indigenous peoples have held their own consultations, they have not been recognized. None of the more than 70 community-based consultations carried out by communities affected by large-scale projects have been given consideration by the government and the Constitutional Court has declared them non-binding.²⁶ These community-based consultations have been initiated because of the failure of the government to respect the engagements required under ILO Convention 169 on indigenous and tribal peoples.²⁷

- 26 Of relevance to the present report is the case of the Chixoy Dam. The Chixoy hydro-electric dam was built between 1976 and 1985 and is the largest in the country. It caused the forcible displacement of 33 communities of Maya Achi of about 3,500 persons and resulted in the massacre of 440 persons. In the absence of national action to recognize the human rights violations caused or provide compensation for the loss of homes and livelihoods, the communities eventually sought a decision from the Inter-American Commission on Human Rights which recommended the Government pay compensation. In 2014, the President rejected the compensation plan stating that the country was not bound by rulings of international bodies. The President, following pressure from the US and the World Bank and Inter-American Development Bank which had part funded the Dam, agreed to a compensation package in October 2014. Thirty years on, hydro-electricity projects are still a major source of conflict. According to the 2014 OHCHR report, communities opposed 14 of the 36 hydroelectric plants being constructed or planned. The report continues:

*"In view of the State's lack of intervention to guarantee that indigenous people are fully informed and consulted, some companies made direct contact with the communities, which in many cases led to divisions within communities, given the failure to observe their traditional forms of organization and decision-making."*²⁸

²⁵ Report of James Anaya, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, "Preliminary note on the application of the principle of consultation with indigenous peoples in Guatemala and the case of the Marlim mine" United Nations 2010 (A/HRC/15/37/Add.8), para. 5.

²⁶ Observatory for the Protection of Human Rights, "Guatemala 'Smaller than David': the struggle of human rights defenders," International Fact-Finding Mission Report, February 2015, p. 13.

²⁷ Guatemala ratified ILO Convention 169 in 1996 which is legally binding. Article 15 (2) reads: "In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."

²⁸ OHCHR para. 60.



“What is the Jupilingo river? It’s a miracle to see the river because for the last three years we have lost our harvest from drought. It’s a miracle. It is our only natural resource, our source of life. Our lives depend on it”



The view of the valley where a hydroelectric project is planned

II MAIN ACTORS IN THE CH'ORTI' CONFLICT

E The community: the Ch'orti' of Chiquimula

"We are the indigenous people of Ch'orti' territory. We were born here. We did not 'come' here"

("Somos originarios de la tierra Ch'orti'. Somos nacidos. No hemos 'venido'")

- 27 The Ch'orti' are one of the indigenous Maya peoples. They live in southeastern Guatemala, northwestern Honduras and northern El Salvador. They number approximately 51,000. The majority of Ch'orti' live in Guatemala, including large numbers in the region of Chiquimula.²⁹ Their traditional language is the Maya Ch'orti'



Map of Guatemala showing Chiquimula region in red

- 28 In common with other Maya peoples, the Ch'orti' hold a special relationship to the land. When asked what they mean by their territory (*territorio*), they explain that it is the land where they were born, where their ancestors were born, and where their children will be born. *"It is where we originate, where we all live, where we grow up, where we eat, and sit to rest."* They told us: *"The land is, and has always been ours. It is the inheritance left by our ancestors"* (*"Es de nosotros, sigue siendo de nosotros. Es nuestro patrimonio, desde nuestros ancestros. Nos lo dejaron nuestros abuelos"*). Their understanding of territory comprises the earth, the rocks, the forest and the river – all of which require their care.
- 29 The river in question is the river *Río Grande de Jocotán* or *Jupilingo* (as it is known by the locals) which traverses

²⁹ "The census lies, it minimizes the Ch'orti people." ("El censo miente, minimiza al pueblo Ch'orti"). (Interview with Jeremías, representative of Nuevo Día]. The Ch'orti' spread around Camotán, Jocotán, and beyond, including Olopa, Unión Zacapa and other municipalities of Zacapa.

Ch'orti' ancestral lands in Honduras as well as the Chiquimula region. Because Chiquimula belongs to the region known as the *corredor seco* (or dry corridor), where there is little water or vegetation, community members describe the Jupilingo as a miracle. *"What is the Jupilingo river? It's a miracle to see the river because for the last three years we have lost our harvest from drought. It's a miracle. It is our only natural resource, our source of life. Our lives depend on it"* (*"Que es el río Jupilingo? Es un milagro ver ese río porque 3 años que se pierde cosecha por la sequía. Es un milagro. Es el único bien natural que nos da la vida, de eso vivimos*). We were told of their dependence on the Jupilingo: *"When there is no water, we rely on the river."* (*"Cuando no hay agua, tenemos que ir al río"*). The Ch'orti' people also describe having very close links to the forest. They say all Ch'orti' people have a forest next to them, not to exploit but to live with.

- 30 The Ch'orti' community support themselves mainly through agriculture on the mountain slopes. As they put it: *"We eat from the land"* (*"Comemos de la tierra"*)³⁰. They grow essentially beans and maize, crops which are vulnerable to the frequent droughts in the region. The river is essential in supporting the crops grown by the Ch'orti' as well as providing water for cattle.³¹
- 31 The river serves the Ch'orti' in other essential ways. Families collect water for cooking from the river; they bathe in the river and women bring their clothes to wash by the river.
- 32 The Ch'orti' in common with other indigenous peoples in Guatemala and in the wider region, govern themselves by means of an indigenous council. This is composed of elected community members.
- 33 Governmental structures known as the COCODES have also been created. The delegation was informed that these operate in different ways in different regions of the country. In some instances, they are formed of elected individuals, in a manner similar to the indigenous council. In other instances, members are appointed to the COCODES by mayors with a view to being a conduit of communication between the community and local government. It cannot be said that the COCODES and its members are always representative of the views and wishes of the communities.
- 34 In the course of its investigations, the delegation met with representatives of the indigenous council of 7 communities from the municipality of Jocotán and 7 Communities from the municipalities of Camotán. These included:
- 34.1 Communities from Jocotán municipality:
- Las Flores
 - Matasano
 - Guareruche
 - Escobillar
 - Pelillo Negro
 - Guahiquel
 - Ingenio Guaraquiche
- 34.2 Communities from the Camotán municipality
- Cajón del Río
 - Palo Verde
 - Lelá Obraje
 - Lelá Chancó
 - Shupá
 - Rodeo
 - Pilincas
- 35 The location of the communities is set out in Appendix A.

³⁰ *"We plant different varieties of corn, beans and pumpkin in the milpa system"* (*"Plantamos maíz, camagüa, el lote, jilote en milpas (chicas); sembramos frijol, el chupe, ajote, perome grande"*).

³¹ *"The animals, cattle, cows, go to the river to drink water."* (*"Los animales, las reses, vacas, van al río a beber agua"*).

F Nuevo Día

- 36 Nuevo Día means ‘new day.’ This is the shortened name of the NGO Ch’orti’ Campesino Central Coordination Nuevo Día. It advocates on behalf of Ch’orti’ communities in the department of Chiquimula. Part of its work includes training and informing rural communities on issues relating to the rural economy, the environment, rights and land, in coordination with other organisations in the region. It supports the indigenous council of various villages to organise their response to threats to their communities and helps coordinate their actions. The organisation includes members from 32 Ch’orti’ communities in the region, some self-identifying as indigenous, some as campesino, some as mixed.
- 37 Nuevo Día also provides legal advice to communities seeking formal recognition of their status as indigenous Maya Ch’orti’ people. The community of Las Flores, which the delegation met, was the first indigenous Ch’orti’ community recognized as such by the Guatemalan state in a recent application for this status.
- 38 Nuevo Día also supported members of the community of Camotán to make claims in the national courts for childhood and adolescence (*Juzgado de la Niñez y la Adolescencia*) for the malnutrition of five children suffering from lack of food following drought conditions. These claims were successful and forced the government to take responsibility for issues of malnutrition in the region.³²
- 39 Members of Nuevo Día described central aspects of their work as consisting of:
- 39.1 Sharing ideas, or *Ti b’ana ri’ pixab’*;
 - 39.2 Creating a space for encounter and discussion within the communities;
 - 39.3 Advocating for their right to equality as they feel the indigenous Mayan population has been historically discriminated against;
 - 39.4 Supporting women’s rights and the need to establish and secure their place within their own organization and community leadership;
 - 39.5 Obtaining respect, rather than generating fear;
 - 39.6 Seeing the humanity in all, and sharing the resources of mother Earth.
- 40 Their cosmic vision sees the notion of duality linked to the idea of complementarity as two interdependent aspects of the same thing producing harmony and equilibrium. By complementarity they understand that the human being is immersed in the Cosmos and is part of nature. In nature every source of life has value. The parts of the whole complement each other. By equilibrium they understand that if all things existing within the Cosmos complement each other, there is a collective responsibility for keeping that equilibrium.

G The company: Las 3 niñas

- 41 The communities were concerned with two hydro-electric projects: one in El Orégano and one in El Cajón del Río. These dam projects were owned and planned by two different companies, although they appeared to the delegation to be owned by the same person:
- 41.1 Las Tres Niñas SA plans to build *El Orégano* hydro-electric dam on Río Grande between Zacapa and Chiquimula. The application for the licence from the Ministry of Energy and Mines specified a height for the dam of 120 metres³³ and a production of 30 Megawatts. However, the director of the company building the dam, Mr Jongezoon informed us that the project had been downsized 6 months prior to our meeting in May 2015 to a dam of 49 metres. It has a 50 year licence. Construction was due to

³² See for example Case No 19003-2011-00641-Of. 1ª. Juzgado de la Niñez y la Adolescencia y de los Adolescentes en Conflicto con la Ley Penal, Department of Zacapa, Zacapa, Judgment of 31 May 2013. See also “Derecho a la alimentación: Cinco niños olvidados ganan juicio al Estado”/“Right to food: Five forgotten children win legal case against the State” Report by Rodrigo Baires Quezada and Angel Mazariegos Rivas (08/07/2013). Available on <http://www.plazapublica.com.gt/content/cinco-ninos-olvidados-ganan-juicio-al-estado>.

³³ Although Mr Joangezoon told us that the application for the license was for 115 metres, official sources from the Ministry informed us that it was for 120 metres.

commence in April 2015 and finish in April 2018, but had not started at the time of the delegation's visit. Licences were obtained on April 2011³⁴. Applications made in June 2010.³⁵

- 41.2 Jonbo SA plans to build a dam in *Cajón del Río* with a height of 15 metres and a production of 4 Megawatts, according to the local manager. We were informed by officials from the Ministry of Energy and Mines that dams with a production less than 5 megawatts do not require a licence and can be built by anyone. Accordingly, this dam does not appear to be subject to regulation.
- 42 We met with Mr Kenneth Jongezoon, who introduced himself as the director and owner of both companies. Mr Jongezoon was at pains to highlight that his grandmother had been a Ch'orti. He prided himself on being able to bring clean and renewable energy to Guatemala and Chiquimula in particular.
- 43 When asked about the ownership of Las Tres Niñas SA and Jonbo SA, Mr Jongezoon maintained that he was the sole owner. The NGO Nuevo Dia, however, claims that both companies are owned by a larger group called Trans America Group,³⁶ which owns other businesses in the field of telecommunications, technology, and financial and management consultancy. We were able to verify that the companies do feature on the website of Trans America Group. This company, it is claimed, is owned by the Gutierrez-Bosch families, one of the richest in Central America.

II Municipal and national authorities involved

- 44 Local government structures include:
- 44.1 The Alcaderías, or mayor's offices. The Alcalde, or mayor, is elected in local elections for a term of 4 years.
- 44.2 The gobernación (provincial government);
- 45 It was not possible for the delegation to meet any representatives of the gobernación. However, we met with the Alcalde (mayor) of Camotán, Byron Gonzalez. The Alcalde of Jocotán declined to see us.
- 46 At a national level, the main actors are :
- 46.1 The Ministry of Environment, and
- 46.2 The Ministry of Energy and Mines.
- 47 The mission met with representatives of the Ministry of Energy and Mines which is ultimately responsible for giving permission for the building of hydro-electric dams, mines or other large energy project. However, we understand the permission process requires cooperation between both ministries.

³⁴ <http://www.energias4e.com/noticia.php?id=472>. Letter of Mr Jongezoon dated 08 October 2012 (on file with the mission), referring that the company had obtained a license ("*Contrato de Autorización Definitiva para utilizar bienes de dominio público para la Instalación de centrales Generadoras Hidroeléctricas,*") from the Ministry of Energy and Mines (MEM). That the project had a license was confirmed to us by the Ministry of Energy and Mines of Guatemala.

³⁵ http://en.centralamericadata.com/en/article/home/Guatemala_Hydroelectric_Project_Tres_Ninas_Moves_Forward

³⁶ <http://www.americatransgroup.com/>



Indigenous Ch'orti' community members indicating the areas that may be affected by the hydroelectric project in Jocotán



Member of Nuevo Día. The T-Shirt reads "I am Ch'orti' and I defend my territory because I love life"

I The Guatemalan legal system

Guatemala is formed by diverse ethnic groups among which are found the indigenous groups of Mayan descent. The State recognizes, respects, and promotes their forms of life, customs, traditions, forms of social organization, the use of the indigenous attire by men and women, [and their] languages and dialects.

*(Constitution of Guatemala 1986, Article 66
(Protection of Ethnic Groups); Third Section (Indigenous Communities))*

- 48 Guatemala is a country with a civil law system. Article 175 of the 1986 Constitution enshrines the principle of the primacy of the Constitution over any other domestic law.³⁷ It provides for the “ipso iure nullity of any law that goes against the Constitution.”
- 49 Indigenous groups of Mayan descent are recognized at Constitutional level as “Indigenous Communities.” The Constitution places positive duties on the State in respect of indigenous communities, including those of Mayan descent. Article 66 not only states that the State acknowledges and *respects* (duty not to interfere with their rights) indigenous communities in Guatemala, but it places the positive duty to *promote* their way of life, customs, traditions and their organizations, languages and dialects, on the State.
- 50 Article 67 of the Constitution similarly sets up positive duties on the State in respect of the right to property of indigenous communities of Mayan descent. Whilst Article 39 guarantees the right to property “as an inherent right,”³⁸ Article 67 recognizes the existence of collective property in Guatemala. It acknowledges that indigenous communities collectively own lands that historically have belonged to them and places a duty to *protect* such property, on the part of the State.³⁹
- 51 Like many civil law systems in Latin America, the Guatemalan legal system incorporates international human rights treaties ratified by the State, into Guatemalan law, making them part of its legal system. In that sense Guatemala is a monist system. Moreover, Article 46 provides for the pre-eminence of international human rights law binding on Guatemala, over Guatemala’s own domestic law. It reads:

Article 46: Pre-eminence of [the] International Law

The general principle that within matters of human rights, the treaties and conventions approved and ratified by Guatemala, have pre-eminence over the internal law[,] is established.⁴⁰

- 52 Against the plain meaning of the wording *derecho interno* (domestic law or internal law) the Constitutional Court in Guatemala has interpreted that the notion of “domestic law” would not include the Constitution, thus attempting to limit the pre-eminence of international human rights treaties binding on Guatemala, to laws below the Constitution only.⁴¹ This interpretation contrasts with the interpretation adopted by the Supreme Court years earlier which stated “*Human rights treaties and international conventions prevail over all national*

37 Article 175: Constitutional Hierarchy No law may contradict the provisions of the Constitution. The laws that violate or distort [tergiversen] the constitutional mandates are null ipso iure. [...] / Art. 175 Jerarquía Constitucional: Ninguna ley podrá contrariar las disposiciones de la Constitución. Las Leyes que violen o tergiversen los mandatos constitucionales son nulas ipso iure. [...]

