

# Indigenous Women of the Americas

Methodological and conceptual guidelines to confront situations of multiple discrimination



## **Indigenous Women of the Americas**

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Translation from Spanish: Joanne Hutchinson

Cover design and layout: Kate Bridges (Forest Peoples Programme)

Cover photo: A workshop in the indigenous community of Volcan de Yacoraite, Argentina

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# I-Introduction

This document is the result of a process of collective construction by our organizations; the Council of Indigenous Organizations of Jujuy (*Consejo de Organizaciones Aborígenes de Jujuy*); the National Indigenous Organization of Colombia – Council of Women, Family and Generation (*Organización Nacional Indígena de Colombia - Consejería de Mujer, Familia y Generación*); the Mixe People’s Services (*Servicios del Pueblo Mixe*), Lawyers for Justice and Human Rights (*Abogadas y Abogados para la Justicia y los Derechos Humanos*) and Quebec Native Women (*Femmes Autochtones du Québec*)<sup>1</sup>; carried out as part of a project entitled “Ethnic and Gender Discrimination in the Americas: the Case of Indigenous Women”. Its objectives were: to produce Inter American jurisprudence in favour of indigenous women, to help strengthen them as protagonists of this process and to build a conceptual and methodological framework to combat double discrimination, considering, above all, their own voices and viewpoints.

Our constantly-evolving methodological construction process drew on the experience of organized indigenous women. Each team and each situation took the perspective of indigenous communities into account as well as the experiences of regional and national indigenous and human rights organizations. It was an intercultural and multidisciplinary experience. We worked together to help strengthen awareness of rights among women themselves, documenting instances of discrimination from their own experience and strengthening the capacity of our organizations to facilitate access to justice.

In this process, thanks to the voices of indigenous women and the experience of those who participated in this process, we understand better the many nuances of how this discrimination is experienced and why it goes unreported. Moreover, we have confronted the many obstacles that arise when indigenous women attempt to access justice; including their invisibility in society, the naturalization of discrimination, and the cultural inappropriateness of the

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1 This effort stems from the Committee on international mechanisms of the Continental Network of Indigenous Women (*Enlace Continental de Mujeres Indígenas - Enlace*) a network of indigenous women’s organizations in the Americas. To date, its members FAO and ONIC are involved in this process. Also involved at times in our construction, were Rights and Democracy, the International Human Rights Clinic at the University of Quebec in Montreal, Canada, and the Women’s Coalition on Development (*Coalición de Mujeres Rumbo al Desarrollo*) in Ocosingo, Chiapas, Mexico. We have also benefited from the support of the International Development Research Centre (IDRC) in Canada and finally for this document from the Forest Peoples Programme.

dominant justice system.

This situation has led us to the conclusion that we need to work using methods which are more aligned to the indigenous worldview and with a gender perspective, which enable us to document and report cases of discrimination experienced by indigenous women in the Americas. This methodology was developed after an analysis of the situation was made in four countries of the Americas; namely Canada, Mexico, Colombia and Argentina. In each country we examined in detail a particular right: the right to identity in Canada, to health in Mexico, to live a life free of violence and discrimination in Colombia and to education in Argentina.

Traditional tools for training, documentation, investigation and evidence-gathering have proven to be insufficient to confront, via justice systems and the implementation of public policies, the complex situation of discrimination against indigenous women. In our search for tools more aligned with the women, we began to draw the roadmaps which lead us towards a more comprehensive vision, oriented towards change, based on their strength and vision. In fact, we used as a basis and reaffirmed along every step of our journey, the fact that indigenous women are subjects of rights and above all are actors for change. They are the ones who can best understand their reality and any action for change must include them. This position has conceptual and methodological implications which reverse tendencies to objectify indigenous women or consider them only as victims and not as actors, or subjects.

We would like to share our process with people who work with indigenous women, indigenous organizations, human rights organizations that bring violations of indigenous women's human rights to justice, those involved in policy making, and public and interstate institutions which develop appropriate protection mechanisms. We believe that our reflection could help to facilitate access to justice for indigenous women and thus enable the development of better protection mechanisms such as adequate legislation and reforms. In this way, national justice systems and international protection mechanisms can become more aligned with indigenous women's specific situations.

This paper begins with a presentation of the conceptual framework that guided our work, highlighting the importance of using the indigenous perspective as a starting point, and including a human rights perspective and a gender focus. Then, we present the methodological guidelines that were developed in this process to seek justice.

## II-Conceptual and methodological tools

A participatory process was carried out between indigenous women and those accompanying the project, and a series of methodological and ethical principles were identified, enabling us to place indigenous women at the centre of any process of documentation or analysis of a discriminatory situation. These guidelines are intended to enable a better understanding of the collective and individual effects of discrimination in the social and political context in which the discrimination occurs. These concepts and principles form the basis of a specific framework for research into discrimination and for the construction of cases to be presented before the courts.



Workshop in Jujuy, Argentina

### A- Indigenous perspective-A framework for analysis

In order to identify indigenous women's perspectives, it is essential to use the indigenous perspective as a starting point, since the women are part of indigenous communities. This perspective is based on cross-cutting principles and indigenous traditional law (*derecho propio*), as discussed below.

## ***Indigenous principles***

Indigenous principles are ethical norms of culturally adapted behaviour which offer a way of understanding the world and relating to it. Some principles are specific to some peoples, but others are shared by the indigenous world throughout the Americas.

### ***Duality and complementarity:***

Male/Female and Human Being/Nature. Both dualities are important and are reflected in rituals, oral histories and codes of conduct.

*“Water-fire, up-down, cold-hot, left-right. These apparent opposites describe one polarity where just as fire needs water and the healing process needs cold and warm plants, so women need men and vice versa.*

*In all relationships in the indigenous cosmos a vertical axis is established from top to bottom, and a cross-cutting axis from right to left. These axes meet at a central point, where they converge and are fully realized, there is no longer an up or down, there is instead the meeting place, the point of balance. The vertical axis corresponds to duality, to difference, and the horizontal axis corresponds to relationships: between equals, at the same level, at the meeting place, the place of reciprocity.*

*Equals among women, equals among men and women, equals among peoples. Non-discrimination lies at the heart of this vision, where each being has something to give and something to receive. I receive from mother earth and I must make a payment to her for what she has given me.*

*Starting from this viewpoint, women and men within their peoples and communities should meet each other at a point, with their different strengths and different knowledge, where the feminine is as evident as the male, and men and women have equal value, equal treatment, equal rights, and shared responsibilities.*

*From this viewpoint it is impossible to understand how work mainly done by women relating mainly to care and reproduction can be seen as work of little value or little importance. Indeed, it is impossible to understand how, as women have a definitive role in the survival of their peoples, they are excluded from decision-making and governance processes, denying the presence of the*

*female voice and female thinking in these areas.”<sup>2</sup>*

Duality and complementarity between men and women has sometimes been lost in daily life but is present in indigenous traditional law. Indigenous women emphasize this principle, and insist that their role should be valued by culture and society.

In Jujuy, Argentina, it was found that rituals celebrating duality have been lost through acculturation processes in the education system, and these rituals are now being revived in an effort to reconnect with the strength and contribution of women.

The duality between human beings and nature is different from the Western concept of the use and exploitation of nature. The indigenous relationship with nature is one of respect; nature is known as Pacha Mama, or Mother Earth. This concept also gives rise to indigenous peoples’ special relationship with their territories, and with the cosmos. This has been recognized by the international community.<sup>3</sup>

### Respect and Reciprocity:

Reciprocity is a kind of positive bartering system, in a relationship of mutual agreement, with the mutual consent of both parties, “...to reciprocate is not to give what I have left over or what I think I have to give, but rather to give what the other needs...” to reciprocate means “giving and receiving”, keeping a contented heart. This means that you cannot go to a community to collect evidence without leave something, without giving something in return such as training or support for empowerment. Working with indigenous women in a relationship of respect and reciprocity includes questioning any relationship that treats them as objects. It also means fully recognizing the knowledge of indigenous women and their active contribution to the construction of knowledge.

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2 National Indigenous Organization of Colombia (*Organización Nacional Indígena de Colombia* - ONIC), “Mujeres indígenas sabias y resistentes” (*Wise Indigenous Women in Resistance*), Second edition, from the ONIC 30th anniversary collection, Bogotá, 2012

3 Article 25, UN Declaration on the Rights Of Indigenous Peoples, Adopted by the General Assembly, A/61/L.67, 61/295, 2007, [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)



### Integrity and Spirituality:

Western science has separated knowledge from spirituality. A comprehensive indigenous vision recognizes that spirituality generates knowledge, healing and an understanding of the world. The worlds of emotions and spirituality are not separate from knowledge.

In Jujuy, Argentina, it was noted that women talk more when they are in a safe environment where appropriate rituals are practiced. Spirituality has been a key element in the process, both for documentation and healing. Obviously not all peoples from the continent have the same spiritual practices but we must always look for them and take them into account.

### Harmony:

In the indigenous world discord is never sought, instead indigenous peoples are always looking for harmony and rediscovering it. Harmony with the community, with others, with the cosmos, with Mother Earth and all beings that inhabit it, and with oneself. Harmony is linked to duality and its realization. It is a factor in both spiritual and material peace.



