

Business and Human Rights

Indigenous Peoples' Experiences with Access to Remedy

Case studies from Africa,
Asia and Latin America



Edited by Cathal M. Doyle

**Business and Human Rights:
Indigenous Peoples' Experiences with
Access to Remedy
Case studies from Africa, Asia and Latin America**

Editor: Dr Cathal M. Doyle

Asia Indigenous Peoples Pact (AIPP)

ALMÁCIGA

International Work Group for Indigenous Affairs (IWGIA)

Chiang Mai/Madrid/Copenhagen 2015

Business and Human Rights: Indigenous Peoples' Experiences with Access to Remedy
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Published by: Asia Indigenous Peoples Pact (AIPP), ALMÁCIGA and IWGIA

Layout and cover design: AIPP Printing Press

Front cover photos (clockwise from top left): Fuerza de Mujeres Wayuu; PUINAMUDT; Elifuraha Laltaika; PUINAMUDT; Kanyinke Sena.

Back cover photos (left to right, from top to bottom): Tanya Lee/International Rivers; Richard Solly; Fuerza de Mujeres Wayuu (three sequential photos); Philippine Legal Rights and Resource Centre (LRC); Kanyinke Sena (three sequential photos); Suzanna Noldrum; Elifuraha Laltaika.

Suggested citation: Doyle C. (ed.) *Business and Human Rights: Indigenous Peoples' Experiences with Access to Remedy. Case studies from Africa, Asia and Latin America* (Chiang Mai, Madrid, Copenhagen: AIPP, Almaciga, IWGIA, 2015)

The publication of this book was supported by:



Regnskogfondet
RAINFOREST FOUNDATION NORWAY



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Printed by: AIPP Printing Press Co., Ltd
www.aippprinting.com



The printing press has been established with support from the European Union's European Instrument for Democracy and Human Rights



This book is the product of a collaboration of three organizations - Asia Indigenous Peoples Pact (AIPP), Almaciga, and the International Work Group for Indigenous Affairs (IWGIA) – all of which work closely and collaborate with indigenous peoples in Asia, Africa and Latin America. The book addresses cases from each of these continents, examining the experiences of indigenous peoples with access to remedy when their human rights are affected by corporate activities. By drawing from these experiences it seeks to inform the actions of corporate and State actors in relation their business and human rights obligation to ensure that indigenous peoples have access to effective remedy.



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Foreword

Business and Human Rights: Indigenous Peoples' Experiences with Access to Remedy Case studies from Africa, Asia and Latin America

In its first annual report to the Human Rights Council on 10 April 2012, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises highlighted the “challenging nexus between the role of the State, business activities and the situation of indigenous peoples.” Nowhere is this challenge more pronounced than in ensuring effective access to remedy for indigenous peoples whose rights have been negatively affected by corporate activities. The Working Group therefore decided that its first thematic report, which I presented to the 68th session of the UN General Assembly in 2013, should explore “the challenges faced in addressing adverse impacts of business-related activities on the rights of indigenous peoples through the lens of the United Nations Guiding Principles on Business and Human Rights”.

That report emphasised that the rights of indigenous peoples under international human rights standards fall under the scope of the obligations addressed in the Guiding Principles. This means that the State duty to protect, the corporate responsibility to respect, and the requirement for access to remedy, all apply to the rights affirmed under the UN Declaration on the Rights of Indigenous Peoples and the ILO Convention 169 concerning Indigenous and Tribal Peoples. Respect for the collective rights is necessary to avoid discrimination against indigenous peoples which could lead to a denial of access to remedy. The report also identified the relevance of these instrument’s provisions for remedies for violations of collective rights of indigenous peoples and addressed in the jurisprudence of human rights bodies. Particular emphasis was placed on the importance of recognizing indigenous peoples’ customary institutions as grievance mechanisms, which should play a core role in ensuring access to remedy in the context of corporate related impacts on their rights. Finally, the report stressed the need for engagements with indigenous peoples to occur within a framework of free prior and informed consent, in order to avoid rights violations from occurring in the first place.

In 2013, the Working Group also convened an Expert Workshop on Business Impacts and Non-judicial Access to Remedy. At that workshop, the impact of large scale development projects on indigenous peoples’ ability to obtain access to remedy was noted. It was observed, for example, that “if an indigenous community considers that mining activities prevent them from exercising their culture, religion and traditional way of life, it may conclude that the only possible way to redress those impacts would be for the mining activities to cease completely”. The importance of indigenous peoples’ participation in the early project planning stages was therefore emphasized, as was the role which early access to mediation and judicial mechanisms can potentially play in such contexts. The experts also pointed to the importance of addressing imbalances in

power, concluding that “processes and outcomes that take into account local contexts are also necessary, such as recognizing indigenous peoples’ traditional processes for settling conflicts”.

This book represents an important step towards addressing the issues and challenges which have been observed by the Working Group in relation to access to remedy at this nexus between the role of the State, the responsibility of corporations and the situation of indigenous peoples’ rights. Its focus reflects the increased attention accorded to access to remedy under the Working Group’s mandate, and the fundamental importance to indigenous peoples of redress for corporate related impacts on their rights.

The book is unique in that it is the first such publication to highlight indigenous experiences and perspectives in relation to access to remedy in the context of business and human rights. It includes contributions by authoritative scholars, indigenous activists, and their supporting organizations, addressing specific cases where remedies for corporate related violations of indigenous rights have been sought in Africa, Asia and Latin America. These cases cover mining, oil and gas, tourism, infrastructure, agribusiness and dam projects. The experiences they describe resonate with those of indigenous communities throughout the world. They help to shed light on the significant barriers to effective remedy and the long running struggles which indigenous peoples face when seeking access to justice in contexts where powerful corporate actors and States fail to fulfil their responsibilities and duties to respect and protect indigenous peoples’ rights.

A solid and effective access to remedy pillar is of fundamental importance to the success of the Guiding Principles. Without it the platform for a rights respecting engagement between corporate actors and rights-holders will simply not exist. As noted by the Special Representative to the Secretary General at the outset of his mandate, indigenous peoples are among the groups facing the greatest barriers to effective remedy and are also among those most affected by corporate activities, in particular by those of the extractive industries. The extent to which access to remedy is realized in the context of indigenous peoples’ rights is therefore a key litmus test for the effectiveness of the Guiding Principles and for the success of the Working Group in promoting their dissemination and implementation.

If the recommendations and lessons which this book offers are given the necessary attention by States and corporations, we will have moved further along the path of implementing the UN Guiding Principles and towards the goal of rights-based engagements with indigenous peoples. The book is particularly timely in light of the increased focus which the resolution outlining the Working Group’s mandate directs to addressing barriers to access to remedy. The 2014 Human Rights Council resolution refers to the need for “relevant legal frameworks” for more effective avenues of remedy for affected communities, and encourages all actors to engage with the Working Group to develop guidance with regard to access to both judicial and non-judicial remedy.

In order to improve access to remedy for victims of business-related human rights abuses, the Working Group is requested to hold consultations with all relevant actors “and to publish a progress report thereon before the twenty-ninth session of the Human

Rights Council (to be held in June 2015), and the final report to be considered by the Council at its thirty-second session”. It has also been invited to include the issue of access to remedy as an agenda item of the Forum on Business and Human Rights “in order to foster mutual understanding and greater consensus among different viewpoints”. I believe this book will help to inform these on-going activities of the Working Group and the annual Forum and assist us in making recommendations at the national, regional and international levels for enhancing access to effective remedies available to indigenous peoples whose human rights are affected by corporate activities.

Finally, I wish to offer my support to those indigenous peoples whose experiences are outlined in this book, and to all communities who are facing similar struggles. As a member of the Udege people, one of Russia’s indigenous peoples, and a long time indigenous activist, I can personally empathize with their situations. These historical and on-going struggles have led to international recognition of indigenous peoples’ rights, most clearly manifested in the adoption of the UN Declaration in the Rights of Indigenous Peoples by the General Assembly in 2007 and in the Outcome Document of the High-Level Plenary Meeting of the UN General Assembly, known as the World Conference on Indigenous Peoples, in 2014. In paragraph 24 of the Outcome Document the General Assembly members stated

We recall the responsibility of transnational corporations and other business enterprises to respect all applicable laws and international principles, including the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework and to operate transparently and in a socially and environmentally responsible manner. In this regard, we commit ourselves to taking further steps, as appropriate, to prevent abuses of the rights of Indigenous Peoples.

This reflects the significant contribution which indigenous peoples’ advocacy and struggles have made to moving the business and human rights debate forward while keeping it focused on the urgent need for solutions to on-going and imminent threats to human rights. Their struggles serve as an important reminder that the ultimate measure of success, for all those involved in the area of business and human rights, must be the extent to which the rights of indigenous peoples, and other impacted communities, are respected and the degree to which they are afforded access to justice in cases where their human rights are violated.

I would like to take this opportunity to thank all of the contributors to the book, the editor, and those individuals, organizations and institutions who, through their support to AIPP, Almáciga and IWGIA, facilitated the research and made the publication of this book possible.

Pavel Sulyandziga

Member of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises

February 2015

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List of Contributors

Asia Indigenous Peoples Pact (AIPP) is a regional organization founded in 1988 by indigenous peoples' movements. AIPP is committed to the cause of promoting and defending indigenous peoples' rights and human rights and articulating issues of relevance to indigenous peoples. It aims to strengthen the solidarity, cooperation and capacities of indigenous peoples in Asia to promote and protect their rights, cultures and identities, and their sustainable resource management systems for their development and self-determination. At present, AIPP has 47 member-organisations from 14 countries in Asia with 14 National, 15 Sub-National, and 18 local indigenous peoples' organisations.

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Fuerza de Mujeres Wayuu is an indigenous women's organisation, created by and composed of members of the Wayuu community in La Guajira, Colombia. The organization is open to women and men and aims to defend Wayuu land and life in a peaceful manner. For more information see www.notiwayuu.blogspot.com.

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Acknowledgements

Sincere thanks are due to a number of individuals, organizations and institutions which have made this publication possible. These include Rainforest Foundation Norway and the Spanish Ministry of Foreign Affairs and Cooperation, whose financial support facilitated the research and enabled the publication of this book. The publication would not have come into being but for the collaboration, vision and efforts of three publishing organizations: Asia Indigenous Peoples Pact (AIPP), Almáciga and the International Work Group for Indigenous Affairs (IWGIA).

Others who have contributed at various stages, and to whom I would like to express my gratitude, include Evelin Acosta of the Fuerza Mujeres Wayuu, Lola Garcia Alix of IWGIA, Yaizha Campanario of Perú Equidad, Rosalie Castro of PIPLinks, Joan Carling of AIPP, Catherine Coumans of MiningWatch Canada, Josh Curtis of the Irish Centre for Human Rights, Tanya Lee of International Rivers, Johannes Rohr of the Institute for Ecology and Action Anthropology, Eva Sainz of Almáciga, Pavel Sulyandziga of the UN Working Group on Business and Human Rights and Andy Whitmore of PIPLinks. Particularly heartfelt thanks go to Robie Halip of AIPP and Patricia Borraz for their assistance throughout the entire process. I also wish to thank Anna Kyprianou at Middlesex University Business School for facilitating my work on the publication.

Last, but certainly not least, I would like to thank all of the authors for their valuable and insightful contributions and for their patience and cooperation throughout the editing process. The book is dedicated to those communities and organizations whose story their case studies tell, and who shared their experiences in an effort to improve the situation of indigenous peoples throughout the world who are faced with similarly profound issues and challenges.

Cathal M. Doyle
Editor
Middlesex University, London
19 February 2015

Acronyms

ABG	African Barrick Gold (since November 2014 Acacia Mining)
ACHR	American Convention on Human Rights
ACODECOSPAT	Cocama Association for Development and Conservation San Pablo de Tipishca (Asociación Cocama para el Desarrollo y Conservación de San Pablo de Tipishca)
ACONACO	Association of Cocamas Native Communities (Asociación de Comunidades Nativas Cocamas)
ACONAKKU	Association of KuKamas Kukamiria Native Communities (Asociación de Comunidades Nativas KuKamas Kukamiria)
ADB	Asian Development Bank
AfCHPR	African Court on Human and Peoples Rights
AIDECOS	Samiria Indigenous Conservation and Development Association (Asociación Indígena de Desarrollo y Conservación del Samiria)
AIDSEPP	Interethnic Association for the Development of the Peruvian Rainforest (Asociación Interétnica de Desarrollo de la Selva Peruana)
AIPP	Asia Indigenous Peoples Pact
ANA	National Water Authority (Autoridad Nacional del Agua)
ASIS	Analysis of the Health Situation (Análisis de Situación de Salud)
ATA	Akali Tange Association
CAO	Compliance Advisor Ombudsman
CAS	Committee on the Application of Standards of the ILO
CBD	Convention on Biological Diversity
CC	Civil Code (Código Civil)
CCHR	Cambodian Center for Human Rights
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CERD	Committee on the Elimination of Racial Discrimination
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CHRAGG	Commission for Human Rights and Good Governance
CIYA	Cambodia Indigenous Youth Association
CORPI	Regional Coordinator of Indigenous Peoples (Coordinadora Regional de los Pueblos Indígenas)
CP	Penal Code Código Penal
CSP	Communities and Social Performance
DCGL	Dragon Capital Group Ltd
DENR	Department of Environment and Natural Resources
DGE	Department of Epidemiology, Ministry of Health (Dirección General de Epidemiología del Ministerio de Salud)
DIGESA	Directorate for Environmental Health (Dirección General de Salud Ambiental)
DRC	Democratic Republic of Congo
DS	Supreme Decree (Decreto Supremo)
EC	Equitable Cambodia

EITI	Extractive Industry Transparency Initiative
ELC	Economic Land Concession
ERI	EarthRights International
FAO	United Nations Food and Agricultural Organization (Organización de las Naciones Unidas para la Alimentación y la Agricultura)
FDI	Foreign Direct Investment
FECONABAT	Federation of Native Communities of Bajo Tigre (Federación de Comunidades Nativas del Bajo Tigre)
FECONACO	Federation of Native Communities of Corrientes (Federación de Comunidades Nativas del Corrientes)
FECONAT	Federation of Native Communities of Alto Tigre (Federación de Comunidades Nativas del Alto Tigre)
FEDIQUEP	Quechua Indigenous Federation of Pastaza (Federación Indígena Quechua del Pastaza)
FPIC	Free Prior and Informed Consent
FRA	Forest Rights Act
FSC	Forest Stewardship Council
GoM	Group of Ministers
GOREL	Regional Government of Loreto (Gobierno Regional de Loreto)
GW	Global Witness
HA	Highlanders Association
HAGL	Hoang Anh Gia Lai
HRC	Human Rights Council
HRW	Human Rights Watch
IACHR / CIDH	Inter-American Commission on Human Rights (IACHR) Comisión Interamericana de Derechos Humanos
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ / CIJ	International Commission of Jurists (Comisión Internacional de Juristas)
ICMM	International Council of Mining and Minerals
IDI	Inclusive Development International
IDL	Legal Defence Institute (Instituto de Defensa Legal)
IFC	International Finance Corporation
IHA	International Hydropower Association
IIAP	Research Institute of the Peruvian Amazon (Instituto de Investigaciones de la Amazonía Peruana)
ILC	International Labour Council
ILO / OIT	International Labour Organization (Organización Internacional del Trabajo)
IPIECA	Global oil and gas industry association for environmental and social issues
IPRA	Indigenous Peoples Rights Act
IRAM	Indigenous Rights Active Member
IRMA	Initiative for Responsible Mining Assurance

IWGIA	International Work Group for Indigenous Affairs
JOAS	Indigenous Peoples Network of Malaysia (Jaringan Orang Asal SeMalaysia)
LAPSSET	Lamu-Port-South-Sudan-Ethiopia Transport Corridor
LCF	LAPSSET Communities Forum
MINAM	Ministry of the Environment (Ministerio del Ambiente)
MINEM	Ministry of Energy and Mines (Ministerio de Energía y Minas)
MRG	Minority Rights Group International
MSS	Mahan Sangharsh Samiti
MWC	Mining Watch Canada
NCP	National Contact Point
NEMA	National Environment Management Authority
NGO	Non-Governmental Organization
NHRC	National Human Rights Commission
NTFP	Non-Timber Forest Products
OECD	Organization for Economic Cooperation and Development
OEFA	Agency for Environmental Assessment and Control (Organismo de Evaluación y Fiscalización Ambiental)
OHCHR	Office of the High Commissioner for Human Rights
ORPIO	Regional Organization of Indigenous Peoples of the East (Organización Regional de Pueblos Indígenas del Oriente)
OSINERGMIN	Supervisory Agency for Investment in Energy and Mines (Organismo Supervisor de la Inversión en Energía y Minas)
OXY	Occidental Petroleum Corporation
PAC	Supplementary Environmental Programme (Programa Ambiental Complementario)
PAMA	Environmental Compliance and Management Programme (Programa de Adecuación y Manejo Ambiental)
PCM	Prime Minister (Presidencia del Consejo de Ministros)
PIDESC	International Covenant on Economic, Social and Cultural Rights
PJV	Porgera Joint Venture
PLOA	Porgera Landowners Association
PRC	Pluspetrol Resources Corporation
PUINAMUDT	United Amazonian Indigenous Peoples in Defence of their Territories (Pueblos Indígenas Amazónicos Unidos en Defensa de sus Territorios)
RS	Supreme Resolution (Resolución Suprema)
RSPO	Roundtable on Sustainable Palm Oil
SACGOT	Southern Agricultural Growth Corridor of Tanzania
SCORE	Sarawak Corridor of Renewable Energy
SCs	Scheduled Castes
SEB	Sarawak Energy Berhad
SEIA	Social and Environmental Impact Assessment

SHRC	State Human Rights Commission
SIMDP	Sakhalin Indigenous Minorities Development Plan
SPILL	Strategic Plan for the Implementation of the Land Laws
STs	Scheduled Tribes
SUARAM	Suara Rakyat Malaysia (Malaysian National Human Rights NGO)
SUHAKAM	Human Rights Commission of Malaysia
TBL	Tanzania Breweries Limited
TC	Constitutional Tribunal (Tribunal Constitucional)
TCL	Tanzania Conservation Limited
TFA	Environmental Control Tribunal (Tribunal de Fiscalización Ambiental)
TNBC	Tanzania National Business Council
TNCs	Transnational Corporations
TPH / HTP	Total Petroleum Hydrocarbons (Hidrocarburos Totales de Petróleo)
TVIRD	TVI Resources Development Inc.
UIT	Imposed Tax Units (Unidad Impositiva Tributaria)
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	UN Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNPFII	United Nations Permanent Forum on Indigenous Issues
UPR	Universal Periodic Review
VEIL	Vietnamese Enterprise Investments Ltd
VRG	Vietnam Rubber Group
WB	World Bank
WCIP	World Conference on Indigenous Peoples

Introduction

Business and Human Rights: Indigenous Peoples’ Experiences with Access to Remedy An Introduction

Dr. Cathal M. Doyle

1. Introduction

Throughout history and throughout the world indigenous peoples have suffered disproportionately from the negative human rights impact of business activities in their territories. This pattern continues to the present day, with devastating effects for the survival and flourishing of indigenous cultures and ways of life. Serious rights violations continue to arise as a result of forced displacement, dispossession of territories and devastation of lands and resources. In an alarming number of cases, efforts by indigenous peoples to assert their rights and to seek redress are met with criminalization and the use of force, resulting in violence and leading to physical injuries, social disruption, physiological suffering and, in some cases, death. Basic social and economic rights are systematically denied and indigenous peoples’ cultural and territorial integrity is repeatedly violated. In such contexts the exercise of indigenous peoples’ foundational right to self-determination has been restricted to a struggle to survive as peoples, as opposed to a fundamental freedom to determine their own social, cultural and economic development. The adoption by the UN General Assembly of the *UN Declaration on the Rights of Indigenous Peoples* (henceforth the UNDRIP) in 2007 promised a new era of respect for indigenous self-determination and represented an important step towards remedying past wrongs and preventing future harms.

A year later, the Human Rights Council unanimously adopted the UN “Protect, Respect and Remedy” Framework on the issue of Business and Human Rights – representing the first time agreement was reached by States on an instrument related to the human rights responsibilities of business. This UN Framework was followed in 2011 by a set of UN Guiding Principles on Business and Human Rights, which were likewise unanimously endorsed by the Human Rights Council (HRC). They seek to implement the UN Framework, which consists of three pillars aimed at ensuring compliance with human rights in the context of corporate activities.

The first pillar is specifically targeted at States and reaffirms their duty under international law to protect human rights, including those rights affirmed in specific standards addressing vulnerable groups such as indigenous peoples. It also addresses State responsibility to ensure that business actors respect these rights. The second pillar

addresses the corporate responsibility to respect human rights which exists independently of State actions or compliance with their duties. This responsibility relates to all human rights, including the rights of indigenous peoples, and requires that corporations avoid causing or contributing to adverse human rights impacts by preventing and mitigating the human rights-related risks that are linked to their activities or business relationships. Realizing this requires that they have human rights policies and human rights due diligence processes in place which affirm their commitment to respecting human rights, including indigenous peoples' rights, as affirmed under the UNDRIP and ILO Convention 169 concerning Indigenous and Tribal Peoples. This is required to enable them to identify and account for potential impacts on human rights and prevent and mitigate adverse impacts prior to their occurrence, through compliance with the principle of free prior and informed consent (FPIC) and other indigenous rights safeguards, and, where rights violations occur, to provide for, or cooperate in their remediation through legitimate processes.

This book focuses on the third pillar of the UN Framework and Guiding Principles – namely access to remedy. The third pillar identifies the measures to be taken by both States and businesses in order to facilitate access to effective remedies. A range of mechanisms are addressed, including State based judicial and non-judicial mechanisms, non-State based judicial mechanisms (such as regional or international courts), and non-judicial mechanisms, including operational-level grievance mechanisms, which corporations may implement or in which they may participate.

The 2011 resolution which adopted the Guiding Principles also established a UN Working Group on the issue of human rights and transnational corporations and other business enterprises in order to facilitate their implementation. In its first thematic report to the UN General Assembly in 2013, the Working Group addressed the nexus between business and indigenous peoples' rights. It placed particular attention on barriers to access to remedy which indigenous peoples face, and the implications of their rights for the State duty and corporate responsibility to ensure access to effective and culturally appropriate remedies. The HRC highlighted the need for even greater attention to be directed to the issue of access to remedy in its 2014 resolution renewing the Working Group's mandate which requested it to

launch an inclusive and transparent consultative process with States in 2015, open to other relevant stakeholders, to explore and facilitate the sharing of legal and practical measures to *improve access to remedy, judicial and non-judicial, for victims of business-related abuses*, including the benefits and limitations of a legally binding instrument ... [and] ...*include as an item of the agenda of the Forum on Business and Human Rights the issue of access to remedy, judicial and non-judicial, for victims of business-related human rights abuses, in order to achieve more effective access to judicial remedies.*¹ (emphasis added)

In September 2014, the UN General Assembly held the World Conference on Indigenous Peoples (WCIP) and adopted an Outcome Document reaffirming its support for the UNDRIP.² The Outcome Document recalls the responsibility of all businesses to

to respect all applicable laws and international principles, including the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework and to operate transparently and in a socially and environmentally responsible manner. In this regard, we commit ourselves to taking further steps, as appropriate, to prevent abuses of the rights of indigenous peoples.³

It also includes an acknowledgement on behalf of UN member States that:

indigenous peoples' justice institutions can play a positive role in providing access to justice and dispute resolution and contribute to harmonious relationships within indigenous peoples' communities and within society.⁴

Importantly, the Outcome Document stipulates, among others things, the need for the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) to provide greater assistance to Member States “to monitor, evaluate and improve the achievement of the ends of the Declaration”.⁵ The Expert Mechanism therefore plays a key role in providing guidance as to how State and corporate actors are to realize their duties and responsibilities in relation to indigenous peoples' rights, including their access to remedy. Its existing studies on the issue of access to justice, and on indigenous peoples' right to participate in decision making with a focus on the extractive industries,⁶ constitute authoritative sources of guidance for State and corporate actors in realizing their obligations in relation to indigenous peoples' access to remedy. In keeping with the Outcome Document, in future the Expert Mechanism, working in conjunction with the UN Working Group, could play an important role in assisting to monitor and evaluate State and corporate compliance with these obligations.

The distinct rights and status of indigenous peoples, together with their long and fraught history of domination and oppression involving business actors seeking access to their lands and resources, gives rise to specific historical, cultural, legal, geographical and procedural dimensions of access to remedy in the context of indigenous peoples. From a historical perspective indigenous peoples have suffered enormously as a result of non-consensual resource exploitation in their territories - some to the point of physical and cultural extinction. The current indigenous rights framework represents an attempt to remedy the on-going effects of this history and to prevent similar abuses from occurring in the future. From a cultural and legal perspective ensuring access to effective remedies requires that they cater to indigenous peoples' realities, legal systems and worldviews. These elements are embodied in the international framework of indigenous rights, with the UNDRIP constituting the clearest articulation of that framework. From the geographical perspective remedial mechanisms can span the local, national, regional and international levels. In the case of indigenous peoples they may need to operate within their traditional territorial jurisdictions, which for some indigenous peoples will span national or regional borders. From a procedural perspective redress mechanisms can range from mediation style dispute resolution processes to judicial proceedings, and must include indigenous peoples' customary legal systems and dispute resolution processes.

Indigenous peoples' generally lack access to effective remedies through State based judicial mechanisms in the context of human rights harm caused by natural resource extraction and infrastructure projects. This is due to significant practical (including financial) and legal obstacles which they face when attempting to access courts. The situation is exacerbated by the fact that State based non-judicial mechanisms, tasked with addressing indigenous peoples' rights, frequently tend to lack sufficient capacity or awareness of those rights to effectively address complaints in relation to their enjoyment. Access to mechanisms at the regional and international levels is also challenging for most indigenous communities, and the lack of enforcement powers of these mechanisms limits their effectiveness. These issues are compounded by inadequate respect of State and corporate actors for indigenous peoples own judicial systems. Issues which arise in the context of access to remedy consequently range from the effectiveness of international and State based judicial and non-judicial mechanisms, to respect for indigenous peoples' customary institutions, processes and laws.

In light of this reality, the potential of operational-level grievance mechanisms to contribute to the landscape of remedial mechanisms has gained increased attention. These mechanisms range from those established and run by companies, to corporate engagement with indigenous peoples' own dispute resolution systems under their customary institutions and laws. However, many questions remain as to the potential of such mechanisms to effectively address the core concerns of indigenous peoples, as well as how they should be integrated into the broader landscape of judicial and non-judicial mechanisms.

The ineffectiveness of remedial mechanisms, and the unacceptable extent and nature of violations of indigenous peoples' rights in the context of energy and extractive industry, infrastructure, tourism and agribusiness projects, gives rise to an urgent need for research concerning access to remedy which is grounded on the experiences and perspectives of indigenous peoples. This is a necessary starting point in order to attempt to bridge the chasm between the access to remedy requirements affirmed in international human rights standards, such as the Guiding Principles and the UNDRIP, and the reality on the ground as experienced by indigenous peoples. The book contributes to addressing this gap by providing an insight into the experiences of Asian, African and Latin American indigenous peoples in seeking redress when their human rights are adversely affected by corporate activities. It includes authoritative contributions by indigenous activists, academics and lawyers, and is the first such publication to highlight indigenous peoples' experiences and perspectives in relation to access to remedy in the context of business and human rights.

2. Contents of this book

The book is divided into three parts totalling nine chapters. Part I contains two chapters addressing contextual issues in relation to indigenous peoples' access to remedy. Chapter one outlines the international legal framework as it pertains to indigenous peoples' access

to, and right to, remedy, while chapter two examines the emerging usage of operational-level grievance mechanisms in the context of business and indigenous peoples' rights. Part II comprises seven case study chapters focused on the specific experiences of indigenous peoples seeking access to remedy for corporate related human rights abuses. The case studies span three continents, and address the experiences of indigenous peoples from Latin America (Colombia and Peru), Asia (India, Malaysia and Cambodia) and Africa (Tanzania and Kenya) in their efforts to exercise their right to remedy in the context of mining, oil and gas, tourism, infrastructure, agribusiness and hydroelectric dam projects. As a result of their geographical and thematic scope, the case studies resonate with the on-going experiences of indigenous peoples throughout the world. Part III consists of a concluding chapter which highlights some of the key findings, lessons and recommendations emerging from the case studies. A brief introductory overview of the contents of each chapter is provided below.

Chapter one is written by Dr. Dalee Sambo Dorough, chairperson and expert member of the UN Permanent Forum on Indigenous Issues and Assistant Professor of Political Science at University of Alaska Anchorage. It focuses on the manner in which the international framework of indigenous peoples' rights addresses access to remedy and the right to redress. The chapter contextualizes the discussion in light of the historical experience of indigenous peoples, and identifies the major human rights instruments and associated provisions that underpin indigenous peoples' right to redress and remedy. The central role which a right to remedy plays in the context of gross violations of collective and individual rights is also highlighted with reference to principles and guidelines adopted by States in a 2005 General Assembly resolution. A core argument of the chapter is that indigenous peoples have distinct rights and status under international law and, as such, are recognized as legal subjects vested with the right to self-determination for whom reparations, remedies and redress have particular cultural dimensions. As a result, there is a need to engage with the right to redress within a distinct cultural context in order to guarantee effective remedies and reparations for indigenous peoples. One important component of this is the recognition that culturally appropriate forms of redress go beyond financial compensation, as this alone would fail to remedy economic, cultural, social and spiritual harms that are associated with indigenous peoples' loss of land, territories or resources. The UNDRIP provides important guidance in this regard and must serve to inform the implementation of the Guiding Principles' access to remedy pillar by States and corporate actors in relation to indigenous peoples' rights.

Chapter two is written by Dr. Cathal M Doyle, a research fellow at Middlesex University Business School who focuses on indigenous peoples' rights. It examines the role which operational-level grievance mechanisms may have to play in complementing both judicial and non-judicial remedial mechanisms in the context of ensuring access to remedy for indigenous peoples. The chapter provides an overview of the recent policies of a number of mining, oil and gas companies in relation to these mechanisms, and addresses some of the internal changes which corporations must make to implement their policies in a manner consistent with their responsibility to respect indigenous peoples'

rights. To this end, the chapter provides a synthesis of the guidance developed by a range of human rights bodies in relation to corporate respect for indigenous peoples' rights, including the 2013 report of the UN Working Group, and addresses the criteria for effective operational-level grievance mechanisms in indigenous territories. It closes with a brief critique of four cases where operational-level grievance mechanisms addressing indigenous peoples' issues have been established by mining, oil and gas companies and critiques them from an indigenous rights perspective, pointing to some lessons which can be drawn from these experiences.

Chapter three is the first of the two Latin American case studies, both of which are representative of the experience of many indigenous peoples in the region with large scale extractive industry projects over the last three to four decades. The Colombian case is written by Mikel Berraondo López, a lawyer and indigenous rights advocate, together with Fuerza de Mujeres Wayuu, a local indigenous Wayuu women's organization. The Wayuu territories in La Guajira, on the northern Pacific coast of Colombia, are home to numerous extractive and tourism megaprojects, which cumulatively have had very significant negative impacts on their environment and cultural and physical well-being. The communities have also suffered major human rights abuses, including forced displacement, as a result of paramilitaries who control much of the economic activity in the region. The chapter focuses on the impacts which Carbones del Cerrejón (Cerrejón) coal mining project has had on the rights of the Wayuu and Afro-descendant peoples over the course of its 30 years of operation in their territories. Cerrejón is owned by subsidiaries of Anglo American, BHP Billiton and Glencore, and is one of the biggest open cast coal mines in the world, occupying an area of 800 square kilometres in the municipalities of Albania, Hatonuevo, Maicao y Barrancas, La Guajira, in the northeast Atlantic coast of Colombia. Its current concession expires in 2034 and at present it supplies 60% of Colombia's coal, producing 32 million tonnes of coal per annum, most of which is exported. The project involved the construction of a 150km train line through the Wayuu territory and the largest coal port in Latin America. The case study describes the extensive adverse impact on the environment and the Wayuu and Afro-descendant peoples' health, cultural rights, subsistence and conditions of life, physical integrity, self-government and territorial rights, including consultation and participation rights affirmed under ILO Convention 169 and the UNDRIP. It contrasts these impacts with the company's presentation of the situation, and points to the potential of the Guiding Principles, if implemented in good faith and in accordance with the international indigenous rights' framework, to reduce those impacts and provide remedies to the Wayuu.

Chapter four was written by Delphine Raynal while working as a lawyer with the NGO Peru Equidad and collaborating closely with the indigenous network, PUINAMUDT (the United Amazonian Indigenous Peoples in Defence of their Territories). It concentrates on difficulties which 100 Peruvian Amazonian indigenous communities have faced in accessing reparations for violations of their rights arising from the contamination of the Pastaza, Tigre, Corrientes and Marañón Rivers (all of which are tributaries of the Amazon) in Loreto, Peru, as a result of oil exploitation in oil blocks 1AB and 8. Pluspetrol, a company of Argentinean origin, which has its headquarters in Holland, is currently

operating the blocks which have been in production for 40 years. The gravity of the situation is reflected in the fact that the area was deemed by the responsible government agencies to be in a state of environmental emergency in 2013 and as constituting a sanitary emergency in April 2014. The case study outlines the human rights violations that have arisen as a result of the oil exploitation and the extent to which the obligation to provide remedies has not been respected. The rights impacted include rights to a healthy environment, to water, food, health, adequate housing as well as territorial, cultural, participatory and self-determination rights, such as the right to determine development priorities, and rights to practice religion and protect sacred places. In addition to these collective rights affirmed under ILO Convention 169, there have also been violations of the communities' right to freedom of expression and peaceful assembly. A particular feature of the case is the extent to which the representative organizations of the affected communities coordinated their actions and voiced their complaints to various national, regional and international mechanisms. However, to date, adequate remedies have not been forthcoming.

Chapter five is written by Shankar Gopalakrishnan, a researcher and activist affiliated with the Campaign for Survival and Dignity. The case addresses the situation of the Baigas, the Gonds, the Agarias, the Khairawas and the Panikas who are opposing a proposed coal mine in their territories in Mahan, Singrauli District of Madhya Pradesh, in central India. The proposed coal mine is located in a 20,000 hectare stretch of dense deciduous forest. It would necessitate the clearing of 1,200 hectares of that forest, resulting in a profound effect on the livelihoods of 62 villages, of which approximately one third are indigenous communities. Permission was granted for the project to proceed without consultations with the affected communities, however, forest clearing activities have yet to commence. The legality of those permissions is being challenged by the communities who are actively protesting against the project. The coal from the Mahan Coal Limited mine is to be used to fuel two large power plants - owned by the projects two joint venture partners: Essar and Hindalco. The chapter describes how the villagers organized themselves to demand respect for their rights and the unsuccessful attempts they have made to engage the authorities responsible for the implementation of the Forest Rights Act. It also outlines the steps taken to assert their rights through the use of *gram sabhas* (village assemblies) resolutions, the means through which this has been subverted by the company and local officials and the associated lack of remedy.

Chapter six addresses the Baram Dam in Sarawak, Malaysia and is compiled by Asia Indigenous Peoples Pact (AIPP) with input from Tanya Lee of International Rivers. Indigenous peoples in the three Malaysian states – Sabah, Sarawak and Peninsular Malaysia – share a common experience of land dispossession, discrimination and loss of traditional livelihoods, knowledge and culture brought about by development projects imposed in their territories. The chapter addresses the situation of the indigenous peoples impacted by the planned Baram Dam between the villages of Long Na'ah and Long Kesah on the Baram River in Sarawak. The dam is a component of the government's "Sarawak Corridor of Renewable Energy" (SCORE) programme under which the state-owned Sarawak Energy Berhad (SEB) plans to construct up to 50 large hydropower

dams in Sarawak, the planned location of 12 of which is already known. The issues at the Baram Dam are contextualized in light of the experiences with the two dams that have already been constructed - the Bakun and Murum dams. These dams required the resettlement of thousands of indigenous residents and the affected indigenous peoples were not involved in determining the resettlement packages. Those who have been resettled complain that the land provided is inadequate to maintain their livelihoods and that the housing does not meet their basic needs. It is estimated that between 6,000 and 20,000 people belonging to Kenyah, Kayan and Penan peoples would be displaced from their lands if the Baram dam is constructed. Along with other planned dams, the Baram dam would flood agricultural lands and areas of cultural and spiritual significance to indigenous peoples. The chapter outlines how, like the Bakun and Murum dams, consent was not obtained for the proposed Baram dam and addresses the steps which community members have taken to seek access to remedy, including maintaining barricades at the proposed site for over a year up to the present to halt construction.

Chapter seven is written by Mrs Yun Mane, a member of the Bunong peoples, who has extensive experience working for the UNDP and the ILO. The chapter addresses the predominant business and human rights issue in Cambodia, namely the non-consensual encroachment (also referred to as land grabs) of economic land concessions for rubber plantations on indigenous peoples' land. Since 2003, approximately 700,000 Cambodians have been affected by such land grabs, which are estimated to have resulted in close to 400,000 evictions. Resistance is frequently met with violence and the issue was prominent in anti-government demonstrations which were met with excessive use of force by the authorities. The case study focuses on the issue of access to remedy for the indigenous peoples whose rights have been affected by the activities of a large Vietnamese company, Hoang Anh Gia Lai (HAGL), which operates rubber plantations through a number of subsidiaries in Rattanakiri, Cambodia, as well as in Laos. Dragon Capital Group Ltd (DCGL) invests in HAGL through the Vietnamese Enterprise Investments Ltd (VEIL) fund in which the IFC, the financial lending arm of the World Bank Group, along with other international banks, have investments. The case therefore raises the issue of the responsibility of financial institutions for investments made via financial intermediaries in projects which have negative impacts on indigenous peoples' rights and considers the role of the IFC-CAO in the dispute resolution process.

Chapter eight is written by Elifuraha Laltaika, a lecturer in law at Tumbaini University Makumira, Tanzania, and co-founder of Association for Law and Advocacy for Pastoralists (ALAPA). It addresses indigenous peoples' experiences with access to justice and remedies in Tanzania. The chapter provides an overview of the Tanzanian legislative and judicial frameworks relating to business and human rights (in particular business associated with foreign direct investment) and the relevant regional and international mechanisms which are accessible to indigenous peoples. It examines the issue of access to remedy through the lens of two cases studies. The first is the dispute in relation to "Sukenya Farm", located in Soitsambu ward, Loliondo Division, northern Tanzania. The farm consists of 12,600 hectares of land which is inhabited by the Maasai indigenous pastoralists and forms part of the greater Serengeti ecosystem. The issues commenced in 1984 when

the land was granted to Tanzania Breweries Limited, which subsequently subleased the property to a subsidiary of Thompson Safaris Ltd. The pastoralists, who are denied access to the lands, insist that their “consent” was obtained through fraudulent means and that the lease is illegal. A series of legal challenges have been mounted since 1987 and a case is currently pending before the Tanzanian High Court. Efforts were made to reach an out of court settlement but to no avail. The case has been addressed by UN bodies including the Committee on the Elimination of Racial Discrimination and the Special Rapporteur on the rights of indigenous peoples. It has also been addressed by a district court in the United States which granted discovery assistance in relation to information held by Thomson Safaris. The second case is the 2.1 billion dollar Southern Agricultural Growth Corridor of Tanzania (SACGOT) which spans approximately one third of mainland Tanzania, linking Dar es Salaam port to Malawi, Zambia and the Democratic Republic of Congo (DRC). The project will traverse vast swaths of Tanzania’s indigenous peoples’ traditional lands, over which their legal rights have not yet been recognized. The potential for serious adverse impacts on their pastoral and nomadic livelihoods, which the State regards as an unproductive use of land, is therefore enormous.

Chapter nine is written by Kanyinke Sena, a lawyer and indigenous rights activist from Kenya and a former member and chairperson of the UN Permanent Forum on Indigenous Issues. The chapter delves into the experience of three indigenous communities from different parts of Kenya who are impacted by the Lamu Port South Sudan Ethiopia Transport (LAPSSET) Corridor. The LAPSSET Corridor will connect Kenya, Uganda, Ethiopia and South Sudan by means of a railway, road and oil pipeline network. Like the pastoralists in Tanzania, indigenous pastoralists in Kenya face a serious risk of losing their land and resources as a result of the project and the associated infrastructure and extractive industry projects that it will facilitate. As a result, conflicts are expected to multiply and escalate. Each of the three communities addressed in the chapter chose to focus on a different remedial mechanism in their efforts to seek redress. The Turkana community engaged local remedial mechanisms to try to hold Tullow Oil Plc to account. The Ajuuran community chose to challenge Taipan Resources and its partners through judicial avenues in their efforts to seek access to remedy, while the communities impacted by the construction of a port in Lamu attempted to engage international redress mechanisms. The chapter contextualizes the experience of these communities in light of the protections afforded by the Kenyan constitutional and legislative framework and offers lessons in relation to the strategies they deployed in their efforts to seek access to remedy and redress for existing and potential violations of their rights.

The concluding chapter highlights some of the significant findings and lessons emerging from the case studies and consolidates their recommendations. These recommendations are primarily directed at corporations and the States where they operate, or where their parent companies are registered. They are also targeted at financial institutions and investors, the international community, the UN bodies, including the UN Working Group, national and regional human rights systems, and non-governmental organizations.

The extent to which access to remedy is realized in practice will be a primary barometer of success for the State duty to protect and the corporate responsibility to respect indigenous peoples' rights. Effective access to remedy is essential to provide redress for existing wrongs and to prevent further abuses of the rights of indigenous peoples. The authors, and those who contributed to the research and publication of this book, sincerely hope that the lessons and recommendations which emerge from the case studies will be adhered to, in particular by corporations and States. If they are, the struggles for redress of the indigenous peoples whose stories this book tells, and those of countless others whose stories go untold, will not have been in vain.

¹ UN Doc. A/HRC/26/L.1 2014 paras 8 & 10.

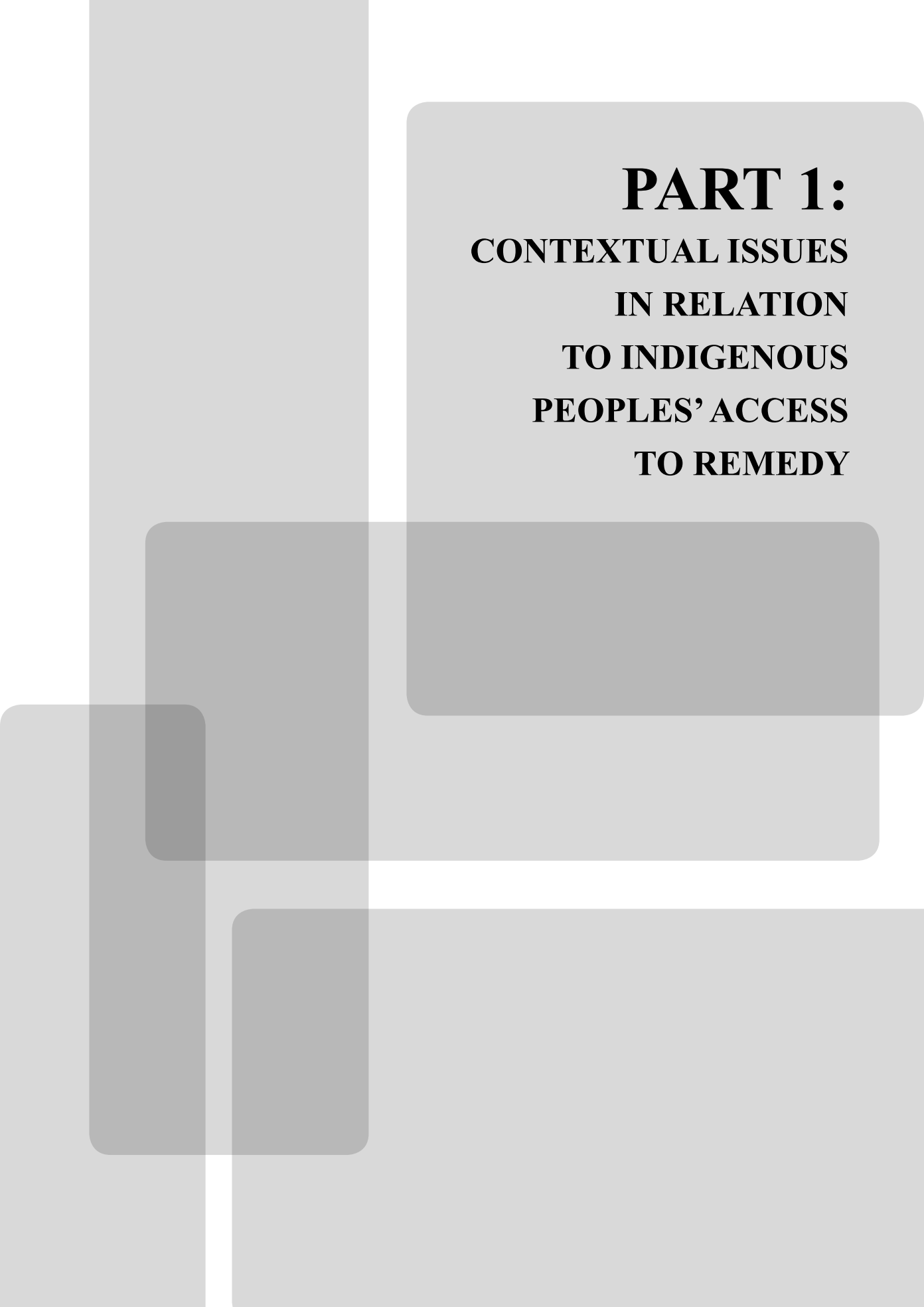
² WCIP Outcome Document UN Doc. A/69/L.1.

³ *Ibid* para 24.

⁴ *Ibid* para 16.

⁵ *Ibid* para 28.

⁶ UN Doc. A/HRC/27/65 and UN Doc. A/HRC/EMRIP/2012/2.



**PART 1:
CONTEXTUAL ISSUES
IN RELATION
TO INDIGENOUS
PEOPLES' ACCESS
TO REMEDY**

Chapter 1 - Indigenous Peoples and the Right to Remedy: The Need for a Distinct Cultural Context

Dr. Dalee Sambo Dorough

Chairperson and Expert Member of the UN Permanent Forum on Indigenous Issues

Anyone even remotely aware of indigenous peoples' existence has some knowledge about their history as well as the current reality that many of them face. One of the most alarming and urgent matters they face stems from the substantial force of extractive industries on indigenous communities and the adverse impacts upon their homelands, territories and resources. Far too often, the horrific problems that indigenous peoples suffer from, ranging from assassinations and killings to forced removal from their lands to criminalization for attempts to defend their basic human rights, all arise in the name of business and increasing the "bottom line" profits for far flung corporate interests that have no direct stake in the diverse environment of the affected indigenous communities. Such actions contribute to further marginalization and a swell of socioeconomic impacts, ranging from lack of access to education, health and other social services, to extreme poverty and food insecurity, to soaring suicide rates and continuing discrimination and loss of indigenous languages and threats to the very integrity of indigenous cultures.

Therefore, access to justice and the right to remedy in cases of violations of indigenous peoples' rights, and the corresponding mechanisms to achieve genuine remedy, are urgently required. The indigenous world must be accorded the same access to applicable international human rights in the area of recourse, remedy and reparations as all other peoples. For this to effectively take place, international human rights law in this field must be buttressed by the particular instruments that concern indigenous peoples specifically, namely the *ILO Convention 169 concerning Indigenous and Tribal Peoples* and the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP), as well as the UN Guiding Principles and the UN Protect, Respect and Remedy Framework.

In this brief article, it is crucial to echo the overarching theme of the most recent Third Annual Forum on Business and Human Rights – "Advancing Business and Human Rights Globally: alignment, adherence and accountability" with a stress on three matters: 1) the need for a distinct cultural context in order to 2) achieve "alignment, adherence and accountability" in the context of 3) indigenous peoples' human rights.

There are far too many examples of indigenous peoples being overrun by the forces of the market economy, from the Penan in Malaysia to the four different indigenous communities being impacted by the Belo Monte dam in Brazil, to the Australian Aboriginal sacrifices to mining interests, to the Inuit in Greenland and China's thirst for elements such as uranium. The recent atrocity in the Zamora Chinchipe province of Ecuador, involving the assassination of Jose Isidro Tendetza Antun, a leader of the Shuar people, is but one horrific example of the lack of respect for the lives of indigenous peoples and

their life ways and dependence upon their lands and territories. Unfortunately, the list of indigenous communities presently being adversely impacted by extractive industries is a long one that involves indigenous peoples in every region of the world.

The UN Framework and Guiding Principles on Business and Human Rights [Guiding Principles] are welcomed by indigenous peoples and are evidence of the progressive development of international human rights law in an area where indigenous peoples are severely, and often times irreparably, impacted. For example, Principle 12 of the Guiding Principles affirms: “The responsibility of business enterprises to respect human rights” and specifically refers to internationally recognized human rights standards including the International Bill of Rights and “United Nations instruments [that] have elaborated further on the rights of indigenous peoples.” In this regard, it is useful to briefly survey the relevant human rights instruments that lend themselves to strengthening this framework in favour of indigenous peoples and their distinct status and rights.

1. Historical experience and relevant international law

There is no question that the right to reparation and a right to remedy attach to indigenous peoples. Taken from a chronological perspective, the earliest of armed conflicts in the context of non-indigenous encounters with indigenous nations, peoples and communities often resulted in purported “legitimate” acts of belligerents in an effort to secure the lands, territories and resources of indigenous peoples. Rightly so, the *UNDRIP* recognizes this unconscionable reality in its preambular paragraph by recalling this ghastly history:

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Despite these “historic injustices”, few, if any, States have ever considered the relevance of the right to remedy which is solemnly proclaimed in the 1907 Hague Convention.¹ Still to this day, the impact of ongoing armed conflicts upon indigenous peoples and communities is not considered of any consequence. Few States have taken up the specific and unique impacts that armed conflict has had, and continues to have, upon indigenous peoples with the fervour that it deserves, especially when one considers the range of ongoing conflicts within and immediately adjacent to indigenous peoples communities or their vast traditional territories.

The 1948 Universal Declaration of Human Rights, an authoritative international human rights instrument, makes specific reference in Article 8 to “effective remedy” for individuals who have suffered violation of their fundamental rights under a constitution or by law. Continuing with the International Bill of Rights, the International Covenant on Civil and Political Rights² (ICCPR) affirms that individuals whose rights or freedoms have been violated “shall have an effective remedy” and furthermore, if a State party does not have a competent judicial mechanism, they should “develop the possibility of a judicial remedy.”³ This language is bolstered by the requirement for State parties to

ensure that these rights are applied without distinction as to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴ A year later, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), in Article 6, affirmed that:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.⁵

In regard to legally binding treaties, such as the ICCPR and the ICERD, it must be acknowledged that many treaty bodies have interpreted, and continue to actively interpret, the provisions of the UNDRIP in relation to their respective treaties, thereby ensuring that they are being responsive to the specific legal status and human rights of indigenous peoples, both collectively and individually.

In 1984, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁶ affirmed that victims of torture have the right to redress, fair and adequate compensation, including “means for full rehabilitation”.

Given the inter-generational rights of indigenous peoples, and the need to protect and promote indigenous culture, the Convention on the Rights of the Child⁷ is critical as a form of remedy and redress. Article 39 specifically requires that State parties

shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

More significant, the Convention makes explicit reference to indigenous children⁸ and the Committee has also issued an important General Comment on the distinct conditions of indigenous children that must be safeguarded.⁹

It is important to note that the member States of the UN, in an effort to crystallize the paramount importance of a right to remedy and access to remedy in the specific context of gross human rights violations and violations of international humanitarian law, catalogued some of these important instruments in the form of a General Assembly resolution, which was adopted in 2005.¹⁰ In this General Assembly resolution, member States carefully elaborated upon a range of issues, including: the nature and elements necessary for: “respect” for human rights obligations; the “scope of the obligation” to respect human rights; gross violations that constitute crimes under international law; the fact that the “statutes of limitations shall not apply to gross violations of international human rights law” and those that “constitute crimes under international law”; treatment of victims; and the right to remedy and access to justice; reparations for harm suffered; and non-discrimination. They also clarified that for purposes of the resolution, “victims

are persons who *individually or collectively* suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law”.(emphasis added).

This broadly worded resolution and the associated basic principles, as well as the aforementioned human rights instruments, many of which are legally binding, are germane to the realm of indigenous peoples. More significantly, all of these foundational international human rights instruments and their specific references to a right to remedy and reparation, as well as that in the 2005 resolution, attach to indigenous peoples, both individually and collectively. Today, with the General Assembly adoption of the UNDRIP in 2007, these international human rights instruments and the basic principles in relation to the right to remedy should be read in conjunction with the human rights affirmed in the UNDRIP, which is regarded as one of the most comprehensive universal human rights instruments specifically concerning indigenous peoples.

Furthermore, the internationally recognized human rights affirmed in ILO Convention 169 help to create a well-rounded cultural context to inform the right to remedy and access to justice for indigenous peoples. The UNDRIP expressly affirms that indigenous peoples are free and equal to all other peoples and ILO Convention 169 expressly uses the term Indigenous “peoples”. Since 2007, it is widely accepted that ILO Convention 169 must be read together with the UNDRIP, as confirmed by the ILO and others. Through these specific provisions (and all other provisions of the Declaration), the group or collective human rights of indigenous peoples are affirmed and, as such, the legal personality of indigenous peoples is affirmed. Indigenous peoples are rights’ holders as groups and also holders of responsibilities (or duties). The sources of indigenous legal personality, possessing rights and duties (or responsibilities) and, increasingly, indigenous capacity to bring claims concerning such rights, have been recognized by the UN human rights regime and other regional inter-governmental human rights regimes. In addition, States have recognized the legal personality of indigenous peoples as peoples through their constitutions, national legislation, agreements, treaties, policy and other instruments. Though not yet finalized, and still under negotiation, the *Draft American Declaration on the Rights of Indigenous Peoples*¹¹ should also be acknowledged as it envisages specific reference to the collective rights of indigenous peoples, including the right to restitution and access to effective legal remedies, as reflected in draft Articles 18 (4), 18(7) and Article 21. In addition, the draft American Declaration affirms a wide range of inter-related and indivisible indigenous specific human rights.

All of these human rights instruments provide a comprehensive framework and an important cultural context to guide reparations, remedies and redress for indigenous peoples. However, the necessary work of member States and businesses to ensure “alignment, adherence and accountability” remains outstanding and these concerns remain urgent.

2. Some elements of a distinct cultural context to guarantee effective remedy and reparations for indigenous peoples

At the outset, it is important to stress that the principle of self-determination, as affirmed in the UN Charter, and the right to self-determination, as affirmed in the International Covenants, and the 1970 Friendly Relations Declaration, is now explicitly affirmed in the UNDRIP. To reiterate, the foundational right to self-determination, as affirmed in Article 3 of the UNDRIP, is identical to Article 1 of the two international human rights Covenants. The right to self-determination is regarded as a pre-requisite to the exercise and enjoyment of all other human rights. Correspondingly, for indigenous peoples, too often, the denial of this pre-requisite right leads directly to the violation of all other human rights, ranging from the right to participate in decision making (and the associated right to free, prior and informed consent in the face of outside or State imposed development schemes) to the right of indigenous peoples to determine their own priorities for economic, social, cultural, political and spiritual development.