38 Article 39: Private Property Private Property is guaranteed as a right inherent to the human person. [...]

39 Article 67: Protection of the Indigenous Agricultural Lands and Cooperatives The lands of the cooperatives, [the] indigenous communities or any other forms of communal or collective possession of agrarian ownership, as well as the family patrimony and the people’s housing, will enjoy special protection of the State, [and] of preferential credit and technical assistance, which may guarantee their possession and development, in order to assure an improved quality of life to all of the inhabitants. The indigenous communities and others that hold lands that historically belong to them and which they have traditionally administered in special form, will maintain that system. (Las comunidades indígenas y otras que tengan tierras que históricamente les pertenecen y que tradicionalmente han administrado en forma especial, mantendrán ese sistema.)

40 Article 46 Preeminencia del Derecho Internacional Se establece el principio general de que en materia de derechos humanos, los tratados y convenciones aceptados y ratificados por Guatemala tienen preeminencia sobre el derecho interno.

41 Constitutional Court of Guatemala, Case Inscripción para el cargo de Presidente de la República de Ríos Montt – Case Number 280-90, Judgment 19 October 1990 Gaceta no 18, Octubre-Diciembre de 1990. See Oficina del Alto Comisionado de las Naciones Unidas Guatemala, “Tendencias Jurisprudenciales de la Corte de Constitucionalidad de Guatemala en Materia de Derechos Humanos,” Guatemala, 2010 at p. 15.

law, including the Constitution" ("en materia de derechos humanos los tratados y convencionales internacionales prevalecen sobre todo el derecho interno, inclusive la Constitución [...]").⁴² Unlike common law systems, previous decisions delivered by courts are not binding in a civil law system. The Guatemala judiciary is not bound by a doctrine of precedents. However the Law regulating Constitutional relief before the Constitutional Court ("*Ley de Amparo, Exhibición Personal y de Constitucionalidad*"), Article 43, provides that three decisions in the same direction by the Constitutional Court creates a binding precedent for the lower tribunals/courts, albeit the Constitutional Court can depart from its own jurisprudence with a new reasoning which will only become binding on the lower courts when three decisions in the same direction are issued.⁴³

- 53 Whether or not the Constitution is seen as part of "domestic law" in Guatemala does not change the ultimate effect of this provision which: (a) makes international human rights law binding on the Guatemalan State part of Guatemalan law; (b) gives such international human rights treaties to which Guatemala is party overriding force over other Guatemalan internal laws, making them at least equal to the Constitution.⁴⁴ This effectively means that international human rights treaties binding on Guatemala are part of the Guatemalan domestic legal system and at a least form part of its *bloque de constitucionalidad* or block of constitutionality.⁴⁵
- 54 Of particular importance and direct applicability in the Guatemalan domestic legal system are therefore ILO 169⁴⁶ (ratified by Guatemala on 5 June 1996), the Inter-American Convention on Human Rights (ratified by Guatemala on 28 July 1978), the International Covenant on Civil and Political Rights (ICCPR) (acceded to by Guatemala on 5 May 1992) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (acceded to by Guatemala on 19 May 1988), all relevant to this analysis.

J Collective rights of indigenous peoples

- 55 With the disappearance of authoritarian governments in Latin America, new constitutions have been adopted in many countries recognizing the plurinational and multicultural character of the state. From a situation in which the indigenous peoples of the countries were deemed merely citizens of the state with no distinctive juridical personality, there has been widespread recognition of indigenous peoples as collectivities with accompanying rights including to their traditional lands. This is the case, for example, in Bolivia, Brazil, Colombia, Ecuador, Mexico, Peru and Venezuela. In these countries indigenous peoples are recognized as peoples with distinctive cultures, languages and identities, rights over land and natural resources as well as the right to consultation prior to the exploitation of non-renewable resources located on their lands.⁴⁷ The Guatemala Constitution of 1985, in force since 1986 and amended in 1993, recognizes ethnic groups (article 66) and although it recognizes indigenous *communities*, it does not refer to them as indigenous *peoples*. The Constitution also notes that through legislation the state will provide land to indigenous communities that may need them for development (article 68) and declares that a law will be established to regulate the section of the constitution relating to indigenous communities (article 70).
- 56 As part of the Peace Accords, the Agreement on Identity and Rights of Indigenous Peoples was signed between the government and URNG in 1995. The Agreement recognizes the Mayan communities as indigenous

⁴² Sentencia de la Corte Suprema de Justicia de 12 Octubre de 1990 referred to in "Tendencias Jurisprudenciales de la Corte de Constitucionalidad de Guatemala en Materia de Derechos Humanos," op cit at p. 36.

⁴³ Article 43 reads: Legal doctrine. The interpretation of the provisions of the Constitution and other laws contained in the judgments of the Constitutional Court, establishes legal doctrine that must be respected by the courts once there are three judicial rulings by the Court. However, the Constitutional Court may depart from its own jurisprudence, reasoning the innovation, which is not binding on other tribunals, unless they are able to issue three successive judicial rulings with the same view. ("Doctrina legal. La interpretación de las normas de la Constitución y de otras leyes contenidas en las sentencias de la Corte de Constitucionalidad, sienta doctrina legal que debe respetarse por los tribunales al haber tres fallos contestes de la misma Corte. Sin embargo, la Corte de Constitucionalidad podrá separarse de su propia jurisprudencia, razonando la innovación, la cual no es obligatoria para los otros tribunales, salvo que lleguen a emitirse tres fallos sucesivos contestes en el mismo sentido.")

⁴⁴ This equal ranking with the Constitution is expressly referred to in the *Inscripción para el cargo de Presidente de la República de Rios Montt* case where the Constitutional Court stated that international human rights law "[enters] the legal order as if it were a constitutional provision." ("[Ingresar] al ordenamiento jurídico con carácter de norma constitucional").

⁴⁵ Although international human rights norms have been given in the jurisprudence of the Constitutional Court equal ranking with the Constitution, the Constitutional Court has refused to accept challenges to secondary legislation which breaches international human rights treaties via constitutional actions ("acciones de inconstitucionalidad").

⁴⁶ International Labour Organisation, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169).

⁴⁷ For example, Article 57, section 7 of the constitution of Ecuador guarantees "free, prior and informed consultation, within a reasonable period of time, on plans and programmes for exploration, exploitation and sale of non-renewable resources located on their lands which could have environmental or cultural impacts on them." It should be noted that although a number of states in the region recognize indigenous peoples' rights, they are less attentive in their implementation – a reality that has been characterised as the implementation gap.

peoples as it does the Xinca and Garifuna peoples. It also acknowledges the multi-ethnic, multicultural and multilingual nature of the nation. The Agreement calls upon the government to make the necessary changes to the Constitution which it has not yet done. It also calls on the government to establish mandatory mechanisms for consultation and, more specifically, requires the government to adopt measures to secure “the approval of the indigenous communities prior to the implementation of any project for the exploitation of natural resources which might affect the subsistence and way of life of the communities.”⁴⁸

- 57 The question of collective rights was discussed at length in international human rights forums from the 1980s. Initially a number of states considered that human rights applied only to individuals and could not be extended to groups or even that to provide collective rights to one group would diminish the rights of others. The adoption of the Declaration on the Rights of Indigenous Peoples in 2007 with the support of all member states of the United Nations has set aside this debate. The rights of indigenous peoples are considered to be of a collective nature and the rights elaborated in the Declaration are deemed essential for the continued development of their distinct cultures. Article 3 of the Declaration recognizes the right of indigenous peoples to self-determination and further articles of the Declaration elaborate on how that right should be understood in principle. The Declaration and the other international instrument exclusively focused on indigenous peoples, the ILO Convention 169 on indigenous and tribal peoples, both use the term ‘peoples’ in recognition of the distinctive identities, histories, cultures, languages, ways of life, political and social organizations, beliefs, sciences and laws that are to be found among indigenous peoples.
- 58 In Guatemala, there was a marked absence of recognition of indigenous identity in the discussion held with governmental officials or representatives of the private sector and what that might imply in terms of the special characteristics of the community and its rights. This is a curious paradox since the Mayan peoples have a long and well-recorded history, clearly pre-dating the Spanish and subsequent colonists, and the descendants of that civilization continue to have attachments to their ancestral lands, and cosmologies, sciences and legal systems that are still a part of daily life. The failure to historically recognize in practice the collective rights of indigenous peoples, and their institutions for collective decision-making by outside interest, leads to the assumption that individuals from the community can enter into agreements on behalf of the group as a whole.
- 59 This lack of *de facto* recognition should be contrasted however, with the collective rights that indigenous peoples in Guatemala (albeit referred to as “indigenous communities”) have under the Constitution; in particular their right to collective property (enshrined in Article 67). It also contrasts with the entitlements (collective rights) they have as a matter of law under the American Convention on Human Rights and other relevant international human rights instruments which, as seen above, are part of the constitutional corpus (*bloque constitucional*) in Guatemala.

κ Rights to land, territory and resources

- 60 ILO Convention 169, ratified by Guatemala, recognizes indigenous peoples’ right to the lands they have traditionally owned and occupied.⁴⁹ It defines the term “lands” so as to include “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.” (Article 13) The Convention also recognizes that indigenous peoples may have strong spiritual ties to their ancestral lands (Article 13).
- 61 Article 7 of the ILO Convention provides for indigenous peoples’ “*right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development*” (Article 7.1). Article 7.3 crucially provides that “*Governments shall ensure that, whenever appropriate,*

⁴⁸ Agreement on Identity and Rights of Indigenous Peoples, 1995, article F 6 (c)

⁴⁹ Article 14 of ILO Convention 169 reads: “1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities... 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities." Article 7.4 states that it is a duty of the State to "take measures in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit." In relation to natural resources, Article 15 states:

"1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservations of these resources.

2. In cases in which the State retains the ownership of mineral or subsurface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertain whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. [...]"

62 The Indigenous Declaration adopted by the General Assembly of the UN with the support of the Government of Guatemala also recognizes indigenous peoples' right to lands and resources as well as rights to restitution or compensation for lands from which they were forcibly displaced, fair and impartial adjudication in cases of disputes, and recognition of indigenous peoples' own systems of land tenure. These rights are now established in international law and in many countries also form a part of national law. Furthermore, jurisprudence on indigenous peoples and their right to lands and resources has been elaborated and progressively interpreted both by international human rights bodies such as the UN Treaty Bodies and the Inter-American Commission and Court on Human Rights.

63 The Inter-American Court of Human Rights has addressed the rights of indigenous peoples under Article 21 (right to property) in a number of cases. Three points in that jurisprudence may be highlighted: *i)* The right to property under the American Convention has been construed to include a collective right to property; *ii)* The right to property of indigenous peoples is protected even in cases where there has not been a legal delimitation, demarcation or grant of title (*titulación*) of their property in the domestic system; *iii)* In the case of indigenous peoples, the right of property has been held to cover both tangible (land, territory and natural resources found therein) as well as non-tangible elements such as customs and culture, acknowledged to be closely linked to the indigenous peoples' right to their traditional territory. To elaborate on these three points:

i) Article 21 of the American Convention protects the communal property of indigenous peoples of their ancestral lands

63.1 The term "property" has been defined as "those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."⁵⁰ Applying an evolving interpretation of international instruments for the protection of human rights, in addition to its own tool of treaty interpretation (Article 29.b of the American Convention) which precludes a restrictive interpretation of rights under the Convention, the Inter-American Court of Human Rights, held in *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* case,⁵¹ that "Article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of indigenous communities within the framework of communal property, [...]"⁵²

ii) The right to property of indigenous peoples is protected even in cases where there has not been a legal delimitation, demarcation or grant of title (titulación) of their property in the domestic system

63.2 The principle was first held in *The Mayagna (Sumo) Awas Tingni Community Nicaragua* case:

⁵⁰ Inter-Am. Ct. H.R., *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Ser C) No 79 (2001), para. 144.

⁵¹ *Ibid.*

⁵² *Ibid.*, at para. 148.

*Indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.*⁵³

From that principle, it follows that indigenous peoples in the Americas (in those jurisdictions protected by the American Convention, including Guatemala) have the right to property to their ancestral lands irrespective of delimitation, demarcation or registration of their lands.

iii) The right to property of indigenous peoples encompasses both tangible (land, territory and natural resources found therein) as well as intangible objects such as culture, closely linked to that territory.

63.3 The Inter-American Court has held that in the case of indigenous peoples that their right to their land and territory under Article 21 is closely tied “to a particular form of life of being, seeing and acting in the world” whereby indigenous peoples have a close relationship with their traditional lands and the natural resources found in such lands, since they are “their primary means of subsistence” and an “integral element of their cosmic vision, religion, and therefore, of their cultural identity.”⁵⁴ In the *Yakye Axa Indigenous Community v Paraguay* case, the Court held in that sense:

[...] indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.

*147. Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members.*⁵⁵

Already in its first case concerning indigenous rights, the Court had held that:

*[...] Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”*⁵⁶

64 In sum, in the *Awes Tingni* case, the Court decided that the Government of Nicaragua was not within its rights to lease lands to a foreign company where the indigenous peoples affected were able to demonstrate their collective rights over the property through long-standing, spiritual and material relations with their territories notwithstanding the absence of a formal legal title held and recognized by the state. Similarly, in the case of

⁵³ Inter-Am. Ct. H.R., *The Mayagna (Sumo) Awes Tingni Community v. Nicaragua*, at para. 151.

⁵⁴ Inter-Am Ct H.R., *Case of Yakye Axa Indigenous Community v Paraguay*, Judgment of June 17, 2005 (Merits, Reparations and Costs), para. 135.

⁵⁵ *Ibid.*, at paras 146 and 147.

⁵⁶ *The Mayagna (Sumo) Awes Tingni Community v. Nicaragua*, para. 149.

the *Saramaka People vs Suriname*⁵⁷, the Court found in favour of the indigenous peoples affirming their right to the lands they had occupied historically as well as their right to be consulted and for their consent to be given prior to large-scale projects affecting their communities.

- 65 In these landmark decisions the Inter-American Court saw indigenous peoples as peoples who had been historically denied justice. As Judge García Ramírez reflected in the Case of the *Sawhoyamaya Indigenous Community v Paraguay*⁵⁸:

*The claims of indigenous groups, communities and peoples and their members are a good example – or perhaps we should say a terrible example – of delayed justice. There is abundant enough evidence for it not to be an overstatement to say that in these cases the delay has spanned centuries: first, the delay in recognizing that “the original peoples could have a property right”, in spite of the law imposed over them by a new domination which disregards the original claims; afterwards, once the recognition is achieved – after historical endeavors – the delay in “recognizing specifically that such right is to be exercised by certain claimants.” The former is a general legal reparation readjusting the horizon of domestic law, whereas the latter is an individual legal restitution specifically reconstituting the heritage of communities and individuals.*⁵⁹

The decisions of the Court were effectively redressing historical wrongs.