Ceremony at the opening of a meeting in Termas de Reyes, Jujuy, Argentina

Losing harmony with the community and with other elements in life can result in great pain.

Harmony is lost when actions cause harm to any being, human or otherwise. In this way every action that violates or affects a woman creates an imbalance that disrupts harmony.

**Indigenous principles are cross-cutting. They should be applied at all stages of case-building: right from awareness-raising, through case identification and documentation, and also during the prosecution stage.**

### *Traditional indigenous law*

Indigenous peoples are distinct from each other and from the people who have colonized their territories. They have their own world view and, within it, their own normative systems. Not all peoples have institutions which impart justice but all have codes outlined in oral stories about their worldview, rules governing relationships, ways of being and living in their territory and in their own ways of imparting justice.

Indigenous traditional law differs from customary law, in that the latter is understood as a socially-recognized right derived from customary practices and is integrated into Western legal systems. While it is true that, traditionally, the recognition of indigenous law was limited only to the recognition of the customs and traditions (“uses and customs”) of an indigenous people, in modern times, with the rethinking of the multicultural nation state, indigenous peoples are now recognised and participate as collective entities, and have their own rights. That is to say *“they are as socially, politically, and economically complex as the civil society which they are part of. That is why we speak of traditional law and not customary law.”*<sup>4</sup> At the same time, indigenous peoples are leading the process to reclaim their own traditional legal systems, which comprise their worldview, norms, customs and authorities. These are systems which have governed and regulated an entire people since ancient or immemorial times and which currently seek the fair recognition of their existence and validity within the dominant laws of a State which denies cultural diversity and aims to use the dominant legal system as the sole regulator.

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4 Acevedo Vicencio, «El reconocimiento del derecho indígena: situación actual en Chile, en el derecho comparado internacional, derechos al agua y geotérmicos. Caso Toconse y el Tatio». Santiago, Chile 2010

Traditional indigenous law, or indigenous peoples' normative systems, are themselves based on 'Original Law', (*Ley de Origen*) understood as the traditional science of indigenous wisdom and ancestral knowledge, which governs everything material and spiritual, whose fulfilment ensures balance and harmony in nature, and the order and continuity of life, the universe and indigenous peoples themselves.

Original law is related to universal order; it governs the relationship between living beings from stones, to humans. As a harmonious world order, it is related to all areas of indigenous peoples' lives, and to every element of nature, thus ensuring the cultural balance of peoples.

Indigenous women are governed by their peoples' codes and regulations, which inform their culture and worldview. Therefore, to understand fully how an indigenous woman is affected by a human rights violation, it is essential to understand the significance of this violation in the context of the particular traditional laws of her people, that is to say their worldview and normative system.

Traditional indigenous law or Original law is ancestral; passed from generation to generation by elders. In the case of Colombia, it is understood as a body of law that accompanies members of indigenous communities and peoples of the Americas; it has legal validity and primacy over other constitutional rights. Traditional law has its source in Original Law or natural law and is different to the indigenous rights recognized in national and international human rights frameworks. The latter recognizes and values the existence of indigenous legal systems and obliges states to respect them, but it does not describe or define these systems.

**To understand discrimination against indigenous women it is essential to explore and take into account the traditional indigenous laws of their peoples.**

*Territory, Autonomy and Culture:*

Together with Unity, these are the founding principles of the National Indigenous Organization of Colombia (*Organización Nacional Indígena de Colombia*) and are also the guiding perspectives of the continental indigenous movement. Both the right to territory, as well as the right to autonomy and culture, have been recognized in international instruments such as ILO Convention 169, the UN Declaration on the Rights of Indigenous Peoples and the jurisprudence of the Inter American Court of Human Rights. They are essential elements for

the survival of indigenous peoples and especially for indigenous women, who give a specific meaning to these principles according to their own experiences and needs. In Colombia for example, indigenous women stress the need for a territory that is not only legally recognized but is also safe. For indigenous women, the earth is the mother, it is a woman, a living being, to be respected and cared for. In order to address the situation of indigenous women, we will consider these principles by giving them the meaning that indigenous women themselves give them.

## **B-Tools to analyse discrimination against indigenous women**

In the search for a conceptual framework to help understand and make visible the specific situation of indigenous women, we highlight some concepts which may be useful in different situations and for different objectives.

### *Intersectionality:*

Indigenous women suffer discrimination for a number of reasons that overlap in their lives; they are discriminated against because of their gender, their ethnicity and their position in society as women in poverty (their social class). These overlapping factors deepen the discrimination they suffer which means that they experience discrimination in a different way to women from other sectors of society.

This “intersectional” vision was initially developed by African American women lawyers<sup>5</sup> who were faced with the limitations of analyzing their own cases only from the perspective of gender discrimination.

Some victims of discrimination are victimised because they display a number of traits associated with negative stereotypes deeply rooted in society, which, on one hand, amplify the severity of the damage to their dignity and, on the other hand, transform to some extent the type of injury they suffer.

An intersectional discrimination refers to a situation in which various

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<sup>5</sup> Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) U. Chi. Legal F. 140; Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1990-1991) 43 Stan. L. Rev. 1241.

discriminatory factors interact simultaneously, producing a specific form of discrimination, which also has differentiated effects.

Intersectional analysis should not be understood as a combination of identities or a mathematical sum that increases the discrimination itself, but rather as the combination of factors that produce **substantively different experiences**. This kind of analysis helps us to understand and assess the impact of such a combination in different situations and to visualize how the design and implementation of public policies, programs, services and laws that affect different aspects of indigenous women's lives, create barriers that depend directly on the application of discriminatory concepts.

It is essential to start from the perspective of the woman concerned in order to understand the specific interactions between ethnicity and gender, social status, age or other sources of discrimination. It is also essential to know the particular context of colonialism, sexism, racism, social inequality and its history, crystallized as exclusionary structures and practices.

It is fundamental, in order to make progress in the prosecution of a case of intersectional discrimination, to demand that the courts do not choose between one form of discrimination and another, but instead consider them all together. Although there is little precedent of "intersectional" sentences or the recognition of new forms of discrimination caused by the amalgamation of several discriminations<sup>6</sup>, there are some examples in Canada. However, this jurisprudence is only just emerging.

To develop jurisprudence at the Inter-American level, it must be shown how the concept of "indigenous woman" is different to the separate concepts of "woman" and "indigenous", and that an intersectional approach is essential.

The reality of the discrimination that indigenous women suffer is situated within a collective context and **the application of an intersectional approach to the analysis of the discrimination faced by indigenous women involves taking into account the collective demands of their peoples and the disadvantages they have inherited from colonial domination**. The notion of "people" and the "collective" is essential when it comes to indigenous women.

The spiritual and cultural relationship between indigenous women and their

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6 Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*, Discussion paper, 2001, available at: [www.ohrc.on.ca](http://www.ohrc.on.ca)

territories, and their legal systems and practices, are symbolic of the intimate relationship between individual and collective rights. The legal human rights tradition has not taken on board the coexistence of these categories of rights, forcing an indigenous woman to choose, in many cases, between her identity as a woman and as a member of an indigenous people, with the result of being left without adequate protection.

Intersectional analysis is very useful for working on indigenous women's cases, as it allows us to understand a reality in the most comprehensive way possible. However, it is necessary that these analyzes do not lose sight of the collective and communal dimensions of the experience of indigenous women. For this reason we must also employ other concepts.

### *Multiple discrimination and other types of discrimination:*

The project teams considered firstly the concept of double discrimination and then multiple discrimination, to describe the reality of indigenous women. We will describe below the reasons for this, and the advantages of each of these concepts.

Double discrimination relates to ethnic discrimination suffered because of being indigenous and gender discrimination suffered because of being a woman. It has the advantage of considering two permanent conditions at once, which are protected by specific instruments under international human rights law.

Indigenous women have made public statements, such as the Beijing Declaration<sup>7</sup>, in which they affirm that they suffer from triple discrimination, adding economic discrimination to the discrimination they suffer because of their gender and ethnicity. Multiple discrimination covers these three forms of discrimination as well as others related to age or disability. These are more specific, do not only refer to indigenous women, and are also covered by international human rights law.

Indigenous women face different types of discrimination. During the project process we analysed direct discrimination entrenched in the policies and guidelines of the Canadian Ministry of Indigenous Affairs, where indigenous women do not have the same right as indigenous men to register their legal status as indigenous. This discrimination is caused by the actions of the

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7 Declaration of Indigenous women in Beijing, NGO Forum, fourth world conference on women, Beijing, China, [http://www.ipcb.org/resolutions/htmls/dec\\_beijing.html](http://www.ipcb.org/resolutions/htmls/dec_beijing.html)

State. We have confronted indirect discriminations whose aim is not unequal treatment but which nevertheless cause discrimination, such as for example when different or unfavourable treatment is given to a person in response to a trait, factor or criterion which is not suspicious or is neutral from an ethnic or gender perspective, but which has an adverse impact on people from a disadvantaged group without sufficient justification.