Another reason that militates for the need for a well-defined cultural context for indigenous peoples within the field of remedy, reparations and recourse is the distinct status of indigenous peoples in contrast to other peoples. The positive connotation of the right to be different, to be identified as different and to be respected as such, is reflective of this distinct status. Indigenous peoples are different. Their inherent political right to self-determination as distinct peoples is of a different character than that of all other peoples. This dimension of their inherent rights is manifested in their long-standing political institutions, traditional legal orders and their particular measures for social control both within, and external to, their diverse communities. In addition, their diverse cultures, lifestyles and relationship to their environment are inter-related dimensions of their lives, which indigenous peoples cherish – these characteristics are reflective of their distinctiveness from other peoples. Their traditional economies, highly dependent upon their lands, territories and resources, are inter-linked with their respective spirituality, languages, customs and practices – all of these things are integrated in a fashion that few other peoples have demonstrated. Their traditional knowledge is highly developed, innovative and unmatched, not to mention the fact that such knowledge has sustained them in some of the most harsh and harrowing conditions on the face of earth. And, significantly, their historical and present day reliance on their traditional homelands embodies and helps to define all of these distinct indigenous traits, legal and political status and pre-existing rights. For example, the Inuit across the circumpolar region have a distinct language that is intimately tied to their unique Arctic homelands and embodies important customs, protocol and knowledge that “we’ve seen no others demonstrate.”¹²

Therefore, the need for a distinct cultural context and reparation for human rights breaches suffered by indigenous peoples has a high degree of complexity, in light of the holistic, inter-related, inter-dependent, inter-connected lifeway’s of indigenous peoples, where spiritual, cultural and social values have extraordinary significance that cannot be measured through consideration for non-indigenous economic interests alone. This reality reflects the paramount need to establish approaches, programmes and understanding of

reparations in favour of indigenous peoples that go far beyond the classical Western-shaped language and conception of reparation.

This is true for two essential reasons: unlike reparations, redress and remedies in the Western world, where reparation is typically considered as compensation to individuals, for indigenous peoples, reparations first and foremost assumes a collective significance. Secondly, more often than not, for the non-indigenous individual, monetary compensation is considered either the only – or at least the paramount – goal to be achieved in order to gain effective reparation. In contrast, for indigenous peoples such material reparation, or this sole form of compensation, does not ensure effective redress for the pain they have suffered and the damage done to their collective dignity, cultural integrity and that of their lands, territories and resources. And, in some cases it may be inappropriate.

For indigenous peoples, non-material reparations have a special significance. The destruction of the social, cultural, spiritual and political constructions of the collectivity, produces harmful and often times, as noted above, inter-generational consequences for the community and their entire existence. Therefore, beyond material restitution, non-material reparations are essential for restoring this order to its original status, allowing the community to continue its collective existence. Such reparations might include recognition of wrongs by the State or other perpetrators; guarantee of non-repetition; disclosure of truth; apology; punishment of the perpetrators; various kinds of social and psychological reparations, which allow victims to fully rehabilitate themselves and their place within their society and culture.

As noted in the UN study on indigenous peoples and their relationship to land, “the profound relationship that indigenous peoples have with their lands and territories” has critical social, economic, political, cultural and spiritual dimensions and this relationship has ensured their survival as distinct peoples.¹³ Therefore, in regard to dispossession of indigenous lands, the form of reparation to be pursued should be first and foremost, restoration of such lands to their original condition. However, re-establishing all of the conditions to their previous situation can only be regarded as full redress or reparation by ensuring that the economic, social and cultural inequality, and other structural conditions that caused such damage, are dramatically altered. Proceeding without removing or altering such unacceptable social, cultural, political and economic conditions that perpetrated the initial human rights abuses would only serve to potentially create fertile ground for future human rights breaches and additional suffering.

3. UN Declaration on the Rights of Indigenous Peoples: explicit affirmation of an indigenous human right to remedy

Because of the historical and ongoing injustices being perpetrated against indigenous peoples, the UNDRIP explicitly addresses the important matters of a right to remedy and access to remedy. However, before turning to the specific provisions of the UNDRIP that address the right to remedy and access to remedy, a few words must be said about the status of the UNDRIP and customary international law in order to provide greater

structural support to the right to remedy of indigenous peoples within the human rights framework.

Indigenous peoples and member States recognize that the UNDRIP, as a whole, may not be an expression of customary international law. However, some of its key provisions can reasonably be regarded as corresponding to established principles of general international law, thereby implying the existence of equivalent and parallel international obligations to which States are bound to comply. According to both the former UN Special Rapporteur on the rights of indigenous peoples and the International Law Association Committee on the Rights of Indigenous Peoples,

[t]he relevant areas of indigenous peoples' rights with respect to which the discourse on customary international law arises are self-determination, autonomy or self-government, cultural rights and identity, land rights as well as *reparation, redress and remedies*.¹⁴ (emphasis added)

Again, it is crucial to establish the fact that the rights to remedy, reparations and redress are of a customary international law nature¹⁵ and, as such, create legally binding obligations upon States and others in order to guarantee their promotion and protection.¹⁶

Furthermore, it is important to understand the overall context of the inter-related, inter-dependent, indivisible and inter-connected nature of all of the UNDRIP standards, including the preambular paragraphs that provide the spirit upon which the operative paragraphs were ultimately negotiated and agreed upon. In addition, the closing general clauses of the UNDRIP must be seen as inherently linked to every operative article. Furthermore, one must consider the most innovative and creative ways to interpret these indigenous human rights norms against the backdrop of the other existing international human rights instruments that affirm the right to remedy, and to seek ways to link them to ensure “alignment, adherence and accountability.”

It is safe to say that, to a large extent, the UNDRIP provisions are responsive and adequate in the area of redress, reparations and remedies. Though indigenous peoples argued in the negotiation process for stronger language, which mirrored the Genocide Convention provisions, Article 8 of the UNDRIP nevertheless captures the major significance of indigenous culture and identity. Specifically, Article 8(2) is clearly inspired by the importance of cultural identity and the sense of belonging to the community in order to ensure proper safeguarding of the rights of indigenous peoples.¹⁷ Here, the term “redress” is broad and allows for an open-ended rule, allowing for the specific kind of reparation to be decided on a case by case basis, to re-establish the pre-existing situation and/or to grant effective redress, according primacy to indigenous peoples' perception of the matter.

Article 10¹⁸ establishes a prohibition against forcibly removing indigenous peoples from their ancestral lands; and relocation is only possible with the “free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.” Further to the need for an indigenous cultural context, the term “compensation” is not limited to pecuniary

redress, as confirmed by the use of the term in the context of the UNDRIP taken as a whole. Furthermore, Article 10 and the right to redress due to indigenous peoples and the language of Article 28 should be read as complementary. The latter is aimed at “reimbursing” the community for the loss of its land, on the basis of its spiritual and other values, and the former specifically addresses the right to redress the anguish suffered by relocation.

There are numerous other examples of the need to interpret the articles addressing redress, remedies and reparations in relation to one another – all of which are aimed at being fully responsive to the distinct status and rights of indigenous peoples. Articles 11 (2)¹⁹ and 12 (2)²⁰ are also complementary and must be read together in relation to restitution of cultural property taken without the free, prior and informed consent of the indigenous peoples concerned or in violation of their laws, traditions and customs and repatriation of ceremonial objects. The use of the term “effective mechanisms” presupposes that any redress or reparations are deemed adequate by the indigenous peoples concerned and is further bolstered by the fact that such mechanisms must be developed in conjunction with indigenous peoples.

The traditional economies of indigenous communities predate any conception of the term “subsistence”, which to many rich indigenous cultures has a very negative connotation because it suggests marginalization, displacement, barely surviving or eking out a living. And, though the standard in the twin 1966 International Covenants affirms what appears to be an absolute prohibition against denying any peoples their own means of subsistence, the fact remains that far too many indigenous peoples have in fact been displaced, marginalized and deprived of their own means of subsistence. Therefore, Article 20 (2)²¹ of the UNDRIP affirms just and fair redress in the event of indigenous peoples being deprived of their means of “subsistence and development.” The broadly worded language and use of the term redress suggests that it must be effective and take into account the perceptions of the victims who have been deprived and that measures taken are in fact adequate to restore their dignity and to effectively compensate the tort suffered. Here again, the right to determine priorities for development and the right to traditional indigenous economies, when violated, must be remedied, repaired and compensated for in a fashion that recognizes and respects the holistic view of the Indigenous world and not merely to ensure that there is food on the table. Such reparations are essential for the future survival of indigenous peoples and for their overall cultural integrity.

To be sure, indigenous peoples’ rights to their lands, territories and resources are the “heart” of the UNDRIP.²² So many aspects of indigenous cultures, values, customs and traditions manifest themselves through their profound relationship to their lands and territories. This view is consistent with the inter-related nature of human rights. And, though Article 26 of the UNDRIP does not have an explicit reference to remedy or reparations, because the right of self-determination includes the essential element of consent, it is crucial to note that when interpreting Article 26 (2),²³ which affirms the right of indigenous peoples to own, use, develop and control their lands, territories and resources, that they possess by reason of traditional ownership or other traditional occupation or use, the “right to control” necessarily includes “consent”.²⁴

The most important provision dealing with reparation included in the UNDRIP is undoubtedly Article 28,²⁵ which affirms the right of indigenous peoples to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

As indigenous peoples well know, in most cases no form of compensation is adequate to recompense effectively the deep cultural, social and spiritual significance of their homelands, their very cultural identity and in most cases, their physical existence. Therefore, restitution is the primary form of redress and this should only be replaced by compensation that is just, fair and equitable when full restitution is not possible and, “[un]less otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress”. This formulation, like Article 10, must take into account the fact that “compensation” is not necessarily limited to monetary redress.

A critical element of Article 28 is the fact that the deprivation of ancestral lands of indigenous peoples perpetrated in the past continue to be suffered by the communities concerned at present, making such an act an ongoing violation that continues to produce its effects today and into the future. Therefore, the reparation proscribed by Article 28 is not to be seen as redress for a violation that merely occurred in the past, but rather for a breach that is continuing to take place. In many indigenous cases, the breach even pre-dates the 1907 Hague Convention on victims of land conflicts.

It is important to point out that Article 28 of the UNDRIP, as well as Article 16 of ILO Convention 169 and Article XXIV of the draft American Declaration, has been supported by extensive State practice by affirmation and reiteration in international and domestic level case law. Numerous programmes of reparation have been established to redress indigenous peoples that have previously been deprived of their traditional lands.

However, ongoing dispossessions occur on a daily basis. Even more troubling is the fact that some States and inter-governmental entities are attempting to re-interpret the provisions of Article 28 by suggesting that in the absence of gaining free, prior and informed consent of indigenous peoples this translates to a legitimate taking of indigenous peoples’ lands, territories and resources. For example, the International Council of Mining and Minerals (ICMM), the international mining industry association, has tried to argue that Article 28 reflected the fact that States can proceed with projects without the consent of the peoples concerned.

To be clear, Article 28, which has a consensual element in both 28(1) and (2), cannot be read or interpreted in a vacuum or in an intellectually dishonest, ill-informed and greed driven fashion. Again, all of the inter-related, inter-connected, indivisible and inter-dependent rights enshrined in the UNDRIP all reinforce the content and substance of an affirmative right of indigenous peoples to self-determination and to free, prior

and informed consent.²⁶ Such distorted and wrongheaded interpretations underscore the need for immediate acceptance of the UNDRIP standards by States, businesses and industry and more significantly, the urgent need for comprehensive implementation of the UNDRIP standards by States and concrete action to genuinely protect and promote the human rights of indigenous peoples.

Article 32(3)²⁷ of the UNDRIP is also relevant to this discussion. The language affirms the obligation of States to provide effective mechanisms for just and fair redress for any project affecting the lands or territories and other resources belonging to indigenous peoples, particularly in connection with the development, utilization or exploitation of mineral, water or other resources; as well as the fact that appropriate measures must also be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact arising from such projects.

This language provides for a form of redress that is due independent of any consent given by the communities concerned - it arises when any one of the stated activities is performed on indigenous lands. And, the redress contemplated is intended as benefit sharing and the terms “just and fair redress” indicates that it must be deemed as effective and equitable by the indigenous peoples concerned.

Article 40 of the UNDRIP,²⁸ a general provision concerning access to and prompt, effective remedies for resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights, is framed in extremely broad language as it addresses all violations of indigenous peoples’ rights, both of individual and collective character. It is significant that this language extends to infringements of collective rights, which are generally not embraced by other international human rights instruments. However, as noted above, with the General Assembly’s adoption of the UNDRIP, these instruments must now be informed by, and interpreted in conjunction with, the human rights norms affirmed by the UNDRIP. Furthermore, Article 40 is the only provision where the term “remedies” is used in order to emphasize “access to justice” and to ensure that wrongs suffered are satisfactorily repaired through adequate redress. Furthermore, the provision states that relevant remedies must be granted through “giv[ing] due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights”. Finally, as a general provision, it attaches to, and must be read in relation to, all of the rights affirmed in the UNDRIP.

4. Conclusion

Given the customary international law²⁹ nature of the right of indigenous peoples to remedy, reparations and redress, combined with the extraordinary and progressive development of international human rights law in the area of the right to remedy, the corresponding obligations of States must be stressed. It is both urgent and crucial for States to take these legally binding obligations seriously in the context of their own actions, as well as the actions of national and multinational corporations operating

within and beyond their respective borders. Lip service and rights ritualism should not be tolerated, especially in the face of severe damage to indigenous territories and cultures, and the number of indigenous lives lost on a daily basis.

We must be mindful of the fact that the UN “protect, respect and remedy” Framework and Guiding Principles concerning access to remedy aim to provide foundational and general principles concerning State and non-State based, judicial and non-judicial grievance mechanisms. In addition, it is significant that these principles are also aimed at industry. The clarification that corporations have an independent responsibility to respect human rights, including the rights of indigenous peoples, implies that they must respect and participate in effective and comprehensive remedial mechanisms, which are designed with, and substantively responsive to the particular rights and cultural context of, indigenous peoples. Furthermore, the necessary effectiveness criteria are outlined and have to play a role in mechanisms that States must establish for indigenous peoples, in order to be responsive to their legal obligations under general principles of international law and customary international law.

Consistent with the Guiding Principles and their recognition of the corporate responsibility to respect human rights, companies must participate in remedial mechanisms and potentially establish operational-level grievance mechanisms. Specific to the human rights of indigenous peoples, the recommendation of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises have recommended that business enterprises:

Commit to respecting the United Nations Declaration on the Rights of Indigenous Peoples and International Labour Organization Convention 169 in their policy commitments; human rights due diligence process; and remediation processes.³⁰

However, for international human rights law on the right to remedy and the Guiding Principles to be effective for indigenous peoples, and to ensure that they are in fact “rights compatible” in practice within the indigenous context, more must be done to respond to the distinct cultural context of indigenous peoples. Like the theme of the Third Forum on Business and Human Rights, “alignment, adherence and accountability” must be calibrated to the unique human rights and legal status of indigenous peoples. For indigenous peoples, this essentially means that member States must restructure their domestic law with a view to adopting all necessary measures – including constitutional amendments, institutional and legislative reforms, judicial action, administrative rules, special policies, reparations procedures and awareness-raising activities – in order to make the full realization of indigenous peoples’ human rights possible within their territories, consistent with the rules, principles and standards established by UNDRIP and the Guiding Principles on Business and Human Rights.³¹

Furthermore, additional policy and legal development must take place at the national and local level in order to give effective meaning to these human rights and Guiding Principles and to create the “adherence, alignment and accountability” needed in the context of indigenous peoples. It also means that corporations whose activities may affect indigenous peoples must *align* their policies and practices to be consistent

with the UNDRIP and the perspectives and aspirations of the concerned indigenous peoples. In addition, when implementing Guiding Principles 22, 29 and 31, any remedial mechanisms which they operate or participate in must be consistent with the provisions of the UNDRIP and the principles outlined above, as well as the established right to remedy that has progressively developed in international law.

The world community has recognized that indigenous peoples are among the most marginalized and disadvantaged peoples across the globe. Therefore, the need to act in favour of the most vulnerable implies that any review or decisions pertaining to indigenous peoples' redress, remedies and reparations must be consistent with the need to rule in favour of the most vulnerable.

¹ Article 3 of the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Protection of Victims of International Armed Conflicts (Protocol I), Art. 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

² International Covenant on Civil and Political Rights [ICCPR], Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

³ ICCPR, Part II, Article 2(3).

⁴ ICCPR, Part II, Article 2(1).

⁵ International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969.

⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987.

⁷ Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.

⁸ Articles 17, 29 and 30, Convention on the Rights of the Child.

⁹ CRC/C/GC/11, Committee on the Rights of the Child, Fiftieth session, Geneva, 12 January-30 January 2009 Committee on the Rights of the Child General Comment No. 11 (2009), Indigenous children and their rights under the Convention, paragraph 5: "The specific references to indigenous children in the Convention are indicative of the recognition that they require special measures in order to fully enjoy their rights. The Committee on the Rights of the Child has consistently taken into account the situation of indigenous children in its reviews of periodic reports of State parties to the Convention. The Committee has observed that indigenous children face significant challenges in exercising their rights and has issued specific recommendations to this effect in its concluding observations. Indigenous children continue to experience serious discrimination contrary to article 2 of the Convention in range of areas, including in their access to health care and education, which has prompted the need to adopt this general comment."

¹⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

¹¹ Proposed American Declaration on the Rights of Indigenous Peoples, Approved by the IACHR on February 26, 1997, accessed on February 11, 2015 at <http://www.cidh.oas.org/Indigenas/Indigenas.en.01/Preamble.htm>.

¹² Welcoming speech by the late Eben Hopson, June 1977, Barrow, Alaska, to Inuit delegates from throughout Alaska, Canada, and Greenland at the first organizing meeting of the Inuit Circumpolar Council.

¹³ Indigenous peoples and their relationship to land: Second progress report on the working paper prepared by Mrs. Erica-Irene A Daes, Special Rapporteur, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1999/18 (June 1999) para 10, 18.

¹⁴ See International Law Association, Interim Report, 2011 The Hague Conference, Committee on the Rights of Indigenous Peoples, p 47, see also S. James Anaya and S. Wiessner, The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment, October 3, 2007, <http://jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php>.

¹⁵ International Law Association Ibid.

¹⁶ See International Law Association, Final Report, 2012 Sofia Conference, Committee on the Rights of Indigenous Peoples, p 29: “[T]he multiplication of international practice in the field shows the existence not only of the element of State practice, but also of a clear *opinio juris*, contextually satisfying both elements traditionally needed to prove the existence of a rule of customary international law.”; See also UN Special Rapporteur Report on the UNDRIP, para. 41, wherein the Special Rapporteur noted how the UNDRIP “can be seen as embodying to some extent general principles of international law. In addition, insofar as they connect with a pattern of consistent international and State practice, some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law.”

¹⁷ Article 8 (1) Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

¹⁸ Article 10 Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

¹⁹ Article 11 (2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

²⁰ Article 12 (2) States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

²¹ Article 20 (1) Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. (2) Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

²² UN Declaration Articles 25-30, and 32 specifically.

²³ Article 26 (1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

²⁴ As affirmed by Canada’s highest court in *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, para. 76: “The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. Thus, business enterprises must go beyond simply identifying specific provisions in the UN Declaration that explicitly include the term “free, prior and informed consent”.

²⁵ Article 28 (1) Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without

their free, prior and informed consent. (2) Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

²⁶ UN Declaration Article 3 on self-determination; Article 26(2) right to control lands, territories and resources; and numerous other UN Declaration standards.

²⁷ Article 32 (2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

²⁸ Article 40 Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

²⁹ See *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, 12 January 2011, available at <<http://www.state.gov/documents/organization/156820.pdf>> (last visited on 20 January 2012), para. 210, quoting, in footnote 55, “ILA Committee on the Rights of Indigenous Peoples, Interim Report (2010), p. 51”. See also the transcripts of the Hearing of the Merits, Saturday, February 13, 2010, available at <<http://www.naftalaw.org/Disputes/USA/GrandRiver/Transcript-06-Merits.pdf>> (last visited on 27 May 2012), where the legal advisers of the United States admitted that the UNDRIP “can reflect customary international law and it can provide evidence that customary international law is evolving in some circumstances” (see p. 2162), as well as that even in the 1989 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries “there could be aspects that may reflect customary international law” (see p. 2164).

³⁰ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, submitted pursuant to Human Rights Council resolution 17/4, UN Document A/68/279, accessed on February 17, 2015 at: <http://www.ohchr.org/Documents/Issues/Business/A-68-279.pdf>, paragraph 56(b).

³¹ Conclusion and Recommendation of the ILA Committee on the Rights of Indigenous Peoples.

Chapter 2 - Operational-Level Grievance Mechanisms and Indigenous Peoples' Access to Remedy

Dr. Cathal M Doyle

1. Introduction

On the 16th of June 2011, the UN Human Rights Council passed a resolution unanimously endorsing the UN Guiding Principles on Business and Human Rights (henceforth the Guiding Principles) for implementing the 2008 UN “Protect, Respect and Remedy” Framework (henceforth the UN Framework). The principles seek to provide guidance in relation to the three pillars of the UN Framework, namely: the State duty to protect human rights; the corporate responsibility to respect human rights; and access to remedy. The access to remedy pillar consists of State and non-State based judicial and non-judicial components. One form of non-State based non-judicial grievance mechanisms promoted by the Guiding Principles is those which are administered by business-enterprises, either alone or in collaboration with others. These are referred to as “operational-level grievance mechanisms”.¹

This chapter focuses on these operational-level grievance mechanisms as they relate to indigenous peoples' rights, with a particular focus on resource extraction companies. It is divided into seven sections. Section two addresses the context within which the UN Framework and Guiding Principles were developed. It also looks at the centrality of the remedy pillar to their legitimacy. Section three summarizes the guidance provided in the Guiding Principles in relation to operational-level grievance mechanisms and their relationship with other grievance mechanisms. Section four outlines the policies of some extractive industry corporations in relation to these mechanisms and the drivers behind their implementation. It also addresses some internal issues that companies face when seeking to implement and operate them. Section five contextualizes the implementation of these mechanisms within the framework of indigenous peoples' rights, focusing on their role in addressing existing or possible violations of indigenous peoples' rights arising from corporate activities. Section six provides an overview of experiences in the implementation of these mechanisms with respect to four projects in the extractive sector located in different parts of the world. It seeks to draw out some of the lessons that can be learned for their implementation in relation to indigenous peoples' rights. The chapter closes with a set of recommendations aimed at guiding the development, implementation and oversight of operational-level grievance mechanisms in a manner consistent with international human rights standards, including the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP).

2. Development of the UN Framework and Guiding Principles

The development of the UN Framework and Guiding Principles between 2005 and 2011 followed almost four decades of intractable debates in the context of UN standard setting

exercises on the subject of corporate obligations in relation to human rights.² At the core of this debate was the question of whether or not corporations have, or should have, legal obligations to respect human rights, and additionally, whether such “legally binding” obligations are necessary in order to guarantee corporate respect for human rights and redress for victims of corporate related human rights abuses.

The Guiding Principles are presented by the former UN Special Representative to the Secretary General, John Ruggie, as constituting a departure from both purely legalistic and purely voluntaristic based approaches to corporate human rights responsibilities.³ He suggests that they achieve this by drawing from both existing State obligations under human rights law with regard to ensuring respect for human rights in the context of corporate activities, and from societal norms and expectations, as well as risk considerations, in relation to corporate behaviour in this regard. The UN Framework and Guiding Principles in effect affirm that corporations have responsibilities to respect all human rights, and that this responsibility is not at the discretion of corporations to accept or reject. In this regard, they aspire to be consistent with the reference to the human rights responsibilities of “every organ of society” in the preamble of the 1948 Universal Declaration on Human Rights.⁴ The fact that the Guiding Principles span all human rights means that they include the human rights of indigenous peoples, including those affirmed under ILO Convention 169 and the UNDRIP. This has been emphasized by the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, the body responsible for facilitating the implementation of the Guiding Principles, as well as by the UN Special Rapporteur on the rights of indigenous peoples and other authoritative human rights bodies and sources.⁵

In adopting this focus on the normative, as opposed to purely legal, dimension of corporate responsibilities, the UN Framework and associated Guiding Principles sought to side-step the debate on voluntary standards versus mandatory obligations. They reaffirm the legal duty of States under international law to protect human rights in the context of business operations, while also introducing the notion of a corporate responsibility to respect human rights, without delving into the potential legal dimensions or implications of this responsibility. This approach gained significant support from the corporate sector and was widely accepted by States. It drew a more qualified welcome from civil society and rights holders, many of whom have chosen to engage with the implementation of the Guiding Principles but have reserved judgement until they demonstrate the capacity to protect rights and ensure remedies. A fundamental concern of civil society and rights holders continues to be the limited enforceability of corporate human rights responsibilities in the absence of international or extraterritorial means to hold corporations accountable, in contexts where national legislation and institutions are inadequate or ineffective and transnational corporations have the ability to avoid, or unduly influence, national enforcement mechanisms.

The legitimacy of the Guiding Principles, and their capacity to constitute a meaningful long term contribution to the Business & Human Rights agenda consequently rests, to a large extent, on whether they can fulfil the promise of the third pillar – namely, ensuring

that rights holders are guaranteed access to effective remedies for human rights violations in the context of business operations. Remedies emerging from these mechanisms may take the form of “apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.”⁶ Implementing this aspect of the Guiding Principles in a manner that is satisfactory to rights holders, would be a significant contribution to resolving debates on the role of legally binding and voluntary corporate obligations. This is because realizing the objective of the third pillar implies the existence of effective remedial mechanisms leading to the enforcement of rights. On the other hand, a failure to fulfil the objective of the third pillar would throw the capacity of the UN Framework and Guiding Principles to deliver on any of their core objectives into serious doubt. Essentially, the proof of the Guiding Principles rests on the implementation of its third pillar, as functioning and effective remedial mechanisms are perhaps the primary driver for corporate respect of human rights.

Realizing the objective of ensuring access to remedy raises questions as to the role of sanctions, the nature of necessary enforcement mechanisms and the effectiveness of existing legal, quasi-legal and non-legal mechanisms. At the national level the Guiding Principles mandate that States, through “judicial, administrative, legislative or other appropriate means”, including State based non-judicial mechanisms, ensure that rights holders have access to effective remedies.⁷ They place a particular emphasis on the effectiveness of judicial mechanisms for addressing business-related human rights abuses, describing them as being “at the core of ensuring access to remedy”.⁸

The Guiding Principles specifically note that home States should take measures to ensure that effective judicial mechanisms are accessible; where, for example, “claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim”.⁹ In this regard, the UN Special Rapporteur on the rights of indigenous peoples clarified that home States should “adopt regulatory measures ... sanctioning and remedying violations of the rights of indigenous peoples abroad for which [their] companies are responsible or in which they are complicit”.¹⁰

The ineffectiveness to date of State implementation of the remedial aspect of the UN Framework is widely acknowledged.¹¹ This deficiency is particularly profound in the context of violations of indigenous peoples' rights, as is clearly reflected in the case studies addressed in this book. As a result, for many rights holders, and in particular indigenous peoples, the State duty to protect their rights has been rendered meaningless. This is an eventuality which the Guiding Principles acknowledge, but seek to avoid by reemphasising the duties of States and focusing greater attention on related, but independent, corporate responsibilities.¹² However, given the inability of operational-level grievance mechanisms to address certain issues, reliance on them would be inappropriate in contexts where State based mechanisms are dysfunctional, and access to effective extraterritorial and international grievance mechanisms would be necessary.

International, regional, national and extraterritorial non-judicial and judicial mechanisms - be they State focused (such as human rights committees, commissions and courts) or corporate focused (such as the OECD National Contact Points and oversight mechanisms of international financial institutions) offer some avenues through which redress can be sought. However, the enforcement of their decisions and recommendations is inevitably contingent on the cooperation of the State or the corporation to which they are directed. The challenges implicit in delivering on the promise of the Guiding Principles' third pillar are clear when viewed in light of the number of alleged violations of indigenous rights associated with large scale infrastructure projects which existing mechanisms receive, and the limitations of these mechanisms in ensuring effective remedies. This reality raises the question of the potential for locally based operational-level grievance mechanisms to play a role in ensuring access to effective remedies.

3. The corporate responsibility aspect of the remedy pillar

The Guiding Principles' remedy pillar reflects its hybrid approach to addressing human rights harms in the context of business operations. It emphasizes the centrality of State based judicial and non-judicial mechanisms, as well as regional and international mechanisms, but also introduces the concept of corporate based non-judicial mechanisms (or operational-level grievance mechanisms), which are similarly aimed at ensuring access to remedy. Such operational-level grievance mechanisms are not intended to replace judicial or other non-judicial remedies, but are instead envisaged as supplementing or enhancing them.

Under Guiding Principle 22, compliance with the corporate responsibility to respect human rights necessitates that where a "business enterprise may cause or contribute to an adverse human rights impact ... its responsibility to respect human rights *requires active engagement in remediation*, by itself or in cooperation with other actors" (emphasis added). While this requirement is framed in relatively strong language, the mechanisms envisaged for engagement in such remediation provide significant flexibility for businesses.¹³ One of the envisaged mechanisms is "operational-level grievance mechanisms", which Guiding Principle 22 states "can be one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31 [addressed below]".

Although operational-level grievance mechanisms predate these initiatives, the UN Framework and Guiding Principles have directed focus to the potential of these mechanisms, and have significantly raised the expectations on corporations to employ them. One of the purported potential strengths of these mechanisms is their capacity to function as early warning systems which serve to prevent human rights harms by identifying "low-level complaints" or concerns before they escalate into more serious disputes and human rights abuses.¹⁴ The Guiding Principles suggest that these mechanisms offer potential advantages over State based and other mechanisms in terms of "speed of access and remediation, reduced costs and/or transnational reach".¹⁵ They also afford corporations a means to identify "systemic problems and adapt their practices

accordingly” and thereby significantly improve their on-going human rights due diligence and rights holder engagement processes.¹⁶

Two interrelated forms of corporate based non-judicial grievance mechanisms are outlined in the Guiding Principles. One form consists of mechanisms associated with industry and multi-stakeholder initiatives that are based on human rights standards.¹⁷ They are generally governed by a code of conduct, and may offer mediation services or reach adjudications as a component of dispute resolution. Examples in the energy and extractive sectors include certification schemes such as the nascent Initiative for Responsible Mining Assurance (IRMA), the Forest Stewardship Council (FSC) and the Roundtable on Sustainable Palm Oil (RSPO), all of which recognize the requirement for indigenous peoples' free prior and informed consent (FPIC) as a necessary safeguard to avoid corporate violations of indigenous peoples' rights.¹⁸ The other form, the focus of this chapter, is at the individual company level and consists of procedures referred to as operational-level grievance mechanisms.

3.1. Content of the operational-level grievance mechanism component of the Guiding Principles

Guiding Principles numbers 28 to 31, and the corresponding components of the UN Framework, specifically address these particular mechanisms. Principle 28 outlines the State duty to facilitate access to non-State based grievance mechanisms. This covers a broad range of mechanisms - from human rights bodies addressing State failure to protect against human rights abuses by business enterprises, to company based operational-level grievance mechanisms. Principle 29 focuses directly on the corporate responsibility to “establish or participate in effective operational-level grievance mechanisms”. It identifies three models for the administration of these mechanisms: a) by the company itself, b) the company “in conjunction with others”, or c) by “mutually acceptable external expert or body”. Its commentary clarifies that these mechanisms should not “preclude access to judicial or other non-judicial grievance mechanisms” or “negatively impact opportunities for complainants to seek recourse through State-based mechanisms”,¹⁹ an issue which will be returned to in sections 5 and 6 below. Principle 30 extends the corporate responsibility to ensure the availability of effective mechanisms for the remediation of human rights impacts to “[i]ndustry, multi-stakeholder and other collaborative initiatives” as well as financial institutions such as the Equator Principles financial institutions. Its commentary notes that their legitimacy depends on the existence of such mechanisms, echoing the position in the UN Framework that “a grievance mechanism provides an important check on performance” of their members.²⁰

According to the Guiding Principles, the objective of a remedy is to “counteract or make good any human rights harms that have occurred”,²¹ while “[p]oorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process.”²² In order to avoid such scenarios, Principle 31 establishes seven interrelated criteria for determining the effectiveness of grievance mechanisms in realizing their remedial objective. These criteria are: legitimacy, accessibility, predictability, equitability,

transparency, rights compatibility, and a source of continuous learning. The content of each of these seven criteria is reasonably self-evident. Legitimacy (in terms of their structures, processes and outcomes) is fundamentally about obtaining and maintaining trust of rights-holders so that they will make use of the grievance mechanism. As a result, it requires that they be seen to function in a fair and unbiased manner without interference. Accessibility implies both awareness of the mechanism by rights holders and their capacity to freely access and engage with it. Predictability implies clarity around procedures, processes, time frames (with the necessary flexibility), outcomes and monitoring of implementation. Equitability implies that information asymmetries and imbalances of power inherent in relationships between rights holders and the companies are addressed through the provision of sufficient information, advice and expertise such that engagement processes can meet the standards of fairness and respect. The objective is to ensure that solutions reached are lasting. Transparency relates to the provision of information about the grievance process to rights holders and about the mechanism's progress to all stakeholders. This is regarded as necessary to ensure legitimacy. Rights-compatibility necessitates that outcomes are consistent with international human rights standards. Continuous learning indicates that grievances mechanisms must act as a source of lessons learned which will inform corporate policies and practices in order to avoid future harms.

These seven criteria apply to all grievance mechanisms, be they judicial or non-judicial. Given the non-adjudicatory nature of operational-level grievance mechanisms they must also meet the additional criteria of being based on engagement and dialogue both in their design and operation. This means that a) they are to be “designed and overseen jointly with representatives of the groups who may need to access [them]”,²³ b) outcomes are to be reached through dialogue, as business cannot legitimately adjudicate complaints directed against them, and c), where necessary, a trusted and mutually acceptable independent third-party mechanism can act as an adjudicator.

3.2. Relationship of operational-level mechanisms with other grievance mechanisms

Non-judicial mechanisms do not have to follow a specific institutional structure or process and should be designed with consideration given to the broader remedial landscape. What Ruggie has described as a “smart mix” of non-judicial and judicial mechanisms may be necessary in order to guarantee effective remedies; with, for example, issues which are irresolvable through operational-level mechanisms escalated through an effective channel to the dispute resolution mechanisms of National Human Rights Institutions, international financial institutions or mutually acceptable arbitration bodies.

The commentary of the UN Framework and discussions among experts on the content and implementation of the Guiding Principles suggest that where “the judiciary is not effective or independent, or where institutional discrimination exists” “non-judicial grievance mechanisms may play an important role in obtaining redress for victims.”²⁴ As recognized in the Guiding Principles, for a range of reasons indigenous peoples are frequently among the groups who “are excluded from the same level of legal protection of

their human rights that applies to the wider population”.²⁵ In many contexts the judiciary is not perceived as according due recognition and weight to their rights or perspectives. In jurisdictions where it does, institutional discrimination or vested interests in other branches of the State apparatus frequently serve to render progressive judicial rulings ineffective. In order to address this reality the Guiding Principles suggest that “[p]articular attention should be given to the rights and specific needs of [indigenous peoples] at each stage of the remedial process: access, procedures and outcome.”²⁶

In contexts where State-based judicial and non-judicial mechanisms are dysfunctional the role which corporate level operational mechanisms can play in the realization of indigenous peoples’ right to redress may be extremely limited. Many indigenous peoples are unwilling to accept corporate activities in their territories until the State first recognizes and protects their rights over those territories. In other contexts indigenous peoples may be unwilling to engage with the State, but may be prepared to enter into rights-based discussions directly with corporations in relation to access to resources located in their territories. In the former situation a corporate based operational-level grievance mechanism will tend to find little or no traction with the communities, while in the latter a mutually acceptable binding dispute resolution mechanism, in which the corporate entity participates, may be considered a prerequisite for FPIC based agreements.

At a minimum, where corporate human rights due diligence identifies that State based mechanisms are not fulfilling their duty to fully protect indigenous rights, an increased burden falls on corporations to ensure that their actions are in compliance with the rights and perspectives of indigenous peoples. The presumption in such contexts must be that State permissions and procedures are inadequate to guarantee compliance and that the thresholds which have to be met for social licence to operate are those of international standards such as the UNDRIP.

4. Overview of extractive company policies on grievance mechanisms

4.1. Current state of play and drivers for uptake

The UN Framework and Guiding Principles on Business and Human Rights have contributed to a relatively rapid evolution in the views of extractive sector actors in relation to operational-level grievance mechanisms. This has been realized not only by focusing on the ethical and potential legal dimensions of aligning business practice with human rights and sustainable development values, but also by capitalizing on other pragmatic drivers for changes in corporate behaviour. One of the primary drivers behind corporate consideration of such mechanisms is their relationship with risk management and their contribution to business continuity, cost efficiency, corporate reputation and the strategic business case for obtaining and maintaining social licence to operate. This translates into avoiding project delays, minimizing risks to shareholder value, reducing the threat of judicial actions, preparing for possible legislative measures, ensuring compliance with third party standards (e.g. of financial institutions, investors and certification schemes), meeting national or regional reporting requirements and avoiding negative publicity.²⁷

Maximizing financial and contractual certainty in the context of a growing recognition of the need for FPIC-based agreements with indigenous peoples is also an important driver for effective grievance mechanisms. The opportunity to consider project proposals, and negotiate the contractual conditions which they find acceptable, is an essential component of indigenous peoples' right to give or withhold FPIC to projects. Corporations that seek to develop extractive projects will generally invest large amounts of financial resources in their development. It is therefore a reasonable expectation that, if they abide by their contractual obligations, their investment is protected from unilaterally imposed supplementary provisions. In the context of obtaining FPIC, entering into formal contractual agreements that include a functioning grievance mechanism therefore provides a way to protect both the indigenous and corporate parties.²⁸

While the uptake of operational-level mechanisms among some of the major extractive industry players has been one of the more tangible manifestations of the corporate responsibility to respect human rights, the relatively short timeframe since the adoption of the Guiding Principles means that these mechanisms have yet to be established on an industrywide scale.²⁹ It also means that the performance of such operational-level grievance mechanisms in providing effective remedies which address human rights harms, and in particular indigenous rights harms, has yet to be subject to extensive in-depth research and analysis. Consequently, it is not yet possible to assess their actual impact in terms of furthering the realization of indigenous peoples' rights. That said, some research is emerging in this area,³⁰ and the policies of some of the world's major mining, as well as oil and gas companies, illustrate the growing level of attention being directed towards these mechanisms.

4.2. Examples of corporate policies

This section draws from a number of industry and other sources in order to provide a snapshot of some of the developments in corporate policies in relation to operational-level grievance mechanisms.³¹ It does not seek to critique or evaluate the implementation of these processes in practice. It does nevertheless point to some of their commendable features and potential areas for improvement.

Anglo American's operational-level grievance mechanism, which forms part of its socio-economic assessment toolbox (SEAT), has been commended for the innovative nature of the computerized/automated system which it uses to manage grievances.³² The company has developed generic guidance on the implementation of such mechanisms, which is applicable to all sites but also allows a degree of design flexibility for local level considerations. The mechanisms provide a range of communication channels and allow for anonymity.³³

A number of challenges have been identified in relation to the effective implementation of the mechanisms. Among these are ensuring adequate awareness among communities of their existence and thereby increasing community engagement. Another important challenge in order to ensure legitimacy and transparency is providing for external and/or community level monitoring of the mechanism's performance. The capacity of staff

to make use of the computer system is also a challenge that is faced at particular project sites.³⁴

In 2012 Barrick Gold committed to having basic grievance mechanisms in place in all of its sites and claimed to have achieved this goal by 2013, with 92 percent of sites having “fully implemented all the mandatory requirements”.³⁵ The company notes that the nature of grievances vary significantly by project site, pointing out for example that:

at the Porgera mine in Papua New Guinea and the North Mara mine in Tanzania, grievances are frequently related to land, driven by ongoing discussions on both sites about resettlement and compensation. At other sites, primary concerns relate to employment opportunities, water, employee conduct in the community, noise and road safety.³⁶

Barrick also points out that the level and frequency of engagement with community members varies significantly by site. During this period, at its Porgera and North Mara mines, hundreds of grievances were related to alleged criminal acts, in particular rapes and killings perpetrated by mine security and police working to secure the mines. The absence of a reference to this above is noteworthy. A highly controversial aspect of Barrick’s grievance mechanisms - discussed in the case study in section 6.4 below - is that in some cases settlements in relation to these serious grievances have included legal waivers under which the right to redress in the form of civil law suits is forfeited by rights holders.

BHP Billiton requires all operating sites to “maintain a register of complaints and company responses to record and track the management of community concerns”.³⁷ The company has a standard investigation process for all complaints, with the resolution method being a function of the issue’s nature and severity. This “can range from a simple face-to-face meeting with the affected person, to a full review by a company’s [cross functional] global ethics panel.”³⁸ Trends are monitored and lessons identified based on collated information arising from these investigations and aggregate data is published in the company’s annual sustainability report.³⁹

At the Tintaya project in Peru, BHP Billiton (prior to Xstrata’s takeover of the project in 2006) participated together with local communities, two Peruvian NGOs, and Oxfam Australia, in a three-year multi-stakeholder ‘Dialogue Table’. The Dialogue Table was initiated in February 2002 by the Oxfam Australia Mining Ombudsman in response to complaints from five mining impacted communities. It was convened on six occasions and investigated grievances relating to land, environmental impacts, sustainable development, and human rights. In December 2004, the ‘Tintaya Agreement’ was signed providing for “replacement of land that had been purchased or expropriated, establishment of a three-year development fund for communities, and ongoing joint environmental monitoring.”⁴⁰ Despite this positive development, large scale and violent protests emerged in the months and years following the agreement, indicating that not all of the community concerns had been adequately addressed.

Freeport McMoRan states that its grievance mechanism is human rights compliant:

Human rights have ... been incorporated into its Corporate Community Grievance Management System Procedure, which is implemented at each site, to ensure that there is a mechanism for collecting human rights grievances (security-related or other) from the community.⁴¹

At all of its sites in Indonesia, Freeport-McMoRan Copper and Gold Inc Indonesia has established an online Incident Management System (IMS) to handle grievances. Priority is assigned based on the issue's impact on the community. Importantly, grievances are accepted regardless of the means through which they are brought to the company's attention. Those deemed to be high impact are raised with senior management within 24 hours. Responsibility for communications between the company and the community rests with Community Liaison Officers who report any allegations to the site Human Rights Compliance Officer. Freeport McMoRan has established a complaints registration and management system as part of its Voluntary Principles on Security and Human Rights implementation action plans.⁴²

At Newmont's Batu Hijau mine in Indonesia the company has established a formal complaints procedure in line with the requirement under its group-wide standard. The system builds on Newmont's previous approach whereby community relations officers had received complaints informally. Under the new system complaints are logged at community relations offices in the villages, a timeframe is provided for resolution and complaints are classified based on the risk associated with them. In some cases, where complaints are of a serious nature, they may be "adjudicated by relevant external parties, including representatives of governments, NGOs and academic bodies".⁴³ The resolution process will be dependent on the site and community context.⁴⁴

At Newmont's Ghana Gold Limited Ahafo South Project a complaints procedure has been developed to address impacts on the communities caused by mining-related activities and a "specific grievance mechanism" is in place to address resettlement and compensation issues.⁴⁵ Under the complaints procedure issues can be raised orally during stakeholder consultations or they can be raised in writing through a complaint register form. Where appropriate, Newmont seeks the "intervention of traditional authorities to assist in resolving disputes".⁴⁶ Resolution may involve responses in writing and face to face meetings. The "specific grievance mechanism" deals with complaints that are considered more important because they "involve resettlement and compensation issues that could result in legal action".⁴⁷ The grievance mechanism initially consists of face to face meetings with appropriate personnel. In complex cases "additional investigation or involvement of third parties" may be required.⁴⁸ Redress for grievances of a legal nature is addressed by the company's legal department in Accra, with settlements coordination under the responsibility of on-site management teams.⁴⁹ A Resettlement Negotiation Committee is also convened on a regular basis to "provide a forum at which individual and community grievances can be raised, discussed and resolved with Company officials."⁵⁰ The company notes that:

Ghanaian citizens and legal entities have the right to access to court with regards to any disputed matter relating to compensation. Any judicial award issued by a court in Ghana against [Newmont Ghana Gold Limited] NGGL, settling a dispute between the company and the person, is considered overpowering the claim made through the complaints of grievance mechanism.⁵¹

A similar policy exists at the Newmont Golden Ridge Limited Akyem Mine in Ghana. The policy notes that: “[a]t any stage, the complainant has the option of taking their issue to the Ghanaian Commission on Human Rights and Administrative Justice (‘CHRAJ’) or to court.”⁵²

In 2011, Rio Tinto published its community complaints, disputes and grievance guidance. The process for addressing grievances varies from site to site and depends on the community context.⁵³ At Rio Tinto’s Aluminium project in Weipa, North Queensland, Australia, a Community Relations Department has been responsible for the onsite grievance mechanism since 2007.⁵⁴ A “feedback procedure” for addressing issues, including adverse human rights impacts, is in place and administered by a department known as Communities and Social Performance (‘CSP’), with responsibility for resolution resting with the Work Area Owner.⁵⁵ Feedback (the term used to cover both “input” and “complaints”) is provided via a toll free phone or any member of Rio Tinto staff who then forwards it to the CSP. Those submitting the feedback are asked for their suggestions as to how the issue should be resolved. The feedback is classified as “positive”, “negative”, a “community incident” (which requires action) or a “community interaction” (which does not require action).⁵⁶ If the community member submitting the “feedback” is not satisfied with the response an investigation is established to examine the causes and identify actions which need to be taken.⁵⁷

Prior to its takeover by Glencore, Xstrata required all of its operations “to implement a grievance and conflict resolution mechanism to allow community members and other external stakeholders to raise issues or complaints, either directly or anonymously.”⁵⁸ At its Las Bambas project in Peru a Coordination Office appointed investigators and complainants were entitled to appeal decisions and propose solutions. A three stage process was established with the final stage, or third “instance”, involving Xstrata and the community both appointing an arbitrator each, who in turn selects a third arbitrator to form an arbitration council. Following an investigation the council would make a decision which could only be appealed by taking the case to court.⁵⁹ Outcomes of complaints were monitored by a multi-stakeholder monitoring committee, consisting of community and company representatives.

4.3. Some observations arising from company policies

From this sample of policies and practices, as well as those addressed in the four cases studies in section six below, it is clear that there have been a range of interesting developments in the area of operational-level grievance mechanisms impacting on indigenous peoples in recent years. In general, the trend appears to be a shift from ad hoc grievance resolution processes towards more systematic approaches to grievance processing, resolution and tracking. These approaches range from the development of computerized management

systems (such as that of Anglo American) for managing and monitoring of grievances, while also facilitating the implementation of customizable mechanisms across project sites, to engagement with traditional dispute resolution mechanisms (as evidenced in the TVI Resources Development Inc. (TVIRD) case and also identified by Cerrejón as a possible future consideration, both of which are addressed below in sections 6.2 and 6.1 respectively). Other interesting developments are the implementation of hybrid systems involving indigenous peoples and local communities in the development and functioning of operational-level mechanisms, such as Newmont's grievance mechanism, touched on above, and Sakhalin Energy's indigenous peoples' grievance mechanism (discussed below in section 6.3).

Most policies provide for some form of escalation in cases where complainants are not satisfied with the resolution of their grievances. In many cases the initial escalation point is internal, often involving senior management in the issue resolution process. In some of the more mature mechanisms it extends to engagement with existing State based mechanisms or mutually acceptable third parties. Newmont's approach to escalation through the Ghanaian National Human Rights Institution and Xstrata's former Las Bambas project's escalation process involving an ad hoc arbitral commission are both noteworthy in this regard. An important aspect of escalation, which is not explicitly addressed in the policies, is the need for this to happen quickly in cases where standard operational-level grievance mechanism procedures are not capable of addressing the complaint due to its nature, severity or scope.

Similarly, the constructive role which independent third parties have played, or can play, in the development of grievance mechanisms is an important topic which emerges from some of these policies. BHP's engagement in the Dialogue Table involving Oxfam Australia and other independent third parties is one such example which is worthy of further examination. The Oxfam Australia Mining Ombudsman also played an important role in the context of addressing community grievances at Oceanagold Corporation's project in Didipio, in the Philippine province of Nueva Vizcaya, drawing attention to the issues and prompting the establishment of a grievance mechanism.⁶⁰

On the policy development front, the fact that major mining companies such as Rio Tinto, Anglo American, BHP and Newmont all have explicit requirements for grievance mechanisms at their project sites, is acting as a catalyst for others to follow suit. This is evident in promises from companies such as Goldcorp and Hindalco which have committed to establishing grievance mechanisms based on international best practices.⁶¹ Guidance produced by the International Council on Mining and Metals (ICMM) also offers useful examples of emerging good practice in the area, and has been one of the pre-Guiding Principles drivers for the uptake of operational-level mechanisms. Oil and gas companies have tended to be somewhat behind mining companies in terms of their engagement with indigenous peoples' rights and issues. However, the 2015 guidance of the global oil and gas industry association for environmental and social issues (IPIECA) indicates a trend towards a greater focus on rights-based engagement with indigenous peoples in the context of addressing their grievances.⁶²

It is also interesting to note the differences in language used by different companies, with Rio Tinto for example referring to “feedback” and “feedback procedures” as opposed to “complaints” and “grievance mechanisms”. This may, in part, be to capture a broader range of issues and also to facilitate greater acceptance and “buy-in” within the company of the procedures and mechanisms for addressing community concerns and complaints.⁶³ While the constructive intent behind the use of such language is understandable, it is equally, if not more, important that communities are aware of the fact that the mechanisms are designed to address their grievances and violations of their rights where these occur. Care therefore needs to be taken that language, which may serve to generate greater internal corporate support and acceptance, does not have the perverse effect of disempowering communities or leading to a perception that the mechanism is of little relevance to their primary concerns.

4.4. Implementation considerations from the corporate perspective

It has been noted that having company community relations personnel present in communities inter-acting with the “wider lives” of community members helps to build trust and facilitate open exchanges which are necessary to address the underlying causes of grievances.⁶⁴ Trust is also built by empowering these company representatives to talk openly on behalf of the company and deliver on their promises – for example granting them the power to ensure that activities do not go ahead without community agreement, or the power to stop operations in the event of serious incidents.⁶⁵ This in turn can incentivize other functions within companies (for example legal, policy, community relations, and compliance departments) to contribute towards conflict prevention and thereby promote cultural change within corporations.

The importance of realizing this shift in corporate culture in order to build internal credibility of grievance mechanisms and enable their effective functioning has been repeatedly emphasized.⁶⁶ Entrenching the notion of rights-compliance within corporate culture requires a series of proactive steps. Incentive structures have to be aligned with conflict avoidance and grievance resolution objectives,⁶⁷ and cross functional involvement is necessary at the contract negotiation and initial FPIC seeking stage in order to reduce the potential for conflict at later operational stages.⁶⁸

If the decision to establish operational-level grievance mechanisms is not accompanied by the allocation of sufficient additional resources to ensure their effective functioning, staffing levels tend to be inadequate, training insufficient, and there is generally inadequate appreciation of the relationship between grievance mechanisms and risk management. This is reflected in limited corporate presence in communities leading to poor communication channels, a lack of timeliness in responding to community concerns, and an unwillingness to escalate community concerns to senior management, or a lack of responsiveness by senior management where issues are escalated.⁶⁹

The general marginalization of the community relations function from senior management and top leadership within companies is also a common issue. To overcome this, community conflict management needs to be framed in terms of risk management

across all company functions and its impact on the company's bottom line must be well understood. This can be represented through metrics, indicating, for example, the cumulative financial cost of disruption arising from unresolved grievances. At the same time there is a need to remain cognizant of the fact that savings realized through conflict avoidance may be impossible to accurately estimate.⁷⁰

A further internal corporate issue which needs to be addressed is how well-designed grievance mechanisms map onto, and interface with, existing company policies, processes and systems which provide avenues for communities to make complaints and seek some form of redress. Shift, an NGO which has done extensive corporate-focused work on the subject of grievance mechanisms, refers to this as situating the grievance mechanism within the "ecosystem" of existing internal company processes.⁷¹ In so doing, companies are better placed to identify gaps across their entire remediation architecture - at the front end in terms of accessibility and avenues for identifying concerns and complaints, at the central coordination point, by consolidating the categorization and assignment of complaints and reviews of outcomes, and at the back-end, in terms of how these grievances are handled and resolved by internal functions and/or external actors.⁷² This can also serve to maximise awareness within the company of human rights impacts and risks, optimize the capacity to respond to complaints and improve long term organizational learning and continuous procedural improvement.

It is encouraging to see that a number of corporations and their industry bodies are actively seeking to address these challenges and ensure internal support and legitimacy for operational-level grievance mechanisms. Ultimately, however, the primary objective of these mechanisms should be to serve rights holders who have suffered human rights harms as a result of business activities. Consequently, the extent to which they are consistently used and trusted by these rights holders, including indigenous peoples, has to be the key metric by which they are assessed.

5. Operational-level grievance mechanisms and indigenous peoples rights

The development and use of operational-level grievance mechanisms is in its infancy. As a result there are a range of issues in relation to these mechanisms that, from the perspective of their users, have yet to be thought through and evaluated in practice. Among these are contextual questions such as: How do grievance mechanisms relate to human rights due diligence and rights-holder engagement? What are the implications of indigenous rights and the requirement for FPIC for grievance mechanisms? Are there certain human rights impacts which are not resolvable through non-judicial remedies? Are there ever circumstances where corporate level non-judicial mechanisms can legitimately restrict or deny access to judicial remedies? What role should communities play in developing and monitoring operational-level grievances and in defining the key indicators of their success? And how can operational-level mechanism be aligned with, and serve to re-enforce, indigenous peoples' customary institutions and practices? This section seeks to briefly explore some of these questions while focusing on the nature of grievances which

tend to arise in the context of extractive industry actors' engagement with indigenous peoples when seeking to access and exploit their lands, territories and resources. Section six then reflects on some experiences regarding the implementation of operational-level grievance mechanisms in projects impacting on indigenous peoples' rights.