- 66 Guatemala has one of the most unequal land distribution patterns in Latin America. The largest 2.5% of farms occupy nearly two-thirds of agricultural land while 97.5% of farms occupy one-sixth of land. Despite the urgent need for clarity around the issue of land tenure within its domestic system, there remain multiple unresolved land disputes and ineffective mechanisms to resolve them.⁶⁰

I Right to consultation

- 67 Consultation is a critical issue for indigenous peoples. Due to the special relationship between indigenous peoples and land and natural resources, “states are under the obligation to consult with indigenous peoples and guarantee their participation regarding any measure that affects their territory.”⁶¹ Consultation is not an aspiration or a mere soft law principle; it is a right enshrined in Conventions binding on Guatemala and part of its constitutional corpus, as seen above.

- 68 The absence of consultative processes and practices prior to major development projects has been and continues to be the major source of social conflict and human rights abuses affecting indigenous peoples not only in the Latin American region but also globally. These large-scale projects whether for the extraction of non-renewable resources, commercial logging, hydro-electricity, agri-business, or major infrastructure have important negative environmental impacts, often undermine local economies and subsistence activities, cause displacement and give rise to social and human rights costs. For this reason, establishing effective and good faith consultative mechanisms has been a key demand from indigenous peoples.

- 69 While consultation among governments, private sector and local communities in the event of development activities that potentially may have disruptive effects, is a general democratic norm, it is of critical importance for indigenous peoples who depend upon their lands and natural resources for their livelihoods and have strong spiritual attachments to their ancestral territories. These relationships have been recognized in international law which requires that governments consult with indigenous peoples prior to major development projects and establish a culturally appropriate, good faith consultative mechanism.

⁵⁷ Inter-Am. Ct. H.R., Case of the Saramaka People v. Suriname, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs).

⁵⁸ Inter-Am. Ct. H.R., Case of Sawhoyamaya Indigenous Community v. Paraguay, Judgment of March 29, 2006.

⁵⁹ Case of the Sawhoyamaya Indigenous Community v Paraguay, Separate Opinion of Judge Sergio García Ramírez, at para . 5.

⁶⁰ USAID Land Tenure and Property Profile on Guatemala, August 2010. Available on <http://usaidlandtenure.net/Guatemala>

⁶¹ Inter-American Commission on Human Rights, IACHR, Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II, December 30, 2009, at para. 273.

70 In the case of ILO Convention 169, which as seen above forms part of the Constitutional corpus of Guatemala, article 13 (1) calls upon governments to respect “the special importance for the cultures and spiritual values of the peoples concerned, of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.” The UN Indigenous Declaration in article 25 states:

“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

Free, prior and informed consent

71 Both ILO Convention 169 and the Indigenous Declaration require governments to consult with indigenous peoples prior to major and potentially disruptive development projects being approved and implemented. ILO Convention 169 in article 15 (1) requires governments to “establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.” The Indigenous Declaration states in article 32 (2):

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

In sum, “[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects” as noted by the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.⁶²

The lack of regulation or subsidiary legislation does not mean lack of existence of the right in the domestic sphere

72 In some Latin American countries regulations or subsidiary legislation have been established or are under discussion on how these consultative procedures should be organized.⁶³ A lack of subsidiary legislation enabling international law in domestic systems, or a lack of regulation of the principle when this forms part of the constitutional *corpus* in a country, does not mean that the duty to consult should no longer be complied with.

73 Several decisions of the Inter-American Court of Human Rights have dealt specifically with the right to consultation under the American Convention within the context of the examination of contentious claims brought by indigenous peoples. In such judgments the Court has held that as a matter of law, States are under an obligation to consult with indigenous peoples and even obtain the consent of the indigenous people concerned prior to a major development project.⁶⁴

74 In the *Saramaka People v Suriname* case, the Court established the criteria that must be applied under Article 21 of the American Convention before granting concessions for the exploration and exploitation of natural resources or for the implementation of development or investment plans or projects on indigenous people’s lands. Three mandatory conditions apply when States are considering approval of such plans. Two of them are relevant to this analysis: (i) non-approval of any project that would threaten the physical or cultural survival of the group; and (ii) approval only after good faith consultations- and, where applicable, consent. Good

⁶² U.N., *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65 (Fifty ninth session)*, U.N. Doc. E/CN.4/2003/90, January 21, 2003, para. 66.

⁶³ This is the case in Bolivia, Colombia, Ecuador and Peru, for example.

⁶⁴ See for example the case of the *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007 at E.2 a), para. 133.

faith consultations imply a prior environmental and social impact assessment conducted with indigenous participation, and reasonable benefit sharing.⁶⁵ To expand on these two conditions:

i) non-approval of any project that would threaten the physical or cultural survival of the group

74.1 “The notion of ‘survival’ is not tantamount to mere physical existence”⁶⁶

74.2 “Survival” of an indigenous or tribal group “must be understood as the ability of the people to ‘preserve, protect and guarantee the special relationship that [they] have with their territory,’ so that ‘they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected [...]”⁶⁷

(ii) approval only after good faith consultations- and where applicable, consent

74.3 Good faith consultations comprise three concurrent and complementary requirements:

Participation: States must ensure the effective participation of the members of the indigenous people in question in that process, in conformity to their customs and traditions, regarding any development, investment, exploration or extraction plan (...) within [ancestral] territory. The consultation should take account of the Ch’orti’s people’s traditional methods of decision-making. Early notice provides time for internal discussion within communities and for proper feedback to the State.

Benefit-sharing: States must guarantee that the members of the people will receive a reasonable benefit from any such plan within their territory.

Prior Environmental and Social Impact Assessment (ESIAs): States must ensure that no concession will be granted within [ancestral] territory unless and until independent and technically capable entities, *with the State supervision*, perform a prior environmental and social impact assessment.

The purpose of such an assessment serves: (a) “to assess the possible damage or impact a proposed development or investment project may have on the property in question and on the community” and (b) to ensure that the indigenous people “are aware of possible risks, including environmental and health risks”⁶⁸

“One of the factors the environmental and social impact assessment should address is the cumulative impact of existing and proposed projects.”⁶⁹

74.4 “Informed consultation” means that precise information on the nature and consequences of the project to the communities prior and during the consultation (possible negative and positive impacts of projects) is conveyed to the indigenous communities. The State must ensure that members of the Ch’orti’ people are aware of possible risks, including environmental and health risks, in order that the proposed plan is accepted knowingly and voluntarily.

75 Since the American Convention and ILO Convention 169 are part of the law of the land in Guatemala, these standards are directly applicable in Guatemala. Indeed the Constitutional Court of Guatemala issued an Advisory Opinion on the question of the constitutional rank of the norms contained in ILO Convention 169 in Guatemala, *Opinion Consultiva Relativa al Convenio 169 sobre Pueblos Indígenas y Tribales en Países Independientes y Convenio No 169 (OIT)*⁷⁰ acknowledging that ILO Convention had at least constitutional rank and “does not contradict the provisions of the Constitution and is a complementary international legal instrument that develops the programmatic provisions of Constitutional Articles 66, 67, 68, 69, which is not opposed to, but on the contrary, consolidates the system of values granted in the Constitution” (“no contradice lo dispuesto en la Constitución y es un

⁶⁵ Case of the Saramaka People v Suriname, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007 at para. 130.

⁶⁶ Inter-American Commission on Human Rights, IACHR, Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II, December 30, 2009, at para. 233. Inter-Am. Ct. H.R., Case of the Saramaka People v Suriname, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008, at para. 37.

⁶⁷ Case of the Saramaka People v Suriname, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008, at para. 37.

⁶⁸ Case of the Saramaka People v Suriname, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008, at para. 40.

⁶⁹ Ibid, at para 41.

⁷⁰ Corte Constitucional de Guatemala, *Opinion Consultiva Relativa al Convenio 169 sobre Pueblos Indígenas y Tribales en Países Independientes y Convenio No 169 (OIT)*. Expediente 199-95, 18 May 1995.

instrumento jurídico internacional complementario que viene a desarrollar las disposiciones programáticas de los artículos 66, 67, 68, 69 de la misma, lo que no se opone sino que, por el contrario, tiende a consolidar el sistema de valores que proclama el texto constitucional.”⁷¹

M Right to self-determination and right to development

Right to self-determination

- 76** The Right of self-determination is enshrined in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both part of the domestic legal system of Guatemala.⁷² Reference to the right of self-determination is also made in the Preamble of ILO 169, relevant in understanding the very object and purpose of the said Convention. Further, Article 3 of the UN Declaration on the Rights of Indigenous Peoples explicitly recognizes the rights of indigenous peoples to self-determination.
- 77** By self-determination is understood within this context, the right of indigenous peoples to “control their own institutions, ways of life and economic development ‘within the framework of the state in which they live.’”⁷³ Intergovernmental bodies in the region of the Americas, such as the Inter-American Commission on Human Rights, have pointed out in that sense that “in the case of indigenous peoples there is a direct relation between self-determination and land and resource rights.”⁷⁴
- 78** In the *Saramaka People v Suriname* case,⁷⁵ the Inter-American Court of Human Rights had the opportunity to address the link between right of self-determination and indigenous peoples’ rights. It referred to the right of self-determination in its interpretation of indigenous land and resource rights under Article 21 (right to property) of the American Convention on Human Rights. The Court observed that the Committee on Economic, Social, and Cultural Rights had interpreted common Article 1 of the Covenants as being applicable to indigenous peoples entitling them to “freely pursue their economic development” and “freely dispose of their natural wealth and resources” so as not to be “deprived of [their] own means of subsistence.”⁷⁶ The Court construed the right to property of indigenous peoples under the American Convention as encompassing the right of freely determining and enjoying their own social, cultural and economic development (including the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied).⁷⁷ It also found that under that Article States had a positive duty to adopt special measures to *recognize, respect, protect and guarantee* the right of indigenous peoples to their territory.

Right to Development

- 79** The jurisprudence and legal pronouncements emerging from the Inter-American system upholds the principle that “there is no development as such without full respect for human rights.”⁷⁸ The Inter-American Commission has observed that “the States of the Americas and the populations that compose them, have the right to development” but that right implies that “each State has the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment” in a manner “necessarily compatible with human rights, and specifically with the rights of indigenous and tribal peoples and their members.”⁷⁹ It has been noted in that respect:

⁷¹ Ibid. p. 16.

⁷² Common Article 1.1 and 1.2 of the ICCPR and the ICESCR reads: 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

⁷³ ILO Convention No 169, Preamble.

⁷⁴ Inter-American Commission on Human Rights, IACHR, Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II, December 30, 2009, at para. 165.

⁷⁵ Inter-American Court of Human Rights, case of the Saramaka People v Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007, Series C No 172.

⁷⁶ Saramaka People v Suriname case, at para. 93.

⁷⁷ Ibid at para 95.

⁷⁸ Inter-American Commission on Human Rights, IACHR, Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II, December 30, 2009, at para 204.

⁷⁹ Ibid.

An important gap exists in the regulation of key aspects of the protection of indigenous property rights in the context of exploitation of natural resources in indigenous territories. A series of structural barriers also impedes effective implementation of the existing legal provisions. As a result, development and investment plans and projects in indigenous or tribal territories, and concessions for the exploration and exploitation of natural resources, have been found to result in multiple violations of individual and collective human rights, including the right to life in conditions of dignity (violated whenever development projects cause environmental contamination, generate noxious effects upon basic subsistence activities and affect the health of the indigenous and tribal peoples who live in the territories where they are implemented). The ICHR and the Court have also found violations stemming from “adverse effects on health and production systems; changes in domestic migration patterns; a decline in the quantity and quality of water sources; impoverishment of soils for farming; a reduction in fishing, animal life, plant life, and biodiversity in general, and disruption of the balance that forms the basic ethnic and cultural reproduction [...]”⁸⁰

N Obligations of the business sector on human rights

- 80** International concern about how business affects human rights led the United Nations to initiate the Global Compact in 2000 as a voluntary commitment by companies to respect key labour, environmental and human rights principles. In 2013, it produced a business reference guide to the UN Declaration on the Rights of Indigenous Peoples. On the principle that consultation with indigenous peoples should seek to obtain their free, prior and informed consent, the guide states that the process “implies a decision-making right to either permit, agree to a modified version or to withhold consent to a project or activity.” The guide also notes that States are still working on how to implement the right but companies that commit to obtaining the consent of the community “are better positioned to avoid significant legal costs and reputational risk”⁸¹
- 81** In 2011, the Human Rights Council adopted new measures on business and human rights by endorsing the Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework. The Guiding Principles affirm the responsibilities of states to protect human rights; companies to respect human rights and; in cases where there are breaches of human rights compliance, recognize the need for redress. The commentary on Principle 12 specifically refers to indigenous peoples who may be particularly affected by business and who enjoy additional rights. The UN Forum on Business and Human Rights, created to discuss challenges arising from implementation of the Guiding Principles, has on several occasions focused on indigenous peoples.
- 82** The Organization for Economic Cooperation and Development (OECD) has also developed Guidelines on Multinational Enterprises, a set of voluntary principles and standards for responsible business. Paragraph 40 of the revised Guidelines makes mention of indigenous peoples noting that the activities of companies may have adverse impacts and that the UN has elaborated specific rights for them. The OECD Guidelines are recommendations addressed by governments to multinational enterprises and are described as non-binding. However, the OECD has in place an implementation mechanism of National Contact Points (NCPs) established by the 42 governments adhering to the Guidelines which assist companies to implement the Guidelines and provide mediation. There have been cases relating to extractive industries and indigenous peoples brought to the attention of NCPs.
- 83** International Financial Institutions have also drawn up specific recommendations related to indigenous peoples’ rights. The World Bank has had a policy on indigenous peoples since the 1980s most recently revised as Operational Policy 4.10 in 2013. The revised policy requires that the Bank, before financing development that may affect indigenous peoples, ensure that the project includes “a process of free, prior, and informed

⁸⁰ Ibid at 209.