In Argentina and Mexico indigenous women face discrimination because of indifference or a lack of differentiation. This is a violation of the right to equality, not because of *unequal* treatment to *similar* people, but rather *equal* treatment to *different* people.<sup>8</sup> By designing universal policies without taking into account indigenous and gender identity, specific discriminations occurs.

### Trifocal Lens:

This tool was initially developed to analyse a Mexican public policy designed to fight poverty known as the Opportunities Program (*Programa Oportunidades*). The rights of indigenous women during the implementation of the program were analysed. It was shown that this policy did not respect the human rights of indigenous women, either as indigenous people or as women, nor from a global human rights perspective.

The trifocal lens enabled the Mexican team to confront the problem of discrimination from three perspectives: human rights, gender and indigenous worldview. This focus attempted to take into account the holistic viewpoint of indigenous communities. It is very important to highlight that by indigenous peoples' rights, we not only mean the individual rights of indigenous women but also their collective rights and other rights, such as those analysed in the case of the Program, namely the right to health and the right to non-discrimination. That was why we built the "trifocal lens" which brings together different perspectives:

1) ***The rights perspective.*** This is part of the inherent nature of human rights and the dignity of all persons, both individually and collectively, as in the case of indigenous peoples. The State has the obligation to provide security, respect and protection via its institutions and agents. This perspective has a dynamic, evolving and therefore historical nature, depending on the identities,

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Martínez, Fernando Rey y Giménez Giménez, Sara. "Caso La Nena: efectos de la discriminación múltiple" (*Case of La Nena: effects of multiple discrimination*).

[http://www.gitanos.org/upload/59/69/Informe\\_Discriminacion\\_FSG\\_2009\\_Caso\\_Nena.pdf](http://www.gitanos.org/upload/59/69/Informe_Discriminacion_FSG_2009_Caso_Nena.pdf)

aspirations and demands of the specific subjects of rights.

That is why in order to consider the right to indigenous women's health or any other of their rights, it is necessary to ask the women themselves the meaning of this right.

2) ***The gender perspective.*** This approach allows us to take into account the reality of historic and specific disadvantages experienced by women in society in the exercise of their rights because they are women, due to the place and the unequal value assigned to their roles in society, culture or everyday practices. Because of this, indigenous women are demanding that their role is re-valued in the specific context of their aspirations and their community life. Many indigenous women organized in different places are doing this, along with men who share their vision. Some have concluded that within their communities they suffer the same discrimination as in society and for that reason it is necessary to begin processes of ongoing reflection to effect change from within.

3) ***The indigenous worldview.*** We believe that when women's capacity to demand their right is strengthened, their peoples are also strengthened. For this reason, any approach to indigenous women's right to health, or any another right, means taking into account at all times elements of their peoples' worldview, culture, traditions, forms of organization and collective rights. In this way, the struggle for indigenous women's rights becomes a collective struggle and not a threat of exclusion or disruption to their community and identity as a people.

These three "foci" provide a framework for analyzing public policy taking into account indigenous women's individual and collective rights. This implies making progress in the comprehensive recognition of the rights of women, linking individual to collective effects which bring discord and unbalance to a community or people. This will allow for true "comprehensive rights", and thereby the formulation of differential public policies with a gender perspective.

The human rights perspective gives us a framework to verify whether other rights such as the right to health, freedom of expression and access to justice, are respected for indigenous women in the implementation of public policy. These three foci are very useful to monitor the State's obligations towards indigenous peoples and visible violations of these obligations.

Different analytical and conceptual tools can be developed to reflect



the discrimination of indigenous women according to the purposes and circumstances behind it. However, **we must always start from the women's perspective, seen through the lens of their peoples' traditional law, and we must also take into account internationally recognized rights such as human rights, particularly the rights of women, which are mainly individual, and indigenous rights, which are mostly collective.**



Nasa Indigenous women from Cauca Colombia, during the Continental summit of women, October 2013

### *A decolonising vision:*

American colonization by European nations had a significant impact both collectively and individually in the lives of indigenous peoples. This impact was different according to region but exists across the whole continent. The ability of indigenous nations to govern themselves has been undermined and structural discrimination has impacted upon how indigenous individuals see themselves, and this is particularly true for indigenous women. Acculturation has different nuances depending on the particular histories of colonization, but its presence is universal.

Documenting and denouncing discrimination requires a holistic view of rights and must aim to effect changes in the situation, so that the factors causing this

discrimination are transformed or eliminated.

One of the project aims was to support processes of empowerment for women and for their communities, which goes beyond the search for justice in national or regional legal systems. This goal led us to consider the situation of the women themselves, and also their communities, organizations and peoples.

### *The affected women:*

The empowerment of women must be collective in the context of the community. By providing opportunities for dialogue among women which allow them to express themselves, their voices, dreams, aspirations and frustrations are heard, and this contributes to mutual empowerment. This process contributes to the strengthening of self-esteem based on women's own cultural identity, identifying sources of frustration and looking for alternatives. In this way knowledge is acquired based on a relationship of equals.

Each woman, using her own voice and her own life experiences, seeks not only to make visible the effects of discrimination but also elements that give her the vitality and strength to overcome them.

This voice which reveals where discrimination is hidden also re-opens unhealed wounds, causing emotions and suffering to resurface. It is important to create caring spaces, from the perspective of the particular indigenous peoples involved, by transforming meetings into spaces for spiritual healing. During the process of recounting their life experiences and healing processes, the women re-value their role as mothers, partners, members of the community and possibilities are therefore opened for a transformation of passivity into empowerment, and a positive rediscovery of their own identity.

### *The community:*

Women are not isolated from their community; on the contrary, their identity is constructed in relation to it. Indigenous women are communal beings. This means that efforts to raise awareness, and to document and litigate cases, must be undertaken with people and communities, with men, and with male and female indigenous authorities. In order to decolonise, working with women also means influencing the capacity of communities to regain their power to decide for themselves, influencing at the same time the factors that cause discrimination against women in the community. For example, discrimination

in access to health and in particular culturally appropriate health services is likely to decrease if the community control over them increases. This does not automatically mean that communities prioritize women's health issues. However, health services are unlikely to be appropriate if the community is not involved in their definition and delivery. To have an impact on discrimination against indigenous women, we need to be aware of all the nuances related to the fact that they are members of different peoples with collective rights as nations.

### **The Mexico team's experience with the Mixe community in Jaltepec de Candayoc, Oaxaca State:**

Consultation with the indigenous authorities has been constant, before each visit dates are consulted and the proposed activities are explained. Once implemented, the authorities are informed of the results. In addition to information and consultation it was agreed that the authorities would support the call for women to participate in the activities as well as offer logistical support to carry out the activities.

This contributed favourably; firstly, to raise awareness of the process of organizing women and the actions they participate in, supported by the authorities and traditional institutions – the council of elders, the council of principal leaders (Consejo de principales) and the community assembly. It also helped to maintain awareness of the actions and the legitimacy of the activities carried out by the women themselves, and a level of community responsibility was achieved in the process.

It was very important to re-discover the story of the community's struggle for their territory, as this served as a basis to strengthen community involvement in the demands for the right to health services. An analysis was undertaken with the elders and principal leaders based on the experience of the community in their struggle for land, resulting in the recognition of the role women have played in strengthening community life, by defending their natural resources.

*The necessary link between collective rights and individual rights:*

The individual and collective rights recognized in international instruments are often presented as conflicting rights, yet the reality for indigenous women obliges us to understand these rights together and develop a comprehensive view. The rights of indigenous women are both individual and collective, and a violation of their rights has both individual and collective impacts. Considering just one of these aspects can have negative effects for an indigenous woman rather than contributing to her protection. For example, her right to physical integrity is as important as her right to territory or culture. These cannot be separated.



Indigenous women from Argentina with UN Special Rapporteur

*Discrimination and violence against indigenous women requires a differentiated and culturally appropriate response:*

There are types of violence and discrimination committed by external agents (e.g. the military, extractive industries, public policy) and other types experienced within the community, namely domestic violence and violence resulting from harmful cultural practices that endanger the life, health and

wholeness of women. Violence committed by external actors should be prevented, punished and eradicated by the State as guarantor of rights, in coordination with indigenous communities and their authorities.

Discrimination and violence that occur within communities should be resolved at the community level, by seeking opportunities and mechanisms which strengthen community justice systems, strengthen visions and practices that value women, and highlight good practices. In order to transform and strengthen indigenous peoples' autonomy, their own systems aimed at restoring harmony and balance must be strengthened, so that their justice systems respond to women in an appropriate and fair way. This task is the responsibility of communities with support from the State.

**We must always take into account gender, indigenous and rights-based perspectives, facing up to their triple-fold challenge and not treating them as an irresolvable dilemma**, to avoid the risk that women who seek justice may be rejected by their community, or that women will only opt for a collective remedy which will leave them unprotected. This helps to make progress in diffusing the apparent tension between individual and collective rights. In cases concerning the collective rights of indigenous peoples we must ask ourselves what happens to women and girls, what specific effects they face, and how the State acts against such effects. Conversely, in cases of violations of a woman's rights, we must ask ourselves what impact this has on the collective, on the community. It is imperative to take into account both dimensions, both the individual and the collective, in relation to cases of violence, legal protection, guarantees of due process, and reparation.