5.1. Grievance mechanisms, due diligence and rights-holder engagement

Existing research illustrates that a full appreciation of the local context is necessary for the development of effective operational-level grievance mechanisms. It points to the intimate relationship between human rights due diligence, rights-holder engagement and remedial mechanisms. The relationship between good faith rights-holder engagement and effective operational-level grievance mechanisms is clearly a mutually reinforcing one. In the absence of good faith engagement a foundation does not exist for relationships based on trust, respect and understanding. This limits the likelihood of communities participating in the development or use of operational-level mechanisms. On the other hand, where good faith engagement exists it provides alternative channels through which community concerns can be addressed and human rights harms prevented. This in turn contributes significantly to both the credibility and effectiveness of operational-level grievance mechanisms.⁷³

Many, if not most, grievances of indigenous peoples in the context of natural resource exploitation projects tend to be linked to the decision-making process in relation to access to and use of their lands and resources. Upfront attention to rights-based negotiations for such access and resource exploitation inevitably pays dividends in terms of reducing the scope and gravity of grievances later in the project life-cycle. From an operational perspective, this suggests that those involved in negotiating access to land and resources (provided this was conducted in good faith and with respect for indigenous rights) may be best placed to attempt to resolve grievances which arise when work commences in those lands. It also points to the fact that, while a grievance mechanism can be important for facilitating rights-based relations between companies and communities, alternative means and channels for obtaining community feedback are also necessary.⁷⁴

Human rights due diligence can also be a major contributor to effective operational-level grievance mechanisms. Through the conduct of due diligence, companies can gain an understanding of how existing local systems should interface with operational-level mechanisms, or how any new mechanisms could potentially influence or impact on existing systems. Based on an assessment of a particular mining company's operational-level grievance mechanism, Kemp and Owen argue for the development of "more rigorous and relational systems of engagement among communities in which [mining companies] operate".⁷⁵ This, they suggest, is of particular importance in contexts where authoritarian States repress communities seeking to voice their opposition. In such contexts there is an absence of adequate State based redress mechanisms leading to a false sense of an extant social license to operate. Human rights due diligence therefore extends to "understanding the grievance landscape and mechanism in its full social and historical context" and how "human rights risks interact with local systems of authority, belief and entitlement".⁷⁶

In a similar vein, Shift notes that company grievance mechanisms do not sit in a vacuum but instead must function within a landscape “of State-based and other grievance mechanisms that may provide alternative or complementary channels, or be a potential point of recourse for issues that cannot or should not be addressed through the grievance mechanism”.⁷⁷ A full understanding of this landscape enables the effective and complementary design of operational-level mechanisms, potentially facilitating interfaces with existing mechanisms as channels for escalation of otherwise unresolved or irresolvable grievances. One concrete example is the escalation channel to the Ghanaian National Human Rights Commission envisaged in Newmont’s Ghana Gold Ltd. Ahafo South Project’s grievance mechanism.⁷⁸ Similarly, a grievance mechanism that is properly situated within the overall framework of remedial mechanisms, better positions independent advisors to provide information and advice on alternative channels and fora where community grievances may be more effectively addressed. A related requirement is that communities be informed of all available grievance mechanisms, such as those of financial institutions, when their FPIC is being sought.

Human rights due diligence should also serve to provide corporations with an insight into the extent to which existing judicial and non-judicial mechanisms are rights-compatible. In so doing, it can serve three important purposes. Firstly, it illuminates if, or how, an operational-level grievance mechanism should be designed to interface with existing mechanisms. Secondly, it provides useful insights into how operational-level mechanisms should be developed in order to deliver rights-compatible outcomes within the particular national context in which they will have to operate. Thirdly, it serves to avoid situations in which companies end up relying on mechanisms which operate to a lower standard than that demanded by international human rights, and in so doing run the risk of directly benefiting from, and being complicit in, State violations of indigenous peoples’ rights.

5.2. Indigenous peoples and operational-level grievance mechanisms

The poor historical relationship between resource extraction companies and indigenous peoples continues to be tarnished by the, often well founded, perception that many States are willing to sacrifice indigenous peoples’ rights to the interests of corporate actors and rent seeking elites. This perception is supported by the exclusion of indigenous peoples from the formulation of national development agendas and policies, and from the negotiation of the terms of trade and investment agreements and contracts impacting on their territories and rights. In such contexts, companies seeking to exploit resources are inevitably regarded with suspicion prior to the commencement of any activities on the ground. This mistrust is compounded where corporations fail to demonstrate a clear intent to go beyond national laws and policies in order to comply with international human right standards, in particular the requirements to transparently assess impacts on indigenous rights, seek and obtain FPIC and ensure adequate compensation and benefit sharing. As a result of these and other contextual realities, in many regions throughout the world there remains a huge deficiency in trust among indigenous peoples regarding extractive sector actors. Factors eroding trust have to be addressed if the potential of

operational-level grievance mechanisms to address human rights harms is to be tapped. This section briefly addresses some of the contextual issues and specific considerations which arise with respect to operational-level grievance mechanisms in the context of natural resources exploitation activities impacting on indigenous peoples' rights.

5.2.1. Due diligence and grievances related to access to resources in indigenous territories

As has been clarified by a range of UN mechanisms addressing the issue of Business and Human Rights, indigenous peoples' rights (as affirmed under ILO Convention 169 and the UNDRIP) fall within the scope of the rights which corporations must respect in order to comply with the Guiding Principles. This implies that the principle of indigenous self-identification, and rights flowing from customary land tenure, must be respected irrespective of State recognition of these rights and principles. It also implies that corporate impacts on territorial, self-determination, development and cultural rights are core issues which must be addressed as part of human rights due diligence, and will inevitably arise in the context of indigenous peoples' engagement with grievance mechanisms. These issues are frequently associated with the manner in which access is obtained to lands and natural resources, and with respect for indigenous governance structures and decision-making rights. They are also reflective of the widespread failure of States to acknowledge an indigenous presence or recognize inherent rights arising from their customary tenure arrangements.

As such, they relate to the fundamental legitimacy of a corporation's presence within indigenous territories. They can be deeply challenging, and in some cases potentially impossible, to address within corporate managed operational-level grievance mechanisms. This is most evident in contexts where a "win-win" result is unlikely, as the desired community outcome - such as preventing the development of a project or making significant modifications to it in order to protect territorial, spiritual or cultural rights - is considered by the company to be detrimental to its financial interests. Indeed, from the perspective of the impacted indigenous community, raising their grievance to a company managed operational-level grievance mechanisms in such contexts may be seen as affording the company a means to manage its own reputation and risks, rather than address the community's concerns.

In some contexts, where such issues are identified through the conduct of human rights due diligence and impact assessments, they may be possible to address with more enlightened companies through mechanisms based on dialogue, consultation and mediation at the initial planning stages of a project, prior to the commencement of any activities. However, they become increasingly intractable where non-consensual activities are underway and indigenous rights harms have already occurred. In so far as this is the case, where effective judicial or quasi-judicial mechanisms exist in the home State, or extraterritorial avenues are available to address community grievances, engagement with these may be more appropriate than with operational-level mechanisms. It has also been suggested that what is needed is "a mechanism that falls between a mediation process and litigation in situations in which the positions of communities and business enterprises are too divergent for mediated outcomes to be achieved."⁷⁹

5.2.2. *Impact assessments*

The conduct of indigenous rights impact assessments is a key enabler for the effective functioning of operational-level grievance mechanisms in indigenous peoples' territories. ILO Convention 169 requires that studies - the outcome of which must serve as "fundamental criteria" for the implementation of extractive industry activities - be carried out as part of consent seeking processes "in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities".⁸⁰ The Inter-American Court on Human Rights, along with other human rights bodies, has affirmed that the *Akwé Kon* Guidelines, associated with article 8j of the Convention on Biological Diversity, constitute the standard which should be adhered to by independent experts in the conduct of participatory impact assessments in relation to indigenous peoples' rights. These impact assessments are essential to ensuring that genuine FPIC is obtained. Where negative impacts do arise, indigenous peoples "are entitled to "just and fair redress" for any damage arising from corporate activities, as clearly set out in the relevant international instruments".⁸¹

5.2.3. *Compensation related considerations and unaddressed legacy issues*

In many instances, by the time engagement with operational-level grievance mechanisms becomes a realistic option for indigenous peoples, harm may have already been caused to their territories and ways of life. While resolving grievances may in some cases necessitate that operations be suspended or even halted, in other cases it may boil down to a question of ensuring culturally appropriate redress. In such contexts an appreciation of the nature and extent of the appropriate compensation requires an understanding of the harm caused from the local indigenous perspective. This is of particular importance when determining the nature of compensation for the use, damage, or appropriation of indigenous peoples' territories without their prior consent.

The objective of a remedy is to "restore individuals or groups that have been harmed ... to the situation they would have been in had the impact not occurred".⁸² In the context of violations of indigenous peoples' territorial rights, human rights law establishes a particularly high threshold for compensation, with restitution always being the preferable option.⁸³ Where restitution is not possible, they must be in a position to freely negotiate compensation agreements. These should generally provide for comparable lands, territories and resources, unless monetary compensation is acceptable to the communities in question. However, inaccurate and culturally inadequate estimates of compensation can result from a range of factors. These include: incorrect classification of the land by the State; a failure to appreciate its usage and importance for livelihoods of community members; ignoring the long-term multi-generational investment which community members have made in their lands to increase productivity; and a lack of appreciation of the peoples' cultural and spiritual attachment to their territories. Compensation related grievances tend to be poorly addressed by resource extraction corporations, and in many instances communities are simply referred to government authorities, or (frequently inadequate) compensation requirements under national legislation are invoked.⁸⁴

Unaddressed legacy issues associated with natural resource extraction in indigenous peoples' territories also add to the complexity of establishing effective and legitimate operational-level grievance mechanisms. Historically, the relationship of resource extraction companies with indigenous peoples has been extremely one-sided, generally premised on the dispossession of lands and the denial of cultural and decision-making rights. This is compounded by the disproportionate extent to which indigenous peoples are impacted by the sectors' expanding environmental, social and human rights footprint. The extent of corporate responsibility for compensation for past and on-going impacts of projects is consequently an area where greater attention is need. By acknowledging the legacy of extractive activities in indigenous peoples' territories, and initiating processes of reconciliation in a manner agreed to by indigenous peoples, corporations could make significant and tangible progress towards realizing their responsibility to respect indigenous peoples' rights. This would constitute an important and much needed step towards ensuring adequate and culturally appropriate compensation and redress.⁸⁵

5.2.4. Contractors and grievance mechanisms

Reliance on contractors and third parties, including security firms, which have a limited understanding of indigenous peoples' perspectives and rights can pose major operational-level problems, even in contexts where the extractive company itself has developed its sensitivity towards those perspectives and rights. Most communities will not differentiate between the company doing the exploration and exploitation work and companies contracted to provide services to enable those activities to proceed. As a result the relationship between the extractive company and the community is only as good as its contractors. It has been suggested that companies should require contractors to set up their own grievance mechanisms.⁸⁶ In the case of indigenous peoples, in order to maximize trust and transparency, the manner in which grievances in relation to these third parties will be addressed should be agreed by the extractive company itself with indigenous communities prior to their entry into indigenous territories.

5.2.5. Mediation and adjudication

One of the methods which the Guiding Principles propose in order to establish trust in, and legitimacy of, operational-level grievance mechanisms is that they be based on engagement and dialogue. This implies "consulting the stakeholder groups for whose use they are intended on their design and performance".⁸⁷ Ensuring these mechanisms' legitimacy implies that corporations cannot simultaneously "be the subject of complaints and unilaterally determine their outcome".⁸⁸ Outcomes are therefore expected to be dialogue-based, consisting of mediated solutions. The exception to this is where a mutually acceptable "legitimate, independent third-party mechanism" is involved in order to adjudicate on the merits of the community complaint.⁸⁹ Depending on the wishes of the indigenous community and the company, such third party involvement could either be triggered on an ad hoc basis, or a grievance mechanism could be "established as a separate function with third-party oversight and operational responsibility, with funding provided by [but managed independently from] the enterprise."⁹⁰

5.2.6. *Operational-level considerations*

At the operational-level a number of factors which are particularly relevant in the context of indigenous peoples can serve to complicate the design and effective functioning of grievance mechanisms. These can be broadly grouped into governance, geographical and cultural considerations. In many indigenous communities internal dispute resolution mechanisms already exist in the form of customary institutions which embody indigenous peoples' governance structures, customary laws and traditional decision-making practices. These tend to be the most effective means of resolving disputes within the communities' territories and consequently their role should be given due consideration in the development of any grievance resolution mechanism involving third party actors who seek to operate in those territories.

These traditional mechanisms may operate on the basis of oral rather than written communications and will frequently function in accordance with indigenous time frames and schedules. Operational-level grievance mechanisms must not serve to undermine the role of indigenous authorities in addressing indigenous' rights-related disputes.⁹¹ In this regard the UN Special Rapporteur on the rights of indigenous peoples has recommended that corporate "grievance procedures should be devised and implemented with full respect for indigenous peoples' own justice and dispute resolution systems."⁹² It is worth noting that the Guiding Principle no 29 states that "business enterprises should establish *or participate in* effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted" (emphasis added). Where acceptable to particular indigenous peoples the most appropriate approach may be for companies to participate in the communities own dispute resolution system, as opposed to establishing a company based grievance mechanism.

A second issue, which arises in the context of some remote indigenous peoples, is the extent to which they can be geographically dispersed, making raising and addressing grievances challenging. In the absence of clear communication between community members and corporate decision-makers a context of misunderstanding and suspicion can quickly develop. Mechanisms have to ensure that community members, as well as their leaders and representatives, are fully informed and involved in decision-making with respect to grievances. Likewise senior decision-makers in companies, and not just junior staff or those responsible for community relations, have to be aware of community perspectives on grievances and accord appropriate weight to their resolution. Such communication and relationship building has to be a continuous throughout the project life cycle and not only when access to land and resources is being sought. In many instances the most effective way to resolve issues may be to work through the communities' traditional communication channels, provided the trust exists for communities to facilitate this.

Finally, respect for indigenous cultures and perspectives is fundamental to the operation of any grievance mechanism. As noted in the Guiding Principles a grievance includes any "perceived injustice evoking ... a group's sense of entitlement, which may be based on ... customary practice, or general notions of fairness of aggrieved communities".⁹³ Sensitivity to indigenous peoples' cultural perspectives is necessary for the appropriate

weight to be accorded to their grievances and for compensation and redress to cater to their social, cultural, or spiritual realities. Ensuring effective indigenous involvement in the development and functioning of operational-level grievance mechanisms is the most effective way of ensuring that the processes and structures, as well as their outcomes, are culturally appropriate.

5.2.7. The central role of free prior and informed consent

None of the issues addressed above necessarily imply that operational-level grievance mechanisms are inoperable in the context of addressing existing or potential violations of indigenous peoples' rights or their concerns. However, all of them point to the importance of corporations fully understanding indigenous peoples' social and historical contexts, and ensuring respect for their customary land tenure and decision-making rights during the conduct of human rights due diligence, from the very outset of their planned activities. In this regard, respect for the principle of FPIC at each stage of the project life cycle is fundamental to enabling the establishment of effective, trustworthy and rights-compliant operational-level grievance mechanisms. As affirmed by the UN Special Rapporteur

indigenous consent is presumptively a requirement for those aspects of any extractive operation that takes place within the officially recognized or customary land use areas of indigenous peoples, or that has a direct bearing on areas of cultural significance, in particular sacred places, or on natural resources that are traditionally used by indigenous peoples in ways that are important to their survival.⁹⁴

Where consent is forthcoming, agreements which guarantee respect for indigenous rights, in addition to formalizing impact mitigation measures and benefits sharing arrangements, should be entered into with indigenous peoples. These agreements should include the grievance procedures available to the peoples in question.⁹⁵ Consultations leading to such FPIC based agreements therefore provide the context within which contractually binding, mutually acceptable, rights based grievance mechanisms can be established. On a related issue, the UN Special Rapporteur on the rights of indigenous peoples noted, in the context of corporate responsibilities arising from the State duty to consult in order to obtain consent, that an "excellent way" of ensuring:

that companies respect indigenous peoples' right to participate in decisions concerning the measures affecting them is to establish permanent institutional fora for consultation and dialogue, in which the peoples and communities concerned, companies and local authorities are appropriately represented, ... in cases of conflict arising from corporate projects in indigenous territories. Such fora may also be associated with informal complaint mechanisms which provide a way to satisfy the demands of the communities concerned.⁹⁶

Ultimately, FPIC based engagements are a means to ensure indigenous peoples' self-determination rights are respected and to attempt to address the enormous power asymmetries that exist between indigenous peoples, corporations and States. Engagement processes which recognize the need to address these historic power imbalances and guarantee respect for indigenous territorial and decision-making rights are fundamental to ensuring the legitimacy of operational-level grievance mechanisms among indigenous peoples.

5.3. Non-judicial mechanisms precluding access to judicial mechanisms

One of the emerging concerns in relation to operational-level non-judicial grievance mechanisms is their potential to limit access to judicial mechanisms or other non-judicial mechanisms, leading to a perverse effect in terms of guaranteeing access to remedies. To avoid this, the UN Framework and Guiding Principles state that operational-level mechanisms “should not be used to undermine ... [or] to preclude access to judicial or other non-judicial grievance mechanisms”.⁹⁷ There are, however, a number of dimensions to the concern that operational-level mechanisms may limit access to other remedial mechanisms, some of which are proving particularly contentious and challenging to address.

The first relates to the lack of community awareness of options and difficulties choosing the right grievance mechanism in which to invest their time and energy. In order to choose the most appropriate fora, communities first need to be aware that alternatives to operational-level mechanisms exist, and that, depending on the nature of their grievance, other judicial or non-judicial fora may be the more appropriate ones with which to engage. In certain contexts, such as where projects are imposed despite community opposition, mediated outcomes may not be possible. Time and effort spent in engaging operational-level grievance mechanisms that do not provide for timely escalation to adjudicative processes, could constitute a major opportunity cost for communities, further disempowering them by limiting their potential to attempt to seek redress in other fora, or assert their rights through potentially more effective means such as international campaigns, direct action or public protest. Given the limited resources and capacity of most communities, engagement with operational-level grievance mechanisms which are not fit for purpose, in terms of addressing a community’s primary issues, can be counterproductive to realizing their desired or optimal outcomes. This is even more so in contexts where some companies may deliberately make use of operational-level grievance mechanisms to detract attention from a community’s core concern or forestall community engagement in other fora or in actions of a more public nature. Addressing this issue boils down to ensuring that communities have access to trusted independent third parties who can offer them advice on the potential benefits and drawbacks of alternative strategies available to them.

A second, and particularly contentious, concern relates to victims of human rights abuses potentially signing away their right to judicial remedies in order to obtain a non-judicial remedy. This issue arose at a 2013 UN expert workshop on Business Impacts and Non-judicial Access to Remedy, where participants asked under what circumstances, if any, is it appropriate to ask victims to do this. The workshop did not attempt to answer the question, but instead flagged it as a potential topic for further research on non-judicial grievance mechanisms.⁹⁸ Given that the pursuit of criminal proceedings is a duty of the State under international human rights law, the right of victims to participate in, or initiate, such proceedings cannot be limited by a settlement under an operational-level mechanism. The Guiding Principles do not, however, differentiate between civil and criminal proceedings, and as a result arguably leave open the question of whether an

agreement under an operational-level grievance mechanism between a company and a victim of human rights abuse can foreclose further civil law claims against the company. This issue is further discussed in the following section in the context of the experience at Barrick Gold Corporation's Porgera mine in Papua New Guinea and its North Mara mine in Tanzania.

6. Implementation experience to date & lessons learned

In order to further explore some of the initial implementation experiences around operational-level grievance mechanisms as they relate to indigenous peoples, this chapter closes with the an overview of Cerrejón's company based grievance mechanism, along with three additional cases addressing contexts where operational-level grievance mechanisms have been established. The first is that of the Canadian company TVI Resources Development Inc. (TVIRD) and the Subanon of Mt Canatuan in the island of Mindanao, the Philippines. The case is significant as it demonstrates the potential for companies to engage with traditional customary law based dispute resolution mechanisms, rather than establish new mechanisms which may be at odds with, or perhaps even serve to undermine, traditional structures. The second case addresses the Sakhalin Energy's grievance mechanism in the Russian Far East. The project developed a dedicated mechanism for addressing certain issues raised by indigenous peoples. This is also an important development as it demonstrates the value of focusing on the cultural propriety of grievance mechanisms and ensuring the involvement of indigenous representatives in their development, design and operation. In both the TVIRD and Sakhalin cases the grievance mechanism emerged in a context of community resistance to the projects. While both demonstrate the potential for appropriately designed and operated grievance mechanisms to contribute to problem resolution, in neither case have all of the underlying issues which are of primary concern to the impacted communities been adequately addressed to date. The third case is that of Barrick Gold in Papua New Guinea and Tanzania. It focuses on the contentious issue of including legal waivers in settlements arising from local level grievance mechanisms under which victims abandon their right to pursue non-criminal claims against corporate actors. The case draws on, and critiques, the Office of the High Commissioner for Human Rights (OHCHR) commentary on the issue, and offers some suggestions as to the appropriateness of such legal waivers from an indigenous rights perspective.

6.1. Carbones del Cerrejón – summary of grievance mechanism assessment

Carbones del Cerrejón (Cerrejón) in Colombia is owned by subsidiaries of Anglo American, BHP Billiton, and Glencore. It operates one of the largest open-pit coal mines in the world located in the territory of the Wayuu indigenous peoples and affects over 200 communities.⁹⁹ The company established a human rights office in line with its commitment to the Voluntary Principles on Security and Human Rights. During the period prior to the establishment of a formal grievance mechanism this office was responsible for addressing complaints of human rights violations.¹⁰⁰ By December 2010, Cerrejón operated three

separate procedures to address grievances in relation to employees, resettlements and other community complaints. Complaints are accepted through a variety of channels, including by phone, email, mail or in person. They are classified as low, medium or high risk based on the rights that are impacted, the frequency of occurrence and the individual or group concerned. Once they have been logged “a plan of action is drafted and the initial investigation will include joint fact-finding involving the Cerrejón investigator and the complainant”.¹⁰¹ A Management Committee of Complaints Response reviews the investigation findings and decides whether a violation exists and the actions to be taken.¹⁰² The establishment of the complaints office at Cerrejón was a component of the pilot project on operational-level grievance mechanisms of the former UN Special Representative, John Ruggie. The following is a summary of some aspects of the 2011 pilot project assessment of Cerrejón’s grievance mechanism against the criteria outlined in Guiding Principle 31.¹⁰³

- Legitimacy: The process gained legitimacy within the company. However, its external legitimacy is still to be demonstrated. A decision was taken not to jointly develop the mechanism with rights holders for fear that a joint process would a) be used by adversarial groups to further agendas which were unrelated to the grievance mechanism, and b) lead to a focus on a “right” to unlimited access for third parties. The company also decided against having an oversight body due to the difficulty of finding “people who both had legitimacy amongst the local population, and, at the same time, were capable of fulfilling a board level position”.¹⁰⁴ Instead, it hopes that participation in the design process of the mechanism will lead to its legitimacy among rights-holders.¹⁰⁵
- Accessibility: To increase accessibility Cerrejón trained its staff who are in constant contact with communities in order to receive complaints. It has plans to hire officers to proactively visit project impacted communities on a regular basis to accept grievances.
- Predictable: From the company’s perspective one of the challenges was finding a balance between acting in a manner that is respectful of the communities’ traditional way of handling disputes on the one hand, and the investigation procedure which is consistent with company standards and Colombian societal expectations on the other.
- Equitable: Cerrejón is considering funding independent experts support to complainants where issues are challenging to resolve. Workshops conducted with communities highlighted their perception of a serious power imbalance in their relationship with the company.
- Rights-compatible: Overcoming the internal reluctance within the company to accepting external parties involvement in the grievance resolution process is a challenge. The company provides regular training to communities to inform them about their rights. It has also increased its involvement with advisors from the community to understand how it can resolve grievances in a rights consistent manner that is also consistent with community laws.

- Transparency: The company plans to be transparent about the process, without providing transparency on outcomes with regard to financial compensation.
- Based on dialogue and engagement: All initial investigations are conducted on a participatory basis involving joint fact-finding. Recourse to a further investigation, by a more senior manager, is available if the complainant is not satisfied with the outcome. Cerrejón is considering the use of community members trained in alternative dispute resolution as “conciliators” in the grievance resolution process. As noted in the assessment, “[g]eneral and ongoing engagement with indigenous peoples has been limited. Few people in the company feel they have the knowledge to engage in a culturally appropriate manner.”¹⁰⁶ This leads to challenges in relation to establishing the correct engagement protocol to follow and how to interact with the community. This is something Cerrejón is attempting to address by contracting indigenous advisors.
- A source of continuous learning: The grievance mechanism has demonstrated some potential to facilitate company learning, as it enabled the long running issue of compensation for the killing of animals by trains to be formally addressed by management. The assessment noted that the mechanism affords Cerrejón an opportunity to consult with external stakeholders and develop the mechanism’s Key Performance Indicators in collaboration with them. Doing so would go some way towards contributing to its legitimacy, accessibility and transparency.

The pilot project was conducted in collaboration with Cerrejón but did not involve direct engagement with rights-holders. As a result, while the assessment focused on engagement with rights-holders (referred to as stakeholders), it did not attempt or claim to present the community perspectives on the mechanism in relation to these eight criteria. As is evident from the Cerrejón case study in chapter three of this book, there appears to be a lack of awareness among community members of the mechanism or a perception that it is not relevant to addressing their issues. While it is commendable that Cerrejón is considering how to ensure that dispute resolution is respectful of the communities’ traditional processes, its staff nevertheless acknowledge that they lack the capacity to engage with the community in a culturally appropriate manner. A decision to develop the mechanism in conjunction with the Wayuu would have avoided this situation, as traditional dispute processes and culturally appropriate procedures could have been built into the mechanism. The grounds upon which Cerrejón decided not to jointly develop the mechanism consequently merit some consideration.

Excluding those who adopt adversarial tactics to the project from the process of developing a mechanism aimed at addressing and resolving grievances in relation to the company’s actions arguably represents a missed opportunity to use the grievance development process as an avenue for understanding the root causes of those positions. It also obstructs the possibility for joint determination of when an operational-level mechanism could potentially assist in resolving some of those concerns. The company’s fear that joint development of the mechanism would also have led to “a focus on the ‘right’ to unlimited access to third parties of any kind and at any time, which would

undermine the good intentions by which the discussion would be started”¹⁰⁷ is also questionable on the grounds of equitability. This demand is perhaps more symptomatic of the huge power imbalance which the Wayuu perceive when engaging with Cerrejón, rather than an attempt by the Wayuu to undermine the companies “good intentions”. Similar concerns arise in relation to the company’s decision not to establish an oversight body. The justification relating to the difficulty of finding people who were trusted by the local community and were also capable of participating at company board level is not satisfactory from a human rights perspective and suggests an insufficient effort on the part of the company or may otherwise be a manifestation of the absence of a social licence to operate, as reflected in chapter three.

The Wayuu case study also highlights that a fundamental requirement to guarantee the relevance and legitimacy of grievance mechanisms among community members is that they be capable of ensuring a meaningful response to the legacy issues associated with company operations. Inherent in this requirement is that they function alongside effective participatory due diligence and impact assessment processes. If the company’s grievance mechanism and rights-holder engagement processes can reach a level of maturity where they proactively address legacy issues, or at least respond to concerns raised in relation to such issues, they will then have the potential to play an important role in building a relationship based on trust and respect with the Wayuu. Until such a time, they will most likely continue to go unnoticed or simply be ignored by those whose grievances they should be serving to resolve.

6.2. TVIRD - respect for customary institutions and need for State engagement¹⁰⁸

The Zamboanga peninsula in the Philippines has traditionally been the territory of the Subanon people.¹⁰⁹ Their population is currently estimated to be 330,000. A history of encroachment by settlers and expropriation of their lands means that they now constitute a minority of the peninsula’s population, and their ancestral domains are scattered throughout it. The peninsula is one of the priority mining areas under the Government’s policy to revitalize the mining industry. For the Subanon this has meant that their ancestral domains have been included in the mining applications of international and national companies including TVI Resources Development Inc. (TVIRD), Rio Tinto, Ferrum 168, Geotechniques and Mines Inc (GAMI) and Frank Real Inc.

The 1987 Constitution of the Philippines recognizes indigenous peoples’ right to practice their customary laws governing their ancestral domains and guarantees respect for their traditional institutions.¹¹⁰ To give effect to these provisions, indigenous peoples’ free prior and informed consent (FPIC) is required for mining activities in these domains under both the Philippine Mining Act of 1995 (Republic Act No. 7942) and the Indigenous Peoples Rights Act (IPRA) of 1997 (Republic Act No. 8371).

In 1994, TVIRD, a Canadian mining company, signed an “Exploration Agreement with Option to Purchase” with a Philippine mining company covering Mt. Canatuan. In 1996 the Department of the Environment and Natural Resources (DENR) approved the Mineral

Production Sharing Agreement (MPSA). It did so in the face of Subanon opposition to the project and without their prior consent, despite Section 16 of the Mining Act which required that “[n]o ancestral lands shall be opened for mining operations without the prior consent of the indigenous cultural communities”. The sustained opposition of the local Subanon leaders and community members to the project drew considerable attention in the Philippines, Canada and in UN human rights fora. As a result an investigation was conducted by the Philippines Human Rights Commission in 2002. The investigation held that the problems at Mt Canatuan stemmed from the

approval of the MPSA by the DENR on October 23 1996 covering an area of 508.34 hectares within the ancestral land of the Subanon ...; The violation committed by TVI and its personnel to include the company guards and the Special Civilian Armed Auxiliary (SCAA) who are assisting the company guards; The failure of the TVI to obtain free prior consent from the indigenous people as the law requires.¹¹¹

However, despite this conclusion that the absence of FPIC was the cause of the rights violations, and the Commission’s acknowledgement that revocation of the MPSA would lead to redress and peace,¹¹² the responsible government agencies took no effective action to address the situation. Instead, in 2002, the National Commission on Indigenous Peoples created a “Siocon Council of Elders” which gave consent to TVIRD at Mt Canatuan, circumventing the long-standing opposition of the local Subanon leaders and community to the project.

By 2004, the Subanon had engaged all available State based judicial and non-judicial mechanisms, but their case had not been acted on. Among the cases which the courts failed to act on was that filed by the Mt Canatuan traditional leader, Timuoy Jose Anoy, requesting an injunction on the mining operations. As a result, in 2004 TVIRD started its mining operations without having obtained legitimate consent. A decision was therefore taken to convene the *Gukom sog Pito Kobogolalan sog Pito ko Dolungan* (roughly translated as *Gukom of the Seven Rivers*), the highest Subanon judicial authority in the area, involving the Timuoy of Mt Canatuan and those of the surrounding Subanon territories. The *Gukom* ruled that the consent obtained was void as the “Siocon Council of Elders” was “illegitimate, illegal and an affront to the customs, traditions and practices of the Subanon.”¹¹³ The *Gukom* also demanded that the traditional leaders be recognized and the community’s FPIC sought. Yet again, there was no action from the responsible government agencies in response to the Subanon demands.

In 2007, the Subanon of Mt Canatuan submitted their concerns in the form of a complaint to the UN Committee on the Elimination of Racial Discrimination’s (CERD). CERD invoked its Early Warning Urgent Action Procedure against the Philippine Government, raising its concerns regarding violations of the Subanon’s human rights. The CERD procedure, which is on-going, has resulted in a series of strong recommendations and communications urging the Philippine Government to address the Subanon’s concerns - including those in relation to reparations - in a rights consistent manner which is acceptable to the community.

In response the Philippine Government has acknowledged that free and informed consent of the Subanon was not obtained prior to the mining operation in Mt. Canatuan. It also handed over the Ancestral Domain title to the Subanon Timuoy Jose Anoy. In addition, in 2012 the National Commission on Indigenous Peoples revised its FPIC implementing guidelines in order to align them with the spirit of the IPRA law, as recommended by CERD. However, to date, the Government has yet to satisfactorily act on CERD's recommendations in relation to the human rights harms suffered by the Subanon as a result of the mining operation, and has failed to initiate the necessary processes to provide culturally appropriate redress.

In September 2007, the *Gukom* again convened in Mt. Canatuan and performed a traditional ritual called *Glongosan sog Dongos nog Konotuan* to condemn the destruction of the sacred Mt. Canatuan. This was followed in December 2007 by a *Gukom* traditional judicial hearing, held to decide on a complaint filed by Timuoy Jose Anoy against TVIRD. The complaint covered all the issues which had arisen from the company's non-consensual presence and mining operations in the area. During the trial, the *Gukom* fined TVIRD for disrespecting existing Subanon protocols. The decision also required TVIRD to conduct a cleansing ritual in atonement for desecrating Mt. Canatuan. TVIRD had consistently rejected the fact that Mt Canatuan was sacred to the Subanon.¹¹⁴ This was despite repeated Subanon assertions of its sacredness in multiple fora. The company also repeatedly challenged the legitimacy of Timuoy Jose Anoy's leadership, including in a submission it provided as part of the Government's response to CERD.

The negative publicity at both national and international levels which the CERD complaint generated contributed to TVIRD's eventual recognition of the Mt Canatuan traditional leadership and their governance structures. There was also a clear, if unstated, pragmatic driver for this recognition. It was in keeping with the company's objectives of expanding its presence into more Subanen territories in the Zamboanga peninsula. Realizing that this expansion would be extremely difficult if the Subanon of Mt Canatuan were to publically sustain their opposition to the Mt Canatuan project, on 17 May 2011 the *Gukom* reported that TVIRD performed the mandatory cleansing ritual called *Bintungan nog gasip bu doladjat* "in atonement for desecrating the sacred Mt. Canatuan", and agreed to negotiations regarding penalties for harms caused.¹¹⁵

Following TVIRD's recognition of the community's traditional authorities and practices, a representative of TVIRD's Community Relations and Development Office (CREDO) has been invited to hearings whenever the traditional local advisory council (the *Pigbogolan*, which is headed by Timuoy Jose Anoy) is addressing community grievances in relation to the company's actions. Community members can suggest the action which the company should take in order to remedy the harm. Where necessary the *Gukom* (the tribal court) will take a decision as to the steps that are necessary to resolve the issue. A representative from the relevant company department will attend the *Gukom* hearing. Third parties are also invited to the hearings on an as-needed basis, be they government bodies, such as the National Commission on Indigenous Peoples, or local government representatives, independent environmental experts or NGOs. The

company is to investigate the allegation of harm and report back to the community at the next *Pigbogolan* meeting (generally held on a monthly basis) as to the steps it is taking to resolve the issue. While attempts are made to reach agreement between the complainant and the company, recourse to external legal and quasi-legal processes is available in cases where the complainants are not satisfied with TVIRD's response or where TVIRD contests the decision of the *Gukom*.

This engagement with the traditional dispute resolution mechanisms means that operational-level grievances at Mt Canatuan are generally addressed in a manner which is consistent with the community's customs and laws. This in turn is conducive to community engagement, relationship building and improved dispute resolution. It also serves to reaffirm rather than challenge the Subanon traditional governance structures and constitutes an acknowledgement of the primacy of customary law within the ancestral domain – something which is affirmed under IPRA. It also relieves the company of having to establish a parallel dispute resolution mechanism which would then have to gain legitimacy within the community. However, it has been suggested that for data management and continuous improvement and organizational learning purposes the company could improve the manner in which it tracks complaints (including their nature and severity) and their associated resolution.¹¹⁶

Despite these positive developments in terms of addressing community grievances and improving community-company relationships, it is important to bear in mind the context in which the community eventually accepted TVIRD's presence. This occurred after 15 years of sustained resistance to the mining project, allegations of serious abuses of indigenous rights and the feeling that, because the mine had already been operating for several years, further existential resistance to the project was unlikely to bring substantive changes. The community continues to hold the State accountable for facilitating the entry of the project and for failing to protect their rights. As a result they are still pursuing their complaint against the Government under CERD's urgent action procedure.

According to Timuoy Anoy, there have been a number of positive outcomes arising from the community's engagement with CERD's urgent action procedure. Firstly, the profile of the case at the international level pressurized the Philippine Government to address some of their issues. This led to the turn-over of the certification of ancestral domain title to the Subanon and its registration at the Registry of Deeds and a formal government response to the allegations filed by the Subanon as well as the submission of an overdue State party report to CERD. It also increased pressure on TVIRD to recognize the leadership and authority of the Subanon Timuoy and the decision-making powers of the Subanon traditional council he leads, and to efforts by the Canadian embassy to coordinate monitoring of TVIRD's operations together with the community.

The CERD procedure addressing the Subanon case is still on-going and the community hope it will encourage the Philippine Government to: a) formally acknowledge its mistakes or wrongdoings in relation to the mining of their sacred mountain which "caused division of the community, and chaos with the ancestral domain", b) respect the rights of the Subanon and the authority of their traditional leadership and inform all national and

local government agencies of this in order to avoid repetitions of past problems, c) ensure “redress in the form of reparation or compensation for damages” for violations of their rights and those of other Philippine indigenous peoples impacted by mining,¹¹⁷ and d) to trigger action on cases before judicial and quasi-judicial bodies, which remain in limbo years after they were filed.

A number of important lessons emerge from the case. Firstly, it demonstrates that culturally appropriate rights-based engagement is a necessary starting point for operational-level grievance mechanisms to be effective. This is evident in the company’s failed attempts to address grievances until the underlying issue of non-recognition of the traditional authorities and the destruction of the sacred Mt Canatuan were addressed. Secondly, it demonstrates that corporate entities can engage with, and even capitalize on, existing traditional customary law based dispute resolution mechanisms. In doing so they not only ensure the legitimacy of the grievance resolution process and improve the effectiveness of outcomes, but are also in a position to more effectively address their legacy issues and initiate processes to repair damaged relationships with indigenous communities. A third observation is that the case demonstrates the mutually reinforcing relationship between grievance processes, as a complaint against the State to an international mechanism resulted in the commitment of the company to participate in local traditional dispute mechanisms. Finally, an important lesson emerging from the case relates to the issue of redress in relation to the granting of the concession to TVIRD in the absence of Subanon consent. As reflected in the Subanon decision to continue to maintain their complaint before CERD, even following the changes in their relationship with the company, this issue of redress and culturally appropriate reparations is a matter which engagement with the company alone has been insufficient to resolve. As a result the Subanon’s most fundamental grievance, the destruction of their sacred mountain against their will, remains unremedied - a situation which clearly raises questions as to the extent of the company’s will to address its wrongs. The project is coming to an end. Ultimately, TVIRD will leave wealthy from the Subanon’s gold, while the Subanon will be left with no redress for the destruction of their sacred mountain and its conversion into a crater for mining waste. They hold the government to be primarily responsible and will continue to seek access to remedy and reparation through CERD.

6.3. Sakhalin – a dedicated mechanism for indigenous peoples grievances

Sakhalin Energy Investment Company Ltd. (Sakhalin Energy) has been operating the Sakhalin-2 oil and gas project in the Russian Far East since the mid 1990’s, with production commencing in 1999.¹¹⁸ It is “one of the world’s largest integrated, export-oriented oil and gas projects”.¹¹⁹ During its construction and operation phases the project is estimated to have impacted some 220,000 people.¹²⁰ It encountered significant opposition due to its impacts on the environment, in particular on the West Pacific whales, and on rights of the Nivkhi, Nanai, Uil’ta, and Evenki indigenous peoples. Local protests and international campaigns, which focused on compliance with European Bank for Reconstruction and Development and World Bank standards, drew significant public attention to the case.¹²¹ In December 2006 Gazprom took over from Shell as the major shareholder in the consortium resulting in a de-facto nationalization of the project.

In recent years the project has been cited as a model for the implementation of operational-level grievance mechanisms by a range of bodies including the OHCHR, the UN Global Compact, and the research team involved in the development of the UN Guiding Principles on Business and Human Rights.¹²² The grievance mechanism was initially established in order to meet the requirements of international lenders and underwent significant revisions in 2006 and 2008.¹²³ Some of its praiseworthy features are:

multiple channels for lodging grievances, clear timeframes for addressing grievances, communication with complainants during all stages of grievance resolution, internal and external monitoring, audit and reporting on the grievance resolution process, automated systems for grievance tracking, and follow-up and notification of relevant Company management.¹²⁴

In addition, the company's community awareness-raising campaigns and trainings provided for staff and contractors have been commended.¹²⁵

The case is of particular relevance to the discussion in this chapter as it involved the establishment of a dedicated mechanism for addressing grievances of indigenous peoples in relation to the implementation of an indigenous peoples' development plan. That mechanism operates in parallel to the generic grievance mechanism, to which indigenous peoples also have access for grievances that are not related to the development plan. Sakhalin Energy has actively sought to share its experience regarding this process, and has described its engagement with indigenous peoples since 2010, in the context of the creation and on-going implementation of the Sakhalin Indigenous Minorities Development Plan (SIMDP), as being within a framework of FPIC.¹²⁶ The Sakhalin Energy funded SIMDP was developed in 2006 in accordance with World Bank standards. This followed a series of complaints and protests by indigenous peoples in relation to the impacts of pipeline construction, in particular on their traditional livelihoods and fisheries, and allegations that the company was "ready to think up an action plan" but was "not willing to assess the real impact of the project on the indigenous population".¹²⁷ The plan was agreed following negotiations with the indigenous peoples of Sakhalin in 2005.¹²⁸ It is implemented in partnership with the Regional Council of Authorized Indigenous Peoples' representatives and the Sakhalin Regional Government.¹²⁹ At the time the plan was established, the existing grievance mechanism associated with it was described as "ineffective" as it failed, for example, to inform management of breaches of the company policy in relation to contractors who lived, fished and hunted in indigenous communities.¹³⁰ It has consequently been noted that the previous operational-level grievance mechanism was least effective when it was most needed, that is, in the initial phases of the project.¹³¹ The current mechanism, which was significantly revised in 2010, is regarded as being more effective. However, it is exclusively focused on grievances related to the implementation of the SIMDP as opposed to those arising from Sakhalin Energy operations which fall under the scope of the generic grievance mechanism. The SIMDP and the associated grievance mechanism are credited with contributing to the capacity building of the local indigenous communities impacted by the Sakhalin-2 project.¹³²

The case of Sakhalin Energy offers a number of important lessons. Firstly, the Sakhalin-2 development of a culturally appropriate parallel operational-level mechanism for indigenous peoples to raise their grievances was a praiseworthy development that provides an interesting example for other companies and communities to consider. However, the fact that this mechanism is restricted to addressing issues related to the implementation of the development plan is something which limits the value of this otherwise progressive approach. From the perspective of indigenous rights holders it is illogical to have one mechanism catering to their specific cultural needs, while expecting them to engage with a different mechanism when they have concerns in relation to the company's operations.

A second consideration is that the operational-level grievance mechanisms only really became effective after the major contentious issues which arose during the construction phase were no longer possible to address. This consequently raises the question as to whether the mechanisms, as they are currently designed, would have been capable of addressing these issues in a satisfactory manner. This is an important consideration in the context where Sakhalin Energy is being promoted as a model for other projects in terms of truly effective operational-level grievance mechanisms related to indigenous peoples.

The case also illustrates the important role which donor agency requirements can potentially play in promoting corporate respect for indigenous rights. However, when viewed within its broader political and social context, one is left with the sense that the mechanism is primarily an issue of compliance with these requirements as opposed to a transition towards a "rights-based" engagement with indigenous peoples that addresses power imbalances. From this perspective the extent to which the mechanism has served to uphold indigenous peoples' rights is less clear. In recent years the actions of the regional authorities have served to significantly undermine indigenous self-determination. In what has been described locally as a coup, the authorities replaced an indigenous rights activist, who was the elected representative of the Council of Authorized Representatives of Indigenous Peoples, with an individual more amenable to the company's development plan. In addition, a central demand of the indigenous communities has been for the conduct of an independent ethnological expert review of the project (the equivalent of a human rights impact assessment). The regional legislature adopted a bill facilitating this. However, it was never implemented and has been since modified in a manner which renders it inapplicable to the project. Whether, or to what extent, the company was complicit in these actions is unknown. However, it is clear that it benefited from them at the expense of the indigenous communities' exercise of their right to self-determination.

6.4. Barrick Gold Corporation and waivers limiting access to judicial remedies

Barrick Gold Corporation's Porgera mine in Papua New Guinea provides a concrete example of the use of settlements reached under an operational-level grievance mechanism to limit access to judicial remedies. Since 2005, MiningWatch Canada (MWC) and local Porgeran organizations Akali Tange Association (ATA) and the Porgera Landowners Association (PLOA) have drawn international attention to issues concerning the rape and

gang rape of women and violence against men by police and security guards at Barrick's Porgera Joint Venture (PJV) mine.¹³³ The allegations and reports of on-going violence were denied by Barrick until late 2010.¹³⁴ In 2011, Human Rights Watch (HRW) issued a report repeating the allegations of local women.¹³⁵ That report, which followed the publicity by MWC, ATA and PLOA, led to PJV developing a framework of remediation known as *Olgeta Meri Igat Raits*¹³⁶ (All Women Have Rights) addressing claims going back to 1990.¹³⁷ Barrick's remedy framework was only to deal with the rape victims, not the violence against men. In addition the framework states that Barrick will only provide remedy for victims of its security guards not for the many women who were victims of the police guarding the mine. Victims who reached a settlement were required to sign an agreement stating that they would not pursue any civil legal actions or claims for compensation related to the acts for which the reparations were provided.¹³⁸ The waiver stated that

the claimant agrees that she will not pursue or participate in any legal action against PJV... or Barrick in or outside of PNG. ... Barrick will be able to rely on the agreement as a bar to any legal proceedings which may be brought by the claimant in breach of the agreement.

Under the agreement Barrick acknowledged the sexual violence of its current or former employees, but did not admit any liability.¹³⁹ According to Barrick, claimants maintained the legal right to pursue separate legal avenues while their claims were under consideration as part of the remediation mechanism. However, once a victim agreed to the outcome of the dispute resolution process under the grievance framework, Barrick held that

it is appropriate that claims against Barrick, PJV and PRFA should be released in order to bring finality to the process. In that circumstance, the independent legal advisor expressly explains the consequences of such a release before it is signed.¹⁴⁰

On 13 March 2013, following MWC's public critique of the waiver, Barrick revised the clause, which now "expressly excludes any criminal action" from its coverage. As such, it acknowledges that victims can initiate or participate in criminal actions irrespective of whether or not they have entered into a settlement.

In response to a request from MWC, the OHCHR issued principled interpretative guidance in relation to the consistency of the waiver clause with the Guiding Principles. In its assessment, the OHCHR noted the Guiding Principles' silence on the issue of limiting access to civil claims. It pointed out that while there was "no prohibition per se on legal waivers in current international law standards" "the presumption should be that as far as possible, no waiver should be imposed on any claims settled through a non-judicial grievance mechanism".¹⁴¹ The OHCHR concluded that any legal waivers should therefore be construed as narrowly as possible and must preserve the right to judicial recourse for criminal claims.¹⁴² It also noted that in practice the admissibility of legal waivers to civil claims in agreements may be ruled upon in judicial proceedings.¹⁴³ Finally, the OHCHR held that the wording of the provision for independent legal advice under the PJV claims process was in keeping with the effectiveness criteria under Guiding Principle 31.

The OHCHR did not conduct an investigation into the implementation of the Porgera Framework and consequently it was unable to comment on the implementation of the legal waivers in practice. In light of the conflicting information it received, it suggested that an independent third party, mutually acceptable to the rights holders and the company, should conduct a review of the Porgera remediation programme focusing on the perspectives of the victims.

MWC also alleged that the compensation offered was inadequate, culturally inappropriate, and inconsistent with what the women would have been entitled to under a traditional dispute resolution procedure. As noted in the OHCHR interpretative guide on the Guiding Principles, the views of victims as to what constitutes an effective (and culturally acceptable) remedy is an important consideration in determining the adequacy of outcomes.¹⁴⁴ Accordingly, the OHCHR suggested that the issue of what remedies were offered to victims should also be included under the scope of the independent investigation. Although MWC, ATA and PLOA wrote letters to the OHCHR welcoming the recommendation for an independent review, Barrick declined to carry out this investigation and continued to implement the remedy programme.

A further issue the OHCHR addressed was the absence of consultation, during the development of the mechanism with ATA and PLOA. The OHCHR concluded that “not directly involving [them] in the development of the Porgera remediation framework by itself would not necessarily render the programme flawed and in breach of [Guiding Principle] 31”.

Barrick has invoked the OHCHR guidance to argue that its Porgera Remediation Framework is “supported by leading human rights experts”.¹⁴⁵ It also states that its Framework was “developed after 18 months of extensive consultation and research with leading national and international experts in human rights” and is “being independently administered by prominent and highly qualified Papua New Guineans”.¹⁴⁶ It further adds that “value of remedy packages is in the upper range of civil damage awards provided in comparable cases in Papua New Guinea” and that claimants are “advised by independent legal counsel throughout the remedy process”.¹⁴⁷

Some months after the OHCHR issued this guidance a number of similar issues arose in the context of a legal waiver as part of Barrick/African Barrick Gold’s (ABG - Acacia Mining since November 2014) Project-Level Non-Judicial Grievance Mechanism in its North Mara gold mine in Tanzania. In December 2013, a confidential legal waiver, dated 16 December 2012, was disclosed in the context of a case against ABG taken in the United Kingdom in relation to shootings and killings at the North Mara gold mine. The lawyers for the victims argued that the contents of the waiver and the process under which it was signed involved “offers to people without adequate legal representation in return for those individuals signing away their rights [to legal redress]”.¹⁴⁸ As outlined by MWC, the waiver (which ABG had subsequently modified) was extremely broad and refers to

“alleged harm suffered by the Complainant,” a man, as a result of an “incident ” which occurred “on the [North Mara Gold Mine Limited] NMGML property.” In return for a “Condolence Disbursement,” the Complainant had to agree “that he will not instigate, encourage or in any way assist *other* complainants, demands or claims by any other person against NMGML, ABG or their affiliates” (emphasis added). The Complainant was also required to sign a “covenant not to sue,” waiving “all and any rights” to be a party to “any proceedings” anywhere in the world against any of the aforementioned business entities.¹⁴⁹

As in the Porgera case, following MWC’s publicity of the waiver, Barrick explained that it had since modified the waiver and also disclosed limited information in relation to the grievance mechanism. The company also states that it offers complainants assistance to seek legal advice before signing the waiver.¹⁵⁰ However, there is a lack of transparency as to what this assistance actually amounts to.¹⁵¹ Barrick further claims that the complainants sign waivers based on free and informed consent and with full knowledge of their rights and invokes the OHCHR interpretative guidance that “there is no prohibition *per se* on legal waivers” to support its policy.¹⁵²

On 6 February 2015 Barrick agreed to an out of court settlement compensating a number of the Tanzanian villagers for an undisclosed amount, demonstrating the fundamental importance of access to judicial remedies, including to civil process, in host and home States.¹⁵³ While this settlement was good for those who participated in the case against ABG, others who had instead participated in the company’s grievance mechanisms will not benefit from it. More troubling still is the fact that people had withdrawn from the case as they were encouraged by the company to forgo their legal claims and sign up to its remedy programme instead.¹⁵⁴ This use of an operational-level mechanism, which includes a legal waiver and lacks transparency in terms of compensation agreements (which have been shown to be inadequate), in order to draw clients away from the law suit related to compensation for serious injuries and deaths is deeply troubling when viewed from the perspective of a human right to remedy.

While the OHCHR guidance¹⁵⁵ sheds some light on the current situation under international human rights law with regard to this contentious use of such waivers to restrict access to civil law claims, it requires further clarification and contextualization in the context of indigenous peoples’ realities and rights, and indeed of all vulnerable groups who find themselves in such situations. Firstly, from the perspective of indigenous peoples’ self-determination rights, the legitimacy of any mechanism impacting on the enjoyment of their rights is contingent on the full and effective participation of all impacted communities and their representative organizations in its development. In this regard the reasoning of the OHCHR in relation to the refusal to allow ATA and PLOA to participate in the development of the mechanism is questionable. This, combined with the OHCHR’s lack of knowledge of the facts on the ground, points to the need for a more cautious and nuanced approach to the question of participation. In this regard, it is suggested that a more appropriate response would have a) emphasized the intent of Guiding Principle 31 that all representative organizations which seek to participate in the design of such mechanisms be afforded the opportunity to do so, and b) suggested

that consideration of the issue of ATA and PLOA participation be part of the independent investigation.

Secondly, the legitimacy of the outcomes afforded by the grievance mechanism are highly questionable. The allegation that the outcomes obtained were less than those which would have been awarded for such a serious offence under the traditional court system suggests that there are issues in the design of the mechanism, over and above the waiver requirement. Ensuring that operational-level grievance mechanisms afford community members fair and equitable outcomes implies that they must be culturally appropriate. Outcomes must therefore be commensurate with outcomes which victims would have obtained under their traditional justice systems as well as under civil courts. The issue is even more serious where a grievance mechanism is designed to block any further claims which could lead to outcomes that are in keeping with traditional adjudications or awards under civil courts. In November 2014 EarthRights International highlighted the inadequacy of the settlements reached with victims who were compensated to a total amount of \$8,500, of which \$6,000 consisted of mandatory business grants, even in the case of an 87 year old woman.¹⁵⁶ EarthRights International point out that in addition to being culturally inappropriate the awards are far from commensurate for harm suffered as a result of rape and gang rape.¹⁵⁷

A third consideration is that the confidential nature of the content of these legal waivers, and the lack of information in relation to outcomes, is at odds with the transparency criteria under the Guiding Principles. Such confidentiality renders it impossible for independent third parties to assess if settlements and associated waivers are rights-compliant, or if those signing them may be agreeing to terms which place unacceptable restrictions on their fundamental rights, as was the case under the extremely broad restrictions of the initial waivers at both Porgera and North Mara.

Finally, in practice, as the two Barrick cases demonstrate, in the absence of some form of independent oversight, such waivers are unlikely to meet the criteria of equitability and predictability. They presume a very high standard of self-monitored behaviour on the part of companies in terms of the provision of information and independent legal representation to vulnerable individuals before they sign their right to further redress away. However, rather than redressing power imbalances these waivers appear to exacerbate them by rendering the victim's right to redress in the form of a civil judicial action something which a more powerful party can negotiate away. The fact that only those women in Porgera who received some form of independent advice from NGO's refused to sign waivers suggests that their use in such contexts is fundamentally flawed.

Given this reality it is difficult to see how such waivers can be justified on human rights grounds. It is clear that while they may not be explicitly prohibited under human rights standards, there is also no clear basis for arguing that they are sanctioned by those same standards. The general presumption underpinning human rights operational-level grievance mechanisms should always be towards maximizing the avenues available for victims to realize their right to redress. They should not be seen as primarily means to ensure finality and financial certainty for corporations. In this regard a simple

solution would be to ensure that any awards which claimants have received through settlements with companies are given due consideration in any subsequent civil claims which a claimant may take.¹⁵⁸ As pointed out by MWC and Rights and Accountability in Development, the compensation awarded by the courts could simply be adjusted to allow for any compensation already paid by the company.¹⁵⁹ This is something which could be stipulated in the settlement agreement. Courts can generally be expected to consider such factors in determining compensation awards. Corporations therefore have little to fear from civil claims where compensation arising from operational-level mechanisms is adequate and culturally appropriate. If, as Barrick states, the “value of remedy packages is in the upper range of civil damage awards provided in comparable cases in Papua New Guinea” then it should have no concerns with regard to any subsequent civil claims against it which afford consideration to the remedy packages in their awards. On the other hand, the right to redress has not been realized where compensation does not meet this threshold. In such contexts, waivers which prevent victims from making civil claims simply serve to deny their rights to redress and justice.