⁸¹ Global Compact, “A business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples”, United Nations, 2013, pp. 22 and 25.

consultation with the affected Indigenous Peoples' communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project"⁸²

- 84** The International Finance Corporation (IFC), part of the World Bank Group providing loans to the private sector, adopted Performance Standard 7 on indigenous peoples which requires that a client receiving financial support for a project on lands traditionally owned by or under customary use of indigenous peoples, obtain the free, prior and informed consent if there is a risk of relocation from their community lands.⁸³ The regional intergovernmental banks have adopted policy guides on indigenous peoples. The Asian Development Bank published its policy on indigenous peoples in 1998 which was superseded by a Safeguard Policy Statement in 2009. The Policy requires that clients obtain the free, prior and informed consent of indigenous peoples although it has qualified this position by defining it as broad community support, a standard that indigenous peoples do not accept (ADB, Policy Principle 4). The Inter-American Development Bank approved an Operational Policy on Indigenous Peoples and Strategy for Indigenous Development in 2006 which sets out a framework around the concept of development and identity and an "intercultural economy" that combines traditional and market elements (IADB). The European Bank for Reconstruction and Development has adopted a Performance Requirement on indigenous peoples and a Guidance Note which endorse free, prior and informed consent as a requirement for projects affecting indigenous peoples supported by the Bank (EBRD).
- 85** The extractive industries have also elaborated guidance for companies with activities likely to affect indigenous peoples. The International Council on Mining and Metals (ICMM), an association of the world's major mining companies, published the Indigenous Peoples Review in 2005 and has endorsed an Indigenous Peoples and Mining Policy Statement. The policy makes commitments on indigenous peoples' rights including to engage in culturally-appropriate consultations with indigenous peoples own decision-making bodies and to work to obtain the consent of the affected community. ICMM has also produced an Indigenous Peoples and Mining Good Practice. In May 2013, the ICMM adopted a Position Statement on Indigenous Peoples and Mining which makes a commitment to work to obtain the consent of indigenous peoples for new projects that are located on lands traditionally owned by or under customary use of indigenous peoples and are likely to have significant adverse impacts on them.
- 86** Another sector-specific initiative, the International Petroleum Industry Environmental Conservation Association (IPIECA) has provided information on Indigenous peoples in the form of a guide for its oil and gas members (IPIECA). FPIC is recognized as a key component of mutually acceptable negotiations but the guide also notes that the right of indigenous peoples to withhold their consent is not accepted by all states.
- 87** The Equator Principles which set out social and environmental policies for lending and investment institutions were revised in 2013 in line with IFC Performance Standard 7 to include reference to free, prior and informed consent in certain circumstances (Equator Principles, Principle 2). Mention can also be made of the 2000 Voluntary Principles for Security and Human Rights which invite companies to respect human rights when setting up security for their operations – relevant for indigenous peoples who have sometimes been the victims of company security – and the Extractive Industries Transparency Initiative (EITI) addressed to countries and requiring extractive industries to disclose revenues and payments, again relevant for indigenous peoples negotiating benefit-sharing arrangements in negotiations with companies.⁸⁴
- 88** Finally, mention should be made of the World Commission on Dams whose final report of 2000 recommended, inter alia, that "[A]ll stakeholders should have the opportunity for informed participation in decision-making processes related to large dams through stakeholder fora. Public acceptance of all key decisions should be demonstrated. Decisions affecting indigenous peoples should be taken with their free, prior and informed consent."⁸⁵

⁸² The World Bank, Operational Manual OP 4.10, Indigenous Peoples, July 2005. The policy is presently under review by the Bank.

⁸³ International Finance Corporation, Performance Standard 7: Indigenous Peoples, January 2012, paras 14 and 15.

⁸⁴ This section draws in part on an in-depth analysis for the European Parliament "Indigenous peoples, extractive industries and human rights" European Parliament, Directorate-General for External Policies, September 2014, prepared by Julian Burger.

⁸⁵ The World Commission on Dams was composed of independent experts from government, academia, industry and NGOs. It is the most comprehensive review of dams ever undertaken and its key findings were widely endorsed by inter-governmental organizations and a number of states. A specific review of dams and indigenous peoples is contained in "Dams, indigenous peoples and ethnic minorities" WCD Thematic Reviews, November 2000 prepared by Marcus Colchester.



Community members from the Indigenous Ch'orti' community of Las Flores, Jocotán



They are communities with their own language, and a sense of ancestral land rights and Ch'orti' organisation, in the Maya tradition. They self identify as indigenous people.

o Implementation of collective rights of indigenous peoples

89 In its discussions with representatives of local and central government and the company building the dams affecting the Cho'rti' communities, there appeared to be no recognition of indigenous peoples' collective rights and identity as recognized in ILO Convention 169 and the UN's Indigenous Declaration. Both documents, the first legally binding in Guatemala and the other now increasingly seen as the minimum human rights standards applicable to indigenous peoples, elaborate the rights of the group and complement the individual human rights that are well-established in international law, if not always respected. By recognizing the collective rights of indigenous peoples, States acknowledge that these communities have collective interests, common histories and shared cultures, as well as ways of taking decisions in accordance with their own traditions and customs.

90 The most illustrative example of the absence of recognition of the collective identity and interests of the Cho'rti' people by governmental and private sector representatives is the case of the so-called COCODES – Consejos Comunitarios de Desarrollo. The COCODES are governmental-sponsored entities for participation at the municipal level and are within a structure that is integrated at the departmental, regional and national levels. The fact-finding team met with representatives of the COCODES in the municipality of Camotán together with the local representative of the company building the dam. The representative of the company explained that the project had involved broad consultation and would bring significant improvements to the community in the form of roads, tourist activities related to the artificial lake that would be created, as well as other small projects to a value of 100,000 Quetzales (approx. £8,380) per community decided on by the people. The company representative said that the consultation had been in the form of newspaper articles, posters, radio spots and noted that in the community to be directly affected "only 5 or 6 were against the dam." The representative criticised the NGO Nuevo Día for fomenting discord in the community by providing incorrect information. The representatives of the COCODES were in favour of the dam and spoke in much the same terms as the company regarding the benefits arising from the dam. They claimed that no negative impacts had been felt in the community and no one had been displaced.

91 The fact-finding team has no reason to doubt the sincerity of the representatives of the COCODES and the positive effects they expect or are already enjoying from the dam project. The concern of the Cho'rti' communities not in favour of the dam is that the COCODES have effectively split the community, undermined traditional practices of taking decisions together in the interests of all, and sown discord and confrontation. The impression is that the driving force for the appointment of these particular individuals as COCODES was the company itself seeking to use the formal participatory structure as a means to gain support for the project. We were made aware by members of the civil society that: *"the pattern is repeated; the company creates its own indigenous authorities" ("se repite un patrón; creación de autoridades indígenas de la empresa")*.

92 The fact-finding team has no criticism of the legitimate interest of the company to present the project to the community and draw attention to its benefits. However, the COCODES are supposed to articulate the development needs of the community and the numerous Cho'rti' opponents of the project claim that their development priorities are not being listened to.

It should also be noted that the COCODES as an institution agree to respect a number of principles. These include a requirement to respect the different cultures that make up Guatemala, to promote harmonious relations among cultures, and to conserve the equilibrium of the environment and support human development based on the cosmivision of the Maya, Xinca, Garifuna and non-indigenous peoples. The establishment of the COCODES that do not take into account the broad, and as yet differing, development priorities of the Cho'rti' peoples appears to have fomented division rather than the harmonious development which is its stated objective.

93 Of note also was the language of the representatives of the company that demonstrated an approach that denied the identity of the Cho'rti' as a people with distinctive collective rights. On the one hand, the term preferred by the local company representative was often farmer or peasant – "campesino". The owner of the

company in a lengthy explanation suggested that the identity of the Cho'rti' people was now diminished due to migration and their community work traditions had been undermined by the cash being sent by relatives from the USA.

P Implementation of right to land and territory

- 94 “Land conflicts are one of the many problems that especially affect Indigenous populations in Guatemala”, noted the Inter-American Commission on Human Rights in its latest report concerning Guatemala.⁸⁶ This – it was noted – is derived, among other things, from a lack of recognition of Indigenous territory and lack of an effective registration system that recognizes ancestral territory enabling the protection of land belonging to the indigenous populations.⁸⁷ When it comes to the right to property, as it was put by a representative of the civil society: *“The law is for whites, not for indigenous people”* (*“La ley es para los blancos, no para los indígenas”*). The denial of ensuring the right to property of indigenous peoples amounts to discriminatory treatment.
- 95 Although the Maya Ch'orti' have historically occupied the land they inhabit as indigenous people, and as such they have a collective right to their land and territory, this right primarily derives from customary law, from the fact that they have occupied those lands since ancestral times, rather than from the actual registration of their land as the collective property of the Maya Ch'orti' qua indigenous people. This is because of two primary reasons:
- 95.1 Land registration is tied to the prior legal recognition of the indigenous community, to be able to exercise procedural rights as a collective entity. Gaining legal recognition (*personería jurídica*) in their own Municipalities has proved to be an uphill battle for the different Maya Ch'orti' communities.
- 95.2 The land rights of indigenous peoples in Guatemala continue to be circumscribed by secondary legislation (below constitutional level) which fails to implement the rights to which indigenous people are entitled by the Constitutional corpus (*bloque constitucional*), of which international human rights law forms part, as seen above.⁸⁸ In particular, the Guatemalan Civil code fails to regulate indigenous communal property.

Gaining legal status as indigenous peoples: “Yes, the Ch'orti do exist” (“Que sí existen los Ch'orti”) *(A Ch'orti' villager)*

- 96 From a legal point of view, the existence of the Indigenous Maya Ch'orti' people has been a *de facto* and not a *de jure* reality. Because of this lack of juridical recognition, they could not act procedurally as subjects of rights and obligations; they could not take legal or administrative action. The Constitutional Court of Guatemala in that sense has set criteria *“As for becoming recognised as a juridical person, which exercises rights through its legal representatives, such juridical persons must accredit their existence; their existence in itself does not give it legitimacy”* (*“En cuanto a la legitimación de las personas jurídicas, la misma se ejerce a través de sus representantes legales, estas personas deben acreditar su existencia; su existencia de hecho o irregular no las legitima”*.)
- 97 In 2014, seven Maya Ch'orti' communities, began the legal process of formal recognition as indigenous Maya Ch'orti' in its municipality.⁸⁹ Once submitted, there is a one-month window for counter claims. The community

⁸⁶ OEA/Ser.L/V/II.118 Doc. 5 rev. 1, 29 December 2003. Inter-American Commission Thematic Report on Guatemala, Justice and Social Inclusion: The Challenge of Democracy in Guatemala, at para. 258. In its most recent report on Guatemala the United Nations High Commissioner for Human Rights refers that in protected natural areas, “one hundred and seventy-four land conflicts [...] remain unsolved” Report of the United Nations High Commissioner for Human Rights on the activities of his office in Guatemala, 12 January 2015, A/HRC.28/3/Add.1. at para. 57.

⁸⁷ Ibid.

⁸⁸ Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala, 13 January 2014. A/HRC/25/19/Add.1, at para. 59.

⁸⁹ Article 20 of the Guatemalan Municipal code states: **Article 20: Indigenous peoples' communities.** The communities of indigenous peoples are forms of natural social cohesion and as such are entitled to recognition of their legal status. For that purpose indigenous peoples communities should register at the civil registry office of the relevant municipality. [Recognition of their legal status] is done respecting the indigenous peoples' internal organization and administration, which is governed by its own norms, values and procedures, with their respective traditional authorities recognized and respected by the State, in accordance with constitutional and legal procedures. (Our translation). (**Article 20 Comunidades de los pueblos indígenas.** Las comunidades de los pueblos indígenas son formas de cohesión social natural y como tales tienen derecho al reconocimiento de su personalidad jurídica, debiendo inscribirse en el registro civil de la municipalidad correspondiente, con respeto de su organización y administración interna que se rige de conformidad con sus normas, valores y procedimientos propios, con sus respectivas autoridades tradicionales reconocidas y respetadas por el Estado, de acuerdo a disposiciones constitucionales y legales.) (In the Spanish, in the original)

of *Las Flores* won formal recognition on 5th August 2014 after submitting its request on 23rd March 2014.⁹⁰ Under Constitutional Law such applications should be resolved within 30 days.⁹¹ But the request from *Las Flores* to obtain recognition was resolved over 4 months later. Moreover, there are attempts to annul this decision.⁹² The other 6 applications were filed on 25th November 2014 and are still awaiting a decision. Such applications have faced general opposition from the municipality, as well as businesses and drug-traffickers, it is alleged.

The lacunas of secondary legislation

- 98 Secondary legislation in Guatemala fails to recognise collective rights to land. As noted by the United Nations High Commissioner for Human Rights in Guatemala, “in February [2013], the Constitutional Court [of Guatemala] resolved a claim that challenged the constitutionality of part of the Civil Code because it did not regulate indigenous communal property.”⁹³ Already in an earlier report, the High Commissioner had pointed out in that respect: “Legislation that recognizes traditional forms of collective land tenure, possession and use by indigenous communities needs to be adopted.”⁹⁴ In its decision, the Constitutional Court recognized that “this was an issue that was pending in the legislative history of the country.”⁹⁵

The historical approach to the resolution of indigenous land conflicts

- 99 Notwithstanding the above situation, indigenous peoples in Guatemala have been able to get recognition to their property rights via administrative procedures. As noted by the office of the UN High Commissioner, “the reform of the administrative procedures of the Land Fund (FONTIERRAS) paved the way for the recognition of indigenous communities as direct collective rights holders, without resorting to formulas that are foreign to indigenous forms of organization, such as peasant associations”.⁹⁶ Unprecedented processes took place in that context, where for instance, a Royal Decree from 1717 was relied on in the context of ancestral land claims.

Seeking remedial action by invoking the direct applicability of the Constitutional corpus

- 100 In light of the inadequate secondary legislation, indigenous peoples have resorted to protecting their rights enshrined in the constitution via *acciones de Amparo*, a remedy for violations of the Constitution other than the right to liberty and integrity (protected by *Habeas Corpus* remedies).⁹⁷ Of particular importance is the case of *Churrancho*⁹⁸ where a Maya Kaqchikel community lodged an Amparo action and claimed that the applicable law to its claim concerning title to land should be “Constitutional, ordinary, and international legislation on human rights which form an integral part of the Guatemalan legal system” (“la legislación constitucional, ordinaria e internacional en materia de derechos humanos, que forma parte integrante del ordenamiento jurídico guatemalteco”).⁹⁹ The claim gave account of the presence of the Maya Kaqchikel community in the critical land before the time of the Spanish conquest and reached the Constitutional Court on Appeal. Having as central axis of its analysis Article 39 (Right to Property) of the Guatemalan Constitution, the Constitutional Court upheld the right to property of the community of *Churrancho*.

⁹⁰ Registro de la Comunidad Indígena Maya Ch’orti’ vecinos de la aldea de las Flores, del Municipio de Jocotán, departamento de Chiquimula. Acta No 01-2014, Secretaría Municipal de Jocotán, Chiquimula, 5 Agosto, 2014.

⁹¹ Article 28 of the Constitution of Guatemala reads: Right of Petition. The inhabitants of the Republic of Guatemala are entitled to direct, individually or collectively, petitions to the authority which is obliged to implement them and resolve them according to the law. In administrative matters, the deadline for deciding on petitions and notifying resolutions cannot exceed 30 days. [...]

⁹² A representative of COCODE (Community development council of the San Pedrito neighbourhood) filed an administrative appeal against the municipality of Chiquimula for the recognition that was granted, making evident the divisions among communities. The hearing took place on 26th January 2015 and the results will be issued in writing. The Human Rights Ombudsman (Procurador de los Derechos Humanos) made the following press release on 28th January about the case “Tribunal será quien determine reconocimiento de comunidad indígena” <http://www.pdh.org.gt/noticias/breves-informativas/item/5262-tribunal-ser%C3%A1-quien-determine-reconocimiento-decomunidad-ind%C3%ADgena.html#.VONyNS7w-DF>

⁹³ Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala, 13 January 2014. A/HRC/25/19/Add.1, at para. 59.

⁹⁴ Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala, 7 January 2013, A/HRC/22/17/Add.1, at para. 66.

⁹⁵ Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala, 13 January 2014. A/HRC/25/19/Add.1, at para. 59 citing Case file 266-2012, p. 18.

⁹⁶ Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala, 13 January 2014. A/HRC/25/19/Add.1, at para. 60.

⁹⁷ Article 265 of the Constitution of Guatemala reads: Proceeding of Amparo. Amparo is instituted for the purpose of protecting persons against the threats of violations of their rights or to restore the rule of same should the violation have occurred. There is no area which is not subject to amparo, and it will always proceed whenever the acts, resolutions, provisions, or laws of authority should imply a threat, restraint, or violation of the rights which the Constitution and the laws guarantee.