Building a conceptual framework adapted to the situation of indigenous women involves using concepts which link collective and individual rights to the multiple facets of discrimination. It also implies action, investigation and thinking based on indigenous principles and must be action-oriented. Indigenous women must be central to this effort and any analysis must be constructed from their perspective.

### **III. Application of tools to confront cases of discrimination against indigenous women**

In this section we present considerations raised by indigenous women related to the main stages of identifying, documenting and litigating cases involving them. While not all of these reflections are unique to working with indigenous women, they deal with necessary issues for those who aim to bring cases of multiple discrimination to national or international justice systems, or to analyze and modify policies that are discriminatory because of a lack of differentiation or adaptation to the specific reality of indigenous women. They are also useful for the eventual development of appropriate public policies.



IACHR hearing in March 2012

The project aimed to create a methodological framework for documenting and prosecuting cases of double discrimination, with a gender and ethnic perspective. To do this, while it may be true that legal proceedings themselves have their own set of rules for collecting supporting information, what the project aimed to do was to contribute to the development of legal arguments from the perspective of indigenous peoples, to help make effective and reparative measures in cases of discrimination against indigenous women.

During the process we discovered that there are many cases of discrimination related to education, health and access to justice, as well as those related to the armed conflict in Colombia. However, we also discovered that following the evidence gathering stage, it is not always possible to initiate a prosecution. Nevertheless, as a result of our analysis of the information available, we began

to construct a working methodology that led us to carry out technical research, in order to find a pathway to guide the documentation and prosecution of cases and which, at the same time, is in line with indigenous ancestral practices.

Taking into account that the social order is not an objective truth but a network of meanings that the members of each community and each given reality construct and reconstruct with emancipatory effects, we realised we had the ability to reinvent a way to make visible or document the reality of indigenous women and to put this at the service of legal strategies seeking to address and end discrimination against indigenous women.

In Mexico, the challenge of finding cases which could serve as evidence of the double discrimination that indigenous women suffer and which could contribute to the implementation of national and regional policies aimed at its eradication, led us to discover other challenges which we had not initially considered, for example, such essential components as: how to approach affected women; how to create conditions encouraging them to report discrimination; their relationship with their community and traditional authorities; the enormous distance between their reality and the legal world; State justice and the rights recognized in the Western world; and their experience of ineffective legal procedures to protect their rights which are often more aggressive than the effects of the discrimination. In an attempt to answer these questions, we considered first and foremost the voice of the women themselves.

## **A. Identification of cases**

### *Indigenous women as subjects:*

As a result of the historical exclusion experienced by indigenous women, cases of violations of their rights have generally been looked at from the outside looking in. During legal complaints processes, the construction of evidence, judicial decisions, or summing-up procedures, they are often treated as objects rather than subjects who can speak for themselves. During this project, we learned that we cannot talk “about” indigenous women “without” them.

This led us to change our concept of our role as organizations and lawyers working “on behalf of” the claims of indigenous women, to organizations and lawyers working “with” them in their search for conditions to advance their claims against the different forms of discrimination they face. We came to understand during this process that it is possible to produce knowledge “with



the other but not on behalf of the other”, thus establishing cooperative and inclusive ways of working with women themselves, involving the creation of opportunities for technical strengthening to help develop research tools. Out of these strengthening processes, emerged “women promoters” and “women community researchers”, who took on a leading role in the process of documentation and prosecution of cases, as in the case of Mexico, where indigenous women investigated the problems they face in accessing health services, and now with their authorities and community, they are plaintiffs before the courts for the solution of these problems.

*Recognition of the knowledge and practices of indigenous women in their territories:*

This relates to showing, making visible and valuing, the invisible and silent role that women play via their knowledge and practices, especially in caring for people and for their territory, which contributes to the survival of their people. These practices and knowledge are related to health, agriculture, art, leisure, gastronomy, ritualism, among others.

*Intercultural dialogue:*

It was an indigenous organization, namely the *Continental Network of Indigenous Women*, which defined the need to develop strategies to confront discrimination suffered by indigenous women. Following this, proposals were developed for actions to make these cases visible, document them and bring them to justice, and this was achieved through permanent dialogue and collaboration with non indigenous organizations, using as a framework both indigenous principles and the working principles built during the process itself. In the words of the COAJ team: in these spaces for meeting, discovery, knowledge and recognition between women, we were able to reveal the principle of duality present in the cosmos, where one element is complemented by another, this is not mere contact with others, but rather the development of an inclusive vision necessary for intercultural dialogue.

This does not mean that the indigenous organizations could not make progress by themselves, but rather that the intercultural dialogue that was and is present in the process of documentation and prosecution, both permitted and nurtured the experience and the lessons learned. Interculturalism is rich to the extent that the contribution of each is respected and leads to a real understanding.



*Awareness-raising, training, legal literacy and care according to identified needs:*

The process of finding and selecting cases to bring to justice, with the aim of proving discrimination and achieving appropriate protection for indigenous women, begins with human rights training and awareness-raising among the women themselves. In fact, **in many cases the situation of systemic oppression has led women to see discrimination as unchangeable**, having been part of their lives forever. This is the first barrier to access justice for indigenous women. However, undertaking the awareness-raising process inevitably raises their consciousness regarding multiple situations of human rights violations and discrimination.

A number of cases may arise that are not in line with our expectations, or where there is not sufficient evidence to bring them to justice. However, the suffering of the victims still exists whether or not it is possible to take the case to court, and this may be beyond the capacity of organizations to follow up on. One strategy used in Argentina in these situations was to address the self-esteem of women, in which spirituality precedes and penetrates women's beings, and indigenous women are connected to nature, not only via the transmission of ancestral knowledge, but via recovering the very essence of their peoples' culture. This was the point at which the women were able to understand the lack of respect for their rights in their everyday lives, allowing them to revisit their peoples' history and their own life stories during feedback sessions, reflecting their ongoing search for a sense of balance and harmony (see next section).

It was also highly important to provide alternatives for women, so that they were not left with a more acute awareness of injustice but without solutions or courses of action. For example, when looking for a case that could illustrate the violation of the right to education for indigenous women in Jujuy, examples arose of discrimination in the exercise of the right to health. When looking for a case in Mexico to illustrate the right to reproductive health, situations of domestic violence arose. Tools had to be developed to confront these situations. In the first case, a brochure was made to inform women from the communities how to report these situations, and radio messages were also broadcast. In the second case a psychologist specialising in domestic violence cases was invited to deal with these cases and provide tools for women victims. Otherwise, the trust built with the women and the principle of reciprocity would have been betrayed. This kind of difficult situation often occurred and it is important to

think of alternatives in advance.

*Psychosocial support<sup>9</sup> and healing:*

The team in Argentina became acquainted with the lives of indigenous women as they shared their life stories; a technique that we had worked on and evaluated as the most appropriate way to raise awareness of multiple discrimination; which produced the effect of raising their awareness on the issue. “Giving them a voice” and glimpsing wounds that had not been healed led the team to ask the following questions: What had we done? We had opened a door without being specialists in psychology, we considered that we could not leave it open, and so we asked ourselves again, what were the implications of giving them a voice? Had they been silenced? What did our grandmothers do? What mechanisms for action had we activated by raising their awareness? Were we raising questions about a reality that was ready to be awakened?

The lack of psychosocial support for the women temporarily diverted our original goal and we began to create spaces, where we sought to meet with the cosmos as we had been taught by our ancestors, to meet with life, with nature and the Pacha Mama, which strengthened our identity as women, and primarily as indigenous women, generators of life. We understood that this is the strength that should emerge when we address situations of frustration in all areas of everyday life, and then, that these spaces had been transformed into spiritual healing spaces, named as such by the women themselves.

These spaces for spiritual healing were not conceived of as spaces of mourning by the women, but rather as places to meet with themselves, allowing them to re-signify their maternal role, their role as wife, as producer, as an artisan, and in other cases, their role as grandmother, as leader of their community, enabling them to see their limitations but more importantly their great potential. These meetings were coordinated by a woman who shares her academic experiences with indigenous communities.

The COAJ team considers that the effects of this work were considerable, as **the impact of these healing practices had the effect of transforming women’s passive role into empowerment**. The sessions were complemented with other actions and we believe that the opening of the *Tecnicatura de Desarrollo*

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9 The word “*contención*”, used by the team in Argentina refers to the attention given to a person or community in a situation of emotional difficulty, in this case mainly when a wound is re-opened during the reporting or documentation process in a case brought before justice.

*Indígena*<sup>10</sup> also had an impact, as it was mainly women who answered the call for training, and it was they who had greater learning outcomes, which shows their interest to keep learning.

We built this pathway based on research practices with healing effects, and in this process, the women themselves were and are the actors and promoters of their own change. We therefore note that this could perhaps be one pathway for change.

*Working with the community and its authorities:*

**A major obstacle to access for indigenous women to justice is their fear of reporting discrimination** or violations of their rights because of fear of their partners, rejection by their community, or reprisals from armed groups in the case of open conflict or war. In many cases reporting incidents may produce a re-victimization as serious as the initial violation. Fear is very common. There is no single answer to this obstacle. However working with the communities is essential.