7. Recommendations

This section does not attempt to provide an exhaustive list of recommendations in relation to operational-level grievance mechanisms as they relate to indigenous peoples. Instead, it seeks to identify some of the key principles which should guide these mechanisms in order to facilitate rights based engagements with indigenous peoples and ensure access to remedy.

7.1. Development of operational-level grievance mechanisms

Operational grievance mechanisms should be developed within a framework of corporate respect for indigenous peoples' rights. This requires:

- 1) the conduct of indigenous rights due diligence, participatory impact assessments, consultations to obtain FPIC and broad based participation of indigenous peoples and their representative organizations in the mechanism design,
- 2) exploring the role of customary law and the use of traditional dispute mechanisms and reaching mutually acceptable contractual agreements providing for culturally appropriate rights based grievance handling procedures and structures as well as benefit sharing, impact mitigation, monitoring, and sanctioning arrangements.

7.2. Features of operational-level grievance mechanisms

Operational grievance mechanisms should:

- 1) provide clear procedures and be based on contractually binding obligations to ensure redress for violations of indigenous peoples' rights,
- 2) complement the existing landscape of judicial and non-judicial mechanisms and include rapid escalation channels to them or to other mutually acceptable arbitration mechanisms,

- 3) ensure that consideration of, and respect for, indigenous customary law is a fundamental component of their procedures and outcomes,
- 4) provide channels through which communities can raise grievances in relation to the conduct of consultation and consent seeking processes and decision-making rights,
- 5) cater to the cultural distinctiveness of indigenous peoples and lead to outcomes that are satisfactory to them and compatible with their traditional dispute resolution procedures,
- 6) have a clear scope and ensure that independent advice is available to indigenous peoples when selecting the appropriate mechanism through which to address their grievances,
- 7) avoid the use of legal waivers prohibiting civil claims where settlements are reached, and instead ensure settlements are given due consideration in any subsequent proceedings,
- 8) ensure that contractors are subject to grievance mechanisms and held to account for violations of human rights,
- 9) be managed by people whom the indigenous community trust - this may require that they be jointly managed, or managed by independent third parties,
- 10) be gender sensitive and considerate of the rights and interests of women, youth and the elderly,
- 11) address grievances regardless of the means through which they are raised to the company.

7.3. Company internal considerations

Effective operational-level grievance mechanisms require:

- 1) cross-functional engagement (from the contract negotiation stage onwards) and companywide understanding of indigenous rights,
- 2) alignment of staff and management incentives with effective grievance resolution,
- 3) accountability of staff across all functions involved in the grievance resolution process,
- 4) clear communication channels and cooperation between those responsible for community engagement and those responsible for addressing grievances,
- 5) adequate resourcing of grievance mechanisms, including resources for translation, with dedicated staff who have effective communication channels to senior management,
- 6) robust information management systems for tracking grievances, escalating issues, identifying trends and facilitating organizational learning,

- 7) facilitation of independent (rights-holder trusted) third party monitoring and oversight,
- 8) clear escalation channels involving mutually acceptable third parties, (potentially for adjudication purposes) with transparent funding arrangements that guarantee impartiality.

7.4. Compensation and redress

Redress under operational-level grievance mechanisms should:

- 1) be in the form of restitution for the non-consensual taking, damage, or use of indigenous peoples lands, territories and resources and where this is not possible, provide just, fair and equitable compensation. This should be in the form of equivalent lands, territories and resources or, where freely agreed to by the impacted peoples, monetary compensation or other culturally appropriate redress,
- 2) extend to cover intangible harms such as impacts of a cultural or spiritual nature or damage to a community's social fabric.

7.5. Oversight of operational-level grievance mechanisms

Companies need to be able to know and *show* that operational-level grievance mechanisms meet the eight criteria outlined in Guiding Principle 31. To this end it is necessary that:

- 1) companies accept community decisions as to who should conduct monitoring activities,
- 2) companies facilitate civil society participation, under the guidance and direction of indigenous peoples, in the monitoring of grievance systems and associated remedies,
- 3) companies facilitate and, where appropriate, participate in multipartite monitoring teams, which may include representatives of the community, their alliances or federations, NGOs, government bodies and other independent bodies acceptable to the communities,
- 4) financial institutions ensure that effective and independent oversight and grievance mechanisms are in place to monitor and remedy indigenous rights violations arising from their investments including projects funded through financial intermediaries.

7.6. Overarching considerations

Beyond the context of specific projects, good faith dialogue is necessary between key extractive sector actors, international financial institutions and representatives of indigenous peoples in relation to grievance mechanisms and access to remedy. Such dialogue could be orientated around two core issues: the fundamental principles which should underpin the development, implementation and monitoring of operational-level grievance mechanisms as they pertain to indigenous peoples' rights; and the pre-requisites for their effective implementation.

Some of the important principles to be addressed in this dialogue include: a) the role of indigenous peoples' customary institutions and customary law in dispute resolution mechanisms, b) the potential for operational-level grievance mechanisms based on contractually binding FPIC agreements as well as good practice in this area, c) the participatory role which the international community, civil society and academia can play, under the guidance of indigenous peoples, in the development, oversight and scaling up of operational-level grievance mechanisms, d) the funding structures and associated checks and balances which need to be established to ensure that company financed grievance mechanisms operate in a truly independent manner, and e) corporate compliance with the decisions and recommendations of judicial and non-judicial bodies in relation to ensuring adequate and culturally appropriate compensation.

In terms of prerequisites necessary for operational-level grievance mechanisms to function effectively, dialogue is required with regard to how indigenous peoples can be empowered to engage with corporate actors. This implies that they be equipped with a full knowledge of their rights under international human rights law and associated mechanisms to ensure their realization, and afforded the necessary time, as well as financial and technical assistance, to strengthen their governance structures prior to the entry of resource extraction companies into their territories. It also presumes a significant investment in corporate capacity building within extractive sector companies and institutions financing them in relation to indigenous peoples' rights, interests, realities and perspectives. Indigenous peoples, being the key holders of this knowledge, must play a core role in such capacity building which should span all corporate geographies, functions and levels.

Finally, a fundamental pre-requisite for effective operational-level grievance mechanism is that the extractive sector actors acknowledge the legacy of their activities and initiate reconciliation processes, in cooperation with indigenous peoples, with the aim of providing culturally appropriate compensation and redress and the building of new rights-based relationships.

¹ Principle 29.

² This followed the failure of the Human Rights Committee to agree on the adoption of the draft UN Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms). The drafting of the Norms had been preceded by a UN intergovernmental process which sought to develop a code of conduct for transnational corporations. The process commenced in the 1970's and was abandoned in the early 1990's following a failure to reach agreement in relation to the voluntary or binding nature of the code.

³ Ruggie J. (2013) *Just Business* (London: Amnesty International).

⁴ Universal Declaration of Human Rights, G.A. Res. 217A (III), preamble (10 December 1948).

⁵ Doyle C. & A Whitmore (2014) *Indigenous Peoples and the Extractive Sector: Towards a Rights Respecting Engagement* (Manila, London: Tebtebba, Middlesex University, PIPLinks).

⁶ Principle 25.

⁷ Principles 25, 26, 27.

⁸ Principle 26.

⁹ Principle 26.

¹⁰ A/HRC/24/41, 2013 para 48.

¹¹ See for example: Morrison J., (2014) "The Social License to Operate: How to Keep your Organization Legitimate" (London: Palgrave Macmillan); Wilson E., and E., Blackmore (2013) *Dispute or dialogue? Community perspectives on company-led grievance mechanisms* (London: IIED); Schwarte and Wilson (2009) "Building Public Trust: Transnationals in the Community". London: IIED.

¹² Principle 25.

¹³ Weissbordt, D (2014) 'Human Rights Standards Concerning Transnational Corporations and other Business Enterprises' 23 *Minnesota Journal of International Law* 135 at 163.

¹⁴ Principle 29; see also Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises Addendum - International Expert Workshop (Toronto): "Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience UN Doc. A/HRC/26/25/Add.3 para 8.

¹⁵ Principle 28.

¹⁶ Principle 29.

¹⁷ Principle 30.

¹⁸ For a discussion on the status of FPIC see Doyle C. (2015) *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (London: Routledge). The FSC recently announced the establishment of a Permanent Indigenous Peoples Committee as a mechanism for engaging indigenous peoples in issues around FSC certification. <https://ic.fsc.org/fsc-press-release.638.548.htm>; Despite the progressive World Commission on Dams report in 2000, the Hydropower Sustainability Assessment Protocol is less advanced in terms of the standards it proposes and does not provide for a grievance mechanism. *Hydroelectric Sustainability Assessment Protocol* (November 2010) available at http://www.hydrosustainability.org/IHAHydro4Life/media/PDFs/Protocol/hydropower-sustainability- assessment-protocol_web.pdf.

¹⁹ UN Framework on Business and Human Rights UN Doc. A/HRC/8/5 para 95.

²⁰ *Ibid* para 100.

²¹ Principle 25.

²² Commentary on Principle 31.

²³ UN Framework on Business and Human Rights UN Doc. A/HRC/8/5 para 95.

²⁴ UN Doc. A/HRC/26/25/Add.3 para 15. See also UN Framework UN Doc. A/HRC/8/5 para 84 commentary stating that non-judicial mechanisms "may be particularly significant in a country where courts are unable, for whatever reason, to provide adequate and effective access to remedy".

²⁵ Principle 26.

²⁶ Principle 26.

²⁷ UN Doc. A/HRC/26/25/Add.3 para 18.

²⁸ Doyle & Cariño (2013) "Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Industries" (London: Middlesex University, PIPLinks, ECCR) at 74.

²⁹ UN Doc. A/HRC/26/25/Add.3 para 20.

³⁰ See for example Kemp D. and J. Owen (2014) 'The Reality of Remedy in Mining and Community Relations: An Anonymous Case from Southeast Asia' in Mohan M. and C. Morel *Business and Human Rights in Southeast Asia: Risk and the Regulatory Turn* (London: Routledge).

³¹ One of the primary sources is the access facility which was previously the wikibases database of the UN Guiding Principles project see <http://www.accessfacility.org>.

³² Wilson & Blackmore 2013 *supra*.

³³ <http://www.accessfacility.org>.

³⁴ Wilson & Blackmore 2013 *supra*.

³⁵ <http://barrickresponsibility.com/2013-performance/community-engagement/>.

³⁶ *Ibid*.

³⁷ ICCM (2009) Human Rights in the Mining & Metals Industry Handling and Resolving Local Level Concerns & Grievances: 21 available at <http://www.icmm.com/document/691>.

³⁸ *Ibid*.

³⁹ www.bhpbilition.com.

⁴⁰ ICMM 2009: 19 *supra*.

⁴¹ Freeport McMoRan Gold and Copper Voluntary Principles on Security and Human Rights 2013 Annual Report to the Plenary March 2014 Montreux, Switzerland at 4.

⁴² Guáqueta A., (2013) Harnessing corporations: lessons from the voluntary principles on security and human rights in Colombia and Indonesia, 6(2) *Journal of Asian Public Policy*, 129-146, at 142 noting that BP has also done this.

⁴³ ICMM 2009: 18 *supra*.

⁴⁴ <http://www.accessfacility.org/general-information-newmont-mining-corporations-operational-level-grievance-mechanisms>.

⁴⁵ <http://accessfacility.org/newmont-ghana-gold-limited-ahafo-south-project>.

⁴⁶ <http://accessfacility.org/newmont-ghana-gold-limited-ahafo-south-project>.

⁴⁷ <http://accessfacility.org/newmont-ghana-gold-limited-ahafo-south-project>.

⁴⁸ *Ibid*.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*.

⁵¹ *Ibid*.

⁵² <http://accessfacility.org/newmont-golden-ridge-limited-akyem-mine>.

⁵³ <http://www.accessfacility.org/general-information-rio-tintos-operational-level-grievance-mechanisms>.

⁵⁴ Kemp & Gotzmann (2009) Community Complaints and Grievance Mechanisms and the Australian Minerals Industry: Second Discussion Paper 42–46 available at: www.csr.uq.edu.au/Publications/ResearchReportsandPapers.aspx.

⁵⁵ <http://www.accessfacility.org/rio-tinto-alcan-weipa>.

⁵⁶ <http://www.accessfacility.org/rio-tinto-alcan-weipa>.

⁵⁷ <http://www.accessfacility.org/rio-tinto-alcan-weipa>.

⁵⁸ ICMM 2009: 21 *supra*.

⁵⁹ Rees, C. and Vermijs, D. (2008) Mapping Grievance Mechanisms in the Business and Human Rights Arena. CRSI Report No. 28. Corporate Social Responsibility Initiative (CSRI), Harvard Kennedy School, Cambridge, MA, at 22-3 available at: <http://198.170.85.29/Rees-Vermijs-Mapping-grievance-mechanisms-Jan-2008.pdf>.

⁶⁰ Oxfam Australia (2007) Mining Ombudsman Case Report: Didipio Gold and Copper Mine; see also ICMM 2011: 17 *supra*.

⁶¹ Goldcorp social responsibility policy available at www.goldcorp.com.

⁶² IPIECA “Community grievance mechanisms in the oil and gas industry. A manual for implementing operational-level grievance mechanisms and designing corporate frameworks” (January 2015).

⁶³ Shift (2014) (Remediation, Grievance Mechanisms and the Corporate Responsibility to Respect Human Rights Shift Workshop Report No. 5, New York May 2014): 6. <http://www.accessfacility.org/general-information-newmont-mining-corporations-operational-level-grievance-mechanisms>.

⁶⁴ Rees, C., (2009) “Report of International Roundtable on Conflict Management and Corporate Culture in the Mining Industry.” CSR Initiative Report No. 37. Cambridge, MA: Harvard University: 5.

⁶⁵ Rees 2009: 8 supra.

⁶⁶ Wilson & Blackmore 2013: 24 supra; UN Doc. A/HRC/26/25/Add.3 para 34.

⁶⁷ Rees 2009: 8 supra.

⁶⁸ Rees 2009: 8 supra.

⁶⁹ Kamp & Owen 2014 supra.

⁷⁰ Rees 2009: 7 supra.

⁷¹ Shift 2014: 4 supra.

⁷² Shift 2014: 8 supra.

⁷³ Shift 2014: 10 supra.

⁷⁴ Wilson & Blackmore 2013: 105 supra.

⁷⁵ Kemp & Owen supra.

⁷⁶ Kemp & Owen (2014): 257 supra.

⁷⁷ Shift 2014: 4 supra.

⁷⁸ See section 4.2 above; see also Shift 2014:6.

⁷⁹ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises UN Doc. A/HRC/26/25/Add.3 para 16.

⁸⁰ ILO Convention 169 articles 6, 7 & 15.

⁸¹ UN Doc. A/HRC/15/37/2010 para 74 citing United Nations Declaration on the Rights of Indigenous Peoples articles. 20.2, 32.3 and ILO Convention No. 169, article 15.2.

⁸² Shift 2014: 4 supra.

⁸³ UN Declaration on the Rights of Indigenous Peoples Article 28; CERD General Recommendation XXIII (1997) and rulings of the Inter-American Court and Commission on Human Rights, the African Commission on Peoples and Human Rights all have similar recommendations in relation to compensation.

⁸⁴ See Sakhalin and TVI cases, see also Wilson & Blackmore 2013: 57 supra, noting that “A common complaint was that BP often responded to grievances by replying that the Government or municipalities were responsible for resolving certain issues (such as ... compensation)”.

⁸⁵ Doyle & Whitmore 2014: 165 supra.

⁸⁶ Rees 2008: 9.

⁸⁷ UN Doc A/HRC/17/31 Principle 31h.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises UN Doc. A/HRC/26/25/Add.3 para 9a.

⁹¹ In a related context, it is clearly understood that operational-level grievance mechanisms “should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes” see Guiding Principle No 29.

⁹² UN Doc. A/HRC/24/41, 2013 Para 78.

⁹³ UN Doc A/HRC/17/31 Principle 25 (commentary).

⁹⁴ UN Doc. A/HRC/24/41, 2013 para 65.

⁹⁵ UN Doc. A/HRC/24/41, 2013 Para 78.

⁹⁶ UN Doc. A/HRC/15/37/2010 para 69.

⁹⁷ UN Doc A/HRC/17/31 Principle 29 and associated commentary.

⁹⁸ UN Doc. A/HRC/26/25/Add.3 para. 41f.

⁹⁹ <http://www.accessfacility.org/cerrej%C3%B3n-joint-venture-mine-colombia>.

¹⁰⁰ Rees, C. (2011) *Piloting Principles for Effective Company–Stakeholder Grievance Mechanisms: A Report of Lessons Learned*. Cambridge, MA: Harvard Kennedy School: 32 available at: www.hks.harvard.edu/m-rcbg/CSRI/pub_reports.html; see also A Guáqueta (2013) *Harnessing corporations: lessons from the voluntary principles on security and human rights in Colombia and Indonesia*, 6(2) *Journal of Asian Public Policy*, 129- 146 for a comment on other roles which the voluntary principles have played in the Cerrejón project.

¹⁰¹ <http://www.accessfacility.org/cerrej%C3%B3n-joint-venture-mine-colombia>.

¹⁰² *Ibid.*

¹⁰³ Rees 2011: 32-40.

¹⁰⁴ Rees 2011: 35.

¹⁰⁵ *Ibid.*

¹⁰⁶ Rees 2011: 38.

¹⁰⁷ Rees 2011: 35.

¹⁰⁸ This case study draws from the authors experience in supporting the Subanon of Mt Canatuan in their complaint to the UN Committee on the Elimination of Racial Discrimination and his documentation of their situation in various reports including Subanon Submission to CERD 2007; Doyle, C., Wicks, C. and Nally, F. (2006) *Mining in the Philippines: Concerns and Conflicts*. Report of a Fact-Finding Trip to the Philippines, July/August 2006. London: Columban Fathers available at: www.communitymining.org/attachments/202_Phillippines%20Mining.pdf; Doyle & Cariño 2013 *supra*; Doyle & Whitmore 2014 *supra*.

¹⁰⁹ Different spelling of Subanen is used by different communities, for example Subanan, Subanen, Subanon. Collectively the term Subanen is generally used. As the community in this case study refer to themselves as Subanon that wording has been used throughout the case study.

¹¹⁰ Constitution of the Philippines (1987) Article XII Section 5, Article XIV, Section 17, Article II, Section 22.

¹¹¹ Commission on Human Rights Case No IX 2002-1770 Resolution In the matter of investigation conducted on the Subanon Case at Tabayo, Siocon, Zambonga del Norte 27 May 2002.

¹¹² Submission on behalf of the Subanon of Mt Canatuan to CERD Early Warning Urgent Action procedure 2007.

¹¹³ *Philippine Indigenous Peoples ICERD Shadow Report*. Submission to the UN Committee on the Elimination of Racial Discrimination. 75th Session. August 2009 at 79.

¹¹⁴ <http://www.tviphilippines.com/stakeholders/nosacredmountain.html>.

¹¹⁵ *Philippines: TVIRD Admits Fault and Performs Cleansing Ritual In Canatuan*. [http://www.piplinks.org/ Timuay+Jose+Boy+Anoy](http://www.piplinks.org/Timuay+Jose+Boy+Anoy)

¹¹⁶ Wilson & Blackmore 2013: 126 *supra*.

¹¹⁷ Communication from Timouy Anoy 15th August 2014.

¹¹⁸ <http://www.gazprom.com/about/production/projects/deposits/sakhalin2/>.

¹¹⁹ <http://www.shell.com/global/aboutshell/major-projects-2/sakhalin.html>.

¹²⁰ Wilson & Blackmore 2013: 85 *supra*.

¹²¹ Wilson & Blackmore 2013: 84 *supra*.

¹²² Rees 2011: 54-62 *supra*, Wilson & Blackmore 2013: 82-106 *supra*; OHCHR (2013) "OHCHR Taking Stock: 1 1/2 Years After the Endorsement of the GP's Pillar III' Access to Non-Judicial Remedy Background Note on the Parallel Session"; Global Compact (2013) "Practical Supplement to the Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples": 19.

¹²³ Wilson & Blackmore 2013: 90 *supra*.

¹²⁴ OHCHR Taking Stock: 3, *supra*.

¹²⁵ *Ibid*.

¹²⁶ Doyle C. (2014) "Indigenous Peoples' Issues and Participation at the UN Forum on Business and Human Rights: Progress to date and Potential for the Future' European Network on Indigenous Peoples": 13 at www.enip.eu.

¹²⁷ Murashko, O. and E. Krikunenko (2005) One Step Forward, Two Steps Backward: The Continuing Story about the Situation in Sakhalin. ANSIPRA (Arctic Network for the Support of the Indigenous Peoples of the Russian Arctic) Bulletin No 14 & 15a at 5, available at: <http://ansipra.npolar.no/english/Bulletin/Bulletin14-14aE.pdf>; see also (2004) Oilmen again violated the rights of Sakhalin's indigenous peoples, with comments by the Rodnik Legal Centre ANSIPRA Bulletin No. 10b, April 2004 20-3; Wilson & Blackmore 2013: 90 *supra*.

¹²⁸ IWGIA (2007) *The Indigenous World*: 51.

¹²⁹ Global Compact Business Reference Guide Practice Supplement (2013) at 19.

¹³⁰ IWGIA *The Indigenous World 2007*: 51.

¹³¹ Wilson & Blackmore 2013: 90 *supra*.

¹³² IWGIA *The Indigenous World 2007*: 52; Wilson & Blackmore 2013.

¹³³ Coumans C. (2014) *Brief on Concerns Related to Project-Level Non-Judicial Grievance Mechanisms*. MWC: 2.

¹³⁴ *Ibid*: 3.

¹³⁵ Papua New Guinea Gold's Costly Dividend; Human Rights Impacts of Papua New Guinea's Porgera Gold Mine. Human Rights Watch 2010 available at <http://www.hrw.org/sites/default/files/reports/png0211webwcover.pdf>.

¹³⁶ For more information see <http://www.accessfacility.org/barrick-gold-corporation-olgeta-meri-igat-raits>.

¹³⁷ Re: Allegations regarding the Porgera Joint Venture remedy framework (OHCHR, 2013) available at http://www.barrick.com/files/doc_downloads/Opinion-of-the-UN-Office-of-the-High-Commissioner-for-Human-Rights.pdf

¹³⁸ *Ibid* at 2.

¹³⁹ *Ibid* at 7.

¹⁴⁰ *Ibid* at 2.

¹⁴¹ *Ibid* at 8.

¹⁴² *Ibid* at 8.

¹⁴³ *Ibid* at 9.

¹⁴⁴ OHCHR Interpretive Guide, p. 64.

¹⁴⁵ Barrick Gold (2014) Response to EarthRights International November 27, 2014 available at <http://www.barrick.com/files/porgera/Response-to-EarthRights-International.pdf>.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*.

¹⁴⁸ Case against African Barrick Gold <http://www.leighday.co.uk/International-and-group-claims/Tanzania>.

¹⁴⁹ Coumans C. (2014) Brief on Concerns Related to Project–Level Non-Judicial Grievance Mechanisms. MWC.

¹⁵⁰ African Barrick Gold Letter to C Coumans and P Feeney 11 March 2014 available at <http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/pdf/abg-response-to-MWC-RAID-march-2014.pdf>.

¹⁵¹ MWC-RAID letter to CEO of Barrick 22 April 2014 available at http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_on_north_mara_2014-04-22.pdf.

¹⁵² Ibid.

¹⁵³ Vidal J. 10 February 2015 British gold mining firm agrees settlement over deaths of Tanzanian villagers <http://www.theguardian.com/environment/2015/feb/10/british-gold-mining-settlement-deaths-tanzanian-villagers>.

¹⁵⁴ RAID-UK – MiningWatch Canada (09 February 2015) “Out-of-Court Settlement Good for Some Tanzanian Villagers – But Many Others Hindered from Participation by Barrick’s Grievance Mechanism” available at <http://www.miningwatch.ca/news/out-court-settlement-good-some-tanzanian-villagers-many-others-hindered-participation-barrick-s>.

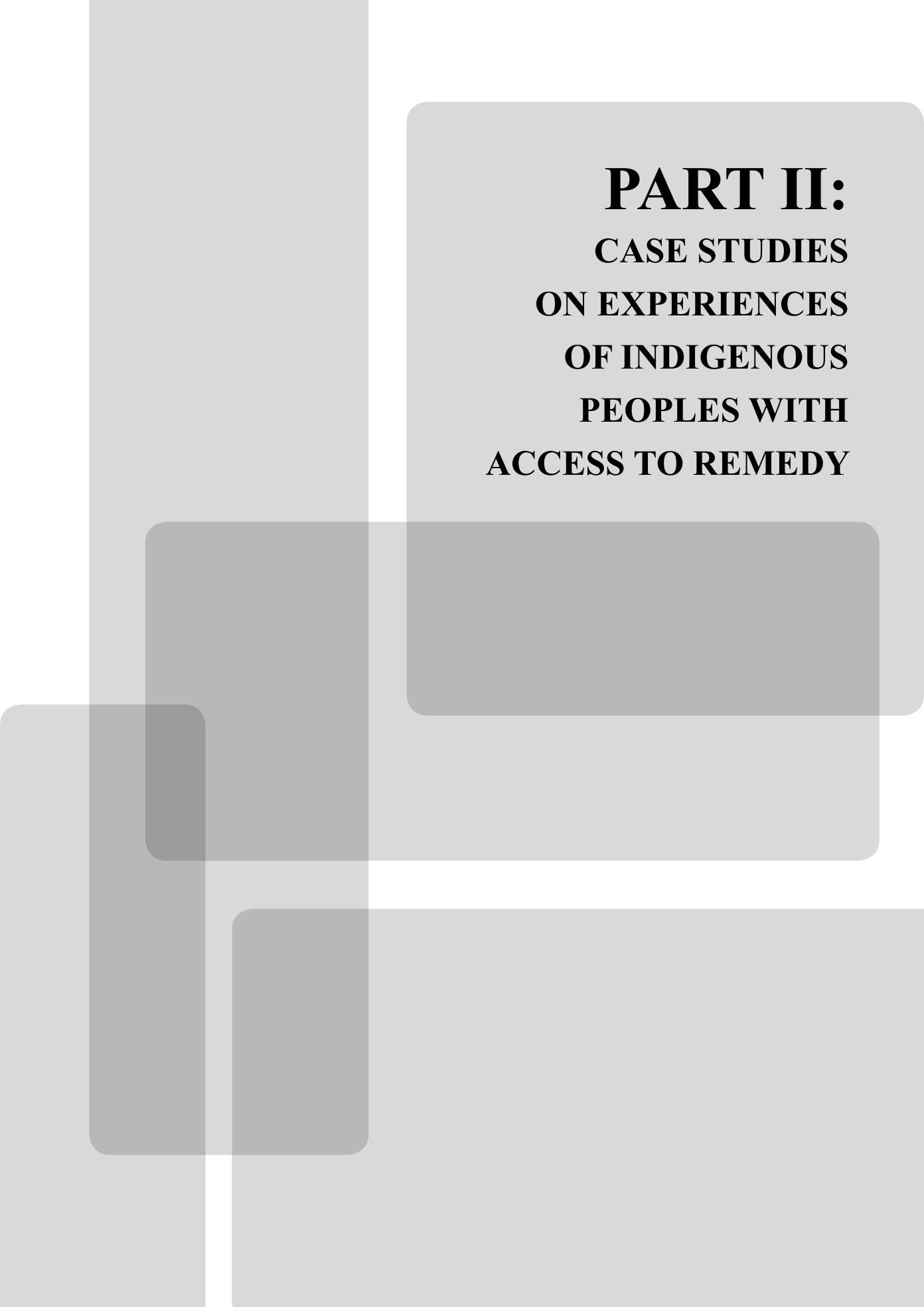
¹⁵⁵ OHCHR 2013 *supra*.

¹⁵⁶ EarthRights International (21 November 2014) Survivors of Rape by Barrick Gold Security Guards Offered. “Business Grants” and “Training” in Exchange for Waiving Legal Rights <http://www.earthrights.org/media/survivors-rape-barrick-gold-security-guards-offered-business-grants-and-training-exchange>.

¹⁵⁷ Ibid.

¹⁵⁸ Coumans C. and P Feeney (2014) “Privatized Remedy and Human Rights: Re-thinking Project-Level Grievance Mechanisms Third Annual UN Forum on Business and Human Rights” Palais des Nations, Room XXII 1 December 2014 (MiningWatch Canada & Rights and Accountability in Development) available at http://www.miningwatch.ca/sites/www.miningwatch.ca/files/privatized_remedy_and_human_rights-un_forum-2014-12-01.pdf.

¹⁵⁹ Ibid.



**PART II:
CASE STUDIES
ON EXPERIENCES
OF INDIGENOUS
PEOPLES WITH
ACCESS TO REMEDY**

Chapter 3 - The Difficult Challenge of Redressing and Mitigating Impacts in La Guajira Colombia: The Wayuu People and their Relationship with the Cerrejón Mine

Mikel Berraondo López and Fuerza de Mujeres Wayuuⁱ



“We believe that the full respect of human rights and democracy are the best context to develop our operation, and that our commitment to human rights results from our Ethical principles more than from our legal obligations; we understand that implementing these principles adds value and competitiveness to the company.”¹

Cerrejón Human Rights Policy

1. Background to the research

This case study seeks to analyse the impacts on Wayuu indigenous peoples of 30 years of mining activities in and around the Cerrejón mine. Above all, however, we aim to explore the possibilities which are afforded by the new international framework on business and human rights to reduce those impacts and provide remedies to the communities which have suffered most from them.

By making use of this new international framework, with which Cerrejón has actively engaged, we seek to propose new relationship models and translate positive discourses into concrete actions, bearing in mind that the mine will be present in the region for another 30 years. In the international arena, Cerrejón is vocal in its support for, and promotion of, the UN Guiding Principles on Business and Human Rights, and defends the need to pursue its activities within a context of respect for and guarantee of human rights. This position should be reflected, as soon as possible, in the company’s operational protocols, so that it moves beyond its impressive discourse towards impressive actions. The situation in La Guajira demands such actions because it is clearly unsustainable when viewed from the perspective of the existing human rights impacts.

ⁱ The original chapter was written in Spanish and will be available at www.almaciga.org. It was translated by Cathal Doyle, the editor, who apologizes for any inaccuracies which may have been introduced as a result.

This chapter was possible thanks to the work of the Wayuu indigenous women's organization, Fuerza de Mujeres Wayuu, which has interviewed community leaders and obtained information as part of its work assisting impacted communities and monitoring the impacts that they have suffered.

2. Introduction

Colombia affords strong constitutional protection to indigenous and Afro-descendent peoples' rights, with over 30% of the country's land mass legally recognized, or in the process of being recognized, as the property of indigenous peoples. In addition, the country's Constitutional Court is among the most progressive in the world in protecting indigenous peoples' rights, including through the affirmation of a requirement for free prior and informed consent (FPIC) in the context of mining and other development projects in their territories. It has also clarified that ILO Convention 169 forms part of the country's constitutional block and has elaborated extensively on the need for urgent measures by the State to ensure that indigenous peoples' way of life and their very existence is not threatened by development activities in or near their territories.

This land rights recognition and rights-affirming jurisprudence has however emerged in a context in which the State is aggressively, and without due respect for indigenous peoples rights, promoting investments in mining on the basis that the sector has the potential to be a major driver for the country's economic growth. It is expected that the country's transition to a post-conflict State will lead to a reduction in the risks associated with investments in the extractive sector. However, much of the mineral resource which is being targeted for exploitation resides in the territories of the country's indigenous and Afro-descendant peoples, and the government's plans to accelerate investment in the sector have been developed without adequate consideration for the enormous risks it implies for these peoples.

As is reflected in the Constitutional Court's jurisprudence, many of the country's indigenous peoples are in a position of extreme vulnerability, with their physical and cultural survival threatened as a result of the nexus between armed conflict (from which the country has yet to fully emerge), organized crime, corruption around large scale infrastructure projects, and the scale and speed of imposed extractive industry developments in indigenous peoples' territories. To compound this vulnerability, decisions of the Constitutional Court remain unimplemented and many communities are relatively powerless to assert their rights vis-à-vis extractive industry companies, even where they have obtained recognition of legal title to their lands or been subject to some form of judicial protection.

Corporate discourse, including that of Cerrejon, has improved in relation to respect for indigenous peoples' rights and some corporate mechanisms have been established with the objective of addressing community grievances. However, the scale and nature of the legacy issues which underpin many of the existing extractive industry operations, the rate at which the government is seeking to implement new extractive projects in their

territories, and the associated absence of trust among indigenous peoples of the sector, mean that a far greater effort is necessary on the part of corporate and State actors before access to remedy and justice in the context of extractive activities can become a reality for Colombia's indigenous peoples.

According to the Wayuu communities in Guajira, Cerrejón has yet to understand and acknowledge the extent of its existing rights violations. This acknowledgement is something which the Wayuu regard as essential for meaningful steps to be taken towards the necessary rights-based dialogue, action and remedies. Until that happens, the Wayuu communities' will be denied access to remedy and the company's presentation of an operational-level grievance mechanism which is consistent with the criteria of the Guiding Principles will continue to remain in stark contrast with lack of access to effective remedy experienced by those whose rights have been violated.



Wayuu Protest. Photo Fuerza de Mujeres Wayuu www.notiwayuu.blogspot.com

3. Findings of the Study

3.1. Description of the affected indigenous peoples: the Wayuu people

The Wayuu are located on the peninsula of La Guajira in the north of Colombia and the north east of Venezuela, in the state of Zulia on the Caribbean Sea. They occupy an area of 1,080,336 hectares, covering the *resguardos* (reserves) of Upper y Middle Guajira, eight more *resguardos* in the south and Middle Guajira and the Carraipía reserve, in the municipalities of Barrancas, Distracción, Fonseca, Maicao, Uribía, Manaure and

Riohacha, as well as in the Venezuelan state of Zulia. In the Colombian zone they number 144,003 people, comprised of 18,211 families grouped into 24 clans - their traditional form of social organization. Together with the Wayuu of Venezuela their total population is about 300,000 people.² The Wayuu represent 20.5% of the country's indigenous population (DNP-Incora, 1997), 48 % of the population of La Guajira and 8% of the population of the State of Zulia. As a result, they are the largest indigenous peoples, not only on the peninsula of La Guajira, but in the country.³ In La Guajira 97% of the population speaks Wayúunaiki, their traditional language, and 32% speak Spanish. 66% of the population have not received any type of formal education.

The region inhabited by the Wayuu is characterised by its hot, dry and inhospitable climate, and is traversed by the Ranchería (Colombia) and Limón (Venezuela) Rivers. Its seasons are clearly marked with a wet season, referred to as *Juyapu*, lasting from September to December, followed by a dry season, *Jemial*, which runs from December to April. This is followed by a second rainy season, *Iwa*, and a long dry season, which runs from May to September. Its demographic distribution is intrinsically related with the seasonal changes. During the dry season many of the Wayuu seek employment in Venezuela, or in other cities and villages, and in the wet season many return to their ranches. The Wayuu are not distributed across their traditional territory in a uniform manner. For example, the population density surrounding Nazareth (in the district of Uribia) is greater than in other parts of the peninsula. Other areas with high population densities in La Guajira are found around Uribia, in the mountains of Jala'ala and the savannahs of Wopu'müin, and in the municipalities of Maicao and Manaure. The Wayuu settlements correspond to their matriarchal structures and are characterised by settlements in *rancherías* (extended ranches) or *Piichipala*. The *rancherías* are composed of several one story ranches inhabited by extended families, which are part of a single branch. The *ranchería* consequently consists of family homes based on the maternal line which form a residential group with: a collective corral, agricultural plots, a cemetery, potentially a mill to pump water or a pond (an artificial well), and *casimbas* (dams in riverbeds) to store water, a close network of cooperation, and the right to access a source of local water. Likewise, territoriality is defined by proximity to a particular natural resource, such as a swamp, a salt lake or a deposit of talc or gypsum.⁴

Given the climatic conditions of the region, the lands which the Wayuu inhabit are not fertile, which gives rise to subsistence challenges in their territory. The Wayuu frequently move to different parties of their own territory, above all in summer time, when it is necessary to migrate as a result of prolonged droughts in search of water in other territories. The Wayuu are primarily pastoral peoples. However, in some areas they cultivate crops during the rainy periods, and in some other zones they exploit sea salt, some are also fishermen, and in the last 50 years a growing number of Wayuu have become involved in informal or illegal trade on the Colombian-Venezuelan border.⁵

From the cultural perspective, the Wayuu people remain deeply rooted in their traditions and way of life. They have a particular juridical system, called *Suküaipa Wayúu*, which enables the peaceful resolution of disputes based on the power of the word, and the

counsel and signals of the dead, which ultimately represent the land. Before going to war the Wayuu always seek reconciliation through the *pütchi*, that is to say, the word. Often it is preferable for the Wayuu to pay with goats, necklaces or money before going to war. As a result of their social organization which is based on clans, the Wayuu have not only had wars with other peoples but also have frequently fought between clans. In this context inter-clan wars are a product of the Wayuu tribal social organization. The Wayuu are a warrior people.⁶

Among the principal social problems which the Wayuu people currently face is the presence of paramilitary groups which have managed to exercise almost absolute control over economic activities – both legal and illegal – in the region, relegating the Wayuu to the least productive activities. Moreover the presence of these groups has, in some instances, due to the paramilitary activities provoked massive forced displacement of Wayuu communities from strategic areas. In other cases, Wayuu communities have been confined and boxed into areas with paramilitary groups preventing their freedom of movement. Many paramilitary groups have established operations on both sides of the border in Wayuu territory. The liberty and impunity with which these paramilitary groups are free to move in Wayuu territory, means that in practice there is no tenure security over the territories which the communities occupy. In addition, many Wayuu leaders receive threats and are taken hostage by paramilitary actors and many of the families on the Colombian side of the border have had to take refuge on the Venezuelan side to escape paramilitary violence.

Another important problem of the Wayuu people is the presence of mining (Cerrejón), gas (Venezuelan pipeline) oil (explorations on the Caribbean coast), energy (Jepirachi wind farms), and ethno-tourism (infrastructure construction in the Cabo de La Vela) megaprojects. These megaprojects impact on the Wayuu culture and territory in a permanent manner and have profound consequences for them. They have resulted in major environmental impacts in an already vulnerable territory, and have greatly contributed to desertification in the region, resource scarcity and the depletion of drinking water. Moreover, these megaprojects have given rise to the colonization of the Wayuu territory by people from other regions, generating conflicts which previously did not exist.

The cumulative effect of these encroachments has been a weakening of the Wayuu culture and their traditional organization. Of particular concern is the weakening of their justice system as a result of interference by legally and illegally armed actors present in the region. Equally serious is the weakening of the traditional authorities and the Wayuu autonomy, given that none of the actors present in their territory afford them the respect which they deserve.

The communities allege that there has been accelerated socio-economic insecurity and impoverishment. This is reflected in the extent to which basic needs have not been met. There is a noticeable trend among the younger generations toward migration to the urban centres of Colombia and Venezuela. As a consequence, the communities are currently primarily composed of older people who are looked after by young boys and girls - the children of fathers and mothers who have migrated. Even though the traditions and the

core symbols of the Wayuu people are evident in the communities, it is important to note that there are families which are suffering from problems which arise from the loss of identity, from being uprooted and from cultural decay.

3.2. Cerrejón in La Guajira

The Cerrejón mine is located in the northwest region of the Colombian Atlantic coast, in the jurisdiction of the municipalities of Albania, Hatonuevo, Maicao and Barrancas, in the department of La Guajira. It is one of the biggest open pit coal mining operations in the world, occupying an area of 800 km² in which there are five contract zones: the North Zone, Patilla, Oreganal, the South Zone (with the Colombian State) and the Central Zone (with the community of Cerrejón). The project generates over 60% of the coal produced in Colombia and is exported to various countries, including Denmark, Ireland, Finland, United States, Spain, Israel, Puerto Rico and Brazil.

The history of the arrival of mining in La Guajira dates back to the 1970's when the Colombian Government initiated the first tenders in what is now known as Cerrejón's North Zone. In 1976, a three phase contract was signed for 33 years between Carbones de Colombia SA (Carbocol) and Intercol - one for exploration (1977-1980), another for construction (1981-1986) and a third for production (1986-2009). In 1999, a new agreement was signed to extend the final stage for a further 25 years until 2034. Since signing the contract, the associated studies have been performed and necessary infrastructure for mining developed. This includes more than 150 kilometres of railway line which traverses the Wayuu territory, and the construction of Puerto Bolívar, the largest coal exporting port in Latin America. From that point onwards, Cerrejón has not stopped exploiting coal and by 2010 had grown to become one of the 10 largest companies in Colombia.⁸

Cerrejón has emerged as one of the engines of the Colombian economy and its presence and influence have increased as the coal market consolidated. It currently has an overwhelming presence in La Guajira and exercises enormous power in the region. The mine's annual production is 32 million tonnes of coal, which accounts for 50% of Colombia's coal exports or 30% of its traditional exports. Cerrejón's production comprises 55% of La Guajira's GDP, and the regional and national institutions receive billions of pesos annually in taxes and royalties associated with its activities. The process of extraction of coal is determined by the nature of the soil. The coal is interwoven with layers of topsoil that is perforated, lifted, removed and conserved for subsequent rehabilitation. The mining process is extremely capital intensive, involving highly technologically advanced heavy machinery. Cerrejón has 200 dump trucks that can be as tall as a five story building, with tires which measure two meters in diameter, each one costing \$ 60 million and having to be replaced every eight months. In order to avoid the raising of dust during transportation of the coal, a fleet of tankers water the roads with 17,000 cubic meters of water per day. The coal is then transported by rail to Puerto Bolívar, with a daily average of seven trains, each having 130 wagons.⁹



Cerrejón Mine. Photo Richard Solly

3.3. The impact of 30 years of Cerrejón mining activities on the Wayuu people

Since the arrival of the Cerrejón company the directly affected communities, and indeed the entire region, has suffered from innumerable impacts as a result of the mining activities. It would be impossible to summarize all the damage that has been caused over the last thirty years of mining. Nevertheless, we would like to offer a sense of the principal impacts on the rights of affected communities. In doing so, we are only touching the tip of the iceberg in an effort to increase awareness of the very serious and tragic situation of the Wayuu people today. This, it is hoped, will contribute towards the initiation of a process aimed at developing public policies and action plans to mitigate these effects and to compensate those who are suffering permanently as a result. These affects can be summarized as follows:

3.3.1. Health

The communities suffer from serious illnesses due to the prolonged inhalation of coal dust to which they are subjected on a daily basis. These include pneumoconiosis, emphysema, chronic bronchitis, cancer and skin rashes. The health disorders are a very serious problem. However, there are no specific treatments available for these diseases, nor have any special health protocols been established. In addition to the problems of

the coal dust pollution, there is also the serious issue of noise pollution. Communities near the mine permanently suffer from the noise and tremors which are associated with exploitation as well as the operation of the company's machines.

3.3.2. *Conditions for a dignified life*

The communities which have been resettled have in general experienced deteriorated conditions of life. They have moved from areas in which they were able to subsist in an autonomous manner, to live in regions that are hotter have less resources and where they have been rendered dependant on others even for access to drinking water, which is normally provided by the company.

3.3.3. *Culture*

Indigenous peoples and Afro-descendant communities have always had a vision of the world which is distinct from that of the rest of society and have lived in harmony with their surrounding areas. The evictions and resettlements have caused a breakdown of the social fabric of neighbouring communities, some of which have been disappeared as a result of mining activities. The commencement of mining activities created expectations within the communities. Rather than being based on genuine collective benefits, these expectations were based on deception, the purpose of which was to foster emotional and social imbalance among community members. For the Wayuu communities, cemeteries are a matter of huge importance. Burial is a central event for the communities, and maintenance of cemeteries is critical because each person who dies must go through a process of several burials which can last several decades. Several cemeteries have been destroyed by the company without any remediation. Another serious problem is the lack of respect for traditional authorities, as the company chooses alternative leaders rather than respecting these authorities.

The cultural impact of the resettlement process is perfectly captured by the case of community Tamaquito II. The leaders decided to accept resettlement when they could no longer survive in their original lands due to contamination as well as the harassment and threats they faced. They realized that their community lands were no longer free, peaceful, healthy places with clean air and clean water. Instead they had been converted into precisely the opposite, places where plants no longer grew or produced fruit, where streams were contaminated and where people experienced harassment and were constantly under pressure. Despite the fact that they were able to conduct the resettlement processes in accordance with their traditions and say farewell to the spirits in their original community, the new resettlement remains unfamiliar to them, and they find no peace there. Elders no longer have dreams, the community members do not enjoy improvements in the new area and leaders are concerned about the cultural impacts that the community is suffering.¹⁰

The right to education, which is closely related to cultural rights, is also particularly impacted for those communities that have been evicted from their lands without being resettled. The members of these communities have been denied their right to a culturally appropriate education in their mother tongue. The State has failed to guarantee the

cultural and educational rights of indigenous and Afro-descendant communities affected by mining.

3.3.4. Environmental damage

Mining has had a huge effect on the environment throughout the project's zone of influence. Reforestation, to which the multinational constantly refers in its speeches in local, national and international arena, has involved the planting of trees which have a short life-span and are not native to the region. One of the major environmental problems is the disappearance of aquifers and the pollution of those which remain. This leads to an extremely worrying situation in which there is a lack of potable water for human consumption. Rivers have been diverted to serve mining activities, and this seriously affects the survival prospects of the communities. It is important to highlight the project, which the company has had for several years now, to divert the Rancheria River which is the main river in the region. While that project is currently paralyzed it has not been cancelled.

3.3.5. Extreme poverty and survival

Despite the large presence of extractive projects in the region, national statistics indicate that La Guajira is one of the poorest regions of the country, with the indigenous Wayuu population being the worst off. According to the official figures of the National Department of Statistics (DANE), some 65% of the population live in poverty, with 37% in conditions of extreme poverty. In 2010, the department had approximately 846,609 inhabitants; the indigenous Wayuu community comprise 42.4% of the population. Distressingly, 60% of the Wayuu are illiterate.¹¹

Due to the environmental pollution caused by mining activity, which affects the potential to grow crops and to access potable water, the Wayuu communities frequently live in conditions of extreme poverty. No one can feel indifferent when confronted with the raw data, with figures published by the EU at the end of 2013 denouncing the death of more than 2,000 children over the course of the last six years as a result of malnutrition and a lack of potable water.¹² The State's presence is minimal when viewed in light of the magnitude of the situation, leading to the systematic violation of the most basic right - the right to life and decent living conditions.

3.3.6. Physical integrity

La Guajira is a region with serious security problems. While not all of these problems are due to the mine's presence, the fact remains that its presence exacerbates the insecurity, especially of those indigenous and Afro-descendant leaders who oppose mining activities and denounce the company's actions. Many of these leaders have faced systematic threats, assaults, harassment and coercion when they have taken positions contrary to the interests of the company. Furthermore, there have been several cases of abuse of authority and arrests of those leaders in order to pressurize them to abandon positions which are contrary to the company's interests.

3.3.7. Consultation and participation

No consultation has ever taken place in relation to those actions of the company that affect the communities, neither prior to nor subsequent the entry into force of ILO Convention 169, even though many relocations occurred after the entry into force of the Convention. Projects with major impacts, such as the Rancheria River diversion, have received government permits without any prior consultation taking place. Dialogue processes driven by the company lack any guarantees and usually do not meet international standards. On 3 September 2011 the Federation of Communities Affected and Displaced by Mining in La Guajira issued a statement declaring the following:

The communities that are currently in the process of dialogue with the exploiting company, as in the case Casitas, alert us to the conflict of interest between the purported defenders or advisors of the communities, professional assistants of the municipal administration, and delegates of the Municipality whose fees are paid with money from the operator, and as a result it is considered that there is no real autonomy or independence in the work they are doing, even though they have been hired by the Municipality.

The lack of consultation and consent for an activity with such serious impacts on indigenous communities demands immediate attention. This is particularly so in light of the fact that the case meets all of the prerequisites for triggering the consent requirement under international standards, such as eviction and relocation and projects which generate major impacts on communities that threaten their physical and cultural survival. For over 30 years the State has failed to guarantee and protect the rights of the Wayuu and Afro-descendant communities. During this time the Cerrejón mine has been free to act as it wishes, benefiting from a situation of systematic violations of the human rights of the communities.

3.3.8. Self-governance and territorial rights

The loss of traditional territory as a result of the presence of extractive companies in the territory of the Wayuu is an issue which merits particular attention. Most of the land is held by foreign multinationals. Cerrejón occupies 66,000 hectares of indigenous ancestral land. The Brazilian company MPX, now CCX, which holds a concession covering 67,000 hectares of land, is the head of a large group of companies which have a presence and concessions in La Guajira, including among others: Pacific Rubiales, Drummond, Chevron, Repsol, Municipal Public Enterprises of Medellín EPM and PDVSA. It is important to note that in all of the related processes to issue concessions over Wayuu territory, the affected communities have never once participated in negotiations, have never been consulted and have never granted their consent.

Cerrejón's current mining expansion, referred to as p50 and p500, and its intention together with CCX to divert the Rancheria River and affect the Manantial de Cañaverales, a Protective Forest Reserve, illustrate the extremes which the *alijunas* (non Wayuu, non-indigenous) have reached, having already displaced, exiled and in bad faith stripped the Wayuu nation and Afro-descendant communities of their natural resources and culture.

In perpetuating these abuses, they have been accompanied by the government officials of the Office of Ethnic Affairs of the Ministry of Interior responsible for prior consultations, and the Ministry of Environment and Ministry of Mines and Energy. These officials adopted measures all of which were favourable to the companies proceeding with their operations. They never acted as guarantors of the rights of the affected indigenous peoples, as mandated under the Constitution, ILO Convention 169, and the judgements of the Honourable Constitutional Court, including its decision (769 of 2009 and its writs (Autos) 004 and 005 of 2009). The reality is that the Wayuu people, on the one hand, remain immersed in a context of armed conflict, resulting in threats, assassinations, accusations, recruitments, displacement and, on the other, find themselves in a mining induced terror, in which the institutional structures of the State and the government are at the mercy of the interests of large multinationals. These realities, in conjunction with other factors, continue to pose a threat to the Wayuu's existence.¹³

This territorial dispossession which the Wayuu have experienced has been in breach of the minimum standards of international law which recognizes the territorial rights of indigenous peoples. There has been no consultation processes seeking consent, no restitution or appropriate compensation in the form of territories or otherwise, there have been evictions and forced resettlements of indigenous communities. In short, there has been an unprecedented occupation and usurpation of the territories of the Wayuu with the support of the Colombian government, which maintains absolute impunity.

The leaders of many communities agree that it is important to highlight the arrogance, exclusion, discrimination, partiality and use of force which the company exhibits, often with the direct support of the national security forces which obey the company's orders. One of the common tactics used to pressure the communities into selling their land is to acquire the land or productive farms which surround them. Once obtained, private security forces are installed to prohibit entry to those lands which they say are privately owned, thereby depriving community members of the ability to grow crops, raise animals and hunt wild animals. Added to this is the pressure of daily blasting, the arbitrary closing of roads, the perpetual heavy machinery traffic and the suspension of basic services such as water distribution, in addition to the permanent pressure on community authorities and leaders who suffer constant harassment, defamation, threats and even illegal detention. With this strategy they succeed in destabilizing communities, forcing them to abandon their territories when they can take no more.

In addition to the systematic violation of land rights there are also violations of the Wayuu's rights to autonomy and self-government. Ever since the non-consensual entry of the company into Wayuu territory, and its subsequent and on-going encroachment, the Wayuu authorities and their traditional forms of government have been seriously impacted. These authorities are discredited if they act contrary to the interests of the company, attempts are made to impose new leaders, and leaders of social organizations are co-opted. Ultimately, measures are taken against traditional forms of organization in order to ensure the absence of any criticism of the company.

To conclude this section we quote from the 2013 report of the Auditor General of the Colombian Republic in relation to the reality of mining in the area:

The process of community displacement, changing land use, adverse environmental impacts reflected in the loss of soil, water, biodiversity, landscape, air, the generation of waste, translates into a risk to the food security of local populations, especially in areas such as the centre of the Cesar and La Guajira, where mining projects cover thousands of hectares and there is clearly a lack of land for farming.

The granting of mining rights, the declaration of mining areas of ethnic communities and of strategic mining areas are made without prior consultation with ethnic communities, despite the fact that they are administrative measures that may affect them. This is a failure to respect Convention 169 which forms part of the constitutional block, and also the Colombian legislation on prior consultation and other fundamental rights such as the rights to life, integrity, free, prior and informed consent, participation, self-determination and property.

There are no mechanisms to ensure the effective participation of local communities in the context of granting of mining permits and environmental licenses. These communities are not informed about applications for mining concessions over their property and have no real role in the identification of the environmental, social and economic impacts and the necessary management measures to prevent, mitigate, rectify, and compensate for, those impacts”¹⁴

While it is true that these impacts are felt throughout the region of La Guajira, it is important to emphasize that their impact has been greatest in those communities directly affected by the mining activity and which, in most cases, have been subject to resettlement processes.



Wayuu Woman at the Rancheria River. Photo Fuerza de Mujeres Wayuu
www.notiwayuu.blogspot.com

TABLE SUMMARISING THE IMPACTS OF THE MINING ACTIVITIES ON THE WAYUU AND AFRO-DESCENDANT COMMUNITIES OF LA GUAJIRA

Wayuu Communities.¹⁵

Community	Summary of impacts
NUEVO ESPINAL	In 1993 the community of Nuevo Espinal was resettled from their ancestral territory and suffered significant cultural impacts from which they have yet to recover. In their new settlement it is difficult for them to maintain their traditional ways of life. In addition they have problems in relation to registration of legal title over their lands, with the relevant authorities failing to recognize the territory as an indigenous <i>resguardo</i> (reserve) more than 20 years after the resettlement.
4 DE NOVIEMBRE	The community of 4 de Noviembre was created in 1992 to settle families coming from diverse displaced communities in Espinal and Caracolí. Some of their authorities have denounced the bad faith and the deceit which the company used to relocate them in the new settlement.
HORQUETA	The community of Horqueta was displaced from their ancestral territories in the absence of any agreement or prior negotiation. They were provided minimal “compensation” for the cost of their homes and no compensation was provided for their territories. On the contrary their territories were swapped for small plots of land at inflated prices.
PALMARITO	The community of Palmarito was forcibly resettled in 2007 following an intervention of “Esmad”, the special security forces. The resettlement was violent in nature and caused serious physical and psychological harm to the community, destroying their dreams and the life plans in their ancestral territories.
TAMAQUITO II	This Wayuu indigenous community of Tamaquito II had to make use of national and international pressure in order for the company to recognize the impacts it had caused and its obligation to resettle them. For many years the company attempted to avoid its responsibility claiming that the State should address the harms which the community had suffered. The community was finally resettled at the end of 2013 after a complicated negotiation, and not without threats to the community leaders.
CAMPO ALEGRE	The members of the community of Campo Alegre live as resettled peoples in this territory because they have not yet been able to obtain the status of <i>resguardos</i> . Due to their location close to the mine they are one of the communities which has suffered the most from the impacts of the mining activities. They experience constant environmental and noise pollution. The frequent explosions cover the community in clouds of dust and their crops have to be washed on a daily basis to prevent them from being destroyed.