⁹⁸ Constitutional Court of Guatemala, Exp 628-2013 (Amparo/Comunidad Indígena Vecinos de la Aldea de Churrancho del municipio de Churrancho del departamento de Guatemala) Judgment of 24 June 2014.

⁹⁹ *Ibid.*, p.2

The practical approach of the Ch'orti people to their right to property

- 101 The Ch'orti' people followed a path many indigenous peoples that were stripped of their ancestral lands in Guatemala have followed so as to ensure that their rights to property would be respected: They bought the land they are living on. *"The Ch'orti' people bought the land they are living on in 1878. We paid the central government and the local mayors to own the land."* However, as noted by the community: *"This right has never been acknowledged by the authorities"*.

Recognition of collective land management despite the legal lacunas is possible

- 102 Against this backdrop, this Mission notes that even with the rudimentary tools provided by administrative law, it is possible to ensure the respect to the right of property of indigenous peoples by the State of Guatemala. Indeed in its 2014 Annual Report the UN High Commissioner for Human Rights noted that there has been a progress towards "recognition of collective land management" in protected areas.¹⁰⁰ It noted that 6 communities of the Sierra de Santa Cruz registered their collective property in the Property Registry Office (*Registro de la Propiedad Inmueble*).¹⁰¹ This shows that despite the inadequacies of secondary legislation, the State of Guatemala can and is bound to use any legal and administrative means to respect its own Constitution and international agreements made part of its Constitutional corpus.

Persecutions, threats and arrest of indigenous peoples defending their right to the land in Guatemala

- 103 However, persecutions, threats, arrests and even murders of peasants and indigenous peoples defending their right to the land, have been reported to inter-governmental organs such the Inter-American Commission on Human Rights.¹⁰²

Observations

- 104 The Guatemalan Constitutional Court itself has recognized that there is a pending, urgent, task for the legislative to implement Article 70 of the Constitution, including regulating the right to land of indigenous communities. However, the Mission notes that, based on Article 175 of the Constitution, which enshrines the principle of the primacy of the Constitution over any secondary legislation, the lack of proper secondary legislation to ensure the respect of the right to land of indigenous peoples (regulation of collective rights to property) does not render the entitlements of the indigenous communities under higher-ranking norms in the Guatemalan legal system meaningless.
- 105 The State of Guatemala not only has a negative duty (duty not to interfere with the right to land of indigenous peoples) but by virtue of its own Constitutional provisions it has a positive duty to ensure the right of indigenous peoples to their lands. This positive duty entails establishing (i) *special*, (ii) *adequate*, and (iii) *effective* procedures for the delimitation, demarcation and granting of titles of territories.¹⁰³ At a minimum this entails using the current existing mechanisms and law in a manner that is consistent with that obligation. Clearly depriving indigenous communities of the right to have their territorial claims properly heard would be a violation of their own Constitution and of international law, made part of its constitutional corpus.
- 106 As part of the positive duties the State has towards indigenous peoples, it is bound to ensure that claims concerning the recognition of the juridical personality of such collectivities are heard promptly as its own Constitution provides. The Mission is concerned by the delays and obstacles the Maya Ch'orti' communities have been facing to have their requests to registration as indigenous communities heard.

¹⁰⁰ Report of the United Nations High Commissioner for Human Rights on the activities of his office in Guatemala, 12 January 2015, A/HRC.28/3/Add.1. at para. 57.

¹⁰¹ *Ibid.*

¹⁰² OEA/Ser.L/V/II.118 Doc, 5 rev. 1, 29 December 2003. Inter-American Commission Thematic Report on Guatemala, Justice and Social Inclusion: The Challenge of Democracy in Guatemala, at para. 260.

¹⁰³ Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua, Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No 79, para 127.

q Implementation of right to consultation

The right to consultation in the secondary legislation in Guatemala

- 107 Despite ratifying ILO Convention 169 in 1996 and being at the forefront of countries lobbying for the adoption of the UN Indigenous Declaration of 2007, Guatemala has so far taken no steps to ensure that its laws and administrative regulations reflect and put into practice the requirements of these two documents and those existing under Article 21 of the American Convention on Human Rights which informs the Constitution of Guatemala itself. The current secondary legislation is inadequate and in open violation of the constitutional corpus and international undertakings of Guatemala. None of the officials that were interviewed by the fact-finding team seemed to be aware that consultation with indigenous peoples was an obligation when intended projects were to be built in indigenous peoples' lands, and that there were specific requirements to ensure that the consultation would be fair and in good faith. Indeed, the officials interviewed considered they were faithfully complying with existing consultative processes.
- 108 At National level, the fact-finding team was informed by officers of the Ministry of Energy and Mines that in the case of hydro-electric projects of 5 MW or less, there was no need for authorization from a governmental entity.¹⁰⁴ Projects of more than 5 MW required authorization. A consultative procedure was available in those cases, under the General Electricity Law of Guatemala. This, it was explained, consisted of publishing the proposal of a hydro-electric project in the official governmental journal and in the journal of largest circulation in Guatemala, after which there was an interval of 8 working days in which anyone opposing the project could register any concerns.¹⁰⁵ If no objections were raised then it was assumed that the project had raised no concerns and could proceed. Hydro-electric and other major development projects also require environmental impact studies and the approval of the ministry but such studies are exclusively concerned with their impact on the environment and not on any social impact nor does the law require the ministry to engage pro-actively with indigenous peoples and their traditional representative bodies to seek the consent of the community in advance of a project.¹⁰⁶ The impracticality of this consultation for indigenous peoples was raised with the officers we met. Such a limited consultative mechanism is in flagrant violation of the human rights commitments which bind the State, as well as of its own Constitutional framework.
- 109 In fact, when asked whether they regarded the right to consultation to indigenous peoples an obligation on the part of the State on such projects in their lands, the officers of the ministry we talked to stated that there was no obligation, and that in any event a "yes" or "no" of such communities was not binding on the project. They also pointed out that there was a "vacuum in the law", as no regulations concerning the right to consultation in the case of indigenous communities existed.
- 110 Not surprisingly, the Office of the UN High Commissioner for Human Rights recorded in its most recent report on Guatemala, that "one of the main sources of tensions among indigenous communities, State authorities and private corporations was the lack of consultations in the context of the construction of hydro-electric projects."¹⁰⁷
- 111 Whilst there has not been a regulation specifically concerned with the right to consultation of indigenous peoples, it is not the case –as raised by members of civil society in Guatemala that "you cannot carry out the consultation because there are no regulations" ("*No se puede hacer la consulta porque no hay reglamento*"). The Constitutional Court of Guatemala recognized in a case concerning a project in San Juan Sacatepéquez back in 2009, that fragmentary as the existing infra-constitutional laws were, there were a number of mechanisms that could and had to be used in conformity to the undertakings of Guatemala on the right to consultation. In that case, the Court recognized that the right to consultation, as enshrined in the international conventions ratified by Guatemala, "form part of the constitutional block or constitutional corpus" of Guatemala and as

¹⁰⁴ General Electricity Law of Guatemala (Ley General de Electricidad), Decreto No. 93-96., Article 8.

¹⁰⁵ Ibid. Article 15. See also Article 5 of the Regulation of the General Electricity Law (Reglamento Ley General de Electricidad)

¹⁰⁶ General Electricity Law of Guatemala, op cit. Article 10.

¹⁰⁷ Report of the United Nations High Commissioner for Human Rights on the activities of his office in Guatemala, 12 January 2015, A/HRC/28/3/Add.1, para. 60.

such Guatemala had to guarantee its efficacy in all cases in which it was relevant.¹⁰⁸ Such infra-constitutional laws recognizing the right to consultation of indigenous peoples include Article 26 of the “Councils of Rural and Urban Development Act” (*Ley de Consejos de Desarrollo Urbano y Rural*)¹⁰⁹ which make explicit reference to the consultations to indigenous peoples.¹¹⁰ Article 65 of the Municipal Code¹¹¹ also contains the right to consultation of indigenous peoples.¹¹²

112 For their part, members of civil society we spoke to point out the following five existing mechanisms in the Guatemalan legal system which despite the shortcomings of the domestic legal system, can nevertheless be used to implement the right to consultation in Guatemala:

112.1 Popular Consultation (“*Consulta Popular*”) (Art. 173 of the Constitution)

112.2 Good Faith Consultation (“*Consulta Buena Fe*”) (Art. 169 ILO)

112.3 Neighbours Consultation (“*Consulta de Vecinos*”) (Art. 64 Municipal Code)¹¹³

112.4 Indigenous Communities Consultation (“*Consulta Comunidades Indígenas*”) (Art. 65 Municipal Code)

112.5 Community consultations under own tradition (*Consultas Comunitarias bajo tradición propia*.)

113 The Constitutional Court decisions concerning the right to consultation of indigenous peoples, however, have failed to provide clarity on this point as it shows no consistency producing at times what has been referred by members of civil society we interviewed as “aberrant legal criteria” (“*criterios jurisprudenciales aberrantes*”). In the *San Juan Sacatepéquez* case itself, despite acknowledging consultation as a “right”, nevertheless the Court found that the consultation under Municipal law “only relates to competencies of a municipality” (“*concernen únicamente competencias propias de un municipio*,”)¹¹⁴ and held mining projects to be outside its reach and to be the exclusive province of the Ministry of Energy and Mines.¹¹⁵ More recently, as noted by the UN High Commissioner for Human Rights,

[...] the obligation of the State to consult with indigenous peoples was reiterated, as a matter of principle, in two Constitutional Court judgements; however, the Court failed to overrule administrative and legislative measures that were adopted without prior consultation with indigenous peoples. In February, the Court dismissed an action challenging the constitutionality of the Mining Law, which alleged lack of

108 Constitutional Court of Guatemala, Case 3878-2007, Judgment of 21 December 2009, p. 24. The case concerned the “El progreso” cement company in San Juan Sacatepéquez. (“San Juan Sacatepéquez case”) See: “The consent and / or ratification of the provisions of multilateral documents listed above implies for the State of Guatemala, in short, the international commitment to take a definite position on the right of consultation of indigenous peoples, expressed in several components: (i) its regulatory proper recognition and therefore the insertion into the constitutionality block or constitutional corpus as a fundamental right, by virtue of the provisions of Articles 44 and 46 of the Constitution; (ii) consequently, the obligation to ensure the effectiveness of the law in all cases where it is relevant; and (iii) the duty to make structural modifications required in the state apparatus-above all in terms of applicable legislation - to comply with this obligation according to the circumstances of the country.” (Our translation)/“El consentimiento y/o ratificación de lo dispuesto en los documentos multilaterales antes enumerados supone para el Estado de Guatemala, en síntesis, el compromiso internacional de asumir una posición definida acerca del derecho de consulta de los pueblos indígenas, expresada en varios componentes: (i) su reconocimiento normativo propiamente dicho y, por ende, su inserción al bloque de constitucionalidad como derecho fundamental, por virtud de lo establecido en los artículos 44 y 46 de la Carta Magna; (ii) consecuentemente, la obligación de garantizar la efectividad del derecho en todos los casos en que sea inminente; y (iii) el deber de realizar las modificaciones estructurales que se requieran en el aparato estatal –sobre todo en cuanto a la legislación aplicable- a fin de dar cumplimiento a esa obligación de acuerdo a las circunstancias propias del país.” (In the original Spanish)

109 Decree 11-2002, issued by Congress (Decreto 11-2002 del Congreso de la República).

110 **Consultations with indigenous peoples.** Whilst the law governing consultations with indigenous peoples is pending, consultations with the Maya, Xinka and Garifuna peoples on development measures promoted by the executive branch and directly affecting these peoples may be conducted through their representatives in the Development Councils.” (Our translation)/“**Consultas a los pueblos indígenas.** En tanto se emita la ley que regule la consulta a los pueblos indígenas, las consultas a los pueblos maya, xinka y garífuna sobre medidas de desarrollo que impulse el Organismo Ejecutivo y que afecten directamente a estos pueblos, podrán hacerse por conducto de sus representantes en los consejos de desarrollo.” (In Spanish, in the original)

111 Decree 12-2002, issued by Congress (Decreto 12-2002 del Congreso de la República).

112 It reads: “**Consultation with indigenous communities or municipal authorities.** When the nature of a matter is such that it affects, in particular, the rights and interests of indigenous communities of a municipality or those of its authorities, the Municipal Council shall conduct consultations at the request of the indigenous communities or indigenous authorities, including the application of criteria that are in keeping with the customs and traditions of the indigenous communities.” (Our translation)/“**Consulta a las comunidades o autoridades indígenas del municipio.** Cuando la naturaleza de un asunto afecte en particular los derechos y los intereses de las comunidades indígenas del municipio o de sus autoridades propias, el Concejo Municipal realizará consultas a solicitud de las comunidades o autoridades indígenas, inclusive aplicando criterios propios de las costumbres y tradiciones de las comunidades indígenas.” (In Spanish, in the original)

113 It reads: “Consultation at the request of ‘neighbours’ or community members. Community members (‘neighbours’) have the right to ask the Municipal Council for consultations when it involves issues which of a general character that affect all residents of the municipality. The application must be signed by at least ten percent (10%) of the residents registered in the municipality. The results will be binding if at least twenty percent (20%) of registered residents participate in the consultation and the majority votes in favour of the consulted matter.” (Our translation)/“Consulta a solicitud de los vecinos. Los vecinos tienen el derecho a solicitar al Concejo Municipal la celebración de consultas cuando se refiera a asuntos de carácter general que afectan a todos los vecinos del municipio. La solicitud deberá contar con la firma de por lo menos el diez por ciento (10%) de los vecinos empadronados en el municipio. Los resultados serán vinculantes si participa en la consulta al menos el veinte por ciento (20%) de los vecinos empadronados y la mayoría vota favorablemente el asunto consultado.” (In Spanish, in the original)

114 San Juan Sacatepéquez case, p. 27.

115 Ibid. pp- 28-29.

consultation with indigenous peoples in the adoption of the Law. In its judgement, the Court confirmed its jurisprudence on the State's duty to consult with indigenous peoples under International Labour Organization (ILO) Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries, but concluded that it was not applicable in relation to the Mining Law because its "scope is broad and not restricted to any particular territorial region or specific cultural or ethnic group".¹¹⁶ Also in February, the Court granted an injunction (amparo) filed by Q'eqchi' communities that had not been consulted on the Entre Ríos hydroelectric project in Lanquín, Alta Verapaz.¹¹⁷ However, the Court decided not to cancel the project, so as not to affect the country's development policies.¹¹⁸

- 114** Similar paradoxical decisions have been reached concerning the binding nature of the results of consultative processes. In the *San Juan Sacatepéquez* case the Constitutional Court noted the principle held in an earlier case that "it is compulsory in terms of its verification [ie that it has been carried out], but it does not remove the competence of the authorities on the final adoption of the legislative or administrative measure, as is generally the case with all the consultation mechanisms" ("*es obligatoria en cuanto a su verificación, pero no sustrae de la competencia de las autoridades la adopción final de la medida legislativa o administrativa, como en general sucede con todos los mecanismos de concertación*").¹¹⁹ The Court found that the right to consultation does not work as a veto to development policies of a country ("*no vetar políticas de desarrollo de un país*"), but just as a mechanism to allow indigenous peoples to "express their point of view" and "influence the decision-making process". It concluded with its view of the right to consultation "as a fundamental right whose recognition originates from international consensus, binds the State concerned, in terms of legal regulation and institutionalized protection, but the position of disapproval that ultimately indigenous peoples can take in practice is not binding" ("*como derecho fundamental cuyo reconocimiento se origina del consenso internacional vincula al Estado de que se trate, en cuanto a su regulación legal y protección institucionalizada pero no es vinculante la postura de desaprobación que en definitiva puedan asumir las poblaciones indígenas en práctica*").¹²⁰ In other words, as put by a member of the civil society: "it is binding when the result says 'yes' to the project and it is not binding when the result says 'no'". Contrast that with a recent case concerned with the right to consultation under the Municipal Code, the *Mataquesuintla* case, issued in January 2015.¹²¹ The Constitutional Court in that case ruled that community consultations or referendums under the Municipal Code should be considered binding legal decisions.¹²² It also upheld the Saramaka principles held by the Inter-American Court of Human Rights and asserted that the State is bound to carry out a social and environmental impact study.