Sometimes the problems that affect women are not considered to be a collective priority. More importantly, communities can see the claims of women as a threat to communal harmony and tradition. Awareness-raising with communities and authorities can help provide a more favourable environment for women to make their complaints and can even result in community support for the complaints of women. For this to occur, it is essential to make visible the relationship between the violation of the individual rights of women and the collective impacts on their communities and peoples.

Our experience in Mexico exemplifies this. We had heard about cases of forced sterilization in a community but no woman dared to report the situation. To create a more conducive environment to deal with such situations, a process of training and discussion was proposed on the right to women's health and reproductive health, including women's voluntary groups but also community authorities. Gradually, they all became interested in the topic and it was found that the problems of access to health afflicted the whole community and therefore they decided to confront them. That was how women in the

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10 The "*Tecnicatura superior en desarrollo indígena*" is a diploma over three years recognised by the education authorities in the Province of Jujuy which offers training to indigenous people with the approval of their community authorities.  
[http://www.ela.org.ar/a2/index.cfm?fuseaction=MUESTRA&campo=htm0054&ext=htm&codc\\_ontenido=494&aplicacion=app187&](http://www.ela.org.ar/a2/index.cfm?fuseaction=MUESTRA&campo=htm0054&ext=htm&codc_ontenido=494&aplicacion=app187&)

community were trained to conduct research on the issue and as a result a writ for the protection of constitutional rights (*amparo*) was presented jointly by the community and the women's group, on access to health. The fact that this *amparo* is collective protects individuals from retaliation by the state. Furthermore, with support from the authorities, a woman from the community decided to report that an intrauterine device had been fitted inside her without her permission.

This process contrasts with the family and community rejection suffered by Valentina Rosendo Cantú in Mexico as a result of her pursuit of justice after being raped by members of the armed forces. She won her case in the Inter-American Court but had to migrate to the city with her daughter<sup>11</sup> because she became separated from her husband and was rejected by her community. It is not known if a prior process with the community could have avoided this situation but it is important to undertake a deep reflection about it.



Kankuama woman-Chemesquemena Community-Workshop on Sexual and reproductive rights. 2013

11 Inter-American Court of Human Rights, Case of Rosendo Cantú, and others vs México, Sentence of 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs) [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_216\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_216_ing.pdf)

### An individual case or collective case:

Choosing a case for litigation is an important moment where the case is measured against the chance of fulfilling the objectives you wish to achieve. Demonstrating multiple discrimination suffered by indigenous women requires making visible the different facets of the case but it is also fundamental to assess its potential for successful prosecution. Demonstrating multiple discrimination definitely falls into the category of strategic litigation, which seeks to bring about social change through jurisprudence and through the creation or modification of public policy in this area.

Until now, the complex reality of indigenous women has not been fully reflected in case law or public policy. Usually, cases involving indigenous women are addressed only from a gender perspective and not from the perspective of indigenous peoples. Indigenous peoples do not always take into account women's reality. It is therefore important to show that it is possible and fundamental to link both perspectives.

Strategic litigation can be brought via an individual case but also through a collective case, whether for the prosecution of a public policy or a community situation which particularly affects women. An individual case can weigh heavily on the shoulders of the victim and since the judicial process is difficult and long, can place the victim in situations of high emotional and spiritual risk. A community case or the prosecution of a public policy is less risky individually but demands a level of statistical and comparative evidence in a world where data on indigenous women is virtually nonexistent. However, as part of this project, the team in Jujuy built a database with information specific to indigenous women, paying special attention to the situation of indigenous women in the sphere of education, an essential tool to influence public policy.

## **B. Documentation and interview process**

Documentation implies a long process requiring innovative thinking, from the first checks to see whether a case can be brought to justice, to the construction of both individual and contextual evidence.

### Documentation guided by the conceptual framework and indigenous principles:

It is important that the conceptual framework and indigenous principles described above are reflected in the search for information and evidence from the beginning of the documentation process. In fact, the questions asked and

the collection of information must necessarily seek to include **data related to the collective rights of indigenous people** to which the affected woman or women belong, about their worldview in general but especially from a human rights perspective and a women's perspective, taking into account the history of oppression and its relation to patterns of systemic discrimination.

*Building the content of rights that have been violated:*

Throughout the process we found that the impact of colonization and andocentric domination in our societies has also impacted on the content of many of the rights recognized in national constitutions and international treaties, which have excluded the reality and vision of indigenous women and their peoples. For that reason, we learned that during the documentation process it is essential to use as a starting point the question of whether **the content of violated rights reflects the reality and vision of indigenous women**, and that if it is not so, it is necessary to construct this content according to its meaning for them.



Skype discussion between Mexican indigenous women and a IACHR lawyer in Washington

We achieved this by holding workshops to give indigenous women a chance

to reflect on the scope of rights as they are described in norms and legal instruments and to identify elements to incorporate in order to reflect their lives and in particular the specific discrimination they face.<sup>12</sup>

Making the effort to outline the content of rights for indigenous women from their perspective, allows us to be clear about the elements which must be documented and included as evidence. For example, when trying to give content to the right to a life without violence, Colombian indigenous women emphasized the importance of including spiritual violence as causing them harm, in addition to psychological, physical or sexual violence, and this is absent in instruments such as the Convention of Belém do Pará. Spiritual violence is related to, among other things, damage to, militarization of, or destruction of sacred sites, making funerals or other rituals impossible. If we want to argue the existence of such violence and the need to take it into account, it is essential to understand the different ways in which it manifests itself and document all these aspects.

In Mexico the same exercise was carried out, enabling the team to verify whether the content of the right to health for indigenous women was a comprehensive concept, not only limited to the health of the body itself. The term “wellbeing” is reflected in the Declaration of Cajamarca on the health of indigenous peoples, as “the ability for the harmonious coexistence of all the elements which constitute inner peace for men and women in relation to other beings, spirits and deities”.

After understanding whether a particular right includes content in line with indigenous women’s perspectives, an exercise can be undertaken to see how this is reflected (or not) in national and international human rights law, by breaking down the component elements of the particular right (see the exercise on the right to education presented to the Inter-American Commission on Human Rights in the text box below).

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12 We can cite the example of the right to private property, protected in Article 21 of the American Convention on Human Rights, in relation to the decision of the Inter-American Court in the case of *Awas Tingni* against Nicaragua in 2001. This Nicaraguan indigenous community whose territory had been granted in part to a Taiwanese company claimed that this had violated their right to private property in their territory. Since this ruling, the right to private property for indigenous peoples is understood as the collective or community ownership they have over their lands or territories. Specific content has been given to the right to private property under the indigenous worldview in the continent. (Inter-American Court of Human Rights, Case of the *Mayagna (Sumo) Awas Tingni vs Nicaragua*, Sentence of 31 August 2001: [http://www.corteidh.or.cr/docs/articulos/seriec\\_79\\_ing.pdf](http://www.corteidh.or.cr/docs/articulos/seriec_79_ing.pdf))



### **Example of the Right to Education, in relation to the situation identified in Argentina<sup>13</sup>**

Every indigenous woman is entitled to good quality education that is consistent with her culture, worldview and spirituality, that respects her role in transmitting culture and values her contribution to her community and people. She has the right to an education in a physically and spiritually safe environment, with guarantees and effective protection against violence. These educational services must be:

#### **Accessible:**

- Without endangering her physical, emotional, spiritual and community integrity as a woman and an indigenous person
- Taking into account in the location of educational services, the importance of the relationship of an indigenous woman with her community
- Without barriers related to economic or geographical factors, or because of threats and risks or otherwise

#### **Without discrimination:**

- Culturally appropriate
- Taking into account the schedules and cycles of indigenous women
- In the language of the people to which she belongs
- Reflecting the history, worldview and wisdom of her people and its elders
- Respecting her cultural role, with respect for reciprocity and duality

#### **Gender sensitive from the outset, with regards to the principles of duality (man/ woman, person / community):**

- Taking into account the traditional roles assigned to indigenous women and offering tools to rethink them and build equitable relationships between women and men
- Taking into account her role in reproduction
- Adopting affirmative measures to ensure the right of women and girls to lives free from violence



- Promoting processes for reflection on the patterns and stereotypes that have led to her subordination and affected her rights

### **Respecting the Community institutions of her people:**

- With the participation of the community authorities in the design of the curriculum
- With the participation or control of the authorities recognized by indigenous peoples themselves, in the management of educational institutions
- Taking into account the history of assimilation and the situation of poverty in which indigenous communities live
- Respecting indigenous educational institutions
- Promoting the reappropriation of methodologies, and ancestral teaching pedagogies

### **Quality:**

- Making scientific and technological knowledge available to indigenous women
- In accordance with the highest standards of training and performance of administrative and teaching staff, via training and awareness on the rights of women, children and the indigenous peoples they belong to, subject to controls regarding respect for such rights
- Equal to the education given to the rest of the population while respecting indigenous peoples' cultural particularity

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13 “ Informe sobre discriminación contra las mujeres indígenas en las Américas, (Report on discrimination against indigenous women in the Americas), hearing during the 144th ordinary period of sessions of the Inter-American Commission on Human Rights “ p.37-38

### Confidentiality:

Documentation processes have different emphases, depending on whether the type of case we want to bring to justice, is individual or collective. Individual cases will focus on a personal situation of discrimination and human rights violation, while collective cases will focus on the community to contextualize or analyze a discriminatory policy. In both cases these must be related to indigenous women, who may face risks, and this therefore involves reflecting on the confidentiality of some data.