Afro-descendant communities.

Community	Summary of impacts
MANANTIAL	Manantial was one of the first communities to be affected by the mine in 1982. They were displaced from their ancestral lands through deceit and received miserable compensation (for each house they were given 120,000 Colombian pesos). They resettled in Roche, where they continue to suffer the impacts of the mine. Profound impacts on their cultural rights, such as the loss of a cemetery as a result of work conducted by the company, are among those for which they have not received reparations.
ROCHE	Roche is an example of bad faith on the part of the company and the deceit which it has practiced. Since the mine was established they have managed to obtain the lands of many of the community members through deceit and bad faith. Those who resisted were displaced through the use of force in 2001 by Carbocol (a State owned company) and Intercol (Cerrejón). The companies always referred to a resettlement, but this only became a reality for 25 families, while the remaining 250 had to find whatever accommodation they could in the nearby urban areas. From a cultural and territorial perspective the effects have been extremely serious, as the communities have lost their lands and ways of life. They have never received any form of compensation for the harms suffered.
TABACO	The arrival of the mine signalled the complete disappearance of the Tabaco community. First the company bought some plots from members of the community and managed to have the army conduct the surveillance of those lands without permitting anyone to enter them. Second, it effectively turned the people who remained in the territory into hostages, preventing them from moving within it, detaining them if they were discovered hunting or fishing, and constantly harassing them. Third, through the use of military and police force it evicted them on 9 August 2011. During the displacement female community members were obliged by the Colombian Institution of Family Well-being (Instituto Colombiano de Bienestar Familiar) to sign compensation agreements under threats that custody over their children would be removed from them for not owing a home. Since the displacement the families have been dispersed to Barranquilla, Hatonuevo, Barrancas, Albania, Fonseca, Urumita, and to neighbouring Venezuela, far away from their ancestral territory where they left their dreams. They have never received any form of compensation or indemnification.
LAS CASITAS	The families of Las Casitas were deceived into abandoning their lands under the promise of being resettled far away from the mine. To date only 36 families have obtained this. The remainder are still waiting for the company to keep its word. In the meantime they live where they can and have lost their ways of life and their cultural practices.

CHANCLETA:	Until the arrival of the mine Chancleta was a self-sufficient community which lived from the land. Since the mine arrival they have barely managed to survive, having lost their autonomy and continuously suffering from health ailments (such as respiratory illnesses and headaches) and environmental harms (contamination of rivers and aquifers and the absence of drinking water) as well as serious impacts on their cultural and territorial rights. The State has never addressed their situation.
OREGANAL	The community of Oreganal was displaced and resettled over 10 years ago. Since that time they have been waiting for the company to fulfil its promises to support them with productive projects, employment opportunities and the legalization of the lands which they occupy. In the meantime, on a daily basis they suffer the contamination and negligence of the company.
PATILLA	The community of Patilla lost its autonomy when the company arrived. The pollution prevents them from raising animals or cultivating crops. In addition they live as hostages under the permanent threat of being detained if they try to move freely in their territory. Instead of conducting a genuine remediation process the company has accustomed the community to being dependent on small grants as a form of compensation. This assistance barely allows them to survive under conditions of extreme poverty.

3.4. The challenge of remediation and respect for rights - the era of protect, respect and remedy

In recent years significant changes have taken place in the private sector's relationship with human rights. The adoption of the UN Guiding Principles on Business and Human Rights and the creation of the UN Working Group on Business and Human Rights signalled important changes within the international community. All of this has arisen from the belief that companies should undertake firm commitments to respect human rights and to prevent any adverse impacts which their activities may cause.

Cerrejón is one of the companies which is developing these new commitments in the international arena. In fact, its human rights policy is based on respect for and compliance with the UN Guiding Principles, the Universal Declaration on Human Rights and the core conventions of the International Labour Organization.¹⁶

If we compare the reality outlined above with the claims of the company on its website we can reach the following conclusions.



Wayuu protesting on the train tracks. Photo: Fuerza de Mujeres Wayuu
www.notiwayuu.blogspot.com

3.4.1. Parallel realities - the problem of human rights

There are clearly two parallel realities in La Guajira. On the one hand, the reality which the company presents through its website, reports and press releases, in which mining has brought wealth to La Guajira. There are no serious problems because it deals with everything, there are no violations of human rights, and all resettlement were in accordance with agreements entered into with communities who are satisfied with the changes. On the other hand, we are faced with the reality presented by local organizations and affected communities. It speaks of a region mired in extreme poverty, with serious environmental problems arising from mining, and a context of systematic violation of the community rights and huge dissatisfaction among the leaders of those communities which have been resettled.

The situation in La Guajira is clearly unsustainable when considered in light of the testimonies that have been gathered and the reality outlined in State reports. As noted earlier, La Guajira is one of the poorest regions in Colombia. There is a serious problem around the lack of access to drinking water and food, which has resulted in the deaths of over 2,000 children in the past six years,¹⁷ and the environmental impacts arising from mining activities continue to worsen.

There is a major disconnect between the actions of the company and international standards when it comes to the rights of the Wayuu people. The infamous “implementation gap”, which was referred to by the first Special Rapporteur on the rights of indigenous

peoples,¹⁸ is glaringly evident in La Guajira. Unfortunately, the fundamental rights of indigenous peoples, which are recognized by Colombia, are not respected. In this regard, it is very striking that the company does not include any reference in its human rights policy to international standards on the rights of indigenous peoples, especially ILO Convention 169 or the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP). This is particularly noteworthy given that its operations are entirely located in indigenous territory, that of the Wayuu people. It is said that actions speak louder than words, and this silence is certainly significant.

The UN Guiding Principles are abundantly explicit in this regard:

Principle 11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Principle 13. The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts..

The undeniable reality in La Guajira is that Cerrejón mining has contributed to violations of the human rights of indigenous peoples and Afro-descendant communities. The company has not avoided contributing to, or causing, negative impacts on the rights of these communities as a result of its activities, nor has it been particularly worried about preventing or mitigating them. Of particular concern are the negative impacts on these communities' land rights, environmental rights, cultural rights and their rights to consultation and participation, as described above.

3.4.2. *Due diligence and remediation*

The conduct of due diligence constitutes one of the fundamental pillars of the UN Guiding Principles. A component of due diligence, as it is laid out in the Guiding Principles, is the obligation of companies to remedy any negative impacts on human rights of local communities that are caused by their activities. The Guiding Principles are very clear with regard to this in Principles 17, 22 and 23, which describe the conditions which must be met, and the obligations and steps which companies should take in order to comply with the requirement.

Principle 17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;(b) Will vary in complexity with the size of the business enterprise, the risk of severe human



“Respect my territory”. Photo Fuerza de Mujeres Wayuu,
www.notiwayuu.blogspot.com

rights impacts, and the nature and context of its operations;(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.

Principle 22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Principle 23. In all contexts, business enterprises should:(a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;(b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;(c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

The lack of adherence with these principles in La Guajira is the basis for affirming that there has been no due diligence in the context of Cerrejón’s actions. Similarly no remedial measures have been taken to address the impacts which Cerrejón’s activities have caused. Not even the resettlement cases can be considered as examples of adequate remediation, as the affected communities are not very satisfied with the results. In numerous cases, the communities were forced or coerced into accepting resettlement and their living conditions in many of the resettlement areas are far worse than they were prior to resettlement. It is also important to clarify that remediation goes beyond resettlement, and in particular resettlement which results in poorer living conditions than a people previously had, giving rise to dependency as a result of having to live in areas with no access to potable water.

The case of the new cemetery of Barrancas is an example of the absence of remedial policies and the failure of the company to live up to its commitments. In 2004, representatives of communities of the now disappeared settlements of El Descanso, Zarahita and Palmarito, entered into agreements with the operator of Cerrejón. Under these agreements displaced communities gave up the lands in which their cemeteries were located while the company undertook to provide them with a new cemetery in the town of Barrancas. The cemetery was built, but instead of turning it over to the displaced communities the company donated it to the Diocese of Riohacha. Seven years later, the company has yet to comply with the agreements as the cemetery has not been handed over to the communities and the work is unfinished. Despite the attempts of communities to resolve the issue, all they have received are insults, slurs and threats from the staff of the company in charge of resettlement.

The company must assume responsibility for the negative impacts that communities have experienced since its installation in their territories and must comply with its commitment to the UN Guiding Principles. Consequently, it should explain how it will fulfil its due diligence responsibilities and, above all, how it intends to comply with the remediation obligations it has assumed under these international commitments.

3.4.3. New actions for new times

Bodies such as the UN Working Group on Business and Human Rights insist that we have entered a new phase marked by the commitment of business to respect human rights. This constitutes a new era in which companies want to reduce the human rights implementation gap and take on environmental and social commitments together with their existing financial ones.

Cerrejón is actively participating in international fora promoting this new era and claims to be committed to human rights. It is time to move from words to deeds and to demonstrate these commitments with concrete actions which help to mitigate the negative impacts which it has generated and to improve relations with the directly and indirectly affected local communities.

There are a number of actions that should be urgently implemented in order to meet the challenge of complying with international standards and the UN Guiding Principles:

- a) The company should publicly acknowledge the negative impacts that have occurred during the three decades that it has been operating in La Guajira. Also, within the framework of the Guiding Principles, it should commit to reaching agreements with affected communities in order to compensate them for these negative impacts and establish measures to mitigate potential future impacts.
- b) It should establish and implement a protocol for dialogue, consultation and participation with all of affected communities for the decision-making in relation to, and implementation of, all activities affecting them. This protocol should be consistent with international standards established under ILO Convention 169, the UNDRIP, the jurisprudence of the Inter-American human rights system and

the recommendations of the UN human rights bodies addressing the rights of indigenous peoples. This protocol would be agreed in advance with indigenous and afro-descendant communities' authorities and establish specific procedures addressing each situation. The protocol should involve the State and should be developed in conjunction with indigenous organizations in accordance with the principles of full and effective participation and free prior and informed consent.

c) The company should develop an urgent action plan in order to comply with the due diligence requirement established under the UN Guiding Principles. At a minimum this action plan should include the following:

i. A review and update of its human rights policy including the incorporation of internationally recognized standards on the rights of indigenous peoples.

ii. Review and update the human rights impact assessments which were conducted in 2010. It is recommended that this new assessment be adapted to the Guiding Principles and implemented, or contracted together with, the affected indigenous communities. This new assessment should be made public through all available means as soon as it has been completed.

d) The company should develop a remedial plan for the negative impacts it caused during the decades in which it has been operating in La Guajira. This remedial plan should address among other issues: individual and/or collective compensation, social investment programs as defined by indigenous authorities, full implementation of resettlement commitments and the establishment of decent living conditions in resettled communities.

e) Similarly, the company should establish an impact mitigation plan. This mitigation plan should be developed in conjunction with affected communities and their authorities. It should establish a permanent monitoring system with the participation of indigenous authorities.

¹ Cerrejón, Human Rights Policy http://www.cerrejon.com/site/Portals/1/Documents/pdf/policies/Cerrejon_Human_Rights_Policy.pdf.

² <http://notiwayuu.blogspot.com.es/>.

³ Dane (2007) "La población étnica y el Censo General 2005"; Colombia: una nación multicultural. Su diversidad étnica".

⁴ Observatorio del Programa Presidencial de derechos humanos y DIH, Diagnostico de la situación del pueblo indígena Wayuu, http://www.derechoshumanos.gov.co/Observatorio/Documents/2010/DiagnosticoIndigenas/Diagnostico_WAY%C3%9AU.pdf.

⁵ <http://notiwayuu.blogspot.com.es/>.

⁶ <http://notiwayuu.blogspot.com.es/>.

⁷ <http://pueblowayuu.blogspot.com.ar/>.

⁸ <http://www.cerrejon.com/site/nuestra-empresa/historia.aspx>.

⁹ Benson, Allison, La Guajira y el Cerrejón: Una historia de contrastes, *Revista económica Supuestos*, February 2011. <http://revistasupuestos.uniandes.edu.co/?p=1517>.

¹⁰ <http://www.elespectador.com/noticias/medio-ambiente/el-pueblo-wayuu-el-carbon-desterro-articulo-477081>, last accessed 18 October 2014.

¹¹ Romero Epiayu, Jazmín Organización Fuerza de Mujeres Wayuu-CODEPAZ. Foro de Derechos Humanos. 1 February 2013. Riohacha, La Guajira – Colombia.

¹² See <http://www.unicef.com.co/publicacion/una-mirada-a-la-realidad-de-los-ninos-y-las-ninas-wayuu-y-wiwa-en-la-guajira-hacia-una-nueva-oportunidad/>.

¹³ Romero Epiayu, Jazmín Organización Fuerza de Mujeres Wayuu-CODEPAZ. Foro de Derechos Humanos. 1 February 2013. Riohacha, La Guajira – Colombia.

¹⁴ Garay Salamanca, Luis Jorge. Fundamentos para Superar el Modelo Extractivista Varias Regiones del Territorio Nacional. Contraloría general de la Republica. May 2013. P. 52- 53.

¹⁵ Information obtained by the Fuerza de Mujeres Wayuu as a result of their research and monitoring of the impacts of mining in the region.

¹⁶ Cerrejón Human Rights Policy, *supra*.

¹⁷ See <http://www.unicef.com.co/publicacion/una-mirada-a-la-realidad-de-los-ninos-y-las-ninas-wayuu-y-wiwa-en-la-guajira-hacia-una-nueva-oportunidad/>.

¹⁸ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Mr. Rodolfo Stavenhagen (2006) UN Doc E/CN.4/2006/78.

Chapter 4 - Oil Exploitation in the Peruvian Amazon, Violations of Human Rights and Access to Remedy: The Case of the Amazonian Indigenous Peoples of the Pastaza, Tigre, Corrientes and Marañón Rivers

Delphine Raynal ⁱ

EQUIDAD



1. Background to the research

1.1. Focus of the research

This chapter addresses the difficulties faced by affected communities in seeking access to remedy for violations of indigenous peoples' human rights caused by oil exploitation activities carried out in oil blocks 1AB and 8 in the Peruvian Amazon. These blocks have been in operation for over 40 years and are currently operated by the transnational company Pluspetrol. In particular it focuses on the human rights impacts of the serious pollution of the Pastaza, Tigre, Corrientes and Marañón River watersheds, in the Loreto department. The situation is so serious that in 2013 an environmental state of emergency was declared in the area and in April 2014 a health emergency was declared.

The chapter aims to provide an overview of the situation in these oil blocks, describe the human rights violations that have occurred, and explain the extent to which the corresponding obligation to provide redress has been fulfilled. The objective is to contribute to the process of implementing the UN Framework and Guiding Principles addressing human rights and transnational corporations and other business enterprises and the associated request of the UN Human Rights Council (HRC) to the UN Working Group on Business and Human rights to include an agenda item at the annual UN Forum on Business and Human Rights on theme of “the issue of access to remedy, judicial and non-judicial, for victims of business-related human rights abuses, in order to achieve more effective access to judicial remedies.”¹

ⁱ The original was written in Spanish and will be available at www.equidad.pe and www.almaciga.org. It was translated by Cathal Doyle who apologizes for any inaccuracies which may have been introduced as a result. The original text is significantly longer and includes greater detail on the national context, the situation in the four watersheds, as well as the legal framework and jurisprudence related to each of the rights affected by Pluspetrol's operations.

1.2. Authors, research team and participants

The research was supported by Almaciga, a Spanish non-profit non-governmental organization (NGO), established in 1996 to support indigenous peoples' own political, cultural, social and economic processes and the recognition, exercise and effective enforcement of their rights.² Almaciga has a long history of supporting indigenous peoples in a range of countries in their development processes and in asserting their rights.

The chapter was written by a team from Peru EQUIDAD's Programme on Public Policies and the Rights of Indigenous Peoples. The team consisted of Delphine Raynal, who acted as the lead researcher, with the support of Pedro García Hierro, Yaizha Campanario Baqué and Javier Mujica Petit. EQUIDAD is a Peruvian non-profit NGO that seeks to promote the creation of a social and institutional environment which facilitates the full and effective realization of all human rights by advocating for public policies which are premised on a human rights approach.³ EQUIDAD staff have extensive experience working with indigenous peoples in the Peruvian Amazon and as a result have witnessed violations of human rights which can arise in contexts of exploration and exploitation of natural resources. The chapter was written in Spanish and forms part of a longer report available on the Peru EQUIDAD website.

The research has benefited from the valuable contributions of the Platform of United Indigenous Peoples of the Amazon in Defence of their Territories (Pueblos Indígenas Amazónicos Unidos en Defensa de sus Territorios - PUINAMUDT). We especially thank Wendy Pineda Ortiz, former technical coordinator of PUINAMUDT and environmental adviser, for the information provided. We also thank Juan Carlos Ruiz Molleda, lawyer for the NGO Legal Defence Institute (Instituto de Defensa Legal - IDL) which supports the affected communities.

1.3. Research and data collection methodology

The study was drafted based on interviews with Wendy Pineda and exchanges with Juan Carlos Ruiz Molleda. Additional sources included research produced by PUINAMUDT and published on their internet portal; information available on the internet site of Pluspetrol; and information from the official internet sites of entities including: the Ministry of Environment (MINAM); Ministry of Energy and Mines (MINEM); Congress of the Republic; Perupetro,⁴ Ombudsman Office (Defensoría del Pueblo); and relevant international organizations such as the UN, International Labour Organization (ILO) and the Inter-American Commission and Court of Human Rights (IACHR and IACtHR respectively).

1.4. Case overview

Oil exploration in blocks 1AB and 8, which are located in the watersheds of the Pastaza, Tigre, Corrientes and Marañón Rivers (direct and indirect tributaries of the Amazon River) in the Department of Loreto has been on-going for more than 40 years. Currently both blocks are operated by the transnational company Pluspetrol, which is of Argentinian origin and is headquartered in the Netherlands.

The pollution generated has extremely worryingly effects on the over 100 indigenous communities living in the area. The contamination results in the violation of their right to a healthy and sustainable environment, which in turn has an impact on their rights to water, food, health, life and physical and mental integrity, and their right to adequate housing. Furthermore, the entry of companies into their territories was a violation of their territorial rights and their right to participation, citizen's rights the protection of which is strengthened in the case of indigenous peoples. As a result, their right to freely determine their development priorities and their right to prior consultation, which are protected under ILO Convention 169, were also violated. Violations of the aforementioned rights are also associated with violations of their cultural rights, as the damage to their territory, with which they maintain a special spiritual relationship based on its sacred and religious significance, affects their rights to maintain their traditional practices and customs. Finally, these rights violations have been accompanied by violations of the communities' rights to freedom of expression and peaceful demonstration. There have also been irregularities in terms of compliance with labour laws and associated violations of labour rights.

Both the Peruvian State and Pluspetrol are responsible for these rights violations, whether by their actions or omissions. The affected indigenous peoples have protested on numerous occasions and since the 1980s several reports have documented and publically denounced the pollution. However, until recently, the responses of the State and the company have been very poor. Despite the availability of a range of remedies to victims of fundamental rights violations, access to these remedies has been extremely limited in Peru. This is partly due to difficulties in accessing the required information, together with the existence of barriers to effective and adequate access to these mechanisms, and the limited will of the accountability mechanisms to address claims that are made. Consequently, while several criminal actions were filed, to date communities have been unable to obtain redress in any of the cases they have initiated. There are no records of any processes under constitutional, civil, commercial or administrative law. Environmental instruments are underdeveloped and are not complied with, and the State's ability to monitor and sanction is limited. Even where it does exercise this power, in most cases the company does not comply with the observations and the sanctions imposed by the competent environmental authorities. Instead systematically adopts a legalistic approach in order to challenge them.

As a result of the constant mobilizations of local communities, in 2012, for the first time ever, the Peruvian environmental authorities conducted an environmental analysis and the gravity of the situation was reflected in the declaration of environmental and health emergencies. Although these declarations of emergency, and the current ongoing dialogue process, are steps towards a potential remedy of the violations caused, the declarations have a number of flaws and compliance with them is insufficient and is only driven by the constant mobilization of affected communities. Furthermore, the reluctance of Pluspetrol to participate in the dialogue process constitutes an obstacle to its progress and to the possibility of reaching agreements in relation to remedies.

To date there has been minimal action with regard to remedies for the violations of these rights, and all of those actions have been time-bound and of a short-term nature, such as for example the distribution of water. There have been very few sanctions against the company and its management and, except for some limited financial compensation to certain communities, the actions taken by the State and the company to address the serious situation are sporadic and pejoratively disproportionate to damage inflicted. They cannot be regarded as remedial measures and do not include preventive measures or guarantees of non-repetition. The uncertainty over consultations in relation to the renewal of the license for block 1AB (now referred to as block 192) is of particular concern.

In some cases what we see is the re-victimization of communities as a result of a permissive or even complacent attitude of the State towards the company. Reforms have been proposed or introduced to existing legislation and public policies protecting local populations which strengthen the impunity of companies, and in general benefit extractive industries to the detriment of the people. In the Pluspetrol case, it is the responsibility of the Peruvian State, Pluspetrol and the countries where it is headquartered and registered - Argentina and the Netherlands - to ensure that the victims have access to justice and to remedial mechanisms and to redress, and to guarantee that there is no repetition of violations of their rights. This chapter concludes with series of recommendations in this regard.

2. General context

Since the 1990s, the Peruvian State has promoted a development model based on “economic freedom, private investment and free competition”,⁵ and in particular on the exploitation of natural resources. Mining and hydrocarbons contribute significantly to the Peruvian economy. In the first half of 2012, the extractive sector generated 75% of total Peruvian exports and represented 5% of its GDP.⁶ The country is a major producer of oil and gas

By early 2014, at least 38.63% of Peru’s national territory (128,531 hectares) was covered by mining, gas and oil exploration and exploitation concessions.⁷ As of 31 January 2014, Perupetro reported 50 oil and gas contracts in the exploration phase (representing an area of 27,053,112 hectares) and 24 contracts in the exploitation phase (representing an area of 3,324,916 hectares)⁸ - a total of 30,378,028 hectares, which represents 23.63% of the Peruvian territory.

The presence of mining or hydrocarbon companies is frequently accompanied by social conflicts and violations of human rights. One of the most emblematic cases was the conflict which occurred in the province of Bagua in the context of indigenous defence of their territories.⁹ In April 2014, the Ombudsman recorded 161 active and 51 latent conflicts, a total of 212 conflicts, of which 64.2% (136 cases) are socio-environmental conflicts.¹⁰

The indigenous peoples of the Amazon are particularly affected by the presence of extractive companies in their territories. Indeed, by 31 January, 2014, nearly 60% of the total area in Peru under concessions for exploration and exploitation of hydrocarbons was located in the Amazon region.¹¹

As was highlighted by the renowned anthropologist Alberto Chirif “often, not only has the Peruvian State not complied with the provisions of the Convention [169] and the Declaration [of the UN on the rights of indigenous peoples] it has also violated them”¹² Among the many issues the author mentions are deficiencies in the titling of territories,¹³ the lack of consultation prior to the approval of concessions that overlap or impact on indigenous peoples’ lands and resources or prior to the adoption of legislative measures affecting them, the insufficient and inadequate provision of education to indigenous peoples, not to mention the continued use of racist language by senior government officials, journalists and other public actors.

The pollution of the Corrientes, Pastaza, Tigre and Marañón River watersheds in the Department of Loreto is an emblematic case in so far as it demonstrates the very serious situation in terms of human rights impacts that can eventually arise from the exploitation and exploration of natural resources, in particular due to the extreme pollution and its impacts on a wide range of human rights. It also demonstrates the effect of a lack of State and corporate responses to years of environmental degradation and complaints by affected communities. Finally, the case is particularly notable for the degree of coordination between the organizations representing the affected peoples in the four affected watersheds, their mobilization, outreach and their complaints to the State and to international mechanisms, which, while there is still a way to go, nevertheless constitute important achievements.

3. Relevant legal framework

3.1. The rights of citizens and indigenous peoples in Peru

Peru has ratified the main international and regional human rights instruments, including:

- *The International Covenant on Civil and Political Rights (ICCPR)*
- *The International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- *International Labour Organisation (ILO) Convention 169 concerning Indigenous and Tribal Peoples*
- *The American Convention on Human Rights (ACHR)*
- *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador”.*

Argentina and the Netherlands, the countries in which Pluspetrol has its headquarters, are also parties to these instruments - except for the Inter-American system to which the Netherlands is not party. In addition to these instruments there is also the *UN Declaration*

on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly on 13 September 2007, with the support of Peru, Argentina and the Netherlands.

Article 55 of the Peruvian Constitution affirms that international treaties are part of the national legislation. Its fourth provision states that: “The rules governing the rights and liberties that the Constitution recognizes shall be interpreted in accordance with the Universal Declaration of Human Rights and international treaties and agreements in relation to this subject which have been ratified by Peru”. On this basis, the Constitutional Court held that human rights treaties, including ILO Convention 169, are sources of law and form part of the constitutional block.¹⁴

The Peruvian Constitution and legislation establish guarantees and mechanisms for the protection of human rights. These are fully applicable in the case of rights violations by companies. The Constitutional Court, for its part, has issued several rulings protecting human rights against the activities of such companies.¹⁵ However, there are profound shortcomings and limitations in the national legislation, such as in relation to the right to free, prior and informed consultation with indigenous peoples. Despite having enacted legislation to give effect to this right, the first country in Latin America to do so, there are elements of the law and its implementing rules which are potentially at odds with international standards.

3.2. The obligations that should govern the actions of companies

The obligations that should govern the actions of companies are set out in the UN Guiding Principles on Business and Human Rights, adopted by consensus by the UN Human Rights Council on the 16 June 2011. The Guiding Principles consist of three pillars:

Pillar 1: The State duty to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

Pillar 2: The corporate responsibility to respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

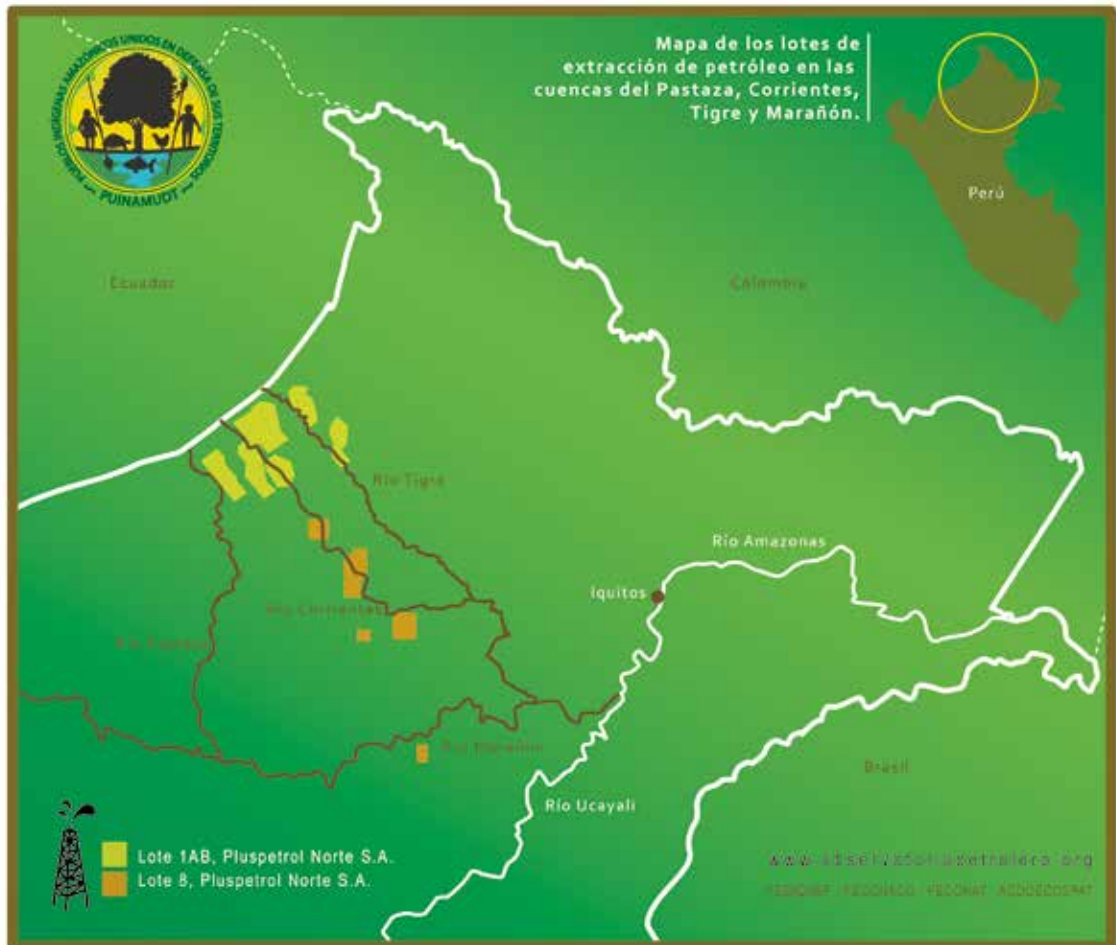
Pillar 3: Access to remedy, which requires both States and corporations to ensure that victims of corporate related human rights abuses have access to effective judicial and non-judicial redress mechanisms.

4. Presentation of the case study

4.1. Context

As noted above, this case study deals with the impacts which have arisen in the oil blocks 1AB and 8, currently operated by the Argentinean multinational Pluspetrol and located in traditional territories of different indigenous peoples and communities.

4.1.1. Geographic location



Map showing oil blocks 1AB and 8

Both blocks are located in the department of Loreto in the Peruvian Amazon. The initial surface area of block 1AB was 497,027.330 hectares. On 12 October 2011 it was reduced to 287,050.906 hectares, following the removal of 209,976.424 hectares. However, in August 2012, for the purpose of bidding, the block was again amended to reintegrate the area around it. The amended block is larger than the original area and covers 512,444.016 hectares. The block number was also changed, becoming block 192.¹⁶

Block 1AB “is of paramount importance to the State, as a result of the knowledge of existing oil reserves, and because it is strategically located in an oil corridor where it is planned to integrate various blocks and hydrocarbon activities”.¹⁷ The Corrientes, Tigre and Pastaza Rivers traverse block 1AB/192.¹⁸

Block 8, which has an approximate area of 182,348 hectares, is primarily located along the Corrientes River watershed. It also covers a part of the Tigre and Marañón River watersheds.¹⁹ In addition, block 8 overlaps the Pacaya Samiria National Reserve, one of the most important wetlands in the world. The Marañón, Tigre, Pastaza and Corrientes Rivers are tributaries of the Amazon River.

4.1.2. The concession holders - Pluspetrol and its operations in Peru

Occidental Petroleum Corporation (OXY) was awarded block 1A in 1971 and 1B in 1978. These were subsequently unified as block 1AB. OXY operated the block until 2000, initially sharing it with Petroperu.²⁰ Pluspetrol acquired the concession for block 1AB for a period of 15 years, in May 2000,²¹ and it has applied for renewal of the concession.

Extractive operations in block 8 were initiated by the state-owned company Petroperu in the 1970s. In 1996, Pluspetrol started to operate the block, under a concession which is valid until 2024.²² Both blocks are currently operated by Pluspetrol.²³ The company has a 100% shareholding in block 1AB and 60% in block 8, which it operates in conjunction with the Peruvian branches of its three partners: Korea National Oil Corporation, Daewoo International Corporation and SK Energy.

Pluspetrol Norte SA has its headquarters in Peru for exploration and exploitation of hydrocarbons in this country. It forms part of Pluspetrol, an Argentinean company founded in 1976.²⁴ Its main shareholder is Pluspetrol Resources Corporation (PRC) which is based in the Cayman Islands.²⁵ It belongs to Pluspetrol Group, whose parent company is Pluspetrol Resources Corporation NV and is based in the Netherlands. The parent company is controlled by a financial corporation called Centennial Partners LLC which holds 85% of the total shares and has investments in the United States.²⁶

Pluspetrol has a presence in Latin America and Africa. According to the company, Pluspetrol is “among the private exploration and production companies with the greater growth in recent decades” and is “the largest producer of oil and gas in Peru”.²⁷ Pluspetrol states that, in general, it “has developed its operations in the certainty that it is possible to operate in highly complex environments using best proven technologies, and to do so while respecting the environment, local culture and the archaeological heritage in each operation.”²⁸

In regard to its activities in Peru, the company states that since it commenced operations in the region in 1996, it has typically operated mature fields in remote areas in harmony with the environment and claims that Pluspetrol Norte “assumes the huge technical and professional challenges which are involved in its operations, overcoming the logistical difficulties and developing guidelines for coexistence and development with its social and environmental context.”²⁹ The company also claims to have made commitments in health and safety.

According to official figures, as of April 2014 oil production in these two blocks reached over 21,000 barrels a day, worth approximately two million dollars a day.³⁰

4.1.3. Affected indigenous communities

According to the 2007 census, Loreto is the department with the highest number of indigenous inhabitants (numbering 105,900) containing “about a third (31.8%) of the total indigenous population” of Peru.³¹

Blocks 1AB and 8 and the activities that take place there affect the indigenous Quechua peoples of the river Pastaza, the Achuar, Quechua and Urarinas of the Corrientes River, the Kichwas of the Tigre River, and the Kukamas Kukamirias of the Marañón River and their territories.

In total, the affected area is home to more than 100 communities and a population of about 20,000 people.³² None of these peoples or their communities was ever consulted in relation to the granting of the concessions, nor were they provided with any prior information as to the potential impacts that these activities could generate.

The communities organized themselves into several federations: the Federation of Native Communities of Corrientes (Federación de Comunidades Nativas del Corrientes - FECONACO) in the Corrientes River watershed; the Federation of Native Communities of Alto Tigre (Federación de Comunidades Nativas del Alto Tigre - FECONAT) in the Tigre River watershed; the Quechua Indigenous Federation of Pastaza (Federación Indígena Quechua del Pastaza - FEDIQUEP) in the Pastaza River watershed; the Association of the Samiria Indigenous Development and Conservation Association (Asociación Indígena de Desarrollo y Conservación del Samiria - AIDECOS), and the Cocama Association for the Development and Conservation of San Pablo de Tipishca (Asociación Cocama para el Desarrollo y Conservación de San Pablo de Tipishca - ACODECOSPAT) in the Marañón River watershed. These organizations participate in the Regional Organization of Indigenous Peoples of the East (Organización Regional de Pueblos Indígenas del Oriente - ORPIO) or in the Regional Coordination of Indigenous Peoples (Coordinadora Regional de los Pueblos Indígenas - CORPI), which are in turn part of the Interethnic Association for the Development of the Peruvian Rainforest (Asociación Interétnica de Desarrollo de la Selva Peruana - AIDSESEP). FECONACO, FECONAT, FEDIQUEP and ACODECOSPAT organized themselves into the Platform of United Indigenous Peoples of the Amazon in Defence of their Territories (Plataforma Pueblos Indígenas Amazónicos Unidos en Defensa de sus Territorios - PUINAMUDT) in order to “develop an agenda in defence of our territory and life in the Amazon in response to hydrocarbon extractive activities which for over 40 years have affected the rivers, mountains and communities.”³³ This unification of the federations of the four watersheds has created an important force which guides mobilizations and unifies the indigenous agenda.

Other associations and federations include the Association of Native Kukamas Kukamiria Communities (Asociación de Comunidades Nativas Kukamas Kukamiria - ACONAKKU) in the Marañón River watershed, the Federation of Native Communities of Bajo Tigre (Federación de Comunidades Nativas del Bajo Tigre - FECONABAT) in the Tigre River watershed, and the Association of Native Cocamas Communities (Asociación de Comunidades Nativas Cocamas - ACONACO) in the Corrientes River watershed.

4.2. Description of the situation

Oil exploration and exploitation have been conducted in the area for more than 40

years resulting in extremely severe environmental pollution. Even if it is conducted in a responsible manner, oil exploration and exploitation activities by definition inevitably give rise to negative impacts on the environment. They require performing seismic surveys and drilling which affect both the area in which they are performed and the surroundings due to strong vibrations which they cause. These vibrations in turn have an impact on the local fauna. In general, the activities are also accompanied by deforestation, particularly in the jungle areas, in order to allow access to the machines to the exploration and exploitation areas and the construction of platforms for operations and drilling and installation of the corresponding pipelines. Furthermore, helicopters landing pads are built in areas that are difficult to access, contributing to deforestation, with helicopters flying overhead causing animals to flee the area.³⁴

Oil extraction in turn requires the use of “enormous volumes of water”³⁵, with significant impacts on the environment. According to Pluspetrol, “this large volume of water is re-injected in accordance with efforts over recent years to adapt to the surrounding environment”.³⁶ However, investigations which have been carried out indicate otherwise,³⁷ and there have been complaints of direct discharges of production water into the river and streams.³⁸ These have contributed significantly to water pollution and, in general, to pollution of areas which the company’s activities influence.

Compounding this is the alarming level of pollution in the area, which in many cases is the result of the company’s negligence and infractions. Both official reports and complaints of communities and organizations assisting them have highlighted issues such as the poor condition of pipelines and the inadequacy of infrastructure and facilities.³⁹ This situation leads to the rusting and rupture of pipelines, which causes recurrent oil spills.



An oil lake in the Pacaya Samiria National Reserve, Block 8X, Marañón River basin. Photo: Cocama Conservation and Development Association (Asociación Cocama de Desarrollo y Conservación)

San San Pablo de Tipishca

An Analysis of the Health Situation (ASIS) of the Achuar people published in 2006 by the Epidemiology Directorate (DGE) of the Ministry of Health pointed to the opening of wells (during the exploration phase) which discharge “thousands of gallons of toxic waste” and which considerably pollute the soil.⁴⁰ A subsequent report claims that Pluspetrol continued to store toxic waste in ponds which were not waterproofed.⁴¹ Furthermore, on several occasions in its communication with the Peruvian authorities, Pluspetrol omitted information about pollution, or delayed informing the State in relation to it, thereby hindering the immediate mitigation of the impacts of the spill to the maximum extent possible. Several cases have also been confirmed in which the company mixed healthy soil with soil that was contaminated by oil or deforested areas in order to hide the spill. A prime example of this practice is deforestation and the disappearance of the Shanshocochoa⁴² lagoon which was of great spiritual value for the Kichua people of Pastaza. The planting of non-native plants to cover contaminated areas has also been pointed out.⁴³

Recent studies conducted by the various responsible State institutions found high levels of barium, chromium, mercury, lead, total petroleum hydrocarbons (TPH) and other contaminants in water and soil, as well as aluminium, manganese, arsenic, and water acidity.⁴⁴

4.3. The demands of the affected communities⁴⁵

Given this situation, the communities demand that, prior to initiating an announced consultation process for the concession of block 192 (current block 1AB) and prior to granting new concessions, the following should be complied with:⁴⁶

- a) the conduct of an environmental assessment and the remediation of environmental damage,
- b) clean-up and land titling,
- c) compensation for the use of their lands and damages caused by oil activity over the course of the last forty years,
- d) the conduct of prior consultation and participation processes in accordance with the form and conditions established under ILO Convention 169,
- e) recognition of community environmental monitoring systems,
- f) the participation of indigenous organizations in the development, evaluation and monitoring of environmental management instruments,
- g) transparency, damage assessment and sanctioning of those responsible for pollution.

5. Human rights violations generated in the context of the company's activities

In the area of influence of the petroleum activities in blocks 1AB and 8 there are more than 100 communities and villages which are mostly indigenous. These populations have been historically marginalized. The company's activities have consequently been

conducted in a context where there was previously limited government presence and long running exclusion of the communities from the State, translating into a denial of their basic human rights. However, the violations of human rights which are the focus of this chapter relate directly or indirectly to the activities of the company. Furthermore, while the organizations representing indigenous peoples in affected areas hold that Petroperu and OXY “acted as bad if not worse” than Pluspetrol,⁴⁷ this chapter will focus primarily on access to redress for those violations of human rights which arose during the operations of the current concession holder, Pluspetrol.

The situation in the areas impacted by mining activities in the blocks 1AB and 8, as described above, is reflective of a serious violation of the **right to a healthy environment** of the local communities which on a daily basis are faced with a highly contaminated environment. This in turn affects the enjoyment of several other fundamental rights of indigenous peoples living in the area.

The high degree of contamination of each of the watersheds and the lakes (*cochas*) seriously affects the communities’ **right to water**. Indeed, in the case of the communities of the four watersheds, water is particularly important because their daily lives revolve around the river: they use it for drinking, cooking, washing clothes, and also for personal hygiene and bathing. Their children often play in the river, and fishing is part of their subsistence and learning. Pollution of the river therefore affects the communities’ rights to food, health and life.

As discussed above, oil exploration and exploitation activities are accompanied by significant impacts that profoundly affect aquatic and terrestrial wildlife, which is the source of food for families in the region. The noise caused by the machinery and trucks which enter the area, transport activities (by land and river), perforations and overflights and landing of helicopters, cause animals to flee the area. In addition, water pollution is poisoning and killing many fish and animals. The communities explain that sometimes the animals they hunt smell of oil when they are being cooked.⁴⁸ Pollution has not only caused a radical reduction in the stock of fish and animals, but eating fish and animals caught in the area puts the health and life of community members at risk. This is the situation of the Kokama people whose territory predominantly consists of water. Their cultural identity is riparian and fishing based, and most of the protein in their diet comes from fish which they consume in quantities well above the average (making the effects of water pollution extremely serious). Their vulnerability in terms of impacts on their health and nutrition is particularly high given that they rely on traditional subsistence practices as the basis for their food supply rather than access to food markets

Water pollution also affects the communities’ enjoyment of their **right to food** in a number of other ways. In their cooking they are forced to use water which is saturated with metals and dangerous substances. Their agricultural production, which complements the local diet, also suffers, as pollution of soil and water means that crop yields are reduced and crops can be rendered inedible as a result of contamination.⁴⁹ By reducing the surface on which crops can be grown the soil contamination has led to the “disruption of settlement patterns (which are now increasingly concentrated)”.⁵⁰

The anthropologist A. Chirif highlights that the food and social security of children appears to be weaker in those communities where more people work with Pluspetrol. This he explains is due to “the rise of commercial activities that lead them to prioritize money over the food (...) and also because parents no longer engage in hunting and fishing activities”.⁵¹

This situation – pertaining to the consumption of, and regular cooking with, contaminated water, its use for hygienic and recreational purposes, ingesting contaminated crops, fish and animal produce, the drastic reduction in hunting and fishing stocks and reductions in healthy agricultural crops - has caused serious harm to **the right to health** of the communities in the areas influenced by Pluspetrol’s activities. Several studies have detected high levels of toxic metals in the blood of these people for over ten years.⁵² High incidences of infectious diseases (HIV, hepatitis B)⁵³ have also been recorded. So too have respiratory tract infections; the consequences of eating food contaminated by hydrocarbons “ranging from chronic inflammation and delayed weight gain, to cancer”;⁵⁴ haemorrhages, in particular in pregnant women; and malaria due to stagnant water. The mental health of the residents is also affected as a result of the drastic changes in their way of life. Their awareness of being forced to live in a situation which seriously affects their health and that of their families, and which they are unable to alter - as they have no choice but to rely on the river water and to consume the produce they grow, hunt or fish - is a powerful contributor to depression which has led to suicides. This reality has even been acknowledged by Commissions of the Peruvian House of Representatives.⁵⁵

As early as 2005, following his visit to Peru, the UN Special Rapporteur on the right to health raised his serious concerns about the pollution caused by extractive industries, and its health consequences, which “disproportionately affect vulnerable groups such as (...) indigenous peoples”.⁵⁶

One of the significant impacts of pollution is its effect on plants that are used for traditional medicine. This denies indigenous peoples of the four watersheds their right to continue their preventive care and healing practices and their right to their traditional medicines (art. 25 of ILO Convention 169). In addition, their traditional medicine is ineffective to address the new health problems which arise as a result of the pollution.⁵⁷

As noted by the Inter-American Commission on Human Rights (IACHR), the “environmental pollution and degradation pose a persistent threat” to the rights to life, security and physical integrity.⁵⁸ The profound impacts on the enjoyment of rights outlined above which arise from the extensive pollution of the four watersheds directly affect community members’ enjoyment of **the right to physical integrity and the right to life**. Moreover, cases have been reported where diseases caused by pollution have led to deaths.⁵⁹ Given the lack of State presence in the area, it is likely that appropriate medical care has never been provided following incidents which have resulted in deaths. Finally, the establishment of brothels during the time OXY was operating the concession contributed to the spread of sexually transmitted diseases which continue to result in violations of the right to life, liberty and personal security.⁶⁰

Violations of the rights to water, food and health of communities in the watersheds of the Corrientes, Pastaza, Tigre and Marañón Rivers are also closely associated with the denial of **the right to adequate housing**. Oil exploration and exploitation activities in the area have been responsible displacement of indigenous families. Displacement took place in block 1AB when exploration was initiated.⁶¹ Further displacement was caused by contamination and the reduced availability of land to grow crops as well as the encroachment of outsiders into the area. The expansion of block 1AB/192 would be accompanied by further displacement of communities. Such forced displacement constitutes a serious violation of the right to adequate housing.⁶²

The indigenous communities over whose territories Pluspetrol's concession extends were neither consulted nor involved in any way in decision-making concerning the issuance of oil concessions impacting on their territories. This constitutes a clear violation of their **territorial rights and right to participate**. There are also serious deficiencies in the recognition and titling of the territories of the indigenous communities living in the four watersheds. By July 2013, out of a total of 124 communities, 68 territories had yet to be titled and 56 were pending an extension of the areas under title.⁶³ The State has only recently started to partially accept environmental monitoring activities that are carried out by the communities.

In the case of indigenous peoples this protection is reinforced. The failure to conduct prior consultation with the communities living in the areas occupied by blocks 1AB and 8 constitutes a violation of their **right to free, prior and informed consultation** and their **right to self-determination**, including **the right to autonomously determine their own development priorities**. It is important to underline that the entry of the company into the indigenous peoples' territories involved the imposition of development models that are incompatible with their traditional practices, and have been accompanied in many cases by the dissemination of disparaging views on indigenous peoples' customs, discrediting their own forms of development in the eyes of the younger generations. This is contributing to a sense of alienation and a willingness to migrate, particularly among indigenous youth.

The impact of environmental pollution on traditional activities such as hunting, fishing and agriculture, and the progressive reduction of certain traditional practices undoubtedly affect the cultural rights and cultural heritage of the communities located in the Corriente, Pastaza, Tigre and Marañón River watersheds. Community members and their organizations have repeatedly stated that the pollution of rivers and lakes as well as the degradation of natural sites which are of cultural significance, including areas that are sacred to them, constitutes a violation of **their cultural and religious rights**.

There are numerous reports of pressure being placed on indigenous leaders who mobilize against oil exploration in the watersheds. For instance, the Kukama Kukamiria people have stressed that "no pressure should be put on us and all kinds of threats, such as those which some State officials wanted to use, should be avoided."⁶⁴ Records show that on several occasions (see section 7.2.1.1) community members from the various watersheds were arrested following protests which they held to denounce pollution

and demand respect for their rights. A particularly perverse form of criminalization of indigenous peoples' protest against company caused environmental damage is the attribution of oil spills to "vandalism" by the local population, placing the responsibility for these events on the communities themselves. All these practices serve to put pressure on the local populations and affect the **freedom of expression and right to peaceful assembly and demonstration** of the communities of the Corrientes, Pastaza, Tigre and Marañón River watersheds.

Finally, there is information which points to a lack of cooperation by the company and difficulties faced during inspections of the facility and working conditions there (see section 7.2.3.7). Additionally, communities complain that safety conditions in the workplace are inadequate, particularly for subcontractors which are mostly comprised of people from the communities. Contact with, and handling of, toxic substances - such as oil that can only be collected manually following oil spills - may have harmful effects on health of workers. These conditions constitute violations of **the right to decent work and labour rights**.

6. Responsibility for the human rights violations

The Peruvian State has the duty to ensure respect for the fundamental rights of the affected people. The licensing of the company without an adequate assessment of how its activities may affect the indigenous communities' rights to a healthy environment, health, life, food, adequate housing, and their land rights, cultural rights, self-determination and participation rights, constitutes a violation by the Peruvian State of its obligation to *respect*, those rights. Its failure to adopt appropriate measures to regulate the activity of the company, in accordance with the international and regional conventions, treaties and instruments to which it has voluntarily acceded or which it has supported, is in addition a violation of its obligations to *protect* the indigenous population against the impacts of the company's activities.⁶⁵ The Peruvian government has "the obligation to prevent and reduce the population's exposure to harmful substances", even when this is a result of third party activity.⁶⁶

The Peruvian State is responsible for investigating complaints and, where necessary, taking action to remedy the situation, "deploy[ing] every effort to protect the life and integrity of the members of these communities".⁶⁷ It should ensure that there is effective and adequate access to remedy for victims.

For its part, Pluspetrol has the duty to *respect* the fundamental rights of the affected indigenous peoples and to *remedy* any negative impacts generated by, or within the context of, its activities. Despite this, Pluspetrol has ignored its responsibility to respect the rights to a healthy environment, food, health, life and physical and mental integrity, water, adequate housing as well as cultural and territorial rights, and the rights to self-determination and participation of the peoples living within its area of influence. Pluspetrol has failed to comply with its duty to respect, due to both the impact of its activities on the rights mentioned and the lack of remedy for those impacts, despite the company's well-publicized corporate social responsibility policy.

7. Access to justice and remedy: an inadequate response

The affected indigenous peoples and their representative organizations have made numerous public complaints about the pollution and its impact on the enjoyment of their fundamental rights. There have also been reports of multiple public protests and since the 1980s reports have been produced to systematically document and publicly denounce the pollution.⁶⁸ However, for many years the State and the company denied the existence of the alleged pollution. Until recently, the State's response has been practically non-existent, as has been that of the company.

7.1. Existing mechanisms

7.1.1. National mechanisms in Peru

The Constitution of Peru provides for several mechanisms or guarantees for the protection of constitutional rights.⁶⁹ Among these are the following (article 200): Habeas corpus, *amparo* (rapid protection from the Courts) in particular environmental protection, class action and enforcement action.

With regard to criminal law, while this does not include direct criminal liability for legal persons, it does provide an ancillary criminal responsibility when a company has been used to commit a crime.⁷⁰ Penalties extend to dissolution and liquidation of companies (article 105 of the Penal Code PC). "Those who act on behalf of legal persons and the legal persons involved in a cover-up and / or facilitation of an offense may be responsible for any of the offenses specified under the Penal Code."⁷¹ The PC of Peru recognizes, among other things, criminal liability for environmental crimes (article 304-314 PC).

The Peruvian Civil Code (CC) provides for the punishment of persons who are responsible for an illegal act (article 1321 - Contractual relations, 1969 and 1970 - extra contractual relations of the CC) and requires remedy for the damage caused (article 1985).⁷²

Peruvian law establishes the overall framework for the design and implementation of the policies, rules and sanctions which are necessary to ensure the effective exercise of rights and compliance with environmental obligations.⁷³ It provides for the imposition of financial penalties on companies that violate the rules, and designates responsibility to the Agency for Environmental Assessment and Control (OEFA) to take corrective and preventive measures to mitigate and reduce environmental risks. Overall responsibility for ensuring environmental protection in Peru lies with DIGESA (an organ of the Ministry of Health), MINAM, the OEFA, the Supervisory Agency for Investment in Energy and Mines (OSINERGMIN) and the various environmental units of the different ministries. However, due to a conflict of jurisdiction between OSINERGMIN and OEFA in relation to determining liabilities "for some time [between 2011 and 2013], no such work was carried by either of the two institutions."⁷⁴ Importantly, Law No. 29134 of 2007, an act which regulates environmental liabilities in the hydrocarbon sector, envisages that "companies which have activities in the hydrocarbon subsector will take responsibility

for environmental liabilities they have generated, as well as for those generated by third parties for which they assumed responsibility in the respective contracts of transfer or assignment, or in any other way” (article 4).

The Law on Safety and Health at Work (Law No. 29783, 20 August, 2011, and its Regulations, Supreme Decree No. 005-2012-TR) imposes obligations on employers to guarantee the safety and health of their workers.

The Ombudsman “attends to complaints, inquiries, consultations and requests of citizens anywhere in the country, who, for whatever reason, have experienced violations of their rights.”⁷⁵ The office of the Ombudsman has the authority to, among other things, investigate and produce reports. In this framework the office constantly monitors social conflicts and assists dialogue processes.

7.1.2. International and regional mechanisms

At the level of the UN, Peru, the Netherlands and Argentina are party to the ICCPR and the ICESCR. There is therefore the possibility that their respective committees, the Human Rights Committee and the Committee on Economic Social and Cultural Rights, may refer to the situation in their general comments to the State Party, and/or receive individual complaints in relation to it.⁷⁶ Also, the various special mechanisms (UN Special Rapporteurs and Working Groups), are also competent to receive and request information from the Peruvian State, as well as from Argentina and the Netherlands, in relation to this situation. As will be discussed below, steps have been taken by the UN Special Rapporteur on the rights of indigenous peoples and the UN Special Rapporteur for human rights and hazardous substances to engage with the government of Peru in relation to the planned licencing of block 1AB/192.

As Peru is party to the American Convention on Human Rights it is possible for victims to access the Inter-American Human Rights System (both its Commission and Court), either to request monitoring of a situation (hearings before the IACHR) or to submit petitions linked to the violation of the rights protected under the Convention or its protocols, including the San Salvador Protocol, as well as other instruments of the Inter-American human rights system.

Peru, the Netherlands and Argentina are all part of the ILO and have ratified ILO Convention 169. There is therefore an opportunity to seek remedy (comments on the State reports, complaints and reclamations)⁷⁷ and oversight of the implementation of the Convention from the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) and its Committee on the Application of Standards (CAS).

7.1.3. Mechanisms in relation to business and human rights

The Netherlands, host country of the parent company of the Pluspetrol Group, is a member of the Organization for Economic Cooperation and Development (OECD). Meanwhile, both Peru and Argentina have subscribed to the OECD Declaration on International Investment and Multinational Enterprises (in 2008 and 1997 respectively), which includes the OECD Guidelines for Multinational Enterprises. Therefore these guidelines

are applicable in all three countries in relation to the case of the four watersheds.⁷⁸ In case of violation of the guidelines, it is therefore possible to bring complaints before the National Contact Points (NCPs) in each of these countries.

The Peruvian State participates in the Extractive Industries Transparency Initiative (EITI).⁷⁹ However, neither the Netherlands nor Argentina or indeed Pluspetrol are party to this initiative. Likewise, Pluspetrol is not a member of the UN Global Compact, a set of voluntary commitments by corporations to human rights, labour, environmental and anti-corruption standards.⁸⁰

In its community relations plan, a component of its social responsibility programme,⁸¹ Pluspetrol Norte proclaimed its objective of “promoting harmonious and balanced relations with [indigenous communities] and stakeholders in the surrounding areas”.⁸² The company presented a communication and consultation programme, which includes “receiving and processing of demands, complaints and requests of native communities.”⁸³ On the ground, Pluspetrol has people - community liaison officers - who are responsible for communication with local communities who could channel complaints and demands. However, they lack any decision making power, and so they are limited to merely implementing the agreements signed between the company and the communities.