The right to consultation in the Ch'orti' case

- 115** As noted above, in the case of the Ch'orti' people, there appeared to be little recognition by governmental and private sector representatives of their collective rights. This was most evident in relation to the process of consultation.
- 116** We were informed that in the context of seeking permission from the Environment Ministry first for *El Orégano* project, three Environmental Impact Studies (E.I.S) were carried out. *Nuevo Día* lodged their opposition with the Environment Ministry arguing that it would have adverse impacts economically, culturally, and environmentally. The area is one of the most fragile ecosystems in Central America. The Environment Ministry accepted the argument of *Nuevo Día* and denied the licence in a written resolution. The Resolution made reference to endemic species of fish, negative impact on the community economy, negative impact on the ecosystem, and other technical aspects that failed to comply. However, through what has been described by the Ch'orti's as a fraudulent process, the licence was granted later that year in spite of the technical problems already identified (and on the basis of the old E.I.S. already rejected), and in any event, without publishing

¹¹⁶ Case file 1008-2012, p. 38.

¹¹⁷ Case file 4419-2011.

¹¹⁹ Report of the United Nations High Commissioner for Human Rights on the activities of his office in Guatemala, 13 January 2014, A/HRC/25/19/Add.1, para. 57.

¹²⁰ *Ibid.* p. 55.

¹²¹ Constitutional Court, Expedientes Acumulados 4639-2012 y 4646-2012, Judgment of 4 December 2013. http://www.infile.com/leyes/visualizador_demo/index.php?id=69104

¹²² Interviews with civil society representatives. See also <http://www.conflictosmineros.net/noticias/15-guatemala/17364-la-consulta-popular-mecanismo-importante-de-expresion-popular-y-clara-expresion-de-un-regimen-democratico>

- a new E.I.S., and therefore without allowing a reaction from the communities. The community missed the narrow window to oppose (as the E.I.S was not publicized), and the *El Orégano* dam was given permission by the Ministry of Environment on 12th December 2007.
- 117** No social-impact studies were demanded by the authorities for the project, despite its being a *sine qua non*, in accordance with international obligations undertaken by Guatemala and although Governmental Decree 431-2007 contemplates the realization of social-impact studies. ¹²³
- 118** For its part, as discussed elsewhere in this report, the Company does not acknowledge the existence of the Ch'orti' as indigenous people with a collective right to consultation. It has not conducted any consultation with a collectivity but rather (i) it limited itself to producing publicity spots for radio and other publicity material for their project; (ii) it has directly engaged at one-to-one level with those living by the river in order to buy their land bypassing the community, failing to acknowledge a collective right to property; and (iii) it has bypassed the community's traditional forms of organization as discussed in the previous section.
- 119** In the case of the *El Orégano* dam, the consultation process carried out by the company has clearly not satisfied a large part of the Ch'orti' community. There was evidence that entire communities were greatly concerned about the impacts of the dam on the environment on which they and their livelihoods depend. The company's consultation to date had not addressed these concerns but rather adopted the view that the project was positive, had no negative impacts and objections only showed that the community were misinformed or being manipulated by the NGO. This long-standing conflict has led to a stalemate, increasingly acrimonious relations and violence as evidenced by the imprisonment of two community members who were originally charged with murder. There appeared to be no intermediary available willing and able to bring all sides and interests together to find a solution that addressed the concerns of all parties. It might have been thought that this could be a role taken up by the local mayor or mayors but the NGO representing the Ch'orti' indicated that he has sided with the company and would not be neutral. The problems arising from the absence of good faith consultations only underline the importance of the Government elaborating with urgency a procedure for free, prior and informed consultation aimed at obtaining the consent of the indigenous peoples in line with its international commitments.
- 120** Although ignored as a collectivity, the Ch'orti' have nevertheless carried out their own *good faith* consultations in all the communities to be affected using their traditional ways of *consulta*. The Mission had opportunity to revise *actas* (registry of such meetings) showing the refusal to accept the *El Orégano* and *Cajón del Río* projects. ¹²⁴ In *Cajón del Río* the outcome of their consultation process showed that nearly all were against the Project. Only 2 said yes, an old man and a child. Although a *Cocode* said yes, his community said no. Concerning the *Cajón del Río* Project, the Mayor of Camotán received the results of that consultation and made a commitment in writing that he would not authorize the building of the dam. ¹²⁵ In Jocotán in 2009, a statement was signed by all communities rejecting the *El Orégano* Project. There was also an agreement with the Mayor of Jocotán. All the same, the project was given the usufruct for 50 years by the Ministry of Energy and Mines. In addition, in 2010, the municipality of Jocotán gave the usufruct of 2.5 million square metres of community land to the company.
- 121** In the case of *El Orégano* project, despite having obtained a licence from the Ministry of Energy and Mines, under Guatemalan law, it also requires a Social Impact assessment in order to be able actually to build the dam. ¹²⁶ In any event, in Las Flores the social licence (*licencia social*) has not been given.

¹²³ Report of the United Nations High Commissioner for Human Rights on the activities of his office in Guatemala, 7 January 2013, A/HRC/22/17/Add.1, para. 68.

¹²⁴ See for example Acta No 03.2015 Folio 86-87.

¹²⁵ Interview with the Mayor of Camotán who gave the Mission a copy of that document. Certification issued by Municipality of Camotán dated 12 February 2014 referring to Acta No 13-2014 issued on 10 February 2014. See also Certification of Municipality of Camotán 7 January 2015 referring to Acta No 01-2015 dated 5 January 2015 reiterating the same.

¹²⁶ Acuerdo Gubernativo No 431-2007, del Presidente de la República, Article 12.

R The business model

*“There is a business culture that is stuck in another century”
(Civil society observation)*

- 122 We noted a lack of understanding of the requirements of benefit sharing on the part of the companies whose CEO perceived listening to the community requirements almost as a burden and stated that it felt like a *“piñata política”*/*“political trophy”*¹²⁷ and benefit-sharing as a sort of *“blackmail” (chantaje)*. The CEO felt he had done the utmost to secure acceptance of the project and blamed the community for the lack of support of the project.
- 123 The reasons for the lack of compliance with the essential requirements of engaging in proper consultation and carrying out prior social impact assessment are due to the companies’ failure to acknowledge that the Ch’orti’s own a collective right as indigenous peoples, to their territory, and natural resources. When asked about whether he was aware of the rights of the Ch’orti’s as collective rights, the CEO of the companies replied: *“For us that is new, calling themselves indigenous communities is new; it is for tourists” (“Para nosotros eso es nuevo, eso de llamarse comunidades indígenas es nuevo; es para los turistas”)*.
- 124 Members of civil society we interviewed argued that the denial of indigenous people’s rights stemmed from an endemic cultural, juridical, structural and economic racism deeply rooted within the country. At a State level this was reflected in the budget and public policies (*“que se expresa en el presupuesto, en políticas públicas”*).
- 125 In the course of our dialogue with the companies’ CEO he admitted that he was not aware of standards enshrined in the UN *“Guiding Principles on Business and Human Rights.”*¹²⁸ He accepted that he was not familiar with principles of corporate responsibility to respect human rights and therefore that this had not been taken into account for the development of his business model.
- 126 In view of these shortcomings, it is perhaps unsurprising that the projects have met opposition from the indigenous communities. Contrary to good business practice the companies had no risk management assessment concerning opposition to the projects despite the well-known fact that there is a history of protest in Guatemala concerning hydroelectric projects. The specific responsibility for risk management of such, lies within the remit of the companies. The companies’ lack awareness of such responsibility blaming opposition to the *“nature”* of the Ch’orti’s described pejoratively as *“tribes”* which *“like to fight”*.
- 127 The mission finds this to be a poor business model, yet expensive for the company. The CEO of both companies indicated that, in 10 years, the companies had made no profits, and has faced only costs. *“It was an arduous process. The road was time-consuming, exhausting” (“Ha sido un proceso agobiante. El camino ha sido desgastante, agotador”)*. Investments would have been more wisely made had the businesses involved been aware of indigenous peoples’ rights, on the one hand, as well as current best practices in terms of corporation’s respect for human rights. There is an economic cost to disregarding internal law and best practice.

s Impacts of the project

- 128 The impacts of the hydro-electric project raised by the Ch’orti’ community underline the concerns discussed above with regard to the implementation of the collective rights of indigenous peoples, including the right to land and territory, and the right to consultation. Those failures underpin and feed the concerns of the community, and the conflicts it finds itself locked into.
- 129 The communities refer to two types of impacts of the hydro-electric dam projects: First, the concerns as to the future impacts of the construction of the dam, and second, current impacts on community cohesion.

¹²⁷ *Piñata* is a decorated figure containing toys and sweets that is suspended from a height and broken open by blindfolded children as part of a celebration.

¹²⁸ *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* endorsed by the UN Human Rights Council in its resolution 17/4 of 16 June 2011. Prepared by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development.

Perceived future impacts

- 130** As to the first, the communities have expressed a range of concerns. They fear that the dam will affect livelihoods and food security and cause displacement. These are not necessarily connected to the need to move houses as a result of rising of waters after the dam has been constructed. It is a concern for the long-term impacts on an already vulnerable eco-system and micro-climate likely to make droughts more likely.
- 131** The region has been hit by several decades of drought, leading to poor crop yields and famine as noted earlier. Nevertheless, the fear of being unable to meet their basic needs due to the precarity of their sources of subsistence underlies how the Ch'orti' apprehend their surrounding and their future.
- 132** Against this backdrop, the prospect of changing the hydrological features of the region causes real concern. The community's understanding of its environment is as follows:
- 132.1** The rain, rare as it is in the *corredor seco*, is understood to come largely from evaporation of the vegetation and river. Drought is not so much the lack of water but the maldistribution of rain over the year. There is a fear that concentrating the water in one basin, and restricting its flow elsewhere might change the spread of humidity and rain in the region, thereby aggravating the risk of drought in the region.
- 132.2** In particular, there is a concern that the Sierra de Las Minas, a large forested mountain range north of Chiquimula would dry up as it receives rain from evaporation of the Jupilingo.
- 132.3** The municipalities of Camotán and Jocotán have steep hills, of which 80% is denuded of vegetation. The forests which used to cover these hills were cut down over a period of 300 years by the Spanish *conquistadores* as a way of preventing the Mayas from sheltering in the mountains and attacking them in the plains. The slopes are therefore highly erodible. There is a concern that a restricted flow of water in the Jupilingo would be insufficient to wash away the sediment which comes off the denuded mountain slopes. This would eventually lead the river bed to be sedimented and the river to dry up.
- 132.4** There are currently seven applications for hydro-electric dams on the Jupilingo, one of which has been approved. This does not include any dams for which approval is not required namely dams that would produce less than 5 megawatts of electricity. There is a real concern that the river would be exploited far beyond its capacity, and thereby destroy what little natural resource the Ch'orti's have.
- 132.5** The concentration of water through hydro-electric dams would reduce the water available for agriculture around the river. The employment generated by agriculture would be lost, and a basic means of sustenance weakened. This would likely lead to further migration away from the ancestral lands, into urban poverty.
- 132.6** About 15 to 20% of the community also carry out non-commercial, artisanal fishing in the river. This means of subsistence would also be lost.
- 133** Concerns about subsistence and unemployment are not alleviated by any prospect of employment generated by the dams. The regional manager of Jonbo SA informed the Mission that, other than short-term employment during the construction of the dam, he expected the dam to generate 15 long-term jobs. For their part, the indigenous community pointed out that, in any event, the jobs that the companies would generate with their projects were not going to benefit unskilled workers like themselves.
- 134** In addition to the overarching concern over drought and subsistence are the more prosaic worries about access to the river for everyday activities. The Ch'orti' use the river for washing and recreational bathing. They are concerned about losing the river for these amenities.
- 135** These fears are compounded by a sense that, precarious and poor as their current subsistence on this land is, it is where they have lived for generation after generation. It is their land. *"We did not come here, we were born here"*, the community repeatedly informed the delegation. There is a profound sense of connection with their ancestors having lived here for hundreds, if not thousands, of years.
- 136** Added to this is a consciousness that there would be nowhere else to go should they have to leave. *"Wherever people go, there is no longer any land. They are already the owners [the company]" ("Adonde va la gente, tierra ya no hay. Ya son dueños ellos")*.

- 137 It should be clarified that the delegation did not find that the community would necessarily be displaced by the dam. Mr Jongezoon, the director of both dam projects, reported that all affected land had been purchased and was now the property of the company. However, the perceived threat of the dam to the community is not limited to direct displacement by the rising of the water, but by displacement by reason of wider, indirect environmental impacts.
- 138 The communities are suspicious of the information given to them by the Company as to what the impacts of the project will be. The reason for this is that the impacts are always described as positive. *"This is what we bring- they say. They don't tell us about the consequences, they just say it's good; they don't talk about the disasters"* (*"Esto traemos- dicen"*. *"No dicen las consecuencias, sólo dicen que es bien; no hablan de los desastres"*). No downsides or risks are ever discussed with them.¹²⁹ The failure to acknowledge potential problems arising from the construction of a dam makes the communities distrustful of the present discourse regarding the dam.
- 139 However, the communities said they would welcome independent scientific analysis as to the likely impacts of the dam on the surrounding environment.

Current impact

- 140 Despite having yet to be constructed, the dam project has already had very real impacts on the community by causing unrest and division within the community. The active resistance of the community to the project has also led to community members being stigmatized and, in their views, unfairly prosecuted for alleged criminal activity. The community feels that their members are being unfairly criminalized and persecuted only because they seek to have their voice heard.
- 141 The divisions stem from the attempts by the company to gain community acceptance through financial or other incentive. Those community members whose land was purchased by the company, or who have received some aid, or, allegedly, bribes, are supportive of the project. It appears that although they are in a minority, this has been sufficient to tear the social fabric of the communities in a way which is felt acutely and is difficult to repair. The minority is accused of having been bought off. They are seen as falling foul of the saying *"pan para hoy, hambre para mañana"* (bread today, hunger tomorrow).
- 142 The minority argues that the community is resisting progress and development, and that it is misinformed.
- 143 This has caused a climate of fear and suspicion. Outsiders cannot enter the community without being noticed. The community is on constant alert for any sign that company officials have come to bribe or persuade the community through some other means, or that construction is about to start. Outsiders to the community who have not organised their visit with the community members are often stopped and asked what they are doing.
- 144 On one occasion, the community informed the delegation that its members stopped two individuals who had wandered into the village and questioned their presence there. The police were called and eventually attended. These two individuals turned out to be escaped prisoners who were handed over to the authorities. However, on other occasions, this has led to local officials or company representatives being held against their will for short periods of time while discussions take place and the community make clear their opposition to the project.
- 145 The climate of suspicion, the divisions within the community, the clash with local government and the criminalization of the community all have their roots in the failure to implement the rights of indigenous peoples recognized in the law of the country in particular through its ratification of ILO Convention 169. Proper consultation of the community, and a recognition of its right to dispose of its territory and natural resources, would lead to an entirely different outcome. The dynamics of the relationship between the community, the company and local government would look very different if the existing legal framework in Guatemala were in fact implemented at national and local levels.