Working with indigenous women means working with their communities and their authorities. Generally, indigenous communal cultures greatly value public discussion. There may be a conflict between the requirements of confidentiality in a case, the need to protect the affected women and the need to inform the community, especially if we want to gain protection or support from the community. There are no universal rules but we have to **engage in dialogue with both the affected women and with the community authorities, explaining the requirements and purpose of the protection of confidential data and assessing what needs to be handled confidentially and what can be shared.**

### Re-victimization:

Re-victimization is the impact on affected women, in addition to the original violation against her; suffered during the documentation, reporting or prosecution stage, due to the women's exposure to new hostile situations or causing them to suffer again. We generally talk of re-victimization in court when a victim is forced to relive painful situations without receiving emotional support or preparation. However **re-victimization may arise in all stages of the justice process** from the initial documentation stage.

The historic oppression and colonization of indigenous women and their peoples has had an influence on their perception and feelings. We have to take into account and not repeat situations that could be interpreted as new forms of oppression and aggression. Women have been discriminated against or seen as folkloric elements and not as flesh and blood human beings who are fully-conscious leaders of their own lives.

One initial way to avoid re-victimization, is to engage in community awareness-

raising activities to strengthen self-esteem. This is achieved by creating spaces where the affected women can talk without feeling judged or excluded, as a first step towards the creation of favourable conditions for their empowerment. The awareness-raising process will open unhealed wounds or problems will arise or impacts which have not been dealt with, and we must have alternatives for psychosocial support or attention to this renewed suffering. The experience in Jujuy, as mentioned above, shows that it is possible to use elements of spiritual healing as a strategy not only for psychosocial support, but also for reconstructing and re-valuing the lives of women in relation to all that surrounds them.

Empowerment is crucial because as already mentioned above, indigenous women often do not report incidents for fear of being re-victimized, confronted with a system that often despises and humiliates them and use codes that they do not understand. That which was noted in the documentation section of this paper, is also valid to avoid re-victimization at the litigation stage, since this is a continuous process and an ongoing individual and collective relationship.

This applies both to individual cases and when collecting information to show the discriminatory effect of a public policy. We can look for psychosocial care options within indigenous practices, especially in spiritual practices, and via intercultural mechanisms such as healthcare, legal or psychological services. It is important to create alliances with these services so that they accompany the process.

When testimonies are collected and we have the elements for a possible case, we must also start thinking and providing alternatives against re-victimization, by encouraging and helping the affected women to make a legal complaint and then supporting her throughout the process.

*Free, prior and informed consent:*

During both the documentation and litigation stages it is imperative to ensure free, prior and informed consent. While this concept is applied individually before medical procedures and also collectively in the case of economic development projects in indigenous territories, it is also relevant in the case of legal or analytical work with indigenous women.

For consent to be informed it is essential to build a process with community members, and to prioritize decision-making by the victims, who must know what is meant by participation in the documentation process, by a complaints

procedure or by legal proceedings in a court. First they must be fully aware of the rights that have been violated; that is why the awareness-raising phase is so important. After this all the relevant information must be provided in an accessible way in their own language. They must know the implications of and the actual extent of all the stages and phases which they will be part of and must be accompanied throughout both individually and at the community level. This can be verified by designing specific indicators. Victims must have access to all the information gathered during the process and it is important to have a record of the process so that it can always be referred to.

To be truly free, **consent must always be revocable**. The obligations of consent do not end once the victims have given their agreement to undertake legal proceedings. We have to check for each decision made.

It is also important to strengthen the affected woman or women and their communities, using a variety of different approaches, so they can deal directly with the justice system, and know the steps they are undertaking. The affected woman or women need to know what evidence will be submitted during the trial, and must be given opportunities for preparatory role-play, psychosocial support mechanisms, interpreters who understand and can translate comprehensibly, and they must know the possible outcomes of the legal process.

### *The principle of reciprocity in the documentation process:*

We must ensure that the framework for all stages of our work, but even more so during the stage of documentation, is based on the life principles of indigenous peoples, including reciprocity and duality, that is to say, treating the other person as we would like to be treated and therefore not treating potential witnesses as mere reporters, but rather as part of a dual relationship. In this way the person (victim or affected person) will understand the process, and will place importance on their role, in line with their individual and above all community values.

During the documentation stage, women must not only be used as bearers of information; indigenous peoples' principle of reciprocity must be respected, which involves giving and receiving; that is to say, ensuring that whoever offers elements for the documentation of discrimination also obtains useful information, training, support or attention to their problems.

*Cultural and gender appropriateness of the mechanisms used in the documentation stage:*

During the documentation process itself; it is important to decide what will be the appropriate elements, devices, and/or mechanisms to record the information, such as the questions for written or oral interviews or whether a camera or camcorder is invasive or not. This calls for an adaptation of traditional methods in line with indigenous principles, and with their cultural and gender specificities.



Ecuadorian women participating in the National Assembly of Indigenous Women of Colombia

Documentation is crucial because it provides the basis to build the case for litigation. There are two main requirements for documentation, namely the focus and the relationship with the affected women. The approach must include a gender and indigenous perspective, both in relation to traditional indigenous law and to collective rights recognized in international human rights law. The specific content that indigenous women give to these rights must also be included, so that they are not reduced to their western understanding. Relationships with affected women, either during their own individual cases or when they are acting as witnesses showing the damages caused by public policies, require confidentiality; non re-victimization; psychosocial support; free, prior and informed consent; and above all must be culturally coherent. The process is closely linked with its content and in this case the ability to produce or collect relevant information from indigenous women's perspective.

## C. Building evidence of discrimination

The question is how to prove that indigenous women are discriminated against for being a woman and being indigenous and on other possible grounds. How to build evidence of multiple discrimination for the courts is a question that cannot be fully answered as there are very few examples of case law both nationally and regionally. The elements mentioned here are partial and meant to launch a discussion that needs to continue.

Discrimination presupposes unequal treatment via legislation; or implies unequal treatment of people in similar situations, with no objective and reasonable justification; or, equal treatment of people in different situations. The right to non-discrimination is a means to an end for the realization of all human rights. It is an autonomous right, and at the same time, a right that contributes to the fulfilment of all other rights. The right to non-discrimination must be applied immediately and not progressively like economic, social and cultural rights. Nevertheless, it is difficult to prove. For all these reasons it is interesting, if risky, to bring to justice cases of multiple discrimination in order to develop specific and consistent jurisprudence on the situation of indigenous women. It is time to face up to the challenge and develop our ability to prove the complex reality of discrimination against indigenous women through judgments and sentences, thereby obliging States to fulfil their obligations towards one of the most violated sectors and people.

**Evidence of discrimination is essentially contextual evidence** and presupposes the existence of unequal treatment in similar situations or equal treatment in different situations causing exclusion, restriction or impairment in access to rights. It is essential to demonstrate the effects suffered by one indigenous woman or a group of indigenous women, in the most concrete way possible, however it must be shown that these effects are caused by the fact that she is an indigenous woman and that the same things does not happen to others who are not indigenous women.

We have to present and explain how discrimination is experienced from the perspective of an indigenous woman. Then it must be proven where this discrimination comes from and that other groups in society do not experience it in the same way.

It is important to collect information on irregularities that give meaning to the particular effects experienced, including the gender aspects of the case, the unequal power between men and women, because the sex of the affected

woman is related to the violation and the existence of stereotypes in the actions of state authorities.

We can use many tools to describe the panorama of multiple discrimination, under the framework set out above. Below, we offer some non-exhaustive elements for consideration:

*The burden of proof:*

One aspect to consider is who bears the burden of proof in the case of an allegation of discrimination. This implies using as a starting point the rules laid down in the national legal system and the tendency of the more favourable or less disadvantageous international jurisprudence.

In discrimination cases in Canada it falls on the victim to provide proof of discrimination and, when this evidence exists, the burden of proof shifts to the Canadian state. In this case, the State must prove that it has made all possible efforts so that the law or program in question does not have a discriminatory effect (Article 15, charter of rights and freedoms). To counteract the State's arguments it is essential to be well prepared. Often we have to be able to call into question the intentions of the legislature at the time of adopting the new laws, as often it is these initial intentions which reveal the presence of discriminatory treatment. Demonstrating the existence of stereotyping or prejudice also helps to highlight the discriminatory treatment or the discriminatory effects of legislation on certain categories of persons or groups of persons.

Lawyers cannot do this alone and so experts must be sought (anthropologists) to show the difference in treatment and the existence of historical disadvantage or vulnerability affecting certain categories of people.