7.2. Difficulty to access to existing mechanisms in practice

The biggest challenge remains the implementation of these instruments and of legislation in general. As pointed out by the International Commission of Jurists regarding the situation in Peru, “In practice it is in the operation of the legal system and justice where the most important limitations are revealed. There are few judges and courts, most are subject to influence and political pressure because they are temporary, budgets remains small and concentrated in certain sectors, while significant levels of corruption continue.”⁸⁴

There is also a large asymmetry between the actors involved, particularly in the case of indigenous peoples and businesses, especially in terms of resources for technical and legal advice, legal representation and access to State entities. Another important issue is the lack of access to information in an appropriate language in relation to available mechanisms, the potential for their use or the prospects of achieving a concrete outcome. This is particularly the case in communities and rural areas that are far from the centres of power and decision making.

On the other hand, as mentioned earlier, the Peruvian government regards extractive industry activities as being one of the pillars of the economy and therefore ensures that these activities are prioritized, with preference accorded to companies’ actions and a submissive approach adopted towards their wishes.⁸⁵ At the same time, the absence of the Peruvian State and its failure to meet the needs of the people and communities in concession areas is abundantly evident. This is particularly true in the case of indigenous peoples of the Amazon owning, among other reasons, to the difficulties in accessing these communities. For their part the companies have directly or indirectly benefited from this situation.

This situation generates mistrust and limits potential access to various forms of human rights redress mechanisms as it discourages communities from pursuing redress for violations of their rights as part of their rights assertion strategies. This reality is evident in the case of Amazonian indigenous peoples in the Department of Loreto, living in the watersheds of the Pastaza, Tigre, Corrientes and Marañón Rivers, who are severely affected by over 40 years of oil exploitation in their territories.

7.2.1. Responses by the different mechanisms

7.2.1.1. Legal proceedings

There are no known legal processes or lawsuits at the constitutional, civil or commercial levels to address the violations of human rights in the watersheds. There have been some criminal prosecutions,⁸⁶ in particular after heavy oil spills.

Case 1 and 2

On November 6, 2012, ACODECOSPAT filed a criminal complaint with the Nauta Environmental Prosecutor against the legal representatives of Pluspetrol for pollution in the area of the Yanayacu reservoir in block 8 which overlaps the Pacaya Samiria National Reserve. The Nauta Environmental Prosecutor visited the area in December 2012. Meanwhile, on 15 January 2013, following a 2012 congressional report, the Nauta Prosecutor, acting on its own initiative, opened a preliminary investigation on general environmental issues within the four watersheds.⁸⁷ In July 2013, these two processes were in preliminary investigation and research stages.

Case 3

According to PUINAMUDT, in total 14 criminal complaints were filed in 2010 by ACODECOSPAT, congressmen, and the President of the Regional Government. This followed the spilling of approximately 500 barrels of oil as a result of an accident on 19 June 2010 in the district of Urarinas involving a barge belonging to a company which had been contracted by Pluspetrol Norte SA. A criminal complaint was brought against Pluspetrol Norte SA, the transport company Challenger, E.I.R.L., SAMA and other companies for the dumping of oil.⁸⁸ The investigations only commenced three months after the spill. Based on these investigations, the Special Prosecutor for Environmental Matters deemed that there was no evidence of crimes against public health, and decided to close the case in mid-2012. However, towards the end of 2012 the case was reopened following pressure by ACODECOSPAT.⁸⁹

Case 4

Ten criminal complaints were filed following the spill of 5,000 barrels of oil as a result of the sinking of a barge in the Marañón River in October 2000. However, the case was closed having been declared to be outside the period of prescription, because more than ten years had passed between the events and the initiation of the investigation. ACODECOSPAT is demanding that the closure of the case be reviewed.

Case 5

In 2007, in the Los Angeles district court in the USA, the organization EarthRights International (ERI) filed suit against OXY on behalf of 25 members of the Achuar people for the pollution of the Corrientes River during the course of 30 years of oil exploitation. The case is ongoing, primarily due to the various appeals lodged by the company.⁹⁰ This same claim was filed in 2006 by a congressman in the Nauta Public Prosecutor's Office. In December 2012, the process was still in the preliminary investigation stage.⁹¹

The lack of diligence and of outcomes in these cases contrasts with the rapid rate at which proceedings against the community members have advanced.

Case 1

On 20 March 2008, in a protest to demand their rights, indigenous communities took control of the Pluspetrol airfield in Andoas. Clashes which followed the intervention of the police left at least one police officer dead and 50 indigenous community members were detained.⁹² As a result, 21 members of the indigenous Achuar and Kichwa ethnic groups were charged.⁹³ They were acquitted by the Second Criminal Court of Justice of Loreto (December 2009), with the ruling upheld by the Criminal Chamber of the Supreme Court in August 2011.⁹⁴

Case 2

In May 2008, the communities of the Corrientes, Pastaza and Tigre River watersheds and their respective federations mobilized in order to demand protection of their rights. On one occasion there were clashes in the oil company headquarters in Andoas (in the province of Datem, Marañón). As a result 45 people were arrested in Nauta and Iquitos. On 29 May 2008, "15 were interned in the Maynas Sentenced and Accused Jail. The others found themselves under house arrest".⁹⁵

7.2.1.2. Uncompleted and unfulfilled environmental management instruments

Since 1993, the Peruvian legislation requires all operators of oil exploitation projects to submit an Environmental Compliance and Management Programme (Programa de Adecuación y Manejo Ambiental - PAMA) (DS No. 046-93-EM). In 2003, Supplementary Environmental Programmes (Programas Ambientales Complementarios -PAC)⁹⁶ and Closure Plans (DS No. 028-2003) were also created. The PAMA for Block 8 was approved in 1995 and OXY had its PAME for block 1A approved in 1996. The PAC's presented by Pluspetrol, which were approved in 2005 (block 1AB) and 2006 (block 8) expired in 2009, following an extension of the PAC for block 1AB. The PAC's included two projects: a plan to update the water treatment system; and a soil remediation plan. According to Pluspetrol, in the block 1AB, it managed to remediate 100% of the soil and re-inject 100% of the water, while in block 8, 90% of the soil was remediated and 100% of the water re-injected.⁹⁷

However, the reality is that the environmental management tools developed by the company itself are insufficient,⁹⁸ due in part to shortcomings in the legislation

itself and the complacency of State,⁹⁹ and in part to failures by the company when developing the tools.¹⁰⁰ Nevertheless, as the OSINERGMIN monitoring reports and the resolutions OEFA demonstrate, despite the reiteration of observations and reports of the environmental monitoring institutions of the Peruvian State,¹⁰¹ there has been a “repeated failure of Pluspetrol Norte” to comply with the commitments contained in the PAMA and PAC’s¹⁰² and the closure plans which the company itself provided. In the few cases where administrative fines or disciplinary actions have been issued for such breaches, the company has sought to counteract them or has challenged them before the courts and appealed decisions.¹⁰³

7.2.1.3. Administrative and financial sanctions

Between early 2009 and January 2012, OSINERGMIN audited 36 spills in both blocks. In total, it adopted 10 resolutions sanctioning the company, 15 technical requests for sanction, and 17 technical requests to close the case.¹⁰⁴ In 2012, OEFA issued at least three resolutions sanctioning the company for breach of the PAMA and the PAC’s in blocks 8 and 1AB.¹⁰⁵ In turn, on 16 January 2013, Pluspetrol was fined S/. 29 million “for failing to comply with environmental remediation activities in block 8 in the Pacaya Samiria National Reserve”.¹⁰⁶ The latter fine has been the most important in terms of the amount of the sanction.¹⁰⁷ The company appealed,¹⁰⁸ and the decision was upheld by the Environmental Control Tribunal (TFA) on 8 January 2013. In addition, “OEFA decided to fine Pluspetrol Norte SA on several occasions for: not conducting regular inspection programmes, not submitting information, not taking actions to remedy the situation, exceeding the target levels of barium, not installing valves in the pipeline, and for being responsible for several oil spills between 2009 and 2011”.¹⁰⁹

These were all financial penalties¹¹⁰ which the company has systematically challenged before the courts, and, as a result, it has not complied with many of the sanctions. According to statistics of OSINERGMIN, “by May 2013 evidence for both blocks shows that 58.3% of the fines have not been possible to collect, of which 27.9% are under review by the judiciary”.¹¹¹ Of the total S/. 27,884,606 in fines, the total unpaid amount is S/. 16,264,682. Fines for noncompliance with environmental instruments make up only 3% of cases, but account for 92.0% of the total amount of fines imposed. 31.6% of fines are for oil spills and represent 2.2% of the total amount of sanctions.¹¹²

It is worth highlighting that, even if they are paid, the payment of the fines goes to the State and does not necessarily benefit the affected communities, and as a result it does not contribute to repairing the damage caused to those communities. It is also important to note that in cases where a spill occurs, if the company informs the authorities within the agreed deadline and reports on the contingency measures adopted, it will not be penalized. Indeed, oil spills are considered as an inherent risk which is involved in the activity and are covered by the contingency plan which is included in the PAMA. Meanwhile, relevant State institutions do not have sufficient capacity to effectively monitor the remedial actions undertaken by the company. Consequently, according to a technical assessment of PUINAMUDT, the company generally attempts to conceal part of the pollution arising from spills before informing those authorities.

In another area, in September 2010 the Ombudsman reported that following a major spill (of 19 June 2010 - see section 7.2.1.1) in the Marañón River, the Management of the Captaincy of the Ports of Yurimaguas sanctioned the company for violating the regulations and for not reporting the spill immediately (Captaincy Resolution 004-2010). They also imposed fines on Pluspetrol and Petroperú for not having a contingency plan addressing the issue of oil spills duly approved by the maritime authority. However the Appeals Committee of the Directorate of the Captaincy of Ports nullified this sanction.¹¹³

In summary, just as for the development and monitoring of environmental management instruments, the Peruvian State sometimes demonstrates a limited will and capacity to monitor and sanction companies for breaches of environmental legislation (on this point see §7.3). However, in most cases where sanctions are issued against Pluspetrol, it either fails to comply with them or limits their effectiveness.

7.2.1.4. The undermining of an unprecedented attempt to provide remedy

A case which is worthy of highlighting is that of the Shanshococha lagoon,¹¹⁴ in the Pastaza River basin (Andoas district, province of Datem, Marañón). The Shanshococha lagoon covered an area of 2,856.52 m² and was located approximately 200 m from the South Capahuari Platform 18. It was contaminated by discharges which reached great depths. In order to hide the damage, the company proceeded to drain the lagoon and remove the bottom soils which caused the disappearance of the lagoon.

In an unprecedented act, OEFA not only fined the company (5,416.90 Imposed Tax Units - UITs) but also ordered that as a remedy the company “create a new lagoon or, if appropriate, enhance or protect a water body or zone within the affected area.”¹¹⁵ However, Pluspetrol denied its responsibility and adopted a defiant attitude toward OEFA.¹¹⁶ At the time, certain media channels which were aligned with the hydrocarbon sector endeavoured to delegitimize the sanction of OEFA.¹¹⁷

7.2.2. Dialogue and declarations of emergency: the result of constant mobilisations

7.2.2.1. Background to the process: the demonstrations that led to dialogue and declarations of emergency

It is important to highlight that the process of dialogue, the declarations of emergency, as well as other measures taken by the government and the Peruvian authorities have been the result of constant mobilization of the communities living in the Pastaza, Corrientes, Tigre and Marañón River watersheds. The most notable are those demonstrations that led to the signing of memoranda of understanding between the communities, the Peruvian authorities, and on some occasions the company.¹¹⁸ Such is the case of the Dorissa Act (22 October 2006) - Corrientes;¹¹⁹ the Act of Pastaza (25 May 2011)¹²⁰ and the Topal Alliance Act (17 June 2012) - Pastaza;¹²¹ and the 01-Nauta Act or the Act of Tigre (24 October 2011) - Tigre.¹²² All of these agreements were reached after several months, or even years, of community protests, and usually as a result of coercive measures such as

the taking over of company bases or airports (Dorissa and Andoas), or the blocking of the river. They include commitments on health, education, production and infrastructure, holistic development, territorial rights and prior consultation. However, these agreements only apply to their respective areas and have not been fully complied with,¹²³ a reality which explains the continued mobilization of communities to enforce the agreements and to seek a response to their demands.¹²⁴



Photo of petrol spill area in Block 1AB taken during visit of congress representatives.
Photo: Environmental Monitor Federation of Native Communities of Corrientes
(Federación de Comunidades Nativas del Corrientes) - FECONACO.

7.2.2.2. The dialogue process

Until recently, the only clear political support came from particular congressmen. Subsequently, the Congressional Commission of the Andean, Amazonian and Afro-Peruvian Peoples and the Environmental and Ecology conducted visits to the area and presented several reports on the situation of the indigenous peoples in the four watersheds.¹²⁵ In November 2012, as a result of the first report, a Working Group on the Indigenous and Environmental Situation in the four watersheds was established. The Congressional Commission on Justice and Human Rights also presented a report during the 2012-2013 parliamentary term.¹²⁶

The dialogue between the Peruvian authorities and the indigenous communities of the four watersheds is primarily being carried out through multi-sectorial commissions. As for the company, it frequently demonstrates an unwillingness to deal with the situation and has repeatedly refused to sign agreements.

· **Multi-sectorial Commission (2012-2014) and social and environmental monitoring**

The first Multi-sectorial Commission (2012 to 2013)¹²⁷ was composed of various state entities to “analyse, design and propose measures to improve social and environmental conditions of the populations in the Pastaza, Tigre, Corrientes and Marañón River watersheds”.¹²⁸ This committee succeeded the Environmental Working Group which had been established in January 2012.

Within this framework, the environmental and health authorities of the Peruvian State¹²⁹ conducted monitoring activities and environmental assessments in the four watersheds: Pastaza, in October 2012; Corrientes, in April and June 2013; Tigre, in June and July 2013; and Marañón, in September 2013.¹³⁰ The results, presented and delivered to communities, show high levels of contamination throughout the area corroborating previous reports by the communities’ own organizations.¹³¹ This was the main achievement of the Commission. In contrast, the results of the activities of the social working group, which was responsible for the development of a social diagnosis, were poor, “primarily due to a lack of understanding of intercultural relations”.¹³²

· **The Multi-sectorial Development Commission for the watersheds**

In addition, on 31 March 2014, under the framework of the previous Multi-sectorial Commission, the Prime Minister (PCM) provided for the creation a Multi-sectorial Commission for the “Development of the Pastaza, Tigre, Corrientes and Marañón watersheds, in the department of Loreto”.¹³³ The duration of the Commission is 15 months, and it comprises of representatives of the State, indigenous communities, and the company. It was established on 27 May 2014¹³⁴ and should propose measures to enable the integral development of the four watersheds.¹³⁵

However, from late April 2014 to late August 2014, Pluspetrol has refused to participate,¹³⁶ thereby seriously jeopardizing the dialogue process and the prospect for agreements and remedy. Despite this, following several demonstrations by the indigenous federations, the dialogue was resumed on 1 July 2014, with the participation of the State and the federations of the four watersheds.¹³⁷ Three roundtables were formed, addressing: i) development, health and sanitation; ii) environmental remediation and compensation; iii) land titling and compensation. This Development Commission and its roundtables are important advances. If the will exists on behalf of the parties, the Commission and roundtable could facilitate the remedy of human rights violations which occurred in the context of oil exploitation in the four Amazonian watersheds.

In this context, in June 2014, for the first time, the Peruvian government, through the Minister of Energy and Mines, recognized the gravity of the situation caused by the pollution and the fact that development in Peru has been at the expense of the peoples of

the area.¹³⁸ However, these statements were made behind closed doors and not in a public manner. Had they been made publically they would have constituted a form of reparation for the indigenous communities, without detriment to other urgent measures which need to be taken.

7.2.2.3. Declarations of emergency

On the basis of the monitoring conducted under the Multi-sectorial Commission, the government adopted resolutions declaring an environmental emergency in each of the watersheds.¹³⁹ Each declaration includes an Immediate and Short Term Action Plan for Environmental Emergency care. The Action Plans for each watershed specifically aim to “reduce the risk to health and the environment in the affected areas.” In the case of the Pastaza River, it envisages measures for treatment and sanitation of water for human consumption; identification of pollution sources and of directly and indirectly impacted areas; epidemiological studies and studies on the impact of pollution on species which are for human consumption. The resolution was subsequently amended at the request of communities. Measures were introduced in relation to food security and soil remediation. Action plans for the Corrientes and Tigre river watersheds only include measures for treatment and purification of water for human consumption and the identification of pollution sources and of directly and indirectly impacted areas. In addition to these measures the action plan for the Marañón River watershed includes the identification, through participatory monitoring, of additional impact areas. (See table in Annex 1)

On 30 April 2014, the Prime Minister declared a 180 working day Health Emergency in the 65 locations covered by the environmental emergency declarations.¹⁴⁰ The emergency declarations suffer from a series of limitations, in particular their geographical scope which excludes several communities as well as a number of impacted areas. The measures focus primarily on water quality and, apart from the declaration of environmental emergency in Pastaza, they do not address the rights to a healthy environment, to health and to food.¹⁴¹ The proposed measures are short term and do not aim to ensure a long-term reversal of the impacts of pollution and the prevention of further contamination. It is hoped that the recently established Development Committee will be able to respond to these needs. Finally, there is a notable lack of progress around implementation of, or compliance with, the measures contained in the declaration of emergency.¹⁴² This is due, in part, to the fact that the environmental emergency declarations were not accompanied by a dedicated budget. As for the health emergency declaration, the allocation of funding requires a revision of the Ministry of Health’s budget which, by late July 2014, had yet to be realized. Likewise, the Development Committee which was set up in late May 2014 does not have a dedicated budget.

This situation led to protests in April 2014 in the Corrientes watershed.¹⁴³ In general, the responses of the State and the company and any associated progress continue to be driven by community mobilization. Therefore, in March and throughout the month of June 2014, several communities in the impacted watersheds organized themselves to call for the implementation and strengthening of the agreed measures and for responses to their demands.¹⁴⁴

7.2.3. Measures against the violation of specific rights

Remedial measures should seek to eliminate the causes and effects of the rights violations and, as a result, their nature and extent are a function of the material and non-material damage which was caused. It is essential that they are consistent with the human rights violations which have been identified. However, as will be seen, the measures taken in this case are not commensurate with the extent of these violations, or with the criteria which should be met for a sustainable long-term solution. They do not constitute genuine reparation measures, but are instead more akin to measures aimed at addressing an emergency and do not entail preventing a recurrence of damage or further rights violations.

7.2.3.1. Right to a Healthy Environment

As discussed above, even if the declarations of environmental and health emergencies and the Multi-sectorial Commission with its on-going roundtables are an important first step, they have not yet provided an adequate response to the environmental pollution, and the measures taken to date cannot be considered to be adequate remedial measures. This is contrary to the requirements of national legislation and of the pronouncements of the IACHR on the subject.¹⁴⁵



Kichwa environmental monitor holding an oil encrusted piece of forest soil, Block 1AB.
Photo: Federation of Native Communities of Alto Tigre (Federación de Comunidades Nativas del Alto Tigre) – FECONAT

Apart from the unsuccessful attempt of OEFA in its resolution in relation to the Shanshococho lagoon, there have been no reported measures aimed at restoring the environment and the rights of communities. The only reparations that have been recorded to date are targeted monetary payments. These are inadequate in light of the gravity of the situation and they do nothing to avoid the perpetuation of the company's actions and omissions which caused the problem in the first place.

As with the responses to the impacts on other rights, the pattern has been to adopt a palliative approach to each emerging situation where the right to a healthy environment is affected. The following case is one of the few examples in which there was some form of reparation. After a major oil spill in the Marañón River on 19 June 2010, and following the mobilization of indigenous communities in the districts of Urarinas, Parinari and Nauta, the company deposited S/.

1,753.00 for each of the 1,426 affected families. It also delivered food and water in the weeks that followed.¹⁴⁶ However, these are short term measures and do not remedy the pollution which continues to affect the communities.

7.2.3.2. Right to health and to life

As pointed out in the 2006 ASIS report, the actions the State has taken to determine the health impact of the pollution caused by the oil exploration and exploitation activities reflect the serious limitations in terms of both the State's will and its capacity. The actions of the company in relation to the health impacts are also inadequate.

Due to the significant mobilizations of the local communities of the Corrientes watershed it is the area which has seen the greatest response to claims in relation to health impacts. Under the Dorissa Act (October 2006), a Comprehensive Health Plan was agreed for the Corrientes River watershed. Within this framework, the company agreed to the disbursement of 40 million soles over 10 years, which would be used, among other things, for the construction of a hospital building. In contrast, the emphasis on the right to health in other watersheds is poor, with the Tigre River watershed "having the worse coverage."¹⁴⁷ In June 2010, Pluspetrol reported the construction of the new hospital in Villa Trompeteros in Pastaza River watershed.¹⁴⁸ However, the mere construction of a hospital does not, in itself, meet the health needs of the population. Among the common problems identified by the anthropologist A. Chirif in the four watersheds was the isolation and shortage of health personnel; inadequate medical and communication equipment and infrastructure; and inadequate medicine and medical supplies.¹⁴⁹

One outcome of the environmental and health emergency declarations was a commitment of the Ministry of Health to conduct an epidemiological study to determine the diseases from which the community members were suffering. This was to be followed by a toxicological study to identify the causes of the diseases. The epidemiological study was only commenced in July 2014. The conduct of these studies is a first step towards remedies for violations of the right to health and life. However, the proposal has several shortcomings and limitations. Among other things, the toxicological studies would not take all of the heavy metals to which the communities are exposed into consideration;¹⁵⁰ and, according to a PUINAMUDT technical adviser, they are not being conducted in the most affected areas.

In June 2014, the government announced a "permanent campaign in the Achuar, Quechua and Candoshi communities involving specialized personnel who provide free vaccinations, dental care, nutritional and hygiene counselling and health, antenatal care and family planning counselling."¹⁵¹ While these are necessary services, they do not address the specific needs which arise as a result of the high degree of contamination in the area. Furthermore, environmental remediation measures are essential if the health of the local population is to be guaranteed.

7.2.3.3. Right to Water

The right to water is, without doubt, the right that has received the most attention from the State and the company, and the one which has been most publicized by these entities. Consequently, within the context of the declarations of emergency, the government has provided hundreds of water purification kits.¹⁵² This measure, which was obviously necessary in light of the emergency, was of a temporary nature and neither the government nor the company can limit their interventions to such a measure. Furthermore, certain communities expressed concerns about the effectiveness of these kits.¹⁵³

MINAM reported that an assessment would be conducted and that water purification infrastructure would be put in place in the four watersheds.¹⁵⁴ In June 2014, the government announced the upcoming installation of 65 water purification plants in the four watersheds and the implementation of interim measures.¹⁵⁵

Even prior to the declarations of environmental and health emergencies, measures, such as the construction of water ponds, were taken by Pluspetrol and other entities. However, there are records of failures in many of these systems, “some as a result of problems in facilities and other arising from their misuse”.¹⁵⁶ Worse still, “the systems for releasing the water are defective and they are frequently blocked” causing water stagnation which leads to the proliferation of mosquitos that cause malaria.¹⁵⁷

As is the case for the right to health, the communities of the Corrientes River watershed are the best served in relation to their claims pertaining to the right to water. This is due to the commitments made by the State in the Dorissa Act. The Dorissa Act provides for the re-injection of the production water which is discharged into the Corrientes River watershed and for the provision of drinking water. However, water re-injection has not been carried out in an adequate manner and it has taken the State months to sanction Pluspetrol.¹⁵⁸

A full diagnosis of the water quality and the pollution of soil and subsoil throughout the company’s impact area is necessary in order to: identify water sources which are not contaminated; establish secure water catchment and distribution systems; take measures to stop pollution and to remedy it permanently. However, to date the diagnosis is incomplete as it has not been carried out for all communities and all contaminated sites. The aforementioned measures are insufficient and inadequate to ensure water quality. Besides, even if domestic water were adequately purified, the question of the impact of river pollution on agriculture, personal hygiene, and fishing would still be pending. In this regard, the lack of water decontamination plans is an extremely serious issue.¹⁵⁹

7.2.3.4. Right to Food

Following the Dorissa Act, food baskets were distributed in the Corrientes River watershed,¹⁶⁰ and on 14 June 2014, within the framework of the Health Emergency Declaration, the Prime Minister participated in the distribution of food and water in the town of Andoas. However, not only was the solution a temporary one, but, once again, the support provided was inadequate.¹⁶¹

The only case in which it could be argued that there was some form of redress in relation to the right to food was the financial compensation which the company provided to the Native Community of Pucacuro following their protest regarding the pollution of the Atiliano lagoon.¹⁶² In September 2013, Pluspetrol provided S/. 3,000,000 as a community development fund. This was a very poor response, as remedies such as remediation of land and water resources remain essential.

7.2.3.5. Territorial rights

In the context of violations of their territorial rights, the communities of the four watersheds are demanding titles to their lands, compensation for the use of this land and for any damages which have been caused.

· ***Registration and titling of lands***

The Peruvian government committed to titling the territories of communities, and negotiations are on-going in the roundtable in relation to the registration and titling of communal lands.

Nonetheless, the anthropologist A. Chirif has identified a pattern of common problems and irregularities in relation to territorial issues across the four watersheds. These include: limited progress in the registration of lands; arbitrary and discriminatory land classification; ignorance of the holistic nature of indigenous property; the exclusion of water bodies (rivers and lakes) when titling communal territories; attribution of a constitutive (as opposed to declarative) character to resolutions with regard to native communities (thereby denying their pre-existing legal personality). He also denounced the legally invalid exclusion by the Regional Government of Loreto (GOREL) of certain areas that are occupied by the company's premises.

The exclusion of certain parts of their territories has resulted in "a major division of the communities' territory" in contradiction with the requirements of ILO Convention 169.¹⁶³ Also, and as a result of this, the area which is titled is insufficient, in particular due to rising water levels during the rainy season.¹⁶⁴

· ***Compensation for land use and reparations for damage caused***

The communities are entitled to compensation for the use of their territories, and reparations for the damage caused.¹⁶⁵ However, there are serious difficulties in determining the amounts because, as A. Chirif points out, "the exact areas to be compensated for easements are unknown" and "the magnitude of impacts which must be compensated is unknown."¹⁶⁶ Likewise, one of the main causes of the difficulties is the fact that the government has granted the company the free use of the territories for the duration of concessions,¹⁶⁷ in violation of the rights of communities and of national legislation.¹⁶⁸

In the case of block 8, the company has agreements for the use of land with those communities in the directly impacted area, whereas it has a relationship based on *ad hoc* cooperation involving the limited provision of services with those in the indirectly impacted areas.¹⁶⁹ Neither scenario constitutes adequate compensation or redress for violations of the rights of the communities.

The communities in each of the watersheds have mobilized in order to demand compensation and indemnification for the use of the river and of their lands. However, even if in two cases the company has pledged to meet their demands, there have been no tangible outcomes to date.¹⁷⁰

As the lawyer Juan Carlos Ruiz Molleda reminds us, the economic value of land is not the only thing that should be taken into account. Rather the cultural and spiritual value to the people should be given particular consideration in accordance with ILO Convention 169 (art. 13.1) and the provisions of the CC (Judgment 00022-2009-PI / TC, §52). Ultimately, “[t]he entity responsible for such compensation is the private company or contractor, as the law refers to them, with the State acting as the guarantor of rights”.¹⁷¹

7.2.3.6. The right to self-determination: uncertainty regarding the fulfilment of the right to consultation

Indigenous peoples in the four watersheds demand prior consultations before existing concessions are extended or new concessions are granted.

The contract with Pluspetrol to exploit block 1AB (new block 192) expires on 29 August 2015. Despite the serious pollution the government announced a public auction to determine the new operator for the block¹⁷² and stated that a consultation process would take place before the new concession was issued.¹⁷³ However, worryingly, since then the State has issued contradictory statements.¹⁷⁴ Far from responding to and providing remedies for the violation of the right to self-determination and free, prior and informed consultation of indigenous peoples of the area, the renewal of the license contract without prior consultations would deepen and perpetuate the violation of these rights.

7.2.3.7. Labour rights

In response to protests held between September 2008 and March 2010 at the Andoas oil exploitation facilitates by workers demanding better working conditions,¹⁷⁵ the Loreto Regional Labour Office repeatedly asked Pluspetrol to provide transportation in order to access the oil exploitation areas and conduct labour inspections. However, the absence of a response from the company prevented the inspection from being performed. The Loreto Regional Labour Registration and Inspection Office sanctioned the transportation company SERTRANSA SRL for breaches of labour standards and safety and health at work and also sanctioned three of the 23 Pluspetrol contractors (Manpower Perú SA, Aviation Repair and Transportation SAC and Bureau Veritas of Perú SA) for violations of the inspection process. However, SERTRANSA SRL appealed the penalty. And surprisingly, in September 2009, the sanctions against Manpower were dropped due to the failure to conduct the inspection visit. This situation is worrying, given that it was the company itself (Pluspetrol and its contractors) which obstructed the inspection visit. It is also a very serious concern that the State does not have the necessary capacity to perform such inspections, and instead depends on the cooperation and willingness of the company in order to conduct them.

7.2.4. Access to other mechanisms

The Ombudsman (Defensoría del Pueblo) has spent several years reporting conflicts related to the activities of Pluspetrol in the area and is assisting with the dialogue process.

In 2010, the IACHR Rapporteur on the rights of indigenous peoples requested information from the Peruvian government regarding an oil spill in the Marañón River.¹⁷⁶ In December 2013, the former UN Special Rapporteur on the rights of indigenous peoples, Mr James Anaya, conducted a country mission to Peru during which he held meetings in the Department of Loreto. At the end of his visit, he described the situation in the four watersheds as a “critical situation that must be addressed with the urgency it deserves,” and expressed his support for the demands of indigenous communities.¹⁷⁷

On December 15, 2014, the current UN Special Rapporteur on the rights of indigenous peoples, Ms Victoria Tauli-Corpuz, and the UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Mr Baskut Tuncak, again raised the issue of the human rights impacts of Pluspetrol’s activities. In a public press release, they drew the Peruvian government’s attention to the importance of ensuring remediation for these impacts and clean-up of the land “before re-licensing the land and making an awful situation worse” as well as the need for consultations in order to obtain the communities’ free prior and informed consent.¹⁷⁸ The two Rapporteurs stressed that any renewal of the licences absent these and other pre-conditions would only serve to perpetuate and exacerbate the existing serious violations of human rights of indigenous peoples, including their right to health, food and water.¹⁷⁹

Other UN and Inter-American human rights organs have yet to be engaged in relation to the situation in the Pastaza, Tigre, Corrientes and Marañón River watersheds. Similarly, there are no known complaints or remedial decisions addressed to, or issued by, judicial or quasi-judicial mechanisms in the company’s headquarters countries - Argentina and the Netherlands. Finally, the only extraterritorial proceeding in a third country is in the United States, where OXY has its headquarters, referred to above in Section 7.2.1.1.

7.3. Permissive attitude of the State towards the company

In addition to the inaction and inadequate responses of the Peruvian State with regard to ensuring redress for the human rights violations which occurred in the context of the oil activities in the four watersheds, there are several factors which on occasions point to its complacency towards, or even complicity with, Pluspetrol and extractive companies in general.

Of particular concern is the re-victimization of communities. There is a tendency on the part of the company and the authorities to claim that “vandalism” has been the cause of oil spills¹⁸⁰ - claims which are then echoed in the national press. According to the Congressional Commission on Andean, Amazonian and Afro-Peruvian Peoples, the Environment and Ecology, on 15 May 2013 an OSINERGMIN presentation to Congress “showed a statistic that establishes vandalism as the main cause of leaks in block 8,

without identifying or proving who they are referring to when making the assertion.”¹⁸¹ In the case of block 8, OSINERGMIN attributed 58% of the oil spills to vandalism, with those spills representing 81.2% of total barrels spilled.

Another concern is the recent change in the legal interpretation of the current legislation which led to the closure plans being replaced by decontamination plans. Decontamination plans are far more limited than closure plans, both in terms of restoration actions and their scope, as decontamination plans are limited to land, and do not include water sources and abandoned infrastructure.¹⁸² Furthermore, this change in regulation - two years before the completion of the block 1AB concession – includes deadlines that will be impossible for Pluspetrol to meet before the expiration of the concession. As a result, “Pluspetrol is released from the obligation to comply with its closure plans.”¹⁸³

The situation is made more complex by the multiple reconfigurations of block 1AB. The Congressional Commission on Andean, Amazonian and Afro-Peruvian Peoples, the Environment and Ecology has clearly pointed out the manoeuvres by the Peruvian authorities in relation to environmental liabilities associated with block 1AB. The manoeuvre consisted of reducing the concession area in October 2011, without complying with the closure plans, and then re-incorporating these areas in August 2012, leading to a final total area which exceeded the initial total area by three percent. These changes created a legal vacuum, leaving communities in a vulnerable situation, and making it difficult to pursue reparations for rights which had been violated. They also give rise to a situation whereby the Peruvian State was complicit in the violations of those human rights.

Finally, recent legislative amendments are also a source of concern. In 2013, MINAM approved new instruments to address a previous legal vacuum and require companies “to rehabilitate all of the affected areas.”¹⁸⁴ However, in the case of Pluspetrol, there will not be sufficient time to implement the new measure in block 1AB. A reform in April 2013 also strengthened OEFA’s sanctioning powers. It did so by removing the suspensory effect of the “contentious administrative complaints, *amparo* and other proceedings” used by the companies to challenge administrative sanctions issued by the OEFA against them.¹⁸⁵

However, on July 11, 2014, Congress passed Law 30230, entitled “Act which establishes Tax Measures, Simplification of Procedures and Permits for the Promotion and Revitalization of Investment in the country”.¹⁸⁶ On the positive side it requires OEFA to privilege preventive and corrective measures in the case of “environmentally unlawful conduct”. However, the new law weakens OEFA’s capacity to impose sanctions. It also transfers MINAM’s powers for the creation of protected areas to the Prime Minister, converting this technical decision into one of a political nature, thereby weakening its protective nature. In addition, it reduces the timeframes for approval of environmental impact studies and introduces legal measures to facilitate and accelerate investment projects, without making reference to the rights of communities and indigenous peoples.¹⁸⁷

8. Conclusions and recommendations

There are numerous violations of human rights affecting more than one hundred indigenous communities as the result of oil exploration and exploitation in blocks 8 and 1AB currently operated by the transnational company Pluspetrol. Both the Peruvian State and Pluspetrol have responsibilities in relation to these rights violations which arise from their actions or omissions. The weak State presence in the area; its lack of capacity in terms of monitoring, control and sanctioning, and its permissive attitude towards extractive industries have contributed to the violations. To date, there have been very few sanctions imposed on those responsible. With the exception of some minimal financial compensation provided to certain communities, the responses of the State and the company have been *ad hoc* and do not constitute remedial or preventive measures or guarantees of non-repetition. As pointed out by the Congressional Commission on Andean, Amazonian and Afro-Peruvian Peoples, the Environment and Ecology, “both the general and specific demands relate to the protection of territory and therefore are of a strategic nature, however, these are not being addressed. As a result the conflict will not be resolved by focusing exclusively on environmental impacts or issues such as access to water for human consumption and health”.¹⁸⁸ Indeed, in some cases there is evidence of re-victimization of communities, and legal reforms that, instead of protecting the population, facilitate corporate impunity and benefit the extractive industries to the detriment of the population. It is the responsibility of the Peruvian State, Pluspetrol and those countries - Argentina and the Netherlands - where its corporate headquarters are located to ensure that victims have appropriate and effective access to justice and remedy and to ensure non-repetition of rights violations.

In light of this, we wish to make the following recommendations which are aimed at reinforcing and complementing the demands made by the indigenous federations of the four watersheds. The recommendations relate to access to remedy, including measures to ensure access to justice, restitution, compensation and guarantees of non-repetition:

8.1. To the Peruvian State:

1. Take urgent preventive measures both at the national level and in relation to the company to prevent continued environmental damage, in particular to stop oil spills;
2. Oblige the company to adopt and implement urgent measures to decontaminate the water and soil in all areas affected by its activities;
3. Continue to provide access to uncontaminated food and drinking water to all affected communities, in consultation with them and with their consent, while the pollution is being remedied;
4. Conduct, with the participation of affected communities, epidemiological and toxicological studies to determine the diseases from which members of the community suffer, identify their causes, develop appropriate methodologies to assess these and provide the necessary treatment;

5. Facilitate and support victims' access to redress mechanisms through the dissemination of information regarding such mechanisms, and technical and financial assistance for advice and legal representation when engaging with redress mechanisms;
6. Investigate, prosecute and punish the company, and its managers and directors, through administrative, civil and criminal justice, for the damage and human rights violations the company has caused and compel it to compensate and remedy the affected communities;
7. Recognize the gravity of the situation and publicly apologize for violations caused, or facilitated, by the State's permissive attitude;
8. Refrain from criminalizing and re-victimizing communities;
9. Register and title the land of indigenous communities;
10. Repeal the resolutions which granted free easements to the company;
11. Compel the company to compensate communities for the use of their territories;
12. Recognize and institutionalize community environmental monitoring systems;
13. Ensure the participation of indigenous organizations in the development, evaluation and monitoring of the implementation of environmental management instruments;
14. Ensure public access to information in relation to administrative sanctioning procedures;
15. Review the national legal framework from a human rights perspective in order to prevent similar violations of human rights in the future and to protect the environment, and refrain from promoting or adopting retrogressive measures;
16. Suspend the granting of new hydrocarbons concessions until the area is decontaminated and the vacuums in the legal framework are resolved;
17. Guarantee the civil and political, as well as the economic, social, cultural and environmental rights of communities, in line with the needs expressed by the communities themselves;
18. Promote, with the participation of and in consultation with the respective communities, alternative non-extractive industry based forms of development and economic activities;
19. Hold good faith free prior and informed consultations prior to granting new concessions;
20. Fully comply with the recommendations of the current and previous UN Special Rapporteurs on the rights of indigenous peoples and other UN and Inter-American mechanisms in relation to the case.

8.2. To Pluspetrol:

1. Take urgent action to prevent further environmental damage, in particular oil spills;
2. Refrain from actions that give rise to water or soil pollution, or that involve deforestation or are aimed at concealing any pollution caused;
3. Immediately adopt and implement measures to decontaminate soil and water in all areas affected by its activities;
4. Comply with financial, administrative and reparation sanctions imposed by Peruvian State entities;
5. Refrain from taking cases to court in order to delay or avoid sanctions and from exerting any form of pressure on state agencies to act in its favour;
6. Condition its investment on the compliance by the Peruvian State with its duty to conduct prior consultations with the indigenous peoples who may be directly and indirectly affected by the company's activities;
7. Create effective complaint mechanisms and facilitate communities' access to them.

8.3. To the Argentinean and Dutch States:

1. Conduct an assessment with public participation of the risks and impacts that the practices of companies, whose headquarters are located in Argentina or the Netherlands, have on the enjoyment of fundamental rights of the populations in those countries in which they invest. The results of such an assessment should be made public;
2. Guarantee the enjoyment of the right to prompt, efficient, adequate, accessible and effective judicial and non-judicial remedies. This necessitates, among other things, the provision to both groups and individuals of interpreters, legal advice and legal representation before an independent body, as well as adequate reparations, including, as appropriate, restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition to the communities affected by the activities of Pluspetrol;
3. Hold prompt, thorough and impartial investigations, and prosecute and sanction Pluspetrol in civil and criminal courts for violations of human rights committed by it, or related to its activities in the blocks 1AB and 8, and impose commercial and financial sanctions against it to prevent the recurrence of such violations;
4. Where necessary, modify and adapt the national legal framework to facilitate the transparency, accountability and sanctioning of companies headquartered in Argentina or the Netherlands, or who trade with it, in cases where human rights violations are committed at home or overseas.

8.4. To international and regional human rights mechanisms:

1. Issue statements in relation to the situation in the watersheds;
2. Request information from the concerned States (Peru, Argentina and the Netherlands), and the company, Pluspetrol, on measures taken to facilitate victims' access to truth, justice and reparation mechanisms;
3. Issue recommendations on the adoption of measures to this end, and guarantee the non-repetition of human rights violations.

¹ HRC Resolution, A / HRC / 26 / L.1, June 23, 2014 para 10.

² <http://www.almaciga.org/>.

³ <http://equidad.pe/>.

⁴ Perupetro is a governmental entity in charge of the control of the oil production as part of its mandate to supervise the contracts for hydrocarbons exploitation in Peru. See Informe del Perú para el EITI Ministerio de Energía y Minas, Estudio de conciliación nacional – Transparencia – 2011-2012. <http://eiti.org/Peru>.

⁵ Ministry of Energy and Mines, Hydrocarbons, in http://www.minem.gob.pe/_detalle.php?idSector=5&idTitular=4454&idMenu=sub88&idCateg=847.

⁶ EITI, Peru. <http://eiti.org/Peru>.

⁷ In 2012, the Peruvian government registered “about 41,817 existing mining concessions covering 15% of the national territory; 10,870 mining rights under consideration and 244 mining plants” (Informe del Perú para el EITI (Ministerio de Energía y Minas, Estudio de conciliación nacional – Transparencia – 2011-2012. <http://eiti.org/Peru>).

⁸ Perupetro, Contracts and Agreements, in <http://www.perupetro.com.pe/wps/wcm/connect/perupetro/site/Informacion%20Relevante/Contratos%20y%20convenios>.

⁹ The conflict resulted in the death of 33 persons, one disappearance and more than 200 injured in June 2009. Victims included both indigenous community members and police.

¹⁰ Ombudsman Office, Report on social conflicts, No 122, April 2014, <http://www.defensoria.gob.pe/temas.php?des=3#r>.

¹¹ 58.8% of the surface area of the contracts in exploration phase and 57.75% of the surface area in exploitation phase. Estimate based on Petroperu data on contracts from January 31, 2014 (Perupetro, Contracts and Agreements, *supra*).

¹² Alberto Chirif, Diagnóstico social estratégico de las cuencas del Pastaza, Marañón, Corrientes y Tigre, Iquitos, 28 October 2013.

¹³ “When titling communal land, the text of Article 13 of the Convention stating that the territory ‘covers the total environment of the areas which the peoples concerned occupy or otherwise use’ is not taken into account. On the contrary, a distinction is made between agricultural and forest lands. Agricultural lands are titled while only possession is transferred for forest lands”. Alberto Chirif, *supra*.

¹⁴ The Constitutional Court considered that “The Constitution itself, therefore, establishes that international treaties are a source of law in the Peruvian legal system” (unofficial translation). Regarding the human rights treaties, the Constitutional Court states that they “constitute a parameter of constitutionality on rights and freedoms”. (Exp. 00047-2004-AI, 24/04/2006, §18-21). The Peruvian State has incorporated ILO Convention 169 to its domestic legislation since 2 February, 1995 (Resolución Legislativa - RL No 26253). The Constitutional Court has been clear about its significance stating that ILO Convention 169 has constitutional status and forms part of the constitutional block or parameter, which means that it has both a passive force to resist infractions from infra-constitutional sources and an active force to update our legal framework, incorporating into it the rights it recognizes with the same status as constitutional rights. (Exp. 05427-2009-AC, 30/06/2010, §8-9).

¹⁵ For example, in dossier No 3330-2004-AA/TC, which dealt with a conflict between the constitutional rights to free enterprise and the fundamental and the right to health, the Constitutional Court considered that if the recognition of the rights invoked by the company meant a detriment to the rights to health and to a healthy environment of its neighbours, making their enjoyment impossible, these latter rights should prevail.

¹⁶ Comisión de Pueblos Andinos, Amazónicos y Afroperuanos, Ambiente y Ecología del Congreso de la República - Grupo de Trabajo sobre la Situación Indígena de las Cuencas de los Ríos Tigre, Pastaza, Corrientes y Marañón. Final Report. Legislative term 2012 – 2013. (Henceforth, Congressional Commission) available at [http://www2.congreso.gob.pe/sicr/comisiones/2011/com2011pueandamaaframbeco.nsf/pubs1foto/7C6EA2CE879846F505257A440053CE21/\\$FILE/INFORME_FINAL.PDF](http://www2.congreso.gob.pe/sicr/comisiones/2011/com2011pueandamaaframbeco.nsf/pubs1foto/7C6EA2CE879846F505257A440053CE21/$FILE/INFORME_FINAL.PDF).

¹⁷ Adjacent to it are: Block 67 –in exploitation; Block 39 –in exploration; Block 102 –in exploration; and Block 64 –in preparation for exploitation. (Perú: Informe alternativo 2013 – Sobre el cumplimiento del Convenio 169 de la OIT. Organizaciones Indígenas que conforman el Pacto de Unidad con el apoyo del Grupo de Trabajo de Pueblos Indígenas de la Coordinadora Nacional de Derechos Humanos. September 2013. In <http://derechoshumanos.pe/2013/10/presentan-informe-alternativo-sobre-el-cumplimiento-del-convenio-169-de-la-oit/>).

¹⁸ OEFA, Directorial Resolution (RD) number 534-2013-OEFA/DFSAI, 22 November, 2013.

¹⁹ A. Chirif, *supra*.

²⁰ DS 003-71-EM/DGH and DS 004-78-EM/DGH.

²¹ Perupetro, List of hydrocarbons contracts in force, Block 1AB <http://www.perupetro.com.pe/relaciondecontratos/relacion.jsp?token=99>.

²² Perupetro, List of hydrocarbons contracts in force, Block 8 <http://www.perupetro.com.pe/relaciondecontratos/relacion.jsp?token=100>.

²³ Pluspetrol, <http://www.pluspetrol.net/> and <http://www.pluspetrolnorte.com.pe/>.

²⁴ <http://listofcompanies.co.in/pluspetrol-sa/>.

²⁵ Apoyo & Asociados Internacionales S.A.C., Pluspetrol Norte S.A. – May 2008, www.aai.com.pe.

²⁶ Sindicato Unitario de Trabajadores de Pluspetrol Perú Corporation S.A. (SUTRAPPEC), Report on the situation of Pluspetrol for the collective negotiations 2009, June 2009, <http://es.scribd.com/doc/32012117/Informe-sobre-situacion-de-Pluspetrol-para-Negociacion-Colectiva-2009>.

²⁷ Pluspetrol has a block in exploration phase (115, north of Peru), and since 2000 forms part of the consortium for the exploration and exploitation of gas in the megaproject of Camisea, in the south of the country, operating blocks 88 and 56 (in production) and 108 (in exploration phase). It and also participates in refining processes in Pisco.

²⁸ <http://www.pluspetrol.net/origen.html>.

²⁹ <http://www.pluspetrolnorte.com.pe/origen.html>.

³⁰ PUINAMUDT, Claves para entender la crisis ambiental y social en territorios indígenas amazónicos por la contaminación petrolera, 15 May 2014, <http://observatoripetrolero.org/4-claves-para-entender-la-crisis-ambiental-y-social-en-territorios-indigenas-amazonicos-en-loreto-por-actividades-petrolera/>.

³¹ National Institute for Statistics and Information (INEI) National Census 2007: XI population y VI housing - Executive Summary, Final results of indigenous communities, January 2009, http://www1.inei.gob.pe/media/MenuRecursivo/publicaciones_digitales/Est/Lib0789/Libro.pdf.

³² PUINAMUDT, Claves para entender..., *supra*.

³³ PUINAMUDT, <http://observatoripetrolero.org>.

³⁴ On this issue see Ministry of Health, DGE, Análisis de Situación de Salud (ASIS), 2006, http://www.dge.gob.pe/publicaciones/pub_asis/asis20.pdf.

³⁵ Pluspetrol, Un modo de operar, <http://www.pluspetrol.net/crudonegro.html>.

³⁶ *Ibid.*

³⁷ See, section 7.2.1.2 onwards.

³⁸ In a 2012 document, ACODECOSPAT states that: “From 1971 to 1995 production waters were discharged in ecosystems inside the National Reserve Pacaya Samiria (25% in the Huishto Yanayacu stream and 75% in the lagoon adjacent to battery no. 3). Since 1995, 75% of the production waters are discharged on the Marañón River”. The impact of this highly salinized and hot water has to be significant. See PUINAMUDT, *Las lagunas de petróleo en la reserva nacional Pacaya Samiria*, 7 October 2013, <http://observatoriopetrolero.org/las-lagunas-de-petroleo-en-la-reserva-nacional-pacaya-samiria/>. Several NGOs denounced that in Block 1AB Pluspetrol “has continued to use the same practices used by Oxy which had damaged the environment and public health. In particular, (...) they discharged big amounts of production water into the rivers and streams”. (EarthRights International - ERI, Racimos de Ungurahui and Amazon Watch, *Un Legado de Daño - Occidental Petroleum en Territorio Indígena de la Amazonía Peruana*, May 2007).

³⁹ See, for instance, OSINERGMIN reports: the pipes for the transport and reinjection of production water were unprotected as they lacked protective coating, the piping had no insulating elements between it and their ‘H support’, the replaced pipes had not been removed and in some cases were on top of other pipes, and buried pipes which are subject to pressure and prone to breakage were found” (in Congressional Commission, *supra*, citing Technical Report number 33-2013-GFHL-UPPD, 28 May 2013, OSINERGMIN).

⁴⁰ Ministry of Health, DGE, *Análisis de Situación de Salud (ASIS)*, 2006, http://www.dge.gob.pe/publicaciones/pub_asis/asis20.pdf. It consists of a health report which was undertaken with an intercultural approach.

⁴¹ ERI and others, *Un Legado de Daño*, *supra*.

⁴² See OEFA, RD N°534-2013-OEFA/DFSAI, *supra*.

⁴³ PUINAMUDT, *Las lagunas de petróleo en la Reserva Nacional Pacaya Samiria*, 7 October 2013, <http://observatoriopetrolero.org/las-lagunas-de-petroleo-en-la-reserva-nacional-pacaya-samiria/>.

⁴⁴ Studies by OEFA, ANA, OSINERGMIN and SERNANP for each of the four watersheds. See <http://www.minam.gob.pe/cuencas/2013/10/16/declaratoria-de-emergencia-ambiental-reducira-riesgos-ambientales-y-sanitarios-en-la-cuenca-del-pastaza/>; <http://www.minam.gob.pe/cuencas/los-pasivos-ambientales/>; <http://observatoriopetrolero.org/acodecospat-informes-ambientales-del-maranon-y-reserva-pacaya-samiria/>; <http://observatoriopetrolero.org/feconaco-reportes-publicos-ambientales-del-corrientes/>; <http://observatoriopetrolero.org/fediquep-reportes-ambientales-del-estado-sobre-contaminacion-petrolera-en-el-pastaza/> and <http://observatoriopetrolero.org/fediquep-informe-source-sobre-contaminacion-petrolera-pastaza/>.

⁴⁵ See, in particular, Congressional Commission, *supra*, p.63.

⁴⁶ Based on Congressional Commission, *supra* p.11.

⁴⁷ PUINAMUDT, *Claves para entender ...*, *supra*.

⁴⁸ ERI and others, *Un Legado de Daño*, *supra*.

⁴⁹ *Ibid*.

⁵⁰ A. Chirif, *supra*.

⁵¹ *Ibid*.

⁵² See ASIS, *supra*, and studies by OEFA, ANA, OSINERGMIN and SERNANP for each of the four watersheds, *supra*.; The ILO Committee on the Application of Standards (CAS) highlighted their concern in their observations to Peru in 2009 on the issue that “according to the reports of the Ministry of Health, 98% of the girls and boys in these communities surpass the limits of toxic metals in blood” (CAS, comments to Convention 169, Peru, adopted in 2009, published in the 98 session of the ILC (2009), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:2_556433,es:NO).

⁵³ OSINERGMIN in Comisión de Justicia y Derechos Humanos del Congreso de la República, *Vulneración de derechos fundamentales de los pueblos amazónicos asentados en las cuencas de los ríos Pastaza, Tigre, Corrientes y Marañón*, legislative term 2012-2013, <http://www.marisolpereztello.pe/wp-content/uploads/2013/08/cuencas-informe-ddhh-Final.pdf>. This is particularly due to the opening of brothels by OXY. Although they were later closed down, the consequences remain.

⁵⁴ ASIS, *supra*.

⁵⁵ Congressional Commission, *supra* and Comisión de Justicia y DDHH del Congreso de la República, *supra*.

⁵⁶ Report submitted by Mr Paul Hunt, Special Rapporteur on the right of everyone to enjoy the highest attainable standard of physical and mental health, Mission to Peru, 4 February 2005, E/CN.4/2005/51/Add.3.

⁵⁷ Ibid.

⁵⁸ IACHR, Anuario de derechos humanos /2010, Derechos ambientales y obligaciones en el sistema interamericano de derechos humanos, Dinah Shelton, Informe sobre la Situación de los Derechos Humanos en Ecuador, OEA/SerieL/V/II.96, doc. 10 rev. 1, 24 April 1997 (§88).

⁵⁹ ERI et al, Un Legado de Daño, supra.

⁶⁰ In this regard, see IACHR, Case Yanomami v Brasil (Res. No. 12/85) in Dinah Shelton, IACHR, Anuario de derechos humanos /2010, supra.

⁶¹ ERI et al, Un Legado de Daño, supra.

⁶² See CESCR, General Comment No. 7, The right to adequate housing (Article 11.1 of the Covenant): forced evictions, 1997.

⁶³ A. Chirif, supra.

⁶⁴ A. Chirif, supra.

⁶⁵ On violations of the obligation to respect and violations of the obligations to protect, see CESCR, General Comment No. 14, supra, §50 y 51.

⁶⁶ Report submitted by Mr Paul Hunt. Special Rapporteur on the right of everyone to enjoy the highest attainable standard of physical and mental health, Mission to Peru, 4 February 2005, E/CN.4/2005/51/Add.3.

⁶⁷ ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Observation (CEACR) - adoption: 2010, publication: 100a session of the ILC (2011). Convention on indigenous and tribal peoples, 1989 (number 169) - Peru (Ratification: 1994). http://www.ilo.org/dyn/normlex/es/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2328582. See also Observation (CEACR) - adoption: 2012, publication: 102a session of the ILC (2013). Convention on indigenous and tribal peoples, 1989 (number 169) - Peru (Ratification: 1994). http://www.ilo.org/dyn/normlex/es/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3076341

⁶⁸ Studies of the Instituto de Investigaciones de la Amazonia Peruana IIAP, from 1984 to 1987 <http://observatoriopetrolero.org/feconaco-contaminacion-petrolera-de-la-cocha-atiliano/>.

⁶⁹ <http://www.tc.gob.pe/legconperu/constitucion.html> See also http://www.tc.gob.pe/tc_tribunal.php on precautionary rights protection processes (tutela).

⁷⁰ CIJ-IDL, Acceso a la justicia: Empresas y violaciones de derechos humanos en el Perú, May 2013.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Law No. 28611, General Environment Act; Law No. 26821, Organic Law for the Sustainable Utilization of Natural Resources; Law No. 30011, 26 April 2013, amending Law No. 29325 on the National System for Environmental Assessment and Surveillance.