¹²⁹ Indeed, the mission has carefully revised all the material provided by the companies on the information dissemination of the projects and found no information as to risks of assessments of possible negative aspects of such projects and how the projects planned to address or mitigate them.

T Two concepts of 'development'

"The arrival of the companies saddens us." ("Es una tristeza cuando ellos entran")

"They say it is to 'develop us'" ("Dicen que es para 'nos desarrolle'")

"They call it development, they send the bulldozers in and they talk about development" ("Ellos los llaman desarrollo, cuando las máquinas pasan encima y ellos hablan de desarrollo")

They tell us, "you're worthless, you have no idea what development is." ("Nos dicen: "sos un ruin y no sabes aprovechar el desarrollo")

Ch'orti' communities

- 146 On closer inspection, at the heart of the community divisions and the clash with the company are two different understandings of 'development'. Whilst the company states that *"there is no elegance in poverty"* (*"no hay elegancia en la pobreza"*) and there is a *"reluctance to improve, reluctance to work"* (*"desgano de superación, desgano por trabajar"*) within the locals, the community consciously questions the concept of development advanced by the company.
- 147 They do not believe that the dam would effectively lead to the development of the community. A villager from Matasano said: *"They call it development (desarrollo); the community calls it disaster (desastre)"*.
- 148 In a study called "El oscuro negocio de la luz" by FLACSO, it was pointed out, as regards the electricity business in Guatemala: *"Guatemala has the highest electricity rates in Central America, the demand for service almost matched the offer; power generation mainly depends on hydrocarbons causing high levels of pollution; the costs are socialized and profits are privatized; and the legal framework governing the process, from power generation to commercialization, lacks transparency and allows a series of privileges for which consumers must pay"* (*"Guatemala registra las tarifas eléctricas más altas de Centro América, la demanda de servicio ya casi igualó a la oferta; la generación eléctrica depende mayoritariamente de hidrocarburos provocando altos índices de contaminación; se socializan los gastos y se privatizan las utilidades; y el marco jurídico que regula el proceso, desde la generación hasta la comercialización eléctrica, es poco transparente y permite una serie de privilegios que debemos pagar los consumidores"*).¹³⁰
- 149 The Ch'orti' lamented that *"in 15 kilometers of river, they want to build three dams"*. For the The Ch'orti', there is something fundamentally problematic with this, as they explained: *"Rivers for us, represent the serpent, life, what is female, what is male, continuity. When a river is blocked, the flow is cut, the connection to the land is cut. The water is to the earth what blood is for us"* (*"Ríos para nosotros, representan la serpiente, la vida, lo femenino, lo masculino, la continuidad. Cuando se corta un río, la corriente, se corta esa conexión de la tierra. El agua es para la tierra como la sangre para nosotros"*).
- 150 The community and the company are, almost literally, not speaking the same language. One indigenous leader explained: *"They are right, the word 'development' doesn't exist in any Mayan language. Mineral extraction, selling, having paper money in the bank is not our way of understanding life"* (*"Tienen razón, en ningún idioma Maya la palabra 'desarrollo' existe. Sacar minerales, vender, tener papel moneda en banco no es nuestra forma de entender esta vida"*).
- 151 True development for the Ch'orti' mean ensuring conditions for a *"Buen Vivir"* (Good Way of Life) which entails protecting the water, the forests, *"everything that has life"* (*"todo lo que tiene vida"*), *"for those to come"* (*"para los que vienen"*); the guarantee for those yet to be born.
- 152 The communities we spoke to would like to see a form of development which increases their ability to securely meet their basic needs while maintaining their traditional way of life.

¹³⁰ Víctor Ferrigno F., "El oscuro negocio de la luz" FLACSO, November 2009. <http://issuu.com/flacsogt/docs/3epoca8>

- 153 Members of Nuevo Día argue development means for them:
- 153.1 Strengthening communal authorities and leadership structures;
 - 153.2 Establishing public policies which can make agriculture more productive and resilient;
 - 153.3 Promoting ecological agriculture, both as a means of sustenance and an economic activity.
 - 153.4 Ensuring the right to life and subsistence of the community within the natural eco-system they feel they are guardians of. "Rivers represent life and spirit rather than usable energy. If you cut the river into two with a dam, that energy is lost."

The development context

- 154 The Ch'orti' are particularly conscious of what adequate development would be for them. Their resistance to the dam projects is particularly acute because it is seen as the thin edge of the wedge. Several members mentioned to us the "technological corridor" (*corredor tecnológico*), as described in section C, connecting the Atlantic and Pacific Oceans. It would comprise a road, railway and oil and gas pipelines. This corridor would run through their communities in Chiquimula. They are aware of certain additional mining plans for the region as well.
- 155 The creation of additional sources of electricity would therefore only be the first step in development of the region, preceding the construction of massive infrastructure and the growth of the extractive industries. They can see little promise for their traditional way of life and their ancestral lands should these projects come to pass. They see themselves as taking a stand now as defenders of the land.

u Response of local state actors to unrest: conflict and criminalization of the Ch'orti' people

"Companies are untouchable" ("Las Empresas son intocables")

"People are intimidated, or the penal system is used in a spurious manner with people being accused of certain types of criminal offenses such as illicit association, terrorism, kidnapping and then being remanded in custody without considering alternatives to custodial measures" ("Se intimida a la gente, o se usa el sistema penal de manera espuria con tipos penales propios del crimen tales como asociación ilícita, terrorismo, secuestro, sin considerar medidas sustitutivas")

"It's grotesque what they do here" ("Es grotesco lo que hacen acá")

Civil society observations

- 156 Resistance and protest have been part of the Ch'orti' community's response to the perceived threats to its ancestral lands and breaches of their national and international rights. They have expressed their opposition to the form of development on offer via the hydro-electric projects. This has escalated into a conflict between the community, local authorities and company representatives.
- 157 Four aspects of this conflict are of particular concern to the mission:
- 157.1 Activities of resistance and protest have been criminalised in a manner which was not warranted. The response of the State to the opposition of indigenous communities to the hydro-electric projects has been simply to repress such opposition using the criminal justice system;
 - 157.2 There are fundamental failures of due process in the criminal justice proceedings against members of the community;
 - 157.3 The local authorities have not protected the community from acts of aggression and intimidation, nor have such incidents been duly investigated;

157.4 Political exclusion of community members active in the resistance to the hydro-electric dam.

Criminalisation of resistance

- 158 The mission is under no illusion that acts of resistance and protest can amount to criminal offences, if they turn to violence against people or property. However, the concerns of the mission are that community members have been charged with inappropriate offences which have the effect of stigmatising and persecuting the community, and quelling the free expression of their views and will. It effectively amounts to using the criminal justice system to repress opposition.
- 159 The mission has received the following complaints from the Ch'orti' community:
- 159.1 "They blame our communities for the conflict" ("*Culpan a las comunidades del conflicto*")
- 159.2 "We suffer discrimination from local authorities." ("*Las autoridades del municipio discriminan*")
- 159.3 "They make us out to be a group of gangsters" ("*Nos ponen como un grupo de pandilleros*")
- 159.4 Leaders feel "smeared, criminalized, and they fear for their lives." ("*Líderes se sienten "señalados, criminalizados, menciones de asesinato"*")
- 159.5 "We've been called a 'red alert zone'. It's not true. We are defending our territory and the livelihood and natural resources of this community" ("*Nos han llamado 'zona roja'. No es cierto. Estamos defendiendo nuestro territorio y un bien común, los recursos de esta comunidad*")
- 160 For example, we were informed that a protest the Ch'orti's made against the hydroelectric projects in the Jupilingo Bridge on the 18 of September 2014 was met with a strong repression. 200 agents of a special anti-riot police unit (PNC) repressed this protest using firearms, tear gas, and anti-riot batons. There were children among the Ch'orti' people demonstrating. Several members of the community were injured including one person who was shot and wounded by the police. Five members of the Ch'orti' community were detained for "disturbing public order" ("*atentar contra el orden público*"). They were kept in detention for three days and eventually released without charge. Referring to that particular event, the UN High Commissioner for Human Rights noted in its last report on Guatemala: "The work of human rights defenders was also obstructed by arrests and criminal prosecution."¹³¹
- 161 In August 2014, 14 members of the Las Flores Indigenous Council were called to a mediation meeting (*junta conciliatoria*) in the Chiquimula District Attorney's office (*Fiscalía Distrital*). Having received no prior information about the accusation the leaders decided not to attend. They managed to find out that they had been accused of "threatening behaviour." The communities believe that it is part of a strategy to criminalise the community of Las Flores which has just received formal recognition of its indigenous status.

Failure of due process

- 162 The mission's concerns with regard to the criminalization of communities for protest and resistance are compounded by concerns as to the fairness of criminal proceedings once these are begun. There are fundamental problems with access to justice and due process which mean that, even if unfairly charged, community members may not escape conviction and sentence.
- 163 These concerns have been reported to us generally by the community, but became forcefully apparent through our examination of two cases: Timoteo Súchite de Rosa and Agustín Díaz Ramirez, members of *Las Flores*. Timoteo is a father of 4 children and Agustín is a father of 5. Timoteo and Agustín are elected members of the Indigenous Council of Las Flores de Jocotán. On 11 May 2013, a man irrupted into a meeting at *Las Flores* community, threatening attendees and firing his gun in the air. The man was killed in the subsequent scuffle. Timoteo and Agustín were charged with his murder, which they both vigorously deny.
- 164 Timoteo and Agustín were held under preventative detention for 4 months, after which a judge ordered their conditional liberation due to lack of evidence of their individual criminal responsibility for the murder. The Prosecutor's office was given 2 months to present evidence to support the charges. However, in January 2104,

¹³¹ A/HRC/28/3/Add.1, op cit. at para 46 (our emphasis)

they were once again detained. No additional evidence had emerged that could add weight to the charges or justify a new order for detention. In April 2014 the trial took place culminating in their conviction on 15 May 2014 and sentenced to 6 years in prison for manslaughter. In the sentence, the judge signaled that it was a lynching and that investigations would continue to find others involved. The mission was informed that during the trial the judge was openly hostile towards the presence of international observers. The mission had the opportunity to listen to the records of the hearing where both the accused were sentenced. During that sentence reference was made to limited evidence which did not address the individual criminal responsibility of both accused for the events (specifically in which manner they had taken part in the events). There was no reference to forensic tests or other corroborative evidence.

165 The concerns these cases raise with regard to criminal justice processes are as follows:

165.1 Whether the local *Ministerio Público*, ie prosecutorial authorities, had sufficient evidence to charge Agustín and Timoteo. Each country has its own legal test as to the amount of evidence necessary to bring charges, and the mission does not purport to query Guatemalan legal standards in that regard. However, it is a concern that one judge released Agustín and Timoteo because of lack of evidence, only for the charges to proceed without any additional evidence being adduced;

165.2 In the same vein, the mission is concerned that Timoteo and Agustin were convicted on the basis of no or insufficient evidence of their guilt. It is both a universal and trite principle that criminal convictions should only be made on the basis of evidence of guilt to a high standard, such as the test of "beyond reasonable doubt";

165.3 This then raises the question of judicial independence. It is, again, a trite principle of criminal justice that it should not bear any interference from outside political or commercial interests. The fact of a conviction on insufficient evidence, but also of the apparent hostility of their judge, raises questions as to whether Timoteo and Agustín were tried by a fair and independent judge;

165.4 The mission was concerned that preventive detention was used in this case despite the facts that (i) they had no previous conviction or record of wrongdoing, (ii) their domicile was known, (iii) they were the bread-earners of a family of several children with some younger than 5 years old, and (iv) and no other alternative to deprivation of liberty was considered;

165.5 There are further procedural concerns which impeded the preparation of a defence. These include the fact that Timoteo and Agustin could not speak during the trial in their own mother tongue, Maya Ch'orti, and were not provided with an interpreter. This is an impediment for access to justice for all indigenous peoples who may not be fluent in Spanish, but are nevertheless tried in that language;

165.6 Timoteo and Agustin reported that "Our lawyers are treated like terrorists" / "*A los abogados se les trata de terroristas*". They were fortunate in that they were represented by lawyers from NGO Nuevo Dia. However, we are told they were treated with bias;

165.7 The international Commission of Jurists has also raised a number of concerns with regard to access to justice for indigenous peoples which go beyond linguistic barriers, although language is a major concern. These include the distance of the courts to the villages making attendance at court hearings difficult, and expensive and the lack of access to legal representation.

166 Timoteo and Agustín appealed their sentence. At the time that the mission visited them in prison on 6 May 2015, they were awaiting the hearing of their appeal.

167 The mission noted that they were held in overcrowded conditions. According to reports, the prison was designed for 140 prisoners, but held 325 inmates.¹³² Prisoners had to buy all the water they required for drinking, washing and other basic necessities. They had no access to basic healthcare. They had not received family visits for a considerable period of time due to lack of means for their families with young children to visit them in prison from their remote lands. The mission was further troubled by the account from both detainees that unknown individuals, acting allegedly on behalf of the hydroelectric company *Las Tres Niñas*, had visited them suggesting that if they sold their lands they could walk free immediately.

¹³² Michel P Roth, "Prisons and prison Systems: A Global Encyclopedia, Greenwood Press, 2006, p. 121.

Failure to protect the community

- 168** Against this backdrop, it is unfortunate that incidents of harassment, violence, and even killings, against community members have not been investigated and prosecuted with the same vigour. The Ch'orti's denounced threats to leaders and communities. We heard from the community that:
- 168.1** "We feel abandoned by the state. If we take our concerns to the Prosecutor's Office they threaten us with arrest." / *"Nos sentimos abandonados por el Estado. Si vamos al Ministerio Público nos dicen que nos van a capturar"*
- 168.2** Dona Francisca reported an incident in which she was violently assaulted: "They grabbed me and beat me. They threatened to dump me on the roadside." / *"Me agarraron y me golpearon. Me amenazaron con tirarme en la carretera"*. This incident was never investigated and the culprits have not been brought to justice.
- 169** The Ch'orti' denounced to us at least 60 incidents of attacks against them. Between March and November 2014 PBI who has been providing *acompañamiento* to the community, registered 109 security incidents against members of the Ch'orti'. Such security incidents include attacks, death threats, illegal surveillance and intimidatory acts. Between 2013 and April 2015 there have been at least 24 serious incidents of death threats, physical assaults, attempts of physical assault, aggression with firearms and killings against Ch'orti' indigenous peoples in the context of their opposition to hydro-electric projects.¹³³ On 8 March 2013 Carlos Hernandez, a member and leader of the community was shot dead. Two people accused of his murder were released from jail in 2014. To date his murder remains unpunished.
- 170** The community reported that their complaints went unheeded: "They see us as illicit organizations. If we go to the Prosecutor's office to make a complaint, they threaten to arrest us" / *"Nos ven como organizaciones ilícitas. Si vamos al Ministerio Público a hacer alguna denuncia, nos dicen que nos van a capturar"*.
- 171** The mission considers that the local authorities have an obligation to ensure the protection of community members, as it does to any of the residents of the region. We find that there have been serious failings in this regard, made starker by the apparent double standard with regard to the criminalisation of community members.