Constitutional reforms were passed recently in Mexico enabling the prosecution of cases of human rights violations caused by the omission of the State to guarantee and protect these rights. This has made possible the prosecution of discriminatory public policies in which the State has failed to ensure the effective enjoyment of human rights of those targeted by such policies. In those cases, the plaintiffs have the burden of proving the damages caused due to the omission of the authorities, while the burden of proving that these policies have met their human rights obligations corresponds to the state authorities as defendants.

In any case, it is always necessary to develop creative strategies for gathering evidence, to achieve the proposed objectives, as long as they are within the

reach of indigenous women and their communities, and taking care that there are no further obstacles to accessing justice.

*The oral testimonies of an affected woman or women, their community and its authorities, will constitute the main evidence:*

These are ideally taken in their own language by people they trust, in a safe and respectful environment. There are things that are not said to foreigners or those from outside the culture and much less in a language which can not reflect these highly intimate realities. It is essential to discuss with people the elements they wish to share, disclose or keep to themselves.

The testimony of the affected woman or women must incorporate their history of discrimination as experienced individually and collectively, and not only the violation of rights for which they are demanding justice. In relation to the situation of indigenous women, the testimony of the authorities and women's groups is also highly important to demonstrate the collective nature of the violation itself or the collective consequences of the individual violation. It is fundamental to **demonstrate the moral or cultural damage** that the affected women and their communities have suffered by including specific content related to the culture of the indigenous people involved.

*Participatory research and diagnostics:*

As a consequence of the implementation of the conceptual framework described above, the teams found it essential to use different strategies for participatory research to document cases of multiple discrimination with the direct participation of women from the communities themselves. This enabled evidence gathering that directly or indirectly led to case identification, documentation and prosecution.

*A comparative look at general statistics:*

Another tool is the use of statistical databases to show the situation of discrimination experienced by indigenous women. Comparing the situation of non-indigenous women or the situation in mainstream society could be difficult, because there are very few statistics disaggregated by sex and ethnicity. In many cases the context must be widened to use the limited data available but it may be difficult to conserve the perspective of indigenous women. Another possibility is to produce a specific database that will serve as a parameter for the situation of indigenous women; however, this requires considerable efforts. There have been repeated calls to the states of the continent to



produce disaggregated data, including on the part of the UN Permanent Forum on Indigenous Issues since 2001, however the results are still extremely partial.



Workshop on “Strengthening and healing” in the community of 3Pozos in Argentina

### Life stories:

Producing life stories that illustrate and epitomize the discrimination that indigenous women suffer can also support a case, especially when bringing a legal complaint against a State over public policy. This personalises the roadmap of discrimination and its different nuances. For example, in the case of the right to education in Jujuy, discrimination against indigenous women was analyzed, highlighting 5 types of *school stories* illustrating the situation. These stories are testimonies that may exemplify some statistics and analysis related to discrimination. Life stories have the advantage of including many dimensions from the indigenous women’s own perspective, such as their worldview, their sense of belonging in their community and the situation with regards to their collective rights.

### Expert statements:

To complete the testimonies of those affected, which are direct or personal tools, anthropological or cultural expert statements have also been used, based on interviews with indigenous elders who know their culture and history of oppression. Usually the interviews are undertaken by anthropologists or recognized professionals, as required by the established rules of legal proceedings. It is important to measure the effect of each of these experts on the court. Although sometimes it may seem strange to use an external eye to explain our own culture, this can sometimes convince sceptical judges. In other cases, the testimony of a community elder has more impact. Sometimes anthropological experts can bridge the gap between the different discourses of indigenous and Western justice systems.

We considered the kinds of evidence established in domestic laws that may be used to prove in a court the impacts of the design and implementation of public policies on women and indigenous peoples, such as those analysed in the project, which are discriminatory because they do not take into account the specific realities and identities of women and their community. We found that expert statements are a tool which permits the court a closer idea of these realities, identities and impacts. Nevertheless, we also found that this form of evidence has been helpful to focus on a particular discipline, such as medicine and anthropology for example, but that it can ignore other aspects from the perspective of the affected women.

We also considered whether it would be appropriate to use several expert statements - from different disciplines – for example producing an *interdisciplinary expert statement* with the ability to enlighten the court about the different factors and impacts of discrimination. However, this runs the risk that each of the disciplines would address the situation in a fragmented way, without managing to demonstrate the perverse effects of the intersection of discriminations that indigenous women face. For that reason, in cases that have been prosecuted in Mexico, they have so far opted for one expert statement whose pivotal axis is Anthropology, thereby seeking to ensure the inclusion of cultural identity, but always accompanied by a gender focus and specialist knowledge of the specific claims. In this way, expert anthropological evidence was developed in relation to health with a gender perspective (in a lawsuit related to health services) and another in social anthropology with a gender perspective (in a lawsuit against a care program called the *Programa Oportunidades*).

The aspiration of the team in Colombia is that expert evidence can eventually come from community elders in order to demonstrate the content and importance of indigenous traditional law and the indigenous view of each of the rights violated. This aspiration is shared by all the teams in the face of the current reality regarding the procedural rules of litigation, which depends on the intervention of people recognized in the western world as 'experts', to present to the court the essence and feeling of indigenous people.

### *Jurisprudence in human rights protection mechanisms:*

Different jurisprudential sources, and reports from the Inter-American Commission or from UN rapporteurs, may be used to support legal arguments and give them strength. Using positions of the IACHR on the rights of indigenous peoples in indigenous women's cases will help to transfer jurisprudential progress. Progress in standards on collective rights must be transferred when studying a case of violation of the rights of an indigenous woman and conversely, standards on women's rights must be transferred, to include a gender perspective in cases of violations of the rights of indigenous peoples.

### *Documentation of the roadmap of intersectional or multiple discrimination:*

It is fundamental to document the complete roadmap of discrimination. The question is how do we incorporate existing information, to draw this roadmap and thereby broaden cases to show double or multiple discriminations? For example, for a case related to education, it is fundamental to draw the roadmap that a non-indigenous person takes to access university, in order to evaluate what happens to those who cannot complete their studies, which groups they are from, and at what moment barriers exist and how are they typified. This roadmap enables us to highlight multiple discriminations or obstacles that appear along the way and to articulate individual and collective aspects.

COAJ have described the roadmap to discrimination, for example, by reconstructing *educational trajectories* in the case of Argentina to reflect the school life of an indigenous woman and to show the various obstacles that she has to access education. These obstacles are; the cultural inappropriateness of education which is reflected or shown by the lack of articulation between school levels; the absence of school infrastructure in communities; the lack of training for teachers to work with indigenous women; the existence of residential schools where men are in charge of girls; travelling long distances to attend school etc. Another factor is the migration of women from the community to the city to access different school levels, in mid-level, higher

or university education; when they get to the city they encounter an urban culture different to their own which causes not only discrimination but also weakens their identity; their lack of economic resources and their status as poor indigenous woman means that they only have access to jobs in which they are exploited, and this becomes a factor causing them to leave education.

The construction of educational trajectories contributes to drawing the road-map of discrimination and at the same time highlights multiple discrimination or obstacles that appear along the way, throughout the life of indigenous women, which end up being a key impediment to change in their living conditions both personally and in their communities. These multiple discriminations end up not only conditioning indigenous women, but also blocking and destroying their psychological, spiritual and cultural integrity, erasing and causing injury to the world view of women and their indigenous peoples.

## **D. Litigation**

The judicial process is long and alien to the culture of indigenous women. This experience must be transformed through actions, from a source of pain and rejection, into a possibility for reparation for the affected women. Some of these actions are the responsibility of those who accompany indigenous women, such as indigenous organizations, lawyers or attorneys, and others are the responsibility of the national justice system and international protection systems.

National legal systems all have their specificities but none really offers an intercultural perspective of justice or the necessary services for indigenous women to really feel that they are in a safe environment free from prejudices or stereotypes. Obviously training and awareness-raising is required with justice workers, while monitoring and measures for control must be established to ensure that indigenous women are encouraged to report crimes against them, providing them with a satisfactory risk-free experience and effective results.

At the Inter-American level, the existing case law reveals a trend of increased sensitivity to the specificities of indigenous peoples and indigenous women. However, the format and codes of the system are alien to the indigenous way of administering justice. So far there has only been legal assimilation rather than real articulation between different justice systems, both of which are valid but not equally recognized.

It is fundamental to reflect on what action needs to be taken to facilitate better cultural adaptation of the system of justice to the reality of indigenous peoples and indigenous women in particular. On one hand we want to win cases and on the other to help change the system so that it guarantees women their rights. Of course, the opportunity to testify in their own language and to be understood according to their own cultural codes are important elements. This requires skilled interpreters who understand both the victims' culture and the dominant justice system, and a willingness on the part of State institutions to engage in intercultural dialogue. In some cases this is impossible, for example for newly-contacted indigenous peoples who do not have qualified translators. The question of the conditions needed for a fair process for indigenous peoples and indigenous women therefore remains open.

## **E. Advocacy**

The protection of the rights of indigenous women clearly includes the ability to produce appropriate legal decisions that take into account their multiple reality as women and as indigenous people, but also involves differentiated public policies that do not cause further discrimination or other violations of their rights.