⁷⁴ Comisión de Justicia y DDHH del Congreso de la República, supra.

⁷⁵ <http://www.defensoria.gob.pe/defensoria.php#ftds>.

⁷⁶ There exists a possibility of submitting individual complaints to the Human Rights Committee for violations of the ICCPR committed by any of these three countries, as all have ratified the Optional Protocol allowing such submissions. Regarding the CESCR, only Argentina has ratified the Optional Protocol allowing the submission of individual and group complaints to CESCR.

⁷⁷ See article 22 and subsequent articles of the ILO Constitution.

⁷⁸ OECD Guidelines in <http://www.oecd.org/daf/inv/mne/MNEguidelinesESPANOL.pdf> The Guidelines are recommendations by governments addressed to multinational companies who operate in member countries or who have their headquarters in member countries. In the chapter on human rights, the Guidelines establish that companies must respect human rights, which implies they should “Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they

are involved.” In relation to the environment, the guidelines envisage that “Enterprises should ..., take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development”. They also outline the responsibility of companies to “Establish and maintain a system of environmental management appropriate to the enterprise”.

⁷⁹ EITI is a global alliance of governments, companies and civil society to work together to enhance transparency and accountability in the management of financial resources obtained from natural resources. It promotes transparency in the revenues States receive from the companies as taxes and other payments made by extractive industries (mining, oil and gas) with the aim of preventing corruption and conflicts and to ensure that the revenues obtained benefit the general population of the country of origin of such resources and are used to promote development. See EITI website, <http://eiti.org/> and EITI Peru, <http://eitiperu.minem.gob.pe/index.php>.

⁸⁰ The Global Compact is a voluntary initiative where the member companies commit to align their strategies and operations to ten universally accepted principles in four thematic areas: human rights, labour standards, environment and anti-corruption. <http://www.unglobalcompact.org>.

⁸¹ See http://www.minem.gob.pe/minem/archivos/exposicion_pluspetronorte.pdf. and Pluspetrol’s 2012 sustainability report <http://www.pluspetrol.net/informepluspetrol2012.pdf>.

⁸² It includes the following areas: implementation of socio-environmental standards; a compensation programme (agreements); a local labour programme; a health programme; community monitoring; and a projects programme. http://www.minem.gob.pe/minem/archivos/exposicion_pluspetronorte.pdf.

⁸³ Ibid.

⁸⁴ CIJ-IDL, *supra*.

⁸⁵ On this issue, see §7.3.

⁸⁶ Congressional Commission, *supra*.

⁸⁷ Fiscal File N° 2013-04.

⁸⁸ See also <http://periodismohumano.com/sociedad/medio-ambiente/indigenas-peruanos-buscan-amparo-contra-la-mineria-del-oro.html>.

⁸⁹ Congressional Commission, *supra*.

⁹⁰ ERI, *Maynas v. Occidental*, <http://www.earthrights.org/legal/maynas-v-occidental>.

⁹¹ Interview with Wendy Pineda, technical advisor of PUINAMUDT.

⁹² La Región, *Diario Judicial de Loreto, Sustentaron inocencia de indígenas de Andoas*, 28 April 2011, <http://diariolaregion.com/web/2011/04/28/sustentaron-inocencia-de-indigenas-de-andoas/>.

⁹³ Servindi, *Perú: Reabren proceso a indígenas en caso Andoas. Aidesep rechaza criminalización*, 27 April 2011, <http://servindi.org/actualidad/43907>.

⁹⁴ Coordinadora Nacional de Derechos Humanos (CNDDHH), *Confirman sentencia absolutoria a indígenas procesados por toma del aeropuerto de Andoas*, 19 August 2011, <http://derechoshumanos.pe/2011/08/confirman-sentencia-absolutoria-a-indigenas-procesados-por-toma-del-aeropuerto-de-andoas/>.

⁹⁵ Ombudsman Office, *Report on Social Conflicts*, No. 51, May 2008, <http://www.defensoria.gob.pe/temas.php?des=3#r>.

⁹⁶ PAC is “an instrument created to give an additional opportunity to the companies to comply with the pending commitments from their PAMA and to incorporate additional mitigation and remediation measures for the treatment of impacted sites not included in the PAMA”. According to OEFA, “the nature of PAC implies the prior identification of the affected sites, either because they were pending remediation or because they were not adequately considered in the PAMA”. (Congressional Commission, *supra*).

⁹⁷ Pluspetrol Norte, *Cronología*, 2009, <http://www.pluspetrolnorte.com.pe/historia.html>.

⁹⁸ As highlighted by MINAM, not all the impacted areas were identified in these instruments and the identification was carried out with “inappropriate environmental quality standards”. For instance, PAC for block 1A only includes commitments regarding 75 sites previously identified by the company itself. According to OSINERGMIN, “the areas not included in the PAC are under the responsibility of said company” (in Congressional Commission, *supra*).

⁹⁹ In block 1AB, Pluspetrol identified 123 affected sites, in the framework of the commitments of the Environmental Emergency Declaration of Pastaza. However, it does not recognize its legal responsibility for the restoration of those sites, arguing that they were included in the previously adopted environmental management instruments (Congressional Commission, *supra*, referring to Oficio N° PPN-OPE-13-0090, 9 May 2013, Pluspetrol Norte S.A., sent to OEFA). In this sense, the company refused to implement the closure plan based on a MINEM decision which classified the area as “industrial lands”, thus allowing a level of pollution by TPH 30 times higher than that for block 8, whose PAC was adopted on the following year. The State admitted a pollution level of 30,000 mg of TPH/kg of soil, based on a Pluspetrol proposal. (Congressional Commission, *supra*).

¹⁰⁰ For instance, for block 8 Pluspetrol developed a (natural) “ecologic” remediation and rehabilitation proposal, changing the method of remediation they had previously proposed and accepted when they subscribed the PAC. The proposal was rejected by the MINEM, but the company appealed in court and managed “to suspend the remediation work in block 8 and to prevent the presentation of the closure plan”. (Congressional Commission, *supra*, referring to Resolución No 13 del Tercer Juzgado Transitorio Contencioso de la Corte Superior de Lima, October 2012).

¹⁰¹ See reports and observations submitted to and reiterated sanctions imposed by OSINERGMIN and OEFA. “OSINERGMIN’s monitoring report in Pastaza (report No. 219880- 2012-GFHL-UPPD) developed from 15 to 25 October 2012, clearly establishes (para 3.14) the non-compliance with the PAC and PMA in block 1AB within the timeframe for remediation, and demonstrates pollution, with barium, lead and total petroleum hydrocarbons (TPH) exceeding the maximum or objective levels. Non-compliance with the PAC for block 1AB, according to the OSINERGMIN Report No. 180859-2010-OS/GFHL-UPPD, and with the PAC for block 8 according to report No. 169648-2010-OS/GFHL-UMAL, and corroborated in corresponding Resolutions No. 209-2012-OEFA-DFSAI and No. 098-2012-OEFA-DFSAI” (Congressional Commission *supra*.); “On 26 September 2005, Pluspetrol was sanctioned for non-compliance with the PAMA for block 1AB (N° 182-2005- OS-GG). The pending commitments were, among others: programme for the treatment and monitoring of water; management of waste; soil restoration”. (Comisión de Justicia y DDHH del Congreso de la República, *supra*); see also PUINAMUDT, *Las lagunas de petróleo ...*, *supra*; and MINAM, *Declaratoria de emergencia ambiental reducirá riesgos ambientales y sanitarios en la cuenca del Pastaza*, 16 October 2013, <http://www.minam.gob.pe/cuencas/2013/10/16/declaratoria-de-emergencia-ambiental-reducira-riesgos- ambientales-y-sanitarios-en-la-cuenca-del-pastaza/>.

¹⁰² Congressional Commission, *supra*.

¹⁰³ Pluspetrol, “through legal actions, has sometimes neutralized the administrative actions taken by the Directorate of Environmental Energy Affairs (DGAAE) of MINEM, and has challenged some in court, thereby paralysing the ongoing mitigation and remedial activities and preventing the implementation of the respective closure plans” (Congressional Commission, *supra*).

¹⁰⁴ PUINAMUDT, *Reporte de Sanciones I – 2012, Vertimientos de Hidrocarburos, Respecto al seguimiento de las acciones sancionatorias a PLUSPETROL NORTE S.A. por vertimientos de Hidrocarburos en los lotes 8 y 1AB*, 03 July 2012, <http://observatoriopetrolero.org/wp-content/uploads/2013/01/REPORTE-DE- RESOLUCIONES-SANCIONATORIAS-IMPUESTAS-A-PLUSPETROL-NORTE-2.pdf>.

¹⁰⁵ PUINAMUDT, *Reporte Multas II-2012, Incumplimiento de compromisos contenidos en los Instrumentos de Gestión Ambiental para el lote 1AB y 8, Respecto a las tres multas emitidas por el OEFA por los incumplimientos del PAMA y del PAC en los lotes 8 y 1AB*, 09 July 2012, <http://observatoriopetrolero.org/wp-content/uploads/2013/02/REPORTE-DE-MULTAS-IMPUESTAS-A-PLUSPETROL-NORTE-1.pdf>.

¹⁰⁶ MINAM, *Los monitoreos y las declaratorias de emergencia ambiental*, <http://www.minam.gob.pe/cuencas/los-monitoreos-y-las-declaratorias-de-emergencia-ambiental/>.

¹⁰⁷ MINAM, *Declaratoria de emergencia ambiental reducirá riesgos ambientales y sanitarios en la cuenca del Pastaza*, *supra*.

¹⁰⁸ On this issue, see statements by the Environment Minister denouncing the bad faith of the company. *La Primera, Pluspetrol contamina río y se niega a pagar multa*, 26 March 2013, http://www.laprimeraperu.pe/online/nacional/pluspetrol-contamina-rio-y-se-niega-a-pagar-multa_134531.html.

¹⁰⁹ Congressional Commission, *supra*.

¹¹⁰ PUINAMUDT, *Reporte Multas II-2012*, *supra*.

¹¹¹ Congressional Commission, *supra*.

¹¹² Technical report No. 33-2013-GFHL-UPPD in Congressional Commission, *supra*.

¹¹³ Ombudsman Office, Report on Social Conflicts, No. 79 and 87, September 2010 and May 2011, <http://www.defensoria.gob.pe/temas.php?des=3#r>.

¹¹⁴ OEFA, Resolution, 22 November 2013, RD N°534-2013-OEFA/DFSAI, *supra*.

¹¹⁵ <http://www.oefa.gob.pe/noticias-institucionales/oefa-sanciona-a-pluspetrol-norte-s-a-por-contaminar-y-desaparecer-laguna-shanshocochoa-en-loreto>.

¹¹⁶ In particular, Pluspetrol announced the potential submission of court claims against the OEFA. See La República, Pluspetrol rechaza multa de US\$ 7 millones por dañar laguna de Shanshocochoa, 2 December 2013, <http://www.larepublica.pe/02-12-2013/pluspetrol-rechaza-multa-de-us-7-millones-por-danar-laguna-de-shanshocochoa>. Along this line, although from the mining sector itself, see – ver La República, OEFA no podrá fiscalizar si mineras no aportan cuota, 19 September 2014, <http://www.larepublica.pe/19-09-2014/oefa-no-podra-fiscalizar-si-mineras-no-aportan-cuota>.

¹¹⁷ See, for instance, El Comercio, Aún existe la laguna que según OEFA había desaparecido Pluspetrol, 1 December 2013, <http://elcomercio.pe/peru/lima/aun-existe-laguna-que-segun-oefa-habia-desaparecido-pluspetrol-noticia-1666715>. The lagoon may reappear if there are strong rains, but nevertheless the environmental impact is very serious. It may dry up during the dry season. Even if the disappearance of the lagoon is temporary, it has definitely caused the loss of species and the degradation of the local ecosystem.

¹¹⁷ On the mobilization that resulted in the signing of the Dorissa Act, see Ombudsman Office, Report on Social Conflicts, No. 31 and 32, September and October 2006, <http://www.defensoria.gob.pe/temas.php?des=3#r>; on the mobilizations resulting in the signing of the Tigre Act, see Ombudsman Office, Report on Social Conflicts, No. 77 to 104, July 2010 to October 2012.

¹¹⁸ On the mobilization that resulted in the signing of the Dorissa Act, see Ombudsman Office, Report on Social Conflicts, No. 31 and 32, September and October 2006, <http://www.defensoria.gob.pe/temas.php?des=3#r>; on the mobilizations resulting in the signing of the Tigre Act, see Ombudsman Office, Report on Social Conflicts, No. 77 to 104, July 2010 to October 2012.

¹¹⁹ Dorissa Act– “An Act that complements and clarifies the agreements subscribed by the indigenous communities of the river Corrientes- FECONACO, the Ministry of Energy and Mines, the Ministry of Health, the regional Government of Loreto, the company Pluspetrol Norte S.A., and the Ombudsman Office”, 22 October 2006. The following was agreed: 1. Reinjection of production waters discharged in the watershed of the Corrientes River. 2. Integral Health Programme. 3. Integral Health Insurance for the communities. 4 Integral Plan of development. 5. Temporary food support and provision of drinking water. 6. Remediation of environmental threats and damage in blocks 1AB and 8, including the funding of the community monitoring and surveillance programme.

¹²⁰ Congressional Commission, *supra*.

¹²¹ Commitments undertaken by GOREL. The most relevant were the following: Gorel’s acceptance to formally request that prior consultation be held with the communities and for the need to have an environmental diagnosis before the licencing of block 192, as well as to fund an independent international environmental assessment, a toxicological study, the independent indigenous community monitoring programme, the water quality monitoring programme, and the salary of the doctors needed to comply with the health commitments under the Act, as well as other agreements regarding problems in the areas of health, education, production and transport (Congressional Commission, *supra*).

¹²² Agreement between FECONAT and GOREL with commitments regarding health, education, agricultural and aquiculture production and transport. (Congressional Commission, *supra*).

¹²³ For instance, in the case of the Dorissa Act, in spite of Pluspetrol’s statement that they had complied with the re-injection of 100% of the production water, OSINERGMIN argued in October 2011 that it had been inadequately performed and so ordered the temporary closure of three wells (Congressional Commission, *supra*). In April 2014, the payment of 8 million Soles for the Development Plan was still pending (Ombudsman Office, Report on Social Conflicts No. 122, April 2014, *supra*).

¹²⁴ Thus, in July 2013 communities in Pastaza organized new protests to demand the establishment of aroundtable dialogue and responses to their demands (Servindi, Perú: Comunidades del Pastaza marchan haciainstalaciones de Pluspetrol en Nuevo Andoas, 12 July 2013), <http://servindi.org/actualidad/90363>.

¹²⁵ Report of the legislative term 2011-2012 and Report of the legislative term 2012-2013.

¹²⁶ Report titled “Vulneración de derechos fundamentales de los pueblos amazónicos asentados en las cuencas de los ríos Pastaza, Tigre, Corrientes y Marañón”.

¹²⁷ RS-200-2012-PCM, extended by RS-212-2013-PCM (MINAM, La Comisión Multisectorial, <http://www.minam.gob.pe/cuencas/la-comision-multisectorial/>).

¹²⁸ MINAM, Declaratoria de emergencia ambiental reducirá riesgos ambientales y sanitarios en la cuenca del Pastaza, *supra*.

¹²⁹ El Organismo de Evaluación y Fiscalización Ambiental (OEFA), la Autoridad Nacional del Agua (ANA) y la Dirección General de Salud Ambiental (DIGESA).

¹³⁰ MINAM, Los monitoreos y las declaratorias de emergencia ambiental, *supra*.

¹³¹ See studies by OEFA, ANA, OSINERGMIN and SERNANP for each of the four watersheds, *supra*.

¹³² Congressional Commission, *supra*.

¹³³ Supreme Resolution No. 119-2014-PCM, in <http://elperuanolegal.blogspot.com/2014/04/resolucion-suprema-n-119-2014-pcm.html>.

¹³⁴ MINAM, Hoy se instaló Comisión de Desarrollo de las Cuencas del Pastaza, Tigre, Corrientes y Marañón en Loreto, 27 May 2014, <http://www.minam.gob.pe/cuencas/2014/05/27/hoy-se-instalo-comision-de-desarrollo-de-las-cuencas-del-pastaza-tigre-corrientes-y-maranon-en-loreto/>.

¹³⁵ Measures that “will allow the enhancement of the social and environmental conditions” of the population in the four watersheds and “improve the integral development of the watersheds (...) as well as the implementation of public and private development projects” (article 1). It must also, among other issues, propose measures “to implement social programs and access to public services such as sanitation, and electrification, among others;”, “propose necessary environmental alternatives”; “develop a proposal of titling and registration of the ownership and possession rights of the indigenous communities” settled in the districts of the four watersheds included in the Supreme Resolution (article 2).

¹³⁶ Servindi, Nativos rechazan facultad de veto planteada por Pluspetrol, 29 May 2014, <http://servindi.org/actualidad/106019>.

¹³⁷ Lamula.pe, Estado y federaciones indígenas de Loreto retoman el diálogo, 3 July 2014, <https://redaccion.lamula.pe/2014/07/03/estado-y-federaciones-indigenas-de-loreto-retoman-el-dialogo/danyvaldez/>.

¹³⁸ Information provided by the representatives of the indigenous organizations participating in the process.

¹³⁹ In the watershed of the Pastaza river (25 April 2013, No. 139-2013-MINAM); in the watershed of the Corrientes river (6 September 2013, No. 263-2013-MINAM); in the watershed of the Tigre River (29 November 2013, No. 370-2013-MINAM) and in the watershed of the Marañón River (15 May 2014, No. 136-2014-MINAM). Each declaration is in force for 90 working days. The declaration for Pastaza was modified on 10 May 2013, adding a new 90 working days term, and the Corrientes declaration was extended on 20 January 2014, also for another 90 working days.

¹⁴⁰ Supreme Decree 006-2014-SA.

¹⁴¹ On this issue, see PUINAMUDT, ¿Avances? Ministro del Ambiente habla en el Congreso de las Emergencias Ambientales, 11 December 2013, <http://observatoriopetrolero.org/ministro-del-ambiente-ante-comision-de-pueblos-del-congreso-emergencias-ambientales-y-shanshococha/>. See also UN Special Rapporteur on the rights of indigenous peoples James Anaya, in Ombudsman Office, Report on social conflicts No. 118, December 2013.

¹⁴² By the end of May 2014, the Ombudsman Office in Loreto stated: “although the terms of the corresponding declarations for the watershed of the Pastaza and Tigre ended in September 2013 and April 2014, respectively, all the activities contained in their plans have not been met” (Pro y contra, No se cumplió en totalidad actividades por emergencia en cuencas, 27 May 2014, <http://proycontra.com.pe/2014/05/27/no-se-cumplio-en-totalidad-actividades-por-emergencia-en-cuencas/>). Thus, by mid-June 2013, when the emergency declaration for the Pastaza was about to end, only the commitment to provide water purification kits and an environmental diagnosis had been met by Pluspetrol S.A. (Congressional Commission, *supra*).

¹⁴³ Ombudsman Office, Report on Social Conflicts, No. 121 and 122, March and April 2014; El Comercio, Piden a nativos desbloquear vía hacia instalaciones petroleras, 20 April 2014, <http://elcomercio.pe/peru/loreto/piden-nativos-desbloquear-via-hacia-instalaciones-petroleras-noticia-1723885> ; Al Jazeera America, Indigenous tribe occupies Peru's biggest oil facility, cutting output, 25 April 2014, <http://america.aljazeera.com/articles/2014/4/25/peru-indigenous-oil.html>.

¹⁴⁴ For further information see the full case study report available in Spanish at <http://www.equidad.pe/> .

¹⁴⁵ See IACHR, Informe sobre la Situación de los Derechos Humanos en Ecuador, supra, on protection measures and on investigation and remedial measures when damage has been done. At the national level, the General Environmental Law includes provisions on environmental damage reparation (Article 147) and on the administrative responsibility (Article 138).

¹⁴⁶ Ombudsman Office, Report on Social Conflicts, No. 79, September 2010.

¹⁴⁷ A. Chirif, supra.

¹⁴⁸ Pluspetrol, Comunicaciones, Información corporativa, hospital Trompeteros, June 2010, <http://www.pluspetrol.net/comunica.html>.

¹⁴⁹ A. Chirif, supra.

¹⁵⁰ Congressional Commission, supra, on FEDIQUEP's observations.

¹⁵¹ MINAM, Se entregarán 65 plantas de potabilización de agua a las Cuenca del Pastaza, Tigre, Corrientes y Maraón, 16 June 2014, <http://www.minam.gob.pe/cuencas/2014/06/16/se-entregaran-65-plantas-de-potabilizacion-de-agua-a-las-cuenca-del-pastaza-tigre-corrientes-y-maranon/>.

¹⁵² At least 800 kits were provided in the Pastaza watershed (Congressional Commission, supra) and 250 in the Corrientes watershed (MINAM, Cuatro comunidades nativas de la cuenca del río Corrientes recibirán 250 kits “Mi Agua”, 24 March 2014, <http://www.minam.gob.pe/cuencas/2014/03/24/cuatro-comunidades-nativas-de-la-cuenca-del-rio-corrientes-recibiran-250-kits-mi-agua/>).

¹⁵³ Congressional Commission, supra.

¹⁵⁴ MINAM, Cuatro comunidades nativas de la cuenca del río Corrientes recibirán 250 kits..., supra and MINAM, Los pasivos ambientales, <http://www.minam.gob.pe/cuencas/los-pasivos-ambientales/>

¹⁵⁵ MINAM, Se entregarán 65 plantas de potabilización de agua..., supra.

¹⁵⁶ A. Chirif, supra.

¹⁵⁷ A. Chirif, supra.

¹⁵⁸ Interview with a technical advisor of PUINAMUDT.

¹⁵⁹ See PUINAMUDT, ¿Avances? Ministro del Ambiente habla..., supra; See also §7.4.2 on clean-up plans.

¹⁶⁰ See Pluspetrol, Programa de Responsabilidad Social de Pluspetrol Norte, supra.

¹⁶¹ Among other complaints made by the communities, the distribution of powder milk in the framework of the Dorissa Act was criticised as being contrary to their culture, because communities do not usually drink milk. Besides, it is an inappropriate product for an area where the water is highly polluted. In June 2014, according to a technical advisor of PUINAMUDT, the communities were provided with winter coats, an outstanding example of inadequate measures, as it is a jungle area, thus extremely hot.

¹⁶² Ombudsman Office, Report on Social Conflicts, No. 99 to 116, May 2012 to October 2013.

¹⁶³ A. Chirif, supra.

¹⁶⁴ A. Chirif highlights that “nearly all the communities are affected by the high waters (...), 76.9% are fully or partially covered by waters for several months a year”.

¹⁶⁵ On this issue, see Juan Carlos Ruiz Molleda, ¿Las comunidades nativas tienen derecho a una compensación económica, por el uso que hacen de sus territorios las empresas petroleras?, in A. Chirif, supra.

¹⁶⁶ A. Chirif, supra.

¹⁶⁷ Supreme Resolution No. 060-2006, block 8; S.R. No. 061-2006, block 1AB.

¹⁶⁸ The law provides for compensation to the owner of the land to be occupied by hydrocarbon exploration and exploitation (Law No. 26505, 1995, Art.7 and S.D. No. 032-2004-EM).

¹⁶⁹ A. Chirif, *supra*.

¹⁷⁰ See conflicts registered by the Ombudsman Office in the Tigre river watershed (reports July 2010-July 2011); between FECONACO and Pluspetrol – Corrientes river watershed (reports June 2012; July 2013); between FEDIQUEP and Pluspetrol – Pastaza river watershed (La Primera, Pluspetrol pagará por el uso de tierras del Pastaza - Comunidades indígenas obtienen beneficios tras diálogo con empresa Pluspetrol que explota el Lote 1AB en la selva nororiental, 17 September 2013, http://www.laprimerapepu.pe/online/nacional/pluspetrol-pagara-por-el-uso-de-tierras-del-pastaza_149682.html).

¹⁷¹ A Chirif, *supra*.

¹⁷² La República, Perupetro descarta prórroga a Pluspetrol para Lote 192, 3 June 2014, <http://www.larepublica.pe/03-06-2014/perupetro-descarta-prorroga-a-pluspetrol-para-lote-192>.

¹⁷³ Ombudsman Office, Report on Social Conflicts, No. 102, August 2012.

¹⁷⁴ See Perú: Informe alternativo 2013 – Sobre el cumplimiento del Convenio 169 de la OIT, *supra*, p.71; La República, Perupetro descarta prórroga a Pluspetrol, *supra*.

¹⁷⁵ Ombudsman Office, Report on Social Conflicts, May 2008 to March 2010.

¹⁷⁶ IACHR, Anexo al comunicado de prensa 109/10 sobre el 140o periodo ordinario de sesiones de la CIDH, 5 November 2010, <http://www.cidh.org/comunicados/Spanish/2010/109a-10sp.htm>.

¹⁷⁷ Statement by the UN Special Rapporteur on the rights of indigenous peoples James Anaya at the end of his mission to Peru, 13 December 2013 <http://onu.org.pe/noticias/declaracion-del-relator-especial-de-las-naciones-unidas-sobre-los-derechos-de-los-pueblos-indigenas-james-anaya-al-concluir-su-visita-al-peru/>.

¹⁷⁸ UN OHCHR News Release Peru / Indigenous peoples: “New oil project threatens further harm for human rights victims” – UN experts warn December 15, 2014.

¹⁷⁹ *Ibid*.

¹⁸⁰ See, for example, communications published by Pluspetrol in Archivo de noticias <http://www.pluspetrolnorte.com.pe/archivo.php>.

¹⁸¹ See Congressional Commission, *supra*.

¹⁸² See Congressional Commission, *supra*.

¹⁸³ *Ibid*.

¹⁸⁴ MINAM, Declaratoria de emergencia ambiental reducirá riesgos ambientales y sanitarios en la cuenca del Pastaza, *supra*.

¹⁸⁵ Article 20-A, Law No. 30011, amending Law No. 29325, Law on the National System for Environmental Assessment and Surveillance, 8 April 2013.

¹⁸⁶ <http://www.minem.gob.pe/minem/archivos/file/Mineria/LEGISLACION/2014/JULIO/LEY30230.pdf>

¹⁸⁷ See Juan Carlos Ruiz Molleda, Instituto de Defensa Legal, Informe Jurídico - Análisis de la inconstitucionalidad del proyecto No 3627/2013-PE en materia ambiental, saneamiento físico legal y la declaratoria de necesidad pública, June 2014, http://www.justiciaviva.org.pe/webpanel/doc_trabajo/doc26062014-172037.pdf.

¹⁸⁸ See Congressional Commission, *supra*.

Chapter 5 - Indigenous Peoples' Access to Remedies for Violations of their Rights in the Context of Mining Operations in India

Shankar Gopalakrishnan

1. Background to the case study

This study seeks to evaluate the ability of indigenous peoples to access remedies for violations of their rights in the context of mining operations in India. In particular, it examines one ongoing conflict: a proposed coal mine in Mahan, an area of Singrauli District of Madhya Pradesh, which is facing considerable opposition from the local indigenous community. At the time of writing,ⁱ this conflict was ongoing. Although the mine has secured official permissions to commence operations, there are serious doubts about the legality of those permissions, and a legal challenge is currently pending in relation to them. To date, the company has not initiated any tree felling or other construction activities in the area, and protests are continuing.

1.1. Study Team and Methodology

This study has been written by Shankar Gopalakrishnan, a researcher and activist. The methodology consisted of a combination of desk-based research combined with perspectives from the impacted communities. The following key primary and secondary sources were relied upon. Primary sources: Official records of the Forest Advisory Committee, the National Green Tribunal, and other agencies; representations made by the local community and statements of the companies involved. Secondary sources: Materials compiled and published by organisations that are either supporting or opposing the project; press reports and other information regarding the companies involved. The author has also been very peripherally involved in, and has been following the issues in relation to, the proposed Mahan coal mine for some years.

1.2. Case overview

This case study examines one particular proposed mining project in India - the Mahan coal mining block in Singrauli district of the central Indian State of Madhya Pradesh. It highlights how, in this case, the federal (Central), State and local administrations have all engaged in a systematic effort to undermine the rights of those indigenous and forest dwelling communities affected by the mine. In order to contextualize these rights violations, the study first offers an overview of the issues indigenous peoples face in India. It notes that the government of India refuses to accept the term 'indigenous' as a descriptor of any community within India, though, in practice, the official category of "Scheduled Tribes" broadly covers peoples who would be classified as indigenous under international law.

ⁱ Case study completed in September 2014

In the century prior to India's independence, the British colonial administration created a legal structure which sought to expropriate natural resources - particularly in forest lands and in areas under communal control - for the benefit of Britain. This led to repeated resistance and protests across the country by those communities whose rights and livelihoods were negatively impacted. Following independence, a similar pattern of expropriation continued. Most recently, however, a series of protests from 2002 to 2007 led to the passage and notification of the *Forest Rights Act of 2006*, India's first law that aims to recognise and respect the rights of forest dwellers, the majority of whom are indigenous communities.

Under the Indian constitutional and administrative system, these rights should be protected by a range of institutions. These include the judiciary, both at the local and district court levels, and, through specific constitutional provisions, at the High Court and Supreme Court levels. However, due to problems of expense, delays, understaffing and legal complexity, the higher courts are typically not easily accessible to most indigenous communities in the country. Secondly, there are laws that provide for special commissions and tribunals whose function is to uphold the rights of these peoples. These include the National Scheduled Tribes Commission - which is largely non-functional - as well as special courts under the Scheduled Castes / Scheduled Tribes (Prevention of Atrocities) Act and the Protection of Human Rights Act. In addition to these judicial and quasi-judicial institutions, regulatory authorities pertaining to land and environment also exist and are expected to safeguard indigenous rights. Finally, under the Forest Rights Act and other recent legislations, local village assemblies (referred to as *gram sabhas*) are also empowered to protect tribal communities' rights over land and natural resources.

There is also a National Human Rights Commission (NHRC) in India, established pursuant to the Protection of Human Rights Act of 1993 and tasked to: conduct inquiries into complaints of human rights violations; review safeguards provided by, or under, the Constitution or any law for the protection of human rights, and recommend measures for their effective implementation; undertake and promote research in the field of human rights; spread human rights literacy; and study treaties and other international instruments on human rights and make recommendations for their effective implementation. Twenty three State Human Rights Commissions (SHRCs) were also established at the state level. The functions of the SHRCs are similar to that of the NHRC except for the study on treaties and other international instruments on human rights, which is the sole responsibility of the NHRC

The experience of the affected indigenous communities with the Mahan coal mine illustrates how, in practice, most of these institutions fail to function and uphold indigenous peoples' rights. The case concerns a coal block that lies within a 20,000 hectares stretch of dense deciduous forest. The proposed coal mine would destroy 1,200 hectares of forest and have a profound effect on the livelihoods of 62 villages. Approximately one third of those affected are indigenous communities, including among others, the Baigas, Gonds, Agarias, Khairawas and Panikas. Even prior to protests commencing in the area, environmental regulators had raised objections to the mine. Nevertheless, it was

permitted to proceed. Since 2011, the extent of wrongdoings and illegalities associated with the project has increased, this despite the mobilization of people in the area and their formation of Mahan Sangharsh Samiti (MSS) to demand respect for their rights and implementation of the Forest Rights Act. Rather than seeking to recognise and give effect to their rights, the district administration has completely ignored the issues these communities have raised, and instead sought to subvert the local *gram sabhas* (village assemblies) - first by preventing forest rights resolutions from being passed in their meetings, and then by forging a fake resolution in favour of the project. On the basis of this forged resolution, the project was granted its permission to use forest land, even after the country's Minister of Tribal Affairs had himself addressed a joint press conference with MSS and acknowledged that the resolution was forged. Most recently, the company and district officials have filed bogus civil and criminal cases against the villagers, resulting in the arrest of four people on 8 May 2014. To date the police have taken no action in relation to the alleged criminal offences committed by district officials in connivance with the company. Finally, in response to a case filed by the villagers, on 26 May the National Green Tribunal (a specialised environmental court) accepted an undertaking by the State government that it would not fell any trees until October. On 3 June, meanwhile, the press carried reports of a leaked Intelligence Bureau report which claimed that the Mahan agitation has been instigated by "foreign funded NGOs", in particular Greenpeace India.

In short, to date, every institution in Mahan that was meant to protect the rights of indigenous and forest dwelling communities has abdicated its responsibility, been rendered inaccessible or ineffective, been subverted, or been ignored. The reason for this consistent pattern of illegality can be found in the current political economy of resource control in India. Drawing on institutions and traditions created by the colonial authorities, India's biggest corporations (as well as multinational companies and international financiers) currently see easy access to natural resources, particularly minerals, as critical to their economic success. In the process they have also endangered India's financial system and subverted large parts of its regulatory system. In this sense, struggles like that in Mahan are standing in the way of some of India's most powerful interests and in doing so challenging century old discriminatory perspectives and practices.

Such an approach naturally grossly violates the very rights which the UN Guiding Principles on Business and Human Rights were designed to protect. This study seeks to explore these violations in detail. Clearly, in this context it is not sufficient to merely call for either implementation of existing laws and procedures pertaining to indigenous rights, or even for additional regulatory institutions. Instead, it may be more useful to insist on effective and legitimate rights-based processes that are more accessible to local communities who are, in any case, already struggling to assert their rights. The study provides some recommendations in this regard, including expanding and consolidating the legal empowerment of the *gram sabha*, instituting regulations which guarantee that only those projects that respect indigenous peoples rights are authorized to receive investment funding, and finally, by creating a participatory rights-based process for democratic land use planning, particularly in indigenous territories.

2. Introduction

The Government of India does not accept the term “indigenous peoples” to describe any community residing within its borders, on the grounds that, as it stated when voting in favour of the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP), “the issue of indigenous rights pertain[s] to peoples in independent countries who were regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region which the country belonged, at the time of conquest or colonization or the establishment of present State boundaries.” In other words, in the government’s view, all Indians are indigenous.

However, in terms of the working definitions and characteristics used under international law to identify indigenous peoples – such as in the *International Labour Organisation’s (ILO) Convention 169*, in the drafting of the UNDRIP and by the UN Special Rapporteur on the rights of indigenous peoples - India does have large populations of peoples that would be considered indigenous peoples. By and large these groups overlap with those classified under the Indian Constitution as “Scheduled Tribes” (STs). According to the 2001 Census, these communities account for 8.2% of India’s population. For historical reasons, most reside in forested and hilly areas. There is also a large population of what are referred to as “nomadic” and “denotified” tribes, not all of whom are identified as STs, but many of whom would also be considered under international law, and self-identify as, indigenous peoples.

Before examining India’s institutions for access to justice, it is first important to note the primary ways in which the land and livelihood rights of indigenous communities are violated.

Both the colonial regime and the postcolonial Indian State have largely treated the areas in which indigenous peoples live as resource ‘hinterlands’ - places to be used for extractive purposes for the benefit of the colonial State and private business. A key example and central institution of this extractive regime was the colonial forest management system, inaugurated in 1865 (after the anti-colonial uprising of 1857) - the first Indian Forest Act. This Act, the ancestor of the still-operational *Indian Forest Act of 1927*, laid down procedures for declaring “government forests” in India and bringing them under “scientific forestry” - in practice, management by the Forest Department for purposes of timber extraction. Timber was a highly valuable resource at the time and the colonial administration was primarily interested in ensuring increased timber yields - resulting in, among other things, large-scale clear felling of “low yield” natural forests. The rights of the communities living in and depending on forests - mostly, though not all, indigenous communities - were left at the mercy of a rights “settlement” (recording) process by government officials. In most cases this process was never even completed, and where it was completed it systematically ignored the rights of indigenous communities and other oppressed communities.¹ As a result, the livelihoods and existence of these communities were effectively criminalised. A similar, though less systematic, process also took place in non-forest areas, with common lands (once again, a core livelihood resource for indigenous communities) being either expropriated by the State or parcelled out to private landowners and companies.²

Naturally, this process of expropriation was met with resistance, and there were widespread protests and conflicts in indigenous territories, both before and after independence. These struggles took different forms in different parts of the country. For the purposes of this case study, one particularly relevant struggle took place across large parts of the country between 2002 and 2007 - a series of mass mobilisations demanding legal recognition of forest rights. This culminated in the passage of the Forest Rights Act in 2006 and its entry into force at the end of 2007.

The new Act sought to overturn 150 years of “historical injustice” towards forest dwelling communities. Specifically, it recognised the following types of community rights:

- Rights to own and use lands that they occupy (prior to a cut-off date) and non-timber forest produce that they collect;
- Rights to use forest resources such as grazing areas, water bodies, nomadic and pastoralist routes, etc.;
- Finally, and most importantly, rights to manage, protect and conserve forests, biodiversity, and their cultural and natural heritage.

This last right is also framed as an explicit power of the *gram sabha* (or village assembly, see below), and has become a contested issue across India, including in the Mahan case.

2.1. Institutions and Forms of Access to Justice

India has a variety of institutions that are intended to ensure access to remedies in case of violations of rights, some of which are addressed below. Given that the focus of this case study is on access to justice in the context of land and resource rights, only institutions directly or indirectly relevant to that purpose are considered. At the end of this section, the question of pursuing access to justice through engagement with mechanisms established by, or with, companies themselves is also briefly explored.

2.1.1. The Judiciary

India has a system of local and district courts, with several High Courts serving as appellate courts, and the Supreme Court of India being the final authority. In addition to the standard remedies provided by the courts under a common law system (which India follows) - such as criminal cases for violations of law, civil cases for torts and civil wrongs, and so on - India also has a specific constitutional procedure under which residents can approach either the High Courts or the Supreme Court directly in cases of violations of fundamental rights provided for in the Indian Constitution. This form of ‘writ jurisdiction’ has been a space that has been used on occasion to assert the rights of indigenous peoples, though ironically it has also, for reasons outside of our scope here, become a space for the denial of those rights.³ The Indian judiciary is, however, understaffed, slow, and generally expensive to approach. This places judicial remedies outside of the reach of many indigenous communities.

2.1.2. Tribunals, Commissions and Special Courts

Under various statutes and constitutional provisions, other institutions have been created which also seek to provide access to remedies. These include:

- *Special Courts for Atrocities Against Scheduled Castes and Scheduled Tribes:* In 1989, a separate statute - the SC/ST Prevention of Atrocities Act - was passed in order to provide for separate offences and more stringent penalties for hate crimes and discrimination against Scheduled Castes (the Dalits, or former ‘untouchables’) and Scheduled Tribes. Under this Act, special courts are meant to exist for the purpose of trying these offences and ensuring speedy justice. In practice, existing district courts are usually also designated to be special courts for this purpose.
- *The National Scheduled Tribes Commission:* Under the Constitution, separate Commissions have been created at the central (federal) level for the purpose of protecting the rights of Scheduled Tribes and Scheduled Castes (these were earlier under the same Commission). This Commission is meant to be consulted about any policy that will affect Scheduled Tribes, and also has a general mandate to investigate and look into any case of violation of ST rights. In practice, this Commission is rarely very active.
- *Human Rights Commissions: The Protection of Human Rights Act of 1993* provided for the constitution of National and State Human Rights Commissions, as well as special courts for trial of human rights related offences. While the latter institution (special courts) has yet to become meaningfully operational, the Commissions are functioning, and are frequently approached in cases of atrocities. However, they have no separate investigative staff, and tend to rely on the official agencies for information. This greatly reduces their effectiveness.

2.1.3. Regulatory Authorities

Since a large part of the cases of violations of indigenous rights relate to land and forests, a third set of institutions which are critical in terms of access to justice are those concerned with regulating control over these resources. In the case of India there are two institutions in particular that are currently relevant:

- *The Ministry of Environment and Forests:* The central (federal) Ministry of Environment and Forests is the regulatory authority for the grant of “clearances” - permissions - for projects in the country. The two main forms of clearances issued by the Ministry are as follows:
 - *Environmental clearances:* Under the *Environmental Impact Assessment notification of 2006* (a successor to an earlier regulation from 1994), any project above certain size limits is required to obtain a clearance from the central (or, in some cases, the state) government before starting construction. These clearances are granted on the basis of environmental impact assessment reports that are supposed to first be subjected to public scrutiny (at a public

hearing) and then “appraised” by an expert committee. In practice, the project proponents pay the consultants who perform the environmental impact assessments, thereby ensuring that these reports are never objective; and both the public hearings and the expert appraisals are rarely conducted in a thorough and meaningful manner. Public hearings are routinely subverted and objections ignored, while the expert committees hear dozens of projects in every meeting and have no time for a proper appraisal. As a result, one study found that between August 2009 and July 2010, 99% of projects - including all coal mines - that sought environmental clearance received it.⁴ Technically, the environmental clearance process is supposed to include impacts on livelihoods and local communities.

- *Forest clearances*: Under the *Forest (Conservation) Act of 1980*, any use of “forest land” for “non-forest purposes” - that is, any activity not connected to forest management or afforestation - requires permission from the central government. The term “forest land” was extended by a Supreme Court order⁵ to mean any land that either is “recorded on any government record as a forest” or “satisfies the dictionary meaning of the term forest.” This process too has largely been reduced to a formality, with the entire procedure being controlled by forest officials. After the passing of the Forest Rights Act in 2006, new requirements were added that, for the first time, gave local communities a voice in decision making during forest clearances (see next section). But these have largely been flouted in practice, as discussed below and in the case study.
- *The National Green Tribunal*: Constituted by an Act of 2010, the National Green Tribunal was set up for the purpose of hearing appeals against decisions of the Environment Ministry on forest and environment clearances (replacing an earlier, largely non-functional body called the National Environment Appellate Authority).

2.1.4. Gram Sabhas (Village Assemblies)

Under the terms of the *Panchayats (Extension to Scheduled Areas) Act of 1996* and the *Forest Rights Act of 2006*, the *gram sabha* (assembly of all residents of a village) has certain regulatory powers. These include:

- The power to manage, protect and conserve forests (as noted above);
- The power to initiate the process of determining forest rights and to map and verify those rights;
- The power to regulate sale of individual lands to non-tribals (i.e. non indigenous peoples);
- The power to regulate development schemes and hold officials accountable;
- Ownership and control over non-timber forest produce.

As a result of the powers recognized in the first and second points, it also follows that no destruction of forest can be permitted without the informed consent of the concerned *gram sabhas*, and without them certifying that the process of recording of forest rights is complete. This was formalised in the form of a circular issued on 30 July 2009 by the Ministry of Environment and Forests to all state governments, and subsequently upheld by a judgment of the Supreme Court in April 2013.⁶ Under the law, these decisions can only be taken by meetings in which at least half of the villagers are present.

However, in practice these regulations too have been flouted. For instance, between 2008 and April 2013, as per official clearance data from the Environment Ministry's website, approximately 40,000 hectares of forest land was diverted for non-forest use in states where no rights had been recognised under the Forest Rights Act at all. Clearly, all such diversion was illegal. As we see in the Mahan case study, there are numerous ways in which the administration seeks to get around these requirements.

2.1.5. Corporate Remedies

Large corporations in India - both foreign investors and domestic firms - have typically followed a policy of denying any responsibility for issues relating to resource rights, deeming these to be a matter between the State and the local communities (a parallel well known example can be seen in the case of Pohang Steel Corporation's (POSCO) project in Orissa). As a result, the three corporates that are directly involved in this case - Essar, Hindalco and their joint venture Mahan Coal Limited - all provide no public information at all regarding access to remedies in case of violation of rights or breaches of corporate policies. All three do, however, have boilerplate text on their websites about "environment" and "sustainability"; Hindalco has a separate section on "local communities", which reads:

At Hindalco, we are committed to working with our stakeholders to realise social, environmental and economic benefits for the communities around the world. We take safeguards so as to avoid, minimise and remediate any community impacts due to our operations. The first step starts with identifying the community impacts such as health, livelihood, infrastructure and social issues which may arise due to our operations. Technical and operational safeguards are taken to avoid any such impact. We strive towards positive community impact through our various corporate social responsibility initiatives. We take care not to impinge upon common property resource rights like water and energy sources. *For land acquisition for our capital projects, we abide by government guidelines and orders on compensation, resettlement and rehabilitation.* (emphasis added)

Such bald statements are, as discussed below, substantially belied by the way these corporates behave in practice. The last highlighted sentence further illustrates the approach of regarding all rights related issues as matters for the State to address. This approach is not in keeping with the Guiding Principles, and specifically is at odds with Guiding Principles 13, 15(c), 17(a), 18(b), 21, etc. These and related points are discussed in the section on compliance with the Guiding Principles below.

3. The Case Study: Proposed coal mining in Mahan coal block in Singrauli District, Madhya Pradesh

Mahan is a forest area within Singrauli District of the central Indian State of Madhya Pradesh. Approximately one third of the district's population consists of Scheduled Tribes.

Under Indian law, coal mining for market sale purposes can only be carried out by the public sector - specifically, Coal India Limited, a government-owned corporation. However, in the 1990s, the central government began to permit coal mining by the private sector in so-called 'captive' mining blocks - where the coal production is to be entirely used by an associated power plant or other project. Under this procedure, in April 2006, the Central government allocated the Mahan coal block to a joint venture of two private companies - Essar and Hindalco. The coal from the mine is to be used to fuel two large power plants, one each by Essar and Hindalco, and both in Singrauli district. A neighbouring block, in Chhatrasal, was allocated to Reliance, India's largest private company. The coal mine is only expected to provide sufficient coal for these power plants for the next fourteen years, after which other mines would then have to be opened.



A view of the Mahan forest in Eastern Madhya Pradesh. It's one of the oldest sal forests in Asia.

Photo Vivek M./Greenpeace

As is the case with all coal mining in India, no attempt was made to consult the affected local communities during the process of identifying, demarcating or allocating the coal mining block. All of these were done at the government level with no transparency - indeed, the concerned official of the Ministry of Coal is now under investigation for

the arbitrary and opaque allocation of this block, as part of the larger investigation into India's "coal scam".⁷ It was only when the process of granting environmental regulatory approvals began that people in the area were even informed of these developments.

3.1. Impacts of the proposed coal mine

The Mahan forest consists of approximately 20,000 hectares of dense forest, 1,200 hectares of which would be destroyed by the coal block. This is one of the last large deciduous forests of central India. According to the environmental impact assessment report commissioned by the company (for purposes of environmental clearance), the mine would impact the livelihoods of the residents of 62 villages. The impacted indigenous communities in Singrauli District include the Baigas, the Gonds, the Agarias, the Khairawas and the Panikas.⁸

While these villages mostly cultivate land outside the forest area, they heavily depend on the forest for other livelihood purposes, including:

- Grazing and collection of grass for sale as fodder;
- Collection of *mahua* (a flower used for manufacture of liquor and other purposes, and sold by the local collectors);
- Collection of *tendu patta* (a leaf that is used in the production of beedis, or Indian cigarettes);
- Sale of the seeds and other parts of *karanj* (a plant whose oils are used as fuel); and
- Other forms of local wild vegetables and herbs, which are consumed directly.



Raj Kumari collects Mahua flowers early in the morning in Budher village, Singrauli district. Photo Greenpeace

One of these villages - Amelia - would be physically displaced by the mine, while the others would lose a key source of their livelihood. Mining is estimated to result in the felling of 512,780 trees and directly affect a population of over 59,000 people, of which 19,000 are Scheduled Tribes.⁹

3.2. Regulatory process prior to the struggle

As noted above, any such project requires (among other permissions) two regulatory clearances from the Ministry of the Environment and Forests: an “environmental clearance”, which applies to any large project with potential environmental impacts; and a “forest clearance”, which applies to any project seeking to use land classified as “forest” for a “non-forest purpose” (i.e. any activity that is not related to forest management). The first of these is supposed to take place only after a public hearing is conducted in the local area and the communities are given the chance to object, but in practice such hearings are generally regarded as a formality. Indeed, as previously noted, one study found that, between August 2009 and July 2010, 99% of projects - including all coal mines - that sought environmental clearance received it.¹⁰ In keeping with this trend, the Mahan coal project was, unsurprisingly, granted environmental clearance on 23 December 2008.

The forest clearance process, however, did not proceed so ‘smoothly.’ Under the *Forest (Conservation) Act of 1980*, forest clearances for projects can only be granted after consideration by a committee - known as the Forest Advisory Committee - which consists of three non-government ‘experts’ and five forest officials. As in the case of environmental clearances, the vast majority of forest clearances that are sought are generally granted. However, in this case, the committee requested additional information on three occasions and then, on 12 December 2009, decided to constitute a subcommittee to examine the project. The concern was driven primarily by the density of the forest in the area and the presence of wildlife species. Up to this point, no reference was made to the rights or livelihoods of the surrounding communities.

On 7 July 2011, however, the subcommittee of the Forest Advisory Committee submitted its report, in which it noted that the project would affect the “adjoining villages, which are presently dependent on the forest available in the said block to meet their daily needs of fuelwood, fodder and other minor forest products.” It went on to note that the Forest Rights Act had clearly not been implemented in the area and that both the residents and the local officials were entirely unaware of the communities’ rights under that law. The subcommittee recommended rejection of the forest clearance application.

But the application was not rejected. In the interim, the companies - particularly Essar - had been mounting intense pressure on the central government to authorize the project. Repeated letters were sent by Essar’s promoter, Shashi Ruia, to the Prime Minister, whose office was generally very sympathetic to large corporates and which in turn pressurised the Ministry of Environment and Forests to grant the clearance. The Chief Minister of the state of Madhya Pradesh also chose to portray the issue as one of “discrimination” against his state and, in fact, went on hunger strike in February 2011, demanding grant of clearances to the project (among other things). Meanwhile, a “Group of Ministers” (a Cabinet sub-committee, or GoM for short) had been constituted to consider the grant of

clearances to coal mining blocks. On 8 July 2011, the then Environment Minister, Jairam Ramesh, transferred the case to the Group of Ministers for a decision. In September 2012, Ramesh's successor, Jayanthi Natarajan, was directed by the GoM to grant "in principle" (or first stage) clearance to the block.

By this time, however, things had started to change in the area.

3.3. Struggle by local communities

In 2011 and early 2012, affected communities in the area started to organise themselves to demand their rights over forests under the Forest Rights Act. In addition, a series of workshops on forest rights were held by Greenpeace India and other NGOs in Singrauli. They also began to spread information about the law and community rights in the district. Following their initial organising efforts, the local villages of Ammelia, Budher, Suhira, Bandhaura and Barwantola formed Mahan Sangharsh Samiti (MSS) to demand their forest rights and to oppose the coal mining project. In April 2014, Bechan Lal, one of the MSS leaders, succinctly expressed the basis for his opposition by explaining that: "The forest is our mother. We cannot live without it. Our livelihood, our water, our air is all linked to this forest" (Sehgal 2014).

As noted above, under the Forest Rights Act (FRA), no forest clearance can be granted without completion of the FRA process and without the informed consent of the concerned *gram sabhas*. In the case of Mahan, these requirements were completely ignored. Instead, in 2011, the District Collector (the head of the district administration) issued a letter containing the blatantly false claim that the village of Amelia had consented to the project and that there were no further rights to be recognised in the area. This was despite the fact that not a single title for community rights over forest resources had been issued in the entire district.



Villagers march against the proposed coal development in the Mahan forest.

Photo Greenpeace

As part of their protest, villagers from the most directly affected villages in the area began sending letters to the authorities responsible for implementation of the Forest Rights Act, and to the Central Ministry for Environment and Forests, stating that their rights under the Forest Rights Act had not been recognised and that they had not been informed about the law. On 16 March 2012, for instance, villagers from the villages of Amelia, Bandha, Jamgarhi, Piderwah and Budher wrote a letter to the Ministry of Environment and Forests stating the following:

Under the Forest Rights Act of 2006, we have both community and individual rights within the forest area proposed for the Mahan coal block. We understand that on March 14th a team from the Central Ministry of Environment and Forests had visited this area to assess the Mahan coal project. We had sought to meet them but they did not meet us. We request you to ensure that, as per law, we should be consulted before this project is considered or any decision is taken. (Translation from Hindi by the author)

Similarly, on the 14 June, villagers from Budher and Amelia formally wrote to their village Forest Rights Committees, stating:

We wish to bring to your notice that the Central government has, in order to address the historical injustice done to us by the British authorities, passed the Forest Rights Act in 2006. ... Under sections 3(1)(a) - 3(1)(m) of this law, we have individual and community rights over forest land, the power to protect of forests, the power to protect biodiversity [etc.]... We also wish to inform you that under Rules 6(b) and 8(a) of the Forest Rights Rules, it is the responsibility of the district and sub-divisional committees to provide us with records and information... Till date, no effort has been made to recognise our community rights... We wish to point out to you that under section 3(1)(v) of the SC/ST (Prevention of Atrocities) Act, 1989, any non-ST or non-SC who seeks to evict an ST from land occupied or premises occupied by them or who violates their rights to land or water is guilty of a criminal offence. Further, under section 4(5) of the Forest Rights Act, no adivasi or other traditional forest dweller can be removed from forest land until the process of recognition of forest rights is complete. (Translation from Hindi by the author)

Even after such detailed legal submissions were made, the district authorities, the police and Central and State government officials simply ignored the law and the issues raised by the villagers. Despite the villagers' allegation that the District Collector's action is a criminal offence, this too went unheeded by both the State and the Central authorities. Rather than attempting to prosecute him, they encouraged the project proponents to continue to seek the clearance.

On 15 August 2012, *gram sabha* meetings were held in these villages as is routinely the case (in most of India, *gram sabha* meetings are held routinely on 26 January, 1 May, 15 August and 2 October - though the dates may vary in various States, and meetings can be held at any other time as well). In two villages - Amelia and Suhira - attempts were made to table resolutions in the meeting for recognition of community forest rights (the first step in the legal process under the Forest Rights Act). In both *gram sabhas*, company agents, in connivance with local officials, prevented the resolutions from being voted upon or recorded in the register. Subsequently rallies were held in Singrauli and formal complaints submitted against these officials and agents, but no action was taken.

Interference in the *gram sabha* process is a criminal offence under various laws, but once again no attempt was made by the authorities to investigate or act on this.

In September 2012, as outlined earlier, the Environment Ministry granted in principle clearance to the project - notwithstanding all of the illegalities and the violations raised by the villagers. Instead, the order merely included a statement that, prior to final clearance, the FRA process had to be completed in the area and consent had to be sought. As expected, these conditions were not complied with - no attempt was made to either recognise community rights in the area or to seek the informed consent of the *gram sabha*, even in the face of repeated protests.

Some six months later, on 6 March 2013, the district administration called a special *gram sabha* meeting in Amelia. According to the resolution register, this meeting was attended by 184 people - far below the 50% quorum required for any decision on matters related to forest rights. In the actual pages of the register, below the 184 signatures of those who attended, the signature list had been closed using the seal of the local village council secretary and president (the normal procedure for certifying that all signatures have been gathered). However, in this case, beneath the seal and the original 184 signatures, more than a thousand additional signatures are listed. It turns out that the *tehsildar* (a local official of the district administration) went around the village that night, accompanied by two police officers, and compelled a number of other villagers to sign the register. According to the villagers, he and a handful of villagers with ties to the company - including the local village council president - then forged yet more signatures on the register. The final list of signatories includes the names of villagers who had died two years earlier, as well names of people who simply don't exist.

The forged resolution stated that the village had no pending claims on the forest (which clearly was not the case, since their forest rights had not been recognised) and that the village "welcomed" Mahan Coal Limited. Mahan Sangharsh Samiti sought copies of this resolution under India's Right to Information Act, but was unable to obtain them until four months had passed (under the law, all information should be produced within 30 days). Complaints to the local authorities and the State government regarding this blatant forgery went completely unheeded.

On 19 July 2013, MSS raised the matter with the Central government's then Minister for Tribal Affairs, Kishore Chandra Deo, who wrote to the Madhya Pradesh Chief Minister, pointing out the forgery and the failure to implement the Forest Rights Act. On 19 July 2013, having received no reply, he then took the unprecedented step of holding a joint press conference with MSS on the issue. Notwithstanding these statements by a Cabinet Minister of the federal government, and continuing protests in the area, neither the Madhya Pradesh government nor the Ministry of Environment and Forests took any action on the matter. Or, more accurately, they chose to do the opposite. On 12 February 2014, then Minister for the Environment and Forests, Veerappa Moily, granted final forest clearance to the Mahan coal mine, on the basis of the forged resolution of the District Collector. This was done despite the public statements of the Tribal Minister, and the glaringly obvious violation of the Forest Rights Act's requirements.

Following the grant of forest clearance, MSS continued to protest. It also tried repeatedly to file a criminal complaint against the District Collector and the district officials for forgery. The police refused to register the complaint even when evidence was produced. Ironically, while MSS was repeatedly, but unsuccessfully, trying to have the complaint registered, its leaders found themselves facing a criminal case instead. At 12:30 am on 8 May 2014, two MSS leaders (Bechan Lal and Vijay Shankar Singh) and two Greenpeace volunteers were arrested by the local police on a series of fabricated charges - including robbery and obstruction of public servants performing their duty. They were detained at the police station and allegedly beaten when they refused to sign confession statements. Two days later three of the four were granted bail by the district court; the fourth, MSS leader Bechan Lal, was only granted bail three weeks later, after MSS approached the High Court. MSS continues to seek criminal prosecution of the district officials and is now also seeking to have a complaint registered under the SC/ST (Prevention of Atrocities) Act.

The company has also used other methods to harass MSS and its allies. A civil case was filed in April 2014 in the local district court, seeking an absurd Rs. 500 crores (Rs. 5 billion/approximately 80 million USD) in damages from MSS and other organisations and asking the court to issue a temporary order restraining the organisation from demonstrating in the area around the company headquarters. This case is also continuing in the local court.

Meanwhile, in May, MSS filed a case before the National Green Tribunal against the grant of forest clearance to the mine. In the first hearing, on 26 May, the State government promised the tribunal that no trees would be felled before October. The tribunal recorded this statement in its order.¹¹ This order has provided some respite in the area, but due to its temporary nature the conflict will inevitably continue.

Finally, just as this case study was being finalised, on 3 June 2014, the Intelligence Bureau - one of India's two main federal intelligence agencies - produced a new report on foreign-funded NGOs that was leaked to the press. Among other allegations, the Intelligence Bureau's report alleged that the struggle in Mahan is purely instigated by Greenpeace India with the aim of retarding India's "development". Essar has already announced that it will use this report as evidence in its civil suit against MSS. Future developments in this regard remain to be seen.

4. The Mahan case - understanding the context

It is clear from the above that Mahan Sangharsh Samiti, and the locally affected communities, have so far not been able to access justice in any meaningful manner. It is both ironic and typical that, in a story filled with criminal violations of law from start to finish, the only law enforcement action to date has been against innocent villagers. Indeed, the only issue on which the Mahan case is atypical is the fact that such illegal repression has been relatively mild. In other such projects elsewhere in India, we have seen killings, beatings, torture, accusations of Maoist involvement and so on.

The institutions that exist for the purpose of ensuring access to justice and respect for indigenous rights have all, so far, failed in various ways. We can classify these failures into the following categories:

- **Subversion of institutions:** The *gram sabha*, or village assembly, is supposed to be the most accessible institution to the people and the most democratic space available to them. In practice, however, it has been subverted by the collusion between the district administration and the company, resulting first in the prevention of the passage of the rights resolution in August 2012, and then later in the forgery of the subsequent resolution. The failure of state and central authorities to hold these officers accountable for their violations - despite the fact that those violations are in fact crimes under Indian law - is a key problem here. However, it is also necessary to recognise that, notwithstanding the failure of these institutions so far, the fact that these legal provisions exist has been the strongest weapon that MSS has at its disposal. This is a key point that we return to below.
- **Abdication of institutional responsibility:** The Ministry of Environment and Forests, and the central and state governments more generally, have simply ignored their responsibilities under the law and have behaved like agents of the company. The difficulty in holding these institutions to account for rights violations is another facet of the failure of access to justice in this case. In a similar manner, the local police have also ignored evidence of crimes by the administration and the company, and instead foisted false cases on those opposing the project. Once again, a lack of accountability is a serious problem.
- **Institutional marginalisation of dissenting tendencies:** Perhaps the most confusing, but also the most central, aspect of this institutional failure is the fact that institutions that *did* respond - such as the Minister of Tribal Affairs and the sub-committee of the Forest Advisory Committee - were themselves marginalised in the decision making process. It was as if they lost all their constitutional and legal weight merely because they opposed the company. Two Environment Ministers also opposed the project on environmental grounds, but their opposition met with a similar fate. The question here is why this occurs.

Indeed, it is the first and third tendencies - to subvert and marginalise institutions whose purpose is to defend rights - that point us towards a better understanding of what actually happens within the State machinery around these projects and similar cases of violations of indigenous rights. Clearly, merely creating yet another institution (for instance, an ombudsman or regulatory body) is not enough to address these issues. Such an institution will itself merely be subverted or ignored. Nor is it enough to lament the absence of political will on the part of the Indian State or the ruling parties. Rather, it is necessary to consider which institutional approach may in fact make it possible to secure justice.

4.1. The current political economy

Historically, as we noted above, India's forest and land policies were shaped by a colonial regime whose primary interest was in revenue extraction. In the case of agricultural land, the focus was on taxation of agriculture.¹² In the case of forests, where taxation was both far more difficult and much less profitable, the focus was on a valuable natural resource - timber. Both taxation and timber extraction, however, required that common and community land use rights be extinguished. Without doing this, taxation of individual owners, and control over timber, would not be possible. Hence the slew of forest and land laws mentioned above.

In the context of the mining sector, over the course of the last 25 years, India has been witnessing a phenomenon that is both somewhat similar to and different from the colonial approach. The similarity is in the focus on natural resources - whereas earlier, the key resource was timber, now it is minerals. The underlying tactic, moreover, is essentially the same: expropriate an area from its inhabitants as quickly as possible, in order to easily and cheaply extract the resource and sell it. But the difference is that today's extractive drive is driven not by colonial priorities but by the mechanics of international stock markets and the financial sector. With India's "liberalisation" after 1991 and the entry of private companies into mining, the mining sector is increasingly driven by the imperative of demonstrating quick profits - or, more accurately, the potential of quick profits - in the financial markets. In turn, the government's policy of "encouraging" private sector "participation" implies that government financial agencies will do everything they can to facilitate such showcasing of profits and potential financial returns.

Mahan is once again a good example of what results. When she gave her order granting the stage 1 clearance for the project, then Environment Minister, Jayanthi Natarajan, put on record that she was compelled to give the clearance because, among other reasons, the project involved "huge exposure to nationalised banks." Indeed, rumours later emerged that government banks had loaned Essar and Hindalco more than 1,000 crores (or 10 billion rupees) for their power plant projects, on the assumption that the necessary Mahan coal mine permissions would be provided. Separate information confirms that Essar is among India's most indebted companies.

Nor is Essar the only company in this situation. News reports in 2013 and 2014 confirmed that India's infrastructure sector is increasingly unable to repay its debts.¹³ The Reserve Bank of India's Financial Stability Reports have also confirmed that thermal power sector projects - such as the Essar-Hindalco projects in Singrauli - hold the most bad debt of any industrial sector.¹⁴ This had reached the point whereby it posed a threat to the stability of India's financial system.

It is this context that explains both the subversion of institutions and their marginalisation when they stand up for indigenous rights. Given the way the Indian State has chosen to approach access to resources in these territories, the peoples who occupy them now find themselves at the centre of the agenda of India's biggest companies; and the actions of these State and corporate actors also affects the health of the Indian economy as a whole.

It is not surprising, then, that the pressure is enormous and the institutional structure of the State fails to respect indigenous rights.

5. Compliance with UN Guiding Principles on Business and Human Rights

The above should make it clear that, both in the Mahan case and in the question of natural resource based industries more generally, the situation in India is far from both the spirit and the letter of the UN Guiding Principles on Business and Human Rights. Indeed, it would not be an exaggeration to say that every single one of these guiding principles has been disrespected and the rights they were designed to protect violated. More specifically, one can discern the following pattern of violations.

5.1. Regarding human rights as dispensable

The most basic and obvious objective of the Guiding Principles - reflected in all its principles - is respect for human rights. It is clear from the above that neither human rights in general nor the specific legal rights provided for in international and domestic legal instruments have been respected in the Mahan case. For instance, Articles 8(2)(b), 10, 26 and 32 of the UNDRIP recognise and protect the rights of indigenous peoples to their lands, territories and resources. None of these have been respected by either the State or private corporations in the Mahan case. Rather than addressing these issues as legal violations, the centres of State power and the corporations concerned have seen them as dispensable inconveniences to be brushed aside.

5.2. State abdication of responsibility

The Guiding Principles also specifically provide - through principles 3, 5, 6, 8 and 9 - that States must ensure that businesses respect human rights and that the regulatory agencies are aware of and bound by statutory and international law provisions. None of these principles has been respected in this case. Rather, as we saw above, instead of supporting and responding to State authorities that attempted to raise issues of rights, they were simply brushed aside. Contrary to the State duty affirmed under the Guiding Principles, the approach of the centres of governmental power in India has been to declare that the primary objective of the State must be to “facilitate” the concerned project, whatever the legal and human rights violations this may entail.

5.3. Disregarding human rights due diligence

The Guiding Principles also require that businesses undertake “human rights due diligence” (principles 15(b) and 18) and that States mandate such corporate due diligence (principle 4, in cases where corporations receive “substantial support” from the State). The Guiding Principles also state that these steps should be taken through a consultative process. Once again, in this case, we observe not only no due diligence in identifying human rights concerns, but extreme diligence in overriding those concerns. Every effort at raising issues of rights violations, including by statutory bodies, has been brushed under the carpet. The most revealing example of this is Essar’s ludicrous civil case against Mahan Sangharsh Samiti, which accuses the local organisation of defamation.

5.4. No access to meaningful remedies

The Guiding Principles, finally, require that both States and businesses should establish effective mechanisms which guarantee access to remedies (principles 27 - 31). As we have seen above, no effective remedy has been available to the affected communities to date. Police and regulatory authorities have ignored complaints; statutory bodies that did respond were, once again, themselves ignored; and the courts are not easily accessible (though in this case they have been approached). Despite the awareness that there have an ongoing problem for years as a result of the project, to date there has been no remedial action by any authority. In sharp contrast, the corporations concerned are secured benefit after benefit from these authorities, the latest being the suppression of local dissent as a result of the arrests and illegal beating of their opponents by the police.

The companies for their part claim, in their policy statements, to offer remedial measures, however, this remains at the level of rhetoric, as evidenced by Hindalco's statement in its 2013 sustainability report: "We planned to establish the formal grievance mechanism for human rights related issues".¹⁵ In practice, as the case illustrates, these corporations remain complicit in, or responsible for, measures aimed at suppressing community opposition and offer no effective transparent rights-compliant channels through which the communities can seek to have their grievances resolved.

The inadequacy and ineffective nature of the State mechanisms and processes aimed at ensuring access to remedies in this case can be illustrated by contrasting them with criteria outlined in principle 31 with which even non-judicial grievance mechanisms are required comply:

- "Legitimate", enabling trust and being accountable: It was clear from the experience in Mahan that neither the police, nor the local administration, nor the central regulatory authorities could be trusted, since they repeatedly contributed to or facilitated rights violations.
- "Accessible": As we have seen, most of the State institutions are essentially inaccessible to local communities.
- "Predictable": The repeated reversals of decisions, the fact that no negative decision against the company has been allowed to stand, and the forgery of key documents all indicate that there is no predictability.
- "Equitable": The same points also establish a complete lack of equity in the process.
- "Transparent": Practically all decisions of any significance - starting from the grant of the coal block - have been taken behind closed doors. Institutions meant to ensure transparency have been bypassed instead.
- "Rights compatible": As noted in the first point in this section, the outcome has been the opposite.
- A source of continuous learning: On the contrary, this process has been a source of learning on how to subvert the law.

- “Based on engagement and dialogue” (in the case of operational-level grievance mechanisms): No initiative has been made to have any good faith dialogue with the community, and instead fear, intimidation and repression have been used.

6. Possible Ways Forward

In light of all of the above, the question of ensuring access to justice has to be understood as a question of *power*, rather than an *institutional* or *administrative* one. Rather than search for an institution that will be truly “neutral” or accountable, it is important to understand the situation as one of struggle. Hence we must locate institutional spaces that would make it possible for indigenous rights to actually become meaningful in such a conflict.

From the Mahan case, three possibilities emerge:

- **Further empowerment and respect for the powers of the *gram sabha*, or village assembly:** As we noted above, even as the *gram sabhas* have been systematically subverted in Mahan, they remain the only forum that is at least consistently accessible to the local indigenous community. Indeed, it is due to their inability to completely subvert the *gram sabhas* that the administration and the company have so far not been able to force the project through. In this sense, continuing to seek empowerment of the *gram sabha*, and the incorporation of the need for *gram sabha* consent in more legal procedures, would be of great assistance in enhancing access to justice. Some changes that could be considered include:
 - Inclusion of *gram sabha* consent as a requirement for diversion of forest land in the procedures under the Forest (Conservation) Rules, so that it is deemed necessary as part of the routine administrative procedure.
 - Development of a forest mapping and planning process - at the *gram sabha* level - and demanding that the Forest Department incorporate these plans in its own maps and plans, as it is required to do under the Rules under the Forest Rights Act.
 - Pushing for strengthening *gram sabha* consent requirements in other Indian laws, such as the Land Acquisition Act (in whose latest version this is partially present), and the Mines and Minerals (Development and Regulation) Act (so that allocation of blocks is subjected to local accountability).
- **Incorporation of requirements for *gram sabha* consent and rights recognition in financial regulations:** This is an issue that is only now beginning to get some minimal attention. At present, neither Indian nor international stock market and credit regulations require respect for indigenous land rights or common lands prior to extending finance to projects. This creates situations like those in Mahan, where the financial health of entire banks and large investors are placed at risk as a result of a corporate’s desire to grab resources illegally. The error here clearly

lies with those who invested or loaned money to these projects. Hence, requiring disclosure of indigenous rights issues in stock prospectuses, and restricting banks from lending to such projects in the absence of local consent, will both safeguard the financial system and ensure that there is more space for people to assert their democratic and legal rights.

· **Expanding land use planning to include a democratic process:** In the longer term, in designated indigenous territories - which, in the case of India, can begin with what are known as “Scheduled Areas” - there is a need for a participatory rights-compliant democratic process of land use planning. This can only be done after rights are recognized and titles accorded to rights holders. After that, it can start at the level of the local village and build up to district and territory wide plans. Projects should only be permitted within the scope and framework of these plans. A process of *gram sabha* level forest planning - as mentioned above - can be the first step towards such a demand.

The issues which emerge from the Mahan case highlight how illegal, undemocratic and unjust India's resource allocation regime has become. Addressing them as outlined above would go some way towards providing a space in which the voices of indigenous communities (and others dependent on natural resources) can be heard more effectively, and thereby to some extent counter the enormous dominance of private corporations over the current decision making system. This would in turn offer the possibility of making the legal rights of indigenous communities meaningful on the ground, rather than leaving them as mere rhetoric and perpetuating what Dr. B.D. Sharma - former national Commissioner for Scheduled Castes and Scheduled Tribes - once called “an unbroken history of broken promises.”¹⁶

¹ For more details see Sarin, M. (2005) “Scheduled Tribes Bill 2005.” *Economic and Political Weekly* XL (21) (21 May 2005); see also Campaign for Survival and Dignity (2004) *Endangered Symbiosis: Evictions and India's Forest Communities*. New Delhi: Campaign for Survival and Dignity.

² For more information on this see Gopalakrishnan, S. (2012). “Undemocratic and Arbitrary: Regulation, Control and Expropriation of India's Forest and Common Lands.” *Society for Promotion of Wasteland Development*.

³ For an example see Rosencranz, Armin, and Sharachandra Lele. 2008. “Supreme Court and India's Forests.” *Economic and Political Weekly* 43 (05) (February).

⁴ *Mail Today*. 2011. “Projects Getting Faster Clearance in Jairam's Tenure.” *Mail Today* (3 February).

⁵ Order dated 12.12.1996 in T.N. Godavarman Thirumalpad vs. Union of India, WP 202/95 in the Supreme Court of India.

⁶ Judgment dated 18.04.2013 in Orissa Mining Corporation vs. Union of India.

⁷ *Times of India* (2 May 2014) “Parakh Questioned on Allocation of Mahan Coal Block”.

⁸ Greenpeace. 2011. *Singrauli: The Coal Curse*. New Delhi, India: Greenpeace.

⁹ Kohli, Kanchi. 2014. “Mahan's Coal Shadow.” *Civil Society* (June).

- ¹⁰ Mail Today. 2011. "Projects Getting Faster Clearance in Jairam's Tenure." Mail Today (3 February).
- ¹¹ Mahan Sangharsh Samiti vs. Department of Forest and Ors., National Green Tribunal, dated 26.05.2014.
- ¹² For a discussion on the colonial approach see Whitehead, Judy. 2010. "John Locke and the Governance of India's Landscape: The Category of Wasteland in Colonial Revenue and Forest Legislation." *Economic and Political Weekly* XLV (50) (11 December): 83–93.
- ¹³ Mint. 2013. "Funding India's Infrastructure Deficit." Mint (5 December). <http://www.livemint.com/Opinion/p9Bwgd3hCaXo0YXfngIQSK/Funding-Indias-infrastructure-deficit.html>.
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- ¹⁶ Sharma B.D., (2010) *Unbroken History of Broken Promises - Indian State and the Tribal People* (Freedom Press, People's Academy for Social Change and Development).

Chapter 6 - Access to Remedy of Indigenous Peoples Affected by Large Scale Hydropower Dams in Sarawak, Malaysia: The Baram Dam Experience

Asia Indigenous Peoples Pact (AIPP)

1. Research Methodology

This case study was produced by Asia Indigenous Peoples Pact (AIPP). It draws extensively from documentation of fact finding missions and legal studies conducted by the Jaringan Orang Asal SeMalaysia (JOAS)¹, a national network of indigenous peoples in Malaysia, and its networks including Save Rivers Network and International Rivers among others. This study also integrates relevant points from the results of the national land inquiry initiated by the Human Rights Commission of Malaysia (SUHAKAM) in 2012.

2. Case overview

Owing to the rich water resources of Sarawak, a state of Malaysia and part of the island of Borneo, indigenous peoples there have been confronted with plans to build up to 50 large hydropower dams, the location of 12 of which are already known. The plans are part of the “Sarawak Corridor of Renewable Energy” (SCORE), a development corridor in central Sarawak, which will result in the displacement of thousands of indigenous peoples and inundation of agricultural lands and sacred areas of indigenous communities. Three dams in Sarawak have already been built - the Batang Ai dam, the Bakun dam, and the Murum dam. Already, thousands of indigenous peoples displaced by the Bakun and Murum dams in Sarawak have been resettled in areas with substandard housing and limited access to land, and are unable to maintain their sources of livelihood.



Sarawak Dams: Source The Borneo Project

This case study focuses on the experience with access to remedy of indigenous peoples affected by the proposed Baram Dam which is to be built on a section of the Baram River between the villages of Long Na'ah and Long Kesah. This project has been specifically identified by the Sarawak Energy Berhad (SEB) as being central to generating energy for SCORE-related industries and as a potential source of energy for export to Indonesia, once the cross-border transmissions lines are built.

Approximately twenty-six longhouses belonging to the Kenyah, Kayan and Penan indigenous peoples would be directly affected and, as a result, it is estimated that between 6,000 and 20,000 people would be forcibly displaced from their lands. The indigenous peoples in the area have never granted their consent to the Sarawak Energy Berhad (SEB), the state-owned dam proponent, and the Sarawak government to proceed with the project and to determine the socio-economic conditions and well-being of communities in resettlement areas. Coercive tactics, including distribution of “Christmas bonuses” worth thousands of US dollars, are being used to pressure indigenous leaders in the area to accept the plans for the dam. There is reported interference by political parties in the appointment of village headmen and community chiefs.



Area that will be inundated if Baram Dam is built. Photo: International Rivers

The affected indigenous peoples in the proposed Baram Dam project area have submitted petitions to relevant government agencies but so far have not received a positive response.

Instead, they have been subjected to harassment. They have also set up blockades to express their opposition and prevent company equipment from entering the area. These blockades have been in place for over a year, despite attempts by the government authorities to dismantle them.

Aside from conducting local mobilizations, as well as lobbying and advocacy work at local and national levels, the affected communities along with their support groups, have also reached out to international organizations and mechanisms. They have raised their concerns regarding the existing and expected adverse impacts of the dams on indigenous communities in Sarawak to the International Hydropower Association (IHA) and to the Asian Development Bank (ADB) and have also submitted a communication to the UN Special Rapporteur on the rights of indigenous peoples. A complaint has likewise been submitted to SUHAKAM and an official meeting was held with them, at which they committed to look into the matter.

The redress mechanisms and strategies undertaken by the affected communities reflect the problematic state of access to remedy for indigenous peoples who are struggling to have their land rights recognized and respected in Malaysia. Giving the profound land rights issues that they are facing, in part arising from these and other major projects in their territories, a national land inquiry was initiated by the Human Rights Commission of Malaysia (SUHAKAM) in 2012. Among the numerous recommendations in SUHAKAM's ensuing 2013 report were: the establishment of an Indigenous Land Tribunal or Commission to decide on indigenous peoples' land claims, including appropriate settlements and redress; the establishment of a Native Title Court or a special court to deal with the backlog cases in the civil court; and the conduct of a review and amendment of relevant laws to align them to universally accepted norms.

3. Introduction

The indigenous peoples of Malaysia are collectively referred to as the Orang Asal and "consist of more than 80 ethno-linguistic groups, each with its own culture, language and territory."² Their total population is estimated to be around 4 million, or about 15 per cent of the national population.³ The majority, an estimated 60% of the Orang Asal in Peninsular Malaysia (known as Orang Asli) as well as the natives of Sabah and Sarawak, reside in rural areas and are among the most marginalised and disadvantaged groups in Malaysia. Indigenous peoples in the three states – Sabah, Sarawak and Peninsular Malaysia – share a common experience of land dispossession brought about by development projects imposed in their territories, discrimination and loss of traditional livelihoods, knowledge and culture.

3.1. Overview of human rights situation of Malaysia's indigenous peoples

Before addressing the specific case of the Baram dam which the state-owned Sarawak Energy Berhad is planning to construct in the territories of indigenous peoples in Sarawak, the chapter will first provide an overview of the situation of indigenous peoples in Malaysia in terms of the existing legal framework in relation to them and State respect for their rights in practice. Jaringan Orang Asal SeMalaysia (JOAS - Indigenous Peoples

Network of Malaysia) is the network which spans all indigenous peoples of Malaysia. Its 2013 Universal Periodic Review (UPR) submission in relation to the Government of Malaysia's respect for indigenous peoples' rights provides a succinct overview of the current situation. The following is a brief account of some of the key human rights concerns that it raises in relation to indigenous peoples.

3.1.1. Lack of overall protection of indigenous peoples rights

Malaysia voted in favour of the adoption of the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP) on 13 September 2007. However, it has not ratified ILO Convention no. 169 and has no National Action Plan specifically focusing on indigenous peoples. There is a lack of overall protection of indigenous peoples' rights in terms of legislation and governmental policies.

3.1.2. Lack of protection and respect to indigenous peoples collective rights to their lands, territories and resources

Malaysian courts have, in several judgments, essentially recognised Orang Asal collective rights to lands, territories and resources. However, as JOAS point out:

state governments continue to refuse to recognize decisions by the highest court in Malaysia. In Sarawak for example, sections 5(3) and (4) of the Sarawak Land Code provides wide power to extinguish all customary land rights... Currently, there are about 200 cases relating to violations with regards to customary native rights to land, filed and pending in Sarawak courts.

In ...the state of Sabah, the issuance of communal titles to develop native customary lands under a joint venture scheme with government agencies or private sector further erodes Sabah's indigenous peoples' right to ancestral lands. The merging of Native Customary Rights into large plantations under this scheme is deemed dangerous to the status of rights claims of indigenous communities to their traditional lands, territories and resources in the future.⁴

3.1.3. Violations of the right to development and free, prior and informed consent (FPIC)

There has been a consistent lack of good faith consultations with the Orang Asal in order to obtain their free and informed consent prior to authorizing or commencing large scale energy or agribusiness projects in their territories. As noted in the UPR submission as a result of their:

non-recognition of native customary title, the Federal and state governments have acted against the interests of indigenous Orang Asal by forcibly appropriating, acquiring and taking Orang Asal lands, territories and resources without their free, prior and informed consent.

One such example is found in the state of Sarawak, where the state and federal governments are embarking on a major industrialization project called the "Sarawak Corridor of Renewable Energy" (SCORE), worth about USD105 billion. The backbone of this project is 50 hydroelectric dams, with a capacity of 20,000 Megawatt (MW). These dams would flood hundreds of square kilometers of forest and farmland and displace tens of thousands of indigenous peoples.⁵

In another case:

the ancestral lands of the indigenous peoples of Johor straits, or the Orang Seletar in Peninsular Malaysia have been appropriated for developers of a vast industrialization project called Iskandar Malaysia without their FPIC. Several hundred people of nine villages staged a historic protest in front of the Johor state assembly, in December 15, 2011. The community currently lives in dire poverty and poor health due to continuous appropriation of their lands, and resulting pollution from industrial projects.⁶

A class suit filed by the affected community against the developers is currently being heard in court.

3.1.4. Violations of the right to self-determination and self-governance of indigenous peoples

This absence of good faith consultations is further evidenced by the manner in which the government has sought to interfere with the traditional governance systems of the Orang Asal, in particular through its selection and appointment of customary leaders. In this regard the UPR submission notes that:

[t]he Aboriginal Peoples Act of 1954 gave broad powers to the Department of Orang Asli Affairs (JHEOA) relating to matters on indigenous peoples. Part of their mandate is the appointment or removal of Orang Asli headmen. This violates the right of indigenous peoples to self-governance. To make matters worse, village headmen and committee members were required to attend leadership courses conducted by the government to supposedly “change their mindset”.⁷

3.1.5. Civil and political rights violations

In the process of failing to uphold indigenous peoples’ collective self-determination based rights to lands, development and free prior and informed consent, the government is also contributing to numerous violations of the civil and political rights of these communities and their members.

In trying to protect [their] rights to [their] traditional lands, territories and resources, many indigenous communities have suffered intimidation and harassment by the authorities and law enforcement personnel... Indigenous leaders of JOAS have also faced discrimination and harassment by the government where their names were added in the blacklist of the Immigration Department, resulting to their questioning at various entry points between Sabah, Sarawak and West Malaysia. Sarawak in particular, often denies the entry of indigenous rights and human rights activists in the state.⁸

3.1.6. Violation of the right to citizenship

To compound these issues many indigenous peoples in Malaysia are not formally registered in the state system. They consequently do not have identification papers that are necessary to obtain basic services, such as healthcare, housing, education and basic amenities or to exercise other fundamental human rights, including the right to vote.⁹

Having addressed the de-facto situation, the following section will provide an overview of the legal framework and remedial mechanisms in Malaysia as they pertain to indigenous peoples' right to access to justice and remedies.

3.2. Legal framework and remedial mechanisms

The content of this section draw from a draft research report on the legal framework of indigenous peoples rights in Malaysia prepared by JOAS and entitled "Red and Raw: Indigenous Rights in Malaysia and the Law".

Malaysia's legal framework contains a number of strong provisions in relation to access to justice/remedy. These range from Constitutional provisions protecting indigenous peoples' cultural rights, to legislation recognizing the Native Courts system. The Federal Constitution of Malaysia provides that every person is entitled to legal representation (article 5 (3)) and allows the use of other languages, including indigenous languages in the courts (articles 152 (4) and 161 (5)). Under section 44 of the *Specific Relief Act 1950*, natives are entitled to seek judicial review of executive actions or decisions which affect their rights or obtain a declaration of their rights.

3.2.1. Malaysian national court system

The court system of Malaysia is composed of superior courts, which include the Federal Court, the Court of Appeal, and the High Court, and subordinate courts which include the Magistrates Court and the Court for Children, presided over by Magistrates and the Sessions Court. The Federal Court hears appeals from the Court of Appeal while the Court of Appeal hears appeals from the High Court relating to both civil and criminal matters. The High Court has jurisdiction over civil and criminal matters on which the Magistrates and Sessions Courts have no jurisdiction. It may also hear appeals from the Magistrates and Sessions Courts in both civil and criminal matters. The Sessions Court may hear civil matters involving motor vehicle accidents, disputes between landlord and tenants, distress actions and other matters where the amount in dispute does not exceed one million RM. The Sessions Court also has jurisdiction to try all criminal offences except those punishable by death.¹⁰

3.2.2. Native courts and criminal offences

The native courts is a special system for Sabah and Sarawak dealing with disputes involving native customary laws, such as matters pertaining to native land tenure, inheritance, family law and minor criminal law. In his summary of the Native Court (Criminal Jurisdiction) Act 1961, Justice Raus Sharif explained that the Act only conferred:

jurisdiction to the Native Courts of Sabah and Sarawak to try any offences (relating to natives' customary law and customs) punishable for a term not exceeding RM 5,000 or combination of both. Criminal jurisdiction cannot be exercised in respect of an offence that is also an offence under the Penal Code. Further, the decision of the Native Courts in both Sabah and Sarawak are subject to judicial review by the Civil Courts. There have been cases where the decision of the Natives Courts had been quashed by the Civil Court by way of Judicial Review on ground of jurisdictional error.¹¹

In practice, however, there is still some ambiguity on whether some *adat* offences that are connected to criminal offences can still be brought to Native Court following a criminal trial. For example, rape, which is a criminal offence, can be tried as an *adat* offence of impregnating a woman out of wedlock. If the person is already charged in a Civil Criminal Court, bringing the claim in Native Court may constitute an offence of double jeopardy, which is prohibited under Article 7 of the Federal Constitution.

3.2.3. Sabah Native Court System

The Sabah Native Court Enactment of 1992 provides for a three-tiered court system – the Native Court, the District Native Court and the Native Court of Appeal. The Native Court is presided over by a three-member panel namely the district chief, and two others consisting of native chief, representative of the native chiefs or village heads.

The native courts act as courts of original jurisdiction and adjudicate on personal law matters between “native” and “native”, and between native and non-native. They may also adjudicate on other matters if expressly authorized by legislation. They have powers to fine and imprison (on the endorsement of a magistrate), and decisions are taken unanimously or by majority.

Above the native court is the district native court – one for each district within a state – which consists of the district officer as the presiding member and two other members, who are appointed from among district chiefs or native chiefs. Above the district native courts are the native court of appeal, which are presided over by a judge (currently the chief judge of Sabah and Sarawak from the Ministry of Justice) and include two other members – district or native chiefs. Litigants may not be represented by advocates in the native courts or district native courts.¹²

All three levels of the native courts apply the native laws and customs. The Native Courts of Sabah, although among the few in the world with legal recognition, do not have the necessary human and financial resources. This shortfall, coupled with the approach of the government, which appoints native chiefs and village heads who may not be familiar with the *adat*, has led to the lack of confidence among of indigenous peoples to fully avail of the services of the Native Courts.

These courts function independently and carry out open proceedings, but their jurisdiction is progressively being limited, because their decisions are not always respected by the Syariah and/or Civil Courts. Another limitation is the provision that Native Courts shall have no jurisdiction in respect of any cause or matter within the jurisdiction of the Syariah Courts or the Civil Courts. This has put the native court in a weaker position, particularly when no proper dialogue has been arranged between the three courts to discuss overlapping issues and jurisdictions. Furthermore, the Sabah Native Court Enactment does not provide for legal aid for a lawyer at the Native Court of Appeal level. If none of the lawyers on the Native Court of Appeal List takes the case, the person is left with no legal representation. This infringes on access to justice by denying the right to counsel, especially if the other side can afford a lawyer.

3.2.4. Sarawak Native Court System

The Native Courts in Sarawak serve “to supervise the administration of justice in as far as the native laws and customs are concerned.”¹³ They were created under the 1992 Native Courts Ordinance, which addresses their constitution, jurisdiction and powers. Their procedures for proceedings and handling of cases are governed under the 1993 Native Courts rules.¹⁴

The Native Courts are comprised of (a) a District Native Court; (b) a Chief’s Superior Court; (c) a Chief’s Court; and (d) a Headman’s Court. Each has a particular structure involving traditional institutions and assessors. The appeals structure flows, subject to certain conditions, from the Headman’s Court to the Chief Court; from the Chief’s Court to the Chief’s Superior Court, from the Chief’s Superior Court to the District Native Court; from the District Native Court to the Resident’s Native Court; and from the Resident’s Native Court to the Native Court of Appeal.¹⁵

The Native Courts can address a) breaches of *adat*; b) Native Customary Rights (NCR) land disputes and c) applications from individuals to be identified with the native communities of Sarawak.¹⁶ All matters related to *adat* are first heard before the Headman’s Court or the Chief’s Court, with the Chief’s Superior Court acting as the final appellate court.¹⁷ NCR land disputes are addressed to the District Native Court.

The Resident’s Native Court addresses applications of individuals seeking to be identified with a native community. The Resident’s Native Court also addresses acquisition of land by non-natives. For civil cases and land disputes the Native Court of Appeal is the final court of appeal in the Native Court system, with jurisdiction to hear and determine all pending appeal cases.¹⁸ A Chief Registrar oversees 58 Registrars who are obliged to follow the special directions of the State Secretary in the administration of the Courts.¹⁹

3.2.5. Human Rights Commission of Malaysia (SUHAKAM)

The Human Rights Commission of Malaysia Act of 1999 served to establish SUHAKAM and assign it with following functions:

1. To promote awareness of and provide education relating to human rights;
2. To advise and assist Government in formulating legislation and procedures and recommend the necessary measures to be taken;
3. To recommend to the Government with regard to subscription or accession of treaties and other international instruments in the field of human rights;
4. To inquire into complaints regarding infringements of human rights.²⁰

Since its establishment in 1999, SUHAKAM has been pursuing the protection of land rights and the right to education, among other rights, of indigenous peoples in Malaysia. One of the most important undertakings of SUHAKAM in relation to the land rights of indigenous peoples was its initiation of a national inquiry on the land rights of indigenous peoples in 2012. The result of this was a report entitled, “Report of the National Inquiry into the Land Rights of Indigenous Peoples in Malaysia”²¹, which was submitted to the

government. This led to the establishment by the Prime Minister's office of a National Task Force to study the report.

3.2.6. Institutions and agencies providing legal aid

A number of bodies, some governmental and some private, have been established to provide legal aid to vulnerable individuals and groups in Malaysia. Some of these have adopted a particular focus on the issues of the Orang Asli and have assisted them in bring their issues to the courts.

The Legal Aid Department (LAD) is a governmental body, under the Legal Affairs Division of the Prime Minister's Department, which provides legal aid and advisory services and has branches in all States and Federal Territories. It was established in September 1970 and is governed under a series of regulatory acts dating from 1970 to 2006.

The National Legal Aid Foundation (NLAFF) "was proposed by the Malaysian Bar Council to ensure that all accused persons have access to a fair hearing in courts in line with Article 5(3) of the Federal Constitution."²² It provides free legal services to members of households whose income falls below a certain threshold. Its services extend from criminal justice issues to education programmes aimed at increasing rights awareness. Lawyers who sign up to handle cases are paid from a dedicated fund.²³

The Bar Council Legal Aid Centre (BCLAC) "was founded by the Malaysian Bar Council with the objective of providing citizens equal opportunities for the enforcements of their fundamental rights".²⁴ It does pro-bono work for Orang Asli and others, providing them free legal advice and representation and has represented the Orang Asli in 11 cases.²⁵

As will be addressed below, despite these legal aid programmes, the Indigenous Peoples Network of Malaysia (JOAS) has found that delays in addressing cases, the absence of court injunctions, language barriers, and culturally inadequate court procedures, in particular around cross examination, constitute major obstacles for indigenous peoples to access to remedies through the courts.

4. Access to remedy of indigenous peoples in Sarawak affected by large scale hydropower dams

The Sarawak government and the Sarawak Energy Berhad (SEB), the state-owned company responsible for the generation, transmission and distribution of electricity in Sarawak, are collaborating to build a series of up to fifty large-scale hydroelectric dams. Between them, these large-scale hydroelectric dams are expected to inundate an area of more than 2,100 square kilometres consisting of forests, agricultural areas and villages, displacing tens of thousands of indigenous peoples from their customary lands. The dams are part of the Sarawak Corridor of Renewable Energy (SCORE), one of the five regional development corridors being implemented throughout the Malaysia with the stated objective of balancing development levels across the State.

For the purposes of distributing the energy sourced from the dams, SEB requested a private sector loan of \$45 million from the ADB under Project 44921-014 (Trans Borneo Power Grid: Sarawak to West Kalimantan Transmission Link). As noted in a letter, dated 6 October 2014 from a group of national and international NGO's concerned about the impact of the project on the affected indigenous peoples, to the ADB president:

According to the Project Data Sheet, the loan is intended to finance the construction of a 47 kilometre, double-circuit 275 kV transmission line in Sarawak between Mambong and the West Kalimantan border and two 275 kV line bays at the Mambong substation. The loan for the development of the electricity distribution network in West Kalimantan (Indonesia), Project 40174, was approved in August 2013. According to the corresponding "Report and Recommendation of the President to the Board of Directors: Proposed Loan and Administration of Loan and Grant to Republic of Indonesia: West Kalimantan Power Grid Strengthening Project", importing power from Sarawak is rationalized as economical because hydropower-generated energy can be utilized as an alternative to coal and oil reserves. The Report and Recommendations of the President also note that the project will contribute to a net overall reduction in the carbon footprint of power generation in Borneo.²⁶

The projects, and their existing and future potentially devastating impacts on indigenous peoples, have been addressed in a range of reports. One such report is that of a 2014 fact finding mission conducted by the Save Sarawak Rivers Network, and endorsed by Jaringan Orang Asal SeMalaysia (JOAS), Suara Rakyat Malaysia (SUARAM), Asia Indigenous Peoples Pact (AIPP), Asian Forum for Human Rights and Development (FORUM-ASIA), Bruno Manser Fund and International Rivers. The mission found that the projects lacked any justification on the base of energy demands:

...the recently completed Murum Dam is yet to begin operating due to technical design flaws, while the Bakun Dam is not operating at full capacity because of an insufficient demand for the electricity. The existence of excess unused power potential and the lack of evidence of demand-side needs for more power mean that there is no clear rationale for proceeding with the construction of more dams.²⁷

It also noted the profound impact which the projects had on indigenous peoples.

The poor management of environmental mitigation and dismal situation of the thousands of displaced indigenous peoples affected by the Batang Ai, Bakun and Murum dams has attracted local, national and international concern. Human rights violations at these sites have been scrutinized and denounced by the national human rights organization, SUARAM, the Malaysian Human Rights Commission (SUHAKAM), and the Malaysian Bar Council. In particular, these investigations have shed light on substandard living conditions at the resettlement sites, unfulfilled promises of livelihood support for the displaced families, the denial of peoples' rights to access information and the use of coercion, threats and intimidation against those who raised questions or objections to the dam projects.²⁸

Furthermore, the manner in which the police have dealt with disputes arising between companies and the communities is also cause for concern. In the national inquiry report of SUHAKAM, it emerged that complainants had been reporting violations of companies to the police but these were not being acted upon. On the other hand, when companies call on the police because communities stop them from entering community lands this leads

to the arrest and detention of community members. As a result there is understandably a strong perception of police bias among the complainants.

4.1. Baram Dam

The 2014 fact finding report also addresses the potential displacement of indigenous peoples of proceeding with the construction of the Baram Dam, explaining that

[t]he 1200 Megawatt (MW) Baram Dam is proposed to be built on a section of the Baram River in north-eastern Sarawak between the villages of Na'ah and Long Keseh. Approximately 400 square kilometers of land would be inundated if the project moves ahead. Twenty-six villages of Kenyah, Kayan and Penan indigenous peoples would be directly affected, and as a result, between 6,000 and 20,000 people would be forcibly dispossessed of their ancestral lands.²⁹



Penan villagers face uncertain future. Photo: International Rivers

The process to inform the impacted communities has been woefully inadequate and community opposition to the project has been sustained from the time they first became aware of the plans. The extent of this opposition and the sentiment of the impacted communities are addressed in the fact finding report:

The Kayan, Kenyah and Penan families living along the Baram River first heard about SEB's proposal to build the Baram Dam over the course of 2012 and 2013. Since that time, they have raised questions and concerns about hydroelectric project. Residents have publicly expressed their objections to the Baram Dam and their grievances by gathering thousands of signatures on a petition presented to the Sarawak government, writing letters to authorities, posting information online, erecting signs outside their homes, filing complaints with the police, approaching

legal advocates, consulting with indigenous peoples' alliances, and taking direct action to stop project-affiliated personnel from working.

The testimonials of the Kayan, Kenyah and Penan from the fact-finding mission to the thirteen affected villages revealed the following:

- Denial of right to information and lack of transparency about the impacts of the proposed project and the process of the Social and Environmental Impact Assessment (SEIA);
- Denial of the right to free, prior and informed consent;
- Violation of the right to participate in decision-making through representatives of own choosing;
- Extinguishment of customary land rights and violation of the right to livelihood;
- Use of coercion against villagers, including the issuing of punitive measures, threats and intimidation;
- No independent or legitimate process for project-affected villagers to seek redress for their grievances; and
- Violations of the right of indigenous peoples to participate in development planning and to self-determination.³⁰



Longhouse that will be inundated if Baram Dam is built. Photo: International Rivers

The opposition of the communities is in part a result of their awareness of the situation of those communities that have been impacted by the Bakun, Murum and Batang Ai dams and their determination to avoid a similar fate. However, they face similar challenges to these communities as they have also “been confronted with attempts by the Sarawak government to limit and extinguish their customary land rights through changes to laws and regulations as well as through the provision of licenses for logging, plantations, oil pipelines, and now, the building of a hydropower dam.”³¹

Faced with this reality, and their knowledge of how the State imposed the previous dam projects despite the absence of community consent, the communities along the Baram River have attempted to form a united front to defend their livelihood and customary land rights.³² To this end they launched the Baram Protection Action Committee in 2008. They have also participated in the establishment of an indigenous peoples' coalition called “SAVE

Rivers” in 2011.³³ The 2014 fact finding report of this coalition is one of the means through which the communities are attempting to raise awareness of their plight and demand respect for their rights. That report describes the recent community actions and the company’s response as follows:

Beginning in October 2013, Baram community members established two road blockades to prevent construction, surveying work and logging at the proposed location of the Baram Dam. As a result, preparatory construction works have remained stalled. Nevertheless, since November 2012, SEB claims to be engaging in a social and environmental impact assessment (SEIA) ‘process’ in communities to be affected by the proposed dam. In this context, alarming human rights violations at the hands of SEB are being reported in the twenty-six affected communities.

SEB’s website explains that the “SEIA process for dams in Sarawak draws upon key elements of internationally accepted consultation which are ‘free, prior and informed’ consultation leading to consent”. SEB is consolidating separate and distinct processes involved in the project preparation phase. Standard processes for project preparation include informing all stakeholders about the proposed project, carrying out baseline studies and impact assessments, conducting inclusive and meaningful consultations with affected communities about the project’s expected impacts and proposed mitigation plans, developing proposed resettlement action plans, and seeking the free, prior and informed consent (FPIC) of affected communities to proceed.³⁴

In response to SEB’s claims, the fact finding report team point out the inadequacies in the company’s understanding of what is required as part of a genuine FPIC process, and its practices, both of which are completely at odds with an indigenous rights based notion of FPIC.

Consent for the project should not be presumed following a one-time consultation as implied by SEB. Instead, communities have the right to freely give or withhold consent, based on the free-will of communities as expressed by the representatives of their own choosing. In their attempts to conduct an ‘SEIA process’ at Baram, SEB and their consultants are engaging in coercive tactics that have included closed-door meetings with selected individuals in each community, verbal threats imposed on elders, pressuring youth with monetary incentives and prematurely acquiring land without the consent of affected individuals.³⁵

Additional concerns with the consent seeking process emerge from interviews which the fact finding team conducted with members of Kayan, Kenyah and Penan longhouses along the Baram River. These community members “testified that they have been provided with inadequate information about the risks and impacts of the Baram Dam and have no access to a channel by which to raise their questions.”³⁶

A range of concerns therefore emerge from the fact finding report. Firstly, the aforementioned absence of a mechanism through which the communities can raise their issues or questions creates a context within which fear and suspicion are inevitable. In the interviews conducted by the fact finding team it was established that SEB does not have a functioning, accessible grievance mechanism. Those who will be affected by the

Baram Dam (upriver, downstream and around the reservoir) were asked if they knew how to file a grievance or have their questions/concerns addressed. In no case was anyone interviewed aware of a process to file a complaint, other than going to SEB's office in the state capital, Kuching.

Secondly, the report points to the absence of any “accessible, independent, or legitimate mechanisms by which communities affected by the proposed Baram Dam can submit grievances, concerns or requests for mediation without fear of retribution”.³⁷ This was a common concern raised in all of the thirteen villages which the fact finding team visited.³⁸ The absence of a “safe or effective process” through which they could seek to have their project related grievances is a major deficiency given the power dynamics which are at play in the context of the joint State and corporate interests. In light of this situation, the only option available to community members from Baram is to seek access to the courts. However, given the expense involved in doing this, and the extended timeframes it implies in terms of having their grievances addressed, the communities are forced to take direct action in the form of blockades and protests in order to assert their rights.³⁹

The case has also been addressed by Asia Indigenous Peoples Pact (AIPP) in the context of questioning the effective application of safeguard policies of international financial institutions such as the ADB.⁴⁰ AIPP points out that: Sarawak Energy Berhad has specifically identified the Baram Dam project as key to generating energy for SCORE-related industries and as a source of energy once the West Kalimantan Power Grid project funded by the ADB will be completed.⁴¹ This grid project is meant to help fast track SCORE and trade energy between Sarawak and Kalimantan, Indonesia.⁴² Perusahaan Listrik Negara (PLN), the state-owned power utility in Indonesia, aims to reduce the cost of power generation in West Kalimantan, Sumatera, by importing hydropower generated electricity from Sarawak. This requires building 83 km of 275 kV transmission lines from the Bengkayang substation in Kalimantan to the border with Sarawak.⁴³ In Sarawak, Sarawak Energy Supply Corporation (SESCO), the state-owned power utility in Sarawak, will build 42 km of 275 kV transmission lines from Mambong substation to the border with West Kalimantan. These transmission lines will form the first regional Brunei Darussalam-Indonesia-Malaysia-Philippines East ASEAN Growth Area (BIMP-EAGA) flagship project, and the first leg of the Trans Borneo Power Grid that aims to connect West Kalimantan across Sarawak, and Brunei, to Sabah (Malaysia), enabling power trading between BIMP-EAGA countries.⁴⁴

4.2. In defence of their land and resources



Indigenous communities have set up a blockade at the access road to the proposed Baram Dam.

Photo: International Rivers

As mentioned above the communities developed a strong and united local level opposition to the dams. One component of this involved establishing the Baram Protection Action Committee as well as a coalition called SAVE Rivers, which comprises of affected indigenous communities. Together, they have staged numerous protests against the building of the Baram dam, including gathering over a thousand-signatures in a petition which they have attempted to provide to the Sarawak Chief Minister.⁴⁵ The affected communities, along with their supporters, have also set up blockades in Long Kesseh and Long Naah to prevent SEB employees from entering the area. The blockade, which started in October 2013, remains in place.

The communities have initiated a series of other actions including:

- Conducting exchange/educational visits to other communities affected by similar Hydro Electric Power dam projects, such as the Bakun Dam, to meet villagers in Asap/Koyan, Belaga who were resettled as a result of that project.
- Lodging police reports against contractors, agents or employees of SEB for trespassing on or encroaching into customary lands near and surrounding the proposed dam site.

- Stopping a drilling exercise (purportedly for geological study purposes) and a survey of the lands near the dam site in October 2013. On the same day the villagers ordered the workers and the SEB representatives to move out from the area.

In addition to these coordinated actions, certain villages and villagers have taken further steps to attempt to halt the project. Specifically, a number of villages have also objected to, or refused to fill, the survey forms for a social environmental impact assessment (SEIA) conducted by a consultant (paid by the SEB) on the ground that they perceive the SEIA exercise to be merely “window-dressing”, and something which could be manipulated to facilitate access to international funding or investments for the project. Villagers living near the proposed dam site have also filed civil cases, which are pending before the High Court, to challenge the extinguishment of their land rights arising from land acquisition for a project which they oppose. The cases are still pending, with the most recent case being filed in February 2015.

On 6 October 2014, the Indigenous Peoples Network of Malaysia (JOAS), along with other civil society organizations, submitted a letter to Mr. Takehiko Nakao, President of the ADB, raising their concerns regarding the private sector loan to SEB. The letter pointed to SEB’s systematic record of corruption and violations of the individual and collective rights of indigenous peoples in Sarawak in the construction of the dams which will provide electricity for the transmission lines.⁴⁶ The ADB response stated that the Bank was only funding the transmission line project, and they have conducted due diligence “on the transmission interconnection, as it is a grid-to-grid interconnection and there is no mutual interdependence of any source”.⁴⁷ This means that ADB does not consider the dams as facilities that are associated with the proposed transmission line project, and instead regards its accountability as being solely related to the transmission line. The ADB’s 2009 Safeguard Policy on the Environment stipulates that “associated facilities” should be subject to compliance with the social and environmental standards outlined in the safeguard policy. The affected communities of Baram, along with numerous Malaysian and international human rights and environmental groups, strongly contest the ADB’s view. They assert that it is absolutely indisputable that the viability of the transmission line project depends on the dams which are planned in Sarawak, and thus the dams are by definition “associated facilities”.

A communication on the Baram case was submitted to the UN Special Rapporteur on the rights of indigenous peoples on 22 October 2014. The communication calls on the Special Rapporteur to raise the communities’ concerns with the Government of Malaysia, in particular in relation to the actions taken to forcefully dismantle the barricade, which had been erected a year ago by local residents of Long Kesseh to assert their native customary rights (NCR) to land being allocated, against their will, to the Baram Dam site.⁴⁸

At the national level, the affected communities presented their concerns at the congress of the International Hydropower Association (IHA) in Kuching in May 2013. Protests and demonstrations were also held during the said congress by hundreds of

people from Baram, and from other affected communities in Sarawak. The communities have also made interventions in various UN processes and conducted a number of press conferences in Kuala Lumpur to raise awareness among key actors and the general public with regard to the concerns of the indigenous peoples in Sarawak in relation to these large-scale hydropower dams.

Government representatives on the other hand continue to promote the projects, despite the media coverage of their harms, questions raised with regard to their financial viability and the petitions of the affected people objecting to them. These politicians have consistently presented the view that it is only through such projects that the interior areas of the country can be developed and local people's livelihoods improved. In so doing they have attempted to entice the Baram people with, among other things, promises of job opportunities, the creation of a new township in the interior of Baram, and a tourism master-plan for Baram around the creation of the reservoir lake. For its part, SEB has been conducting a range of "community programmes" in its efforts to quell opposition to the project. The company also brought in the region of 30 indigenous peoples from Baram to China to visit the Three Gorges dam and resettlement area.

The primary concern in relation to these activities of the government and the company is that they do not start from a rights-based premise in which the land and governance rights of the indigenous communities are recognized and respected and their free prior and informed consent is sought prior to making any decisions with regard to the project. As a result, they have generated a high level of distrust, provided inadequate information with regard to the potential impacts, and failed to address community concerns in relation to them. They have also failed to provide an effective and legitimate channel through which the communities can raise grievances. Given the level of mistrust, and the fact that the community has erected and maintained physical barricades for over a year, it is indeed questionable if a mediation mechanism between the company and the community would serve any purpose at this stage. What is clear is that some form of effective, credible and efficient rights based adjudication, to which the communities have access, is absolutely essential.

5. Recommendations

As is evident from this case study, the Baram dam and the situation of indigenous peoples in Malaysia has been the subject of numerous investigations, reviews and reports, all of which have highlighted the issues faced by the communities and formulated specific recommendations in order to address them. Rather than add to this body of unimplemented recommendations, this chapter will re-echo their advice in relation to remedial mechanisms and compensation in the hope that it will be acted upon.

The 2013 report of the Malaysian National Human Rights Commission (SUHAKAM) on the National Inquiry into the Land Rights of Indigenous Peoples provided a number of recommendations addressing redress mechanism and settlements. Specifically it recommended the following five actions in relation to redress mechanisms:

1. The Inquiry strongly recommends the establishment of an Indigenous Land Tribunal or Commission composed of retired judges and experts on indigenous customary rights to resolve issues and complaints related to indigenous peoples' land claims that are brought before it. The Tribunal or Commission should be empowered to decide on these complaints and issues, including appropriate settlements or redress related to a case.
2. In view of the high number of cases currently filed in court, the Inquiry also recommends the establishment of a Native Title Court or a special court to deal with the backlog of cases in the civil court. Depending on the powers of the proposed Indigenous Land Tribunal/ Commission, its recommendations can be subsequently brought before the Native Title Court to decide on these cases. These processes will significantly reduce the time to decide on land conflicts.
3. Create an independent mediation mechanism e.g. Ombudsman to provide assistance in land disputes involving indigenous peoples' land claims. This mechanism can link with current efforts by the judiciary to encourage mediation for cases brought before the court. Mediation using the *adat* of the indigenous peoples should also be considered, thereby reflecting Government recognition of their cultural traditions.
4. Establish a mechanism to monitor the land rights situation of indigenous peoples that works closely with relevant Government departments and indigenous organisations dealing with land, and the proposed Indigenous Land Tribunal/ Commission and Ombudsman.
5. Legal aid and other forms of support for communities wanting to use strategic litigation and targeted advocacy to seek redress through the courts should also be provided. Where free legal aid is not available especially in Sabah and Sarawak, special arrangements for counsel from the Bar Council Legal Aid Service could be extended to these States. In addition, the Sabah Law Association and the Sarawak Bar should consider extending services similar to those provided by the Bar Council Orang Asli Committee.⁴⁹

It also made the following recommendation in relation to settlement exercises on indigenous customary lands:

Review and amend relevant laws to align them to universally