Political exclusion

- 172** Finally, the mission was concerned to hear that those individuals who were active in resisting the hydro-electric dam were excluded from the local political process. For instance, we were told that community members who joined NGO Nuevo Día were excluded from participation in the COCODES, the committees which liaised between the community and local authorities. These are distinct from the indigenous council chosen solely by the villagers to lead them. For instance, Doña Maria de Cano Anticipe was excluded from her village COCODE because she is a leader in Nuevo Día; and Roberto, who is a leader in Cajón del Río, has been removed from COCODE of his community. More broadly, communities in which Nuevo Día were present felt discriminated against compared to those that were not.
- 173** Further, community members resented the process of local authorities naming individuals within the community as being the reason why certain community requests had been refused. This was felt to be a process of stigmatisation and a way of dividing communities.
- 174** Earlier fact-finding missions corroborate a pattern of criminalisation against those opposing development projects in Guatemala:

*"[...]Community leaders are tendentiously labelled as delinquents, hell-raisers, terrorists, murderers and thieves [...]"*¹³⁴

¹³³ "Incidentes sufridos a miembros de la "Central Campesinas Ch'orti' Nuevo Día en el año 2013, 2014, y lo que va del 2015." On file with the Mission.

¹³⁴ The Observatory for the Protection of Human Rights Defenders, "Guatemala 'Smaller than David': The Struggle of Human Rights Defenders," International Fact-Finding Mission Report, February 2015, p. 24.

“With regards to patterns of aggressions suffered by the communities that oppose the projects, and the organisations that support them, the following aggressions have been documented: physical attacks and attacks against life, threats, defamation, and criminalisation. Regarding the improper use of criminal sentencing against them, the defenders are accused of committing crimes such as: unlawful association, conspiracy; terrorism; inciting crime; acts against homeland security; offenses against the life, security and personal freedoms of others, such as murder, abduction or kidnapping, unlawful detention, etc.”¹³⁵

“It is possible to confirm that the defenders most affected by criminalisation are those who have taken a stand against natural resource extraction projects, [...]. Under the phenomenon of criminalisation it is also possible to observe consistent patterns in that way in which human rights defenders are denied justice, how (im) promptly proceedings are undertaken and that there is a lack of effective responses to complaints presented by community, indigenous peoples, or human rights defenders who are defending either an individual's rights or the rights of specific groups against attacks to these rights; the latter could also be interpreted as a pattern of discrimination with regards to access to justice.”¹³⁶

v Response of national state actors

Ministerial level

- 175** The delegation felt that the response of national state actors was unsatisfactory. At the executive level, there is little awareness of the problem of indigenous communities opposing mining projects, or at least, little political will to look into finding an adequate settlement for all parties.
- 176** Officials from the Ministry of Energy and Mines took time to listen to the concerns we reported from the community and to explain the system of the granting of licences. However, it was plain that the 1996 Law of Electrification, as set out by the Ministry officials, was (a) not capable of addressing the concerns of the community, and (b) non-compliant with the legal framework set out in sections J, K and L above.
- 177** The Ministry officials explained that the process for the granting of licences included opportunities for consultation in the following ways:
- 177.1** Any application for a licence for a dam needs to include an environmental impact study, within which the company must show that it has consulted the community. The adequacy of the environmental impact study is assessed by the Ministry of Environment;
- 177.2** Upon receipt of a fully completed application for a licence, the Ministry of Energy publishes the details of the proposed dam in two journals: the National State Journal and a national newspaper. This does not include publication of the full application with concomitant environmental impact study. Following publication, any person has 8 days to present and technico-legal information which opposes the dam. Anyone who submits such information will be called for a meeting at the Ministry. Failing that, the process of authorization will continue with a site inspection and review by the government's legal service.
- 177.3** If anyone wishes to obtain a copy of the environmental impact study, they may follow the process provided for by the Law for Access to Public Information.
- 178** The Ministry officials specifically said that they had no obligation to consult any of the people affected, indigenous or otherwise, although they did have the willingness to do so. They deplored that people opposed projects once a licence had been granted.

¹³⁵ Ibid.

¹³⁶ Ibid, p. 23.

- 179** They indicated that they saw hydro-electric dams as being part of their vision for the Chiquimula region in which:
- 179.1** The use of fossil fuels would be reduced;
 - 179.2** The cost of energy would be reduced;
 - 179.3** Rural electrification would be fostered.
- 180** The delegation requested meetings with the Ministry of Environment but was not accorded an interview. However, even for the Ministry of Energy and Mines, the prospect of the elections and change of government in a short period of time would hamper much of their activity.
- 181** The delegation's concerns with regard to the approach of the Ministry of Energy and Mines are as follows:
- 181.1** The opportunities for consultation within the preparation of the environmental impact study are inadequate.
 - 181.2** The publication of the details of the licence application in the State Journal and a national newspaper is not a consultation. It is an opportunity to raise objections. In that sense, it does not comply with the legal framework set out in section L above. Further, even as a chance to object it is unsatisfactory for reasons of pure practicality. First, it is unlikely that affected indigenous communities would become aware of a proposed dam project through these two media used. Second, they are unlikely to be able to respond within 8 days, let alone produce technico-legal information setting out their objections within that period of time. The barriers of time, resources and knowledge are such that no community would be able to voice concerns within this framework. In fact, the delegation considers that in no country in the world, however well-resourced and educated its population, could this be seen as a reasonable opportunity to object to a project. The law has been drafted in such a way as to only give token opportunity for objection, but no real voice to affected people.

V RECOMMENDATIONS

180 In light of the above, we recommend:

As urgent steps to take:

- (1) As a basis for ensuring that the potential effects of the projects be understood, it is recommended that an Environmental and Social Impact Assessment [ESIA] be carried out by an independent and technically capable entity under the State supervision. Such assessment should conform to the relevant international standards and best practices. In particular, the *Akwé:Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take place on, or which are Likely to Impact on, Sacred sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*.¹³⁷
- (2) It is recommended in the meantime that the authorities declare a moratorium on the building of the two dam projects so as to reduce tensions in the area and give consideration in due course to the ESIA study and informed views of the communities likely to be impacted.
- (3) Ensuring the participation of the Ch'orti' communities in any process relevant to the determination of concessions in their land affecting their natural resources. This entails addressing them in the consultation process as indigenous peoples, as a collectivity, respecting their traditional decision-making bodies and practices.
- (4) The end of discriminatory practices in proceedings involving indigenous peoples, such as the unjustified delay in the determination of their claims (e.g. applications for juridical personality) and ensuring the full respect of their right to equality before law (before courts and tribunals).

Medium term

- (5) The drafting of a law and regulation on the right to consultation which follow the principles reflected in the *Saramaka* case, held by the Inter-American Court of Human Rights in its construction of Article 21 of the American Convention on Human Rights, a Convention binding on Guatemala.¹³⁸

The mission notes the high number of conflicts related to large scale projects (oil, mining, dams, road construction and other) and recommends that the government engage, in consultation with indigenous peoples, in developing clear guidelines for public and private sector enterprises undertaking activities that might affect them to ensure that indigenous peoples are fully consulted with a view to obtaining their full and informed consent prior to such activities being approved.

- (6) The creation and establishment of a National Plan of Action for Business and Human Rights.

Noting the absence of understanding of emerging international guidelines and practices relating to business and human rights among the representatives of industry the mission met, it is recommended that the government undertake awareness measures and set out guidelines for companies considering activities on indigenous peoples' lands or that may affect their resources.

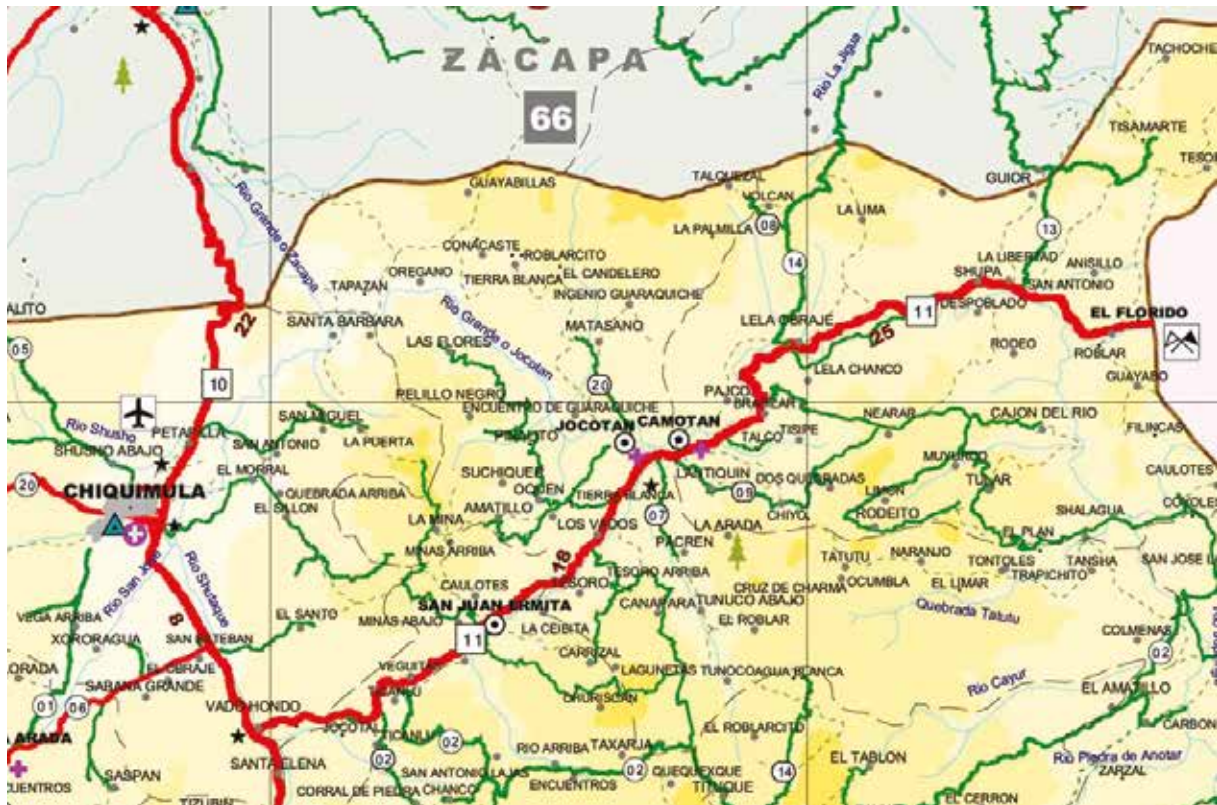
Longer term

- (7) The Cho'rti' case confirms the need to address indigenous peoples' concerns nationally so as to bring the country's laws and administrative regulations and practices into line with the provisions of its Constitution and international human rights law to which the state is committed. In particular, these laws and regulations need to address the formal recognition of indigenous peoples' identities as collectivities, their collective right to property to their ancestral lands and resources (establishing (i) *special*, (ii) *adequate*, and (iii) *effective* procedures for the delimitation, demarcation and granting of titles of territories), and their right to determine their development priorities.

¹³⁷ <https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>

¹³⁸ For the guiding principles see paragraph 63 below.

APPENDIX A – MAP OF CH’ORTI’COMMUNITIES



Experts' biographical information

Dr Julian Burger is a Visiting Professor at the Human Rights Centre of the University of Essex and also teaches and researches at the School of Advanced Studies of the University of London. For more than 20 years he headed the indigenous peoples and minorities programme at the UN Office of the High Commissioner for Human Rights, working directly with indigenous peoples in the region, helping establish technical cooperation activities, training governmental officials in human rights and initiating dialogue between governments and civil society on human rights themes. During this period, he organized the discussions on the Declaration on the Rights of Indigenous Peoples and helped launch the principle human rights mechanisms on indigenous peoples – the Special Rapporteur, Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples. He also helped establish inter-agency networks of UN organizations to improve integration of indigenous and minority rights into development programmes. Dr Burger has published books and articles on indigenous peoples and human rights since the 1980s and is currently working on a publication that will evaluate developments relating to indigenous peoples rights and examine current challenges. He has extensive experience of field work in Latin America, and currently teaches courses on 'Human Rights in Latin America' and on 'the protection of the rights of indigenous peoples'

Monica Feria-Tinta is a barrister at 20 Essex Street, a leading international commercial set of barristers' chambers in England. She is the first Latin American lawyer to be practising at the Bar of England and Wales, and specialises in public international law, including its interface with commercial matters, with a particular focus on energy and natural resource extraction, as well as business and human rights. She has broad experience both as counsel and as adviser in international litigation before international courts and tribunals as well as an adviser in non-contentious matters. She has advised on legal issues relating to the exploration of gas in the Amazon, social and environmental impact of gold-mining projects in Latin America, and civil liability arising from breach of due diligence in a natural gas exploration project in Africa. She is the author of a comparative analysis on corporative liability for torts in the US and in England. A world expert in the Inter-American system of protection of human rights, she has litigated landmark cases before the Inter-American Commission and Inter-American Court of Human Rights and has published extensively on the standards and jurisprudence of these organs. She has appeared as counsel before UN organs, having previously worked for international tribunals in The Hague. Her litigation work received the 2006 Inge Genefke International Award and in 2007, the Gruber Justice Prize, which honours individuals who have advanced the cause of justice as delivered through the legal system.

Monica has taught Public International Law at the London School of Economics and has been a Visiting Scholar at the Lauterpacht Centre for International Law, University of Cambridge. She holds an LL.M. with merit (London) and The Hague Academy Diploma in International Law. Contact: MFeria-Tinta@20essexst.com

Claire McGregor is a barrister practicing at 1 Crown Office Row in England. She has extensive experience representing claimants in complex tort cases, typically for personal injury and/or financial loss arising out of environmental damage. Her work encompasses human rights cases involving corporate abuse or complicity in the extractive industries. She represented some 15,000 fishermen in Nigeria suing the Shell group following an extensive oil spillage affecting their livelihoods and causing long-term damage to the local ecosystem. She was instructed by indigenous farmers in Colombia in proceedings against the British Petroleum group. The claim, for damage caused to their land, environment, and livelihoods as a result of the construction of the OCELSA pipeline, resulted in the longest environmental law trial in the British courts (six months). Before joining the bar, Claire worked for three years at Leigh Day where she was closely involved in the Trafigura case, the largest group litigation case in the UK, in which 30,000 claimants from the Ivory Coast sued oil multinational Trafigura for compensation following a toxic waste spillage in Abidjan. She previously worked in Egypt providing legal advice to refugees in Cairo for year. Claire is a British and French national, and works in both French and Spanish.