In both legal and political terms, it is important to focus on the search for methodological tools that take into account the reality of multiple discrimination and therefore the conceptual framework presented above should be applied and developed in both cases.

It is fundamental to carry out both legal and political advocacy work so that the needs of indigenous women are understood, and to adopt differentiated methodologies both to argue a case in court and to analyze and produce appropriate public policies.

Advocating in the justice system is more complex. A trial often calls for the confidentiality of data and evidence. However, it is possible to create the conditions to talk about a case and this offers an opportunity to raise awareness in the population or in some sectors or potential allies. At the level of the Inter-American Commission on Human Rights, there are mechanisms which allow for advocacy, such as hearings on cases or particular issues. These allow us to provide context in a particular case or give a human face to an affected woman or women's case, which helps the Commission to understand the complexity of the situation.

Another way to influence the understanding of the Inter-American Commission or Court is via expert opinions and *amicus curiae*, which it is best to present as soon as possible. *Amicus curiae* can also be used to include a gender perspective in cases that do not have one, and to help the Commission or the Court to adopt a more holistic view, making indigenous women's perspectives visible.

Discriminatory public policies can be tried under the justice system in some countries. This has the advantage of placing an obligation upon the State to effect a change and of creating jurisprudence. Nevertheless, sometimes the political route may be faster or more productive when the appropriate spaces for advocacy exist. The choice between legal or political means depends on the context, the stakeholder profile and whether you want to change a discriminatory law or program or whether there is an opportunity to influence the design of a new one. In Colombia and Argentina, where members of the team represent important organizations, they have gained significant ground because of their strong representation and because of the knowledge and experience they have gained with indigenous women and on certain issues.

Another kind of advocacy work was carried out during the development of the project itself at the community level. In the case of Mexico, working with the indigenous authorities allowed us to influence the visibility of women's priorities. In Argentina, the creation of healing spaces influenced individuals and their communities and has allowed women to enhance their ability to act at the community level.

The challenge for both legal and political advocacy is to produce analyses and proposals that take into account the reality of the multiple discriminations against indigenous women, in order to transform public policy or to draft it according to their perspectives. In the legal realm the challenge is to create jurisprudence that enables us to demand the implementation of appropriate policies or to adapt protection systems to the reality of indigenous women.

## IV. Conclusions

In this paper we have presented the methodological lessons that we learned throughout this process, for documenting and prosecuting cases of multiple discriminations against indigenous women, and for analyzing the discriminatory effects of public policies that do not match their realities as women and as members of peoples who are different to the rest of the population.

We have tried to demonstrate that it is essential to build a specific methodology respecting indigenous peoples' principles, and to develop a conceptual framework which links together traditional indigenous law, collective rights and women's rights. The frameworks in this paper are proposals which reflect our collective experience as a team. We have presented them here as guidelines, enabling us to make progress in building mechanisms for indigenous women's protection, by recognizing their central role in the conception and construction of these very mechanisms. Only then can this protection be appropriate and offer real potential for change.



Wiwa women, Colombia

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# ANNEX 1:

## PROTOCOL TO ESTABLISH A METHOD OF ADDRESSING VIOLATIONS OF THE RIGHTS OF INDIGENOUS WOMEN

This text is not intended to be a set of definitive guidelines but is instead an attempt to establish principles to address violations of indigenous women's rights, based on the collective knowledge of indigenous women and academics. This involves undertaking a process to un-learn established perspectives that ignore the status of women as actors and agents of change. The Western concept of human rights has marginalised indigenous women's worldview and the reality in which they live:

- **Situations of discrimination faced by indigenous women should not be considered as a single objective reality**, but must instead be understood from the perspective of the meanings that the women themselves attribute to situations of **inequality and discrimination according to their communities' social and historical constructs**.
- To try to understand these meanings, it is important to **evaluate the underlying prejudices that influence our everyday lives**, and which may affect how we look at the realities of indigenous women. This is fundamental in removing any barriers to intercultural dialogue.
- It is important to take into account the community context in which inequalities and violations of rights occur. This necessitates an **understanding of the historical processes** experienced by communities, their worldview and their philosophy of life. This could lead us to rethink and revise our conceptions of **history, memory and identity**.

We can achieve this by taking into account the following elements:

- o The **history** of a community is important but particular attention should be paid to women's 'life stories', which are traversed by political, social, economic and cultural situations, and often differ from official versions of history.
- o Indigenous women have often experienced gross violations of their

rights. They experience memories of these events in a particular way, giving them new meanings over and over again. Because of this, telling a life history can be a significant emotional burden, and can lead to women experiencing periods of forgetfulness and silences when attempting to tell their stories.

o Community identity is essential to the **memory and past** of indigenous women. The expression 'we' (in relation to the community) must be interpreted as representing a dynamic reality that is constantly being modified and reconstructed. Sufficient care must be taken that this concept does not hide internal differences, conflicts and tensions within the community, such as a lack of male recognition for the role of indigenous women.

- In recent decades, there has been growing recognition of the importance of **diversity** in various areas of human and social activity. However, the existing legal framework and state policies regarding indigenous peoples still lack this vision, which creates a tension between the **homogeneous and heterogeneous**. That is to say, the tendency to homogenise continues to be evident in the actions of the state as a legal regulator and generator of public policy.
- On the other hand, the way in which the State understands diversity, heterogeneity, and difference is questionable, and is unlikely to chime with indigenous community members' views of those concepts **Individual and collective rights** are interdependent conceptual frameworks, and it is important to see how the violation of an individual right impacts the collective or vice versa.
- Both the individual and the collective appear to be linked to the concept of **'identity'**, and therefore **'culture'**. It is particularly important to take into account the spiritual principles that are such a key part of the social fabric of indigenous communities and peoples. These principles are expressed as the constant search for **harmony between men, women and nature**, and they have survived despite colonisation. In extreme cases, however, an indigenous person may deny their origins: a response to the **discourse of oppression and domination that has led to a naturalisation of discrimination**.

- Paradoxically, **indigenous women have been protagonists** in the survival of spiritual principles through oral transmission. During a **process undertaken by women to take their ‘voice’ back**, they emphasised the way in which respect for the other is reflected in the indigenous **principles of duality, reciprocity, relationship and complementarity**. When indigenous women are given the opportunity to speak for themselves, we hear another version of history, and are shown a way of learning using a **methodology based on spiritual principles**.
- An emerging term that helps to understand these principles is **‘ancestrality’**, which is deeper and more complex than **‘culturalism’** and precedes it as a concept. Ancestry is linked to traditional indigenous law, while culturalism is a social practice that may or may not be consistent with ancestrality. Cultural concepts are valid for the analysis of common everyday practices such as cultural patterns, including the mistreatment of women because of their gender, or because they are indigenous. This is very different from traditional indigenous law, which includes the right to a life free from violence and discrimination.
- In relation to the above point, **it is important to make visible the kind of damage** that has been done to indigenous women as a result of discrimination and the violation of their rights. For this, a methodology can be employed based on relevant ancestral principles to give women a ‘voice’ via **spaces for spiritual healing**. These are channels for not only **‘naming and giving words to’** situations but can also help to restore balance with the cosmos, in line with ancestral practices.
- Providing a **natural environment** and including elements from the cosmos and spiritual reference points also strengthens the links between indigenous women and their process used for healing after painful or traumatic situations. In this way, **re-victimisation can be avoided**, and the process can contribute to a woman’s ‘rediscovery’ of herself. This in turn leads to the possibility of building new relationships between women, because the potential for resilience is not only developed in a single woman but is multiplied as she helps others.
- **Care and psychosocial support for indigenous women must be**

**undertaken holistically.** Comprehensive care includes dealing with not only physical or psychological harm, but also understanding how this damage is linked to the spiritual cosmos. It implies restoring **the balance between women and nature.** Health is balance. When a woman's rights have been violated, the balance needs to be restored so that she can return to a 'natural' state of harmony.

Addressing violations of indigenous women's rights must be based on indigenous identity and principles, as expressed above. Suitable responses can only be understood and then employed after women themselves have shown us the pathway, both methodologically and conceptually. **We must deal specifically with women's reality without damaging that reality in the process.** Instead, we must consider women's needs in line with their indigenous identity and gender, which will allow us to **give meaning to their rights.**

PROJECT TEAM "JURISPRUDENCE:  
INDIGENOUS WOMEN IN THE AMERICAS"  
(COAJ, ONIC, AJDH, SER Mixe, FAQ)

# Indigenous Women of the Americas

## Methodological and conceptual guidelines to confront situations of multiple discrimination

This document presents guidelines for working with indigenous women, that were collectively created from experiences in Canada, Mexico, Colombia and Argentina. We hope that our efforts will contribute to the building of a detailed methodology to deal with discrimination against Indigenous Women, both when bringing cases to justice, and when conducting research.

“Our methodological construction process drew on the experience of organized indigenous women. Each team and each situation took the perspective of indigenous communities into account as well as the experiences of regional and national indigenous and human rights organizations. It was an intercultural and multidisciplinary experience. We worked together to help strengthen awareness of rights among women themselves, documenting instances of discrimination from their own experience and strengthening the capacity of our organizations to facilitate access to justice.”



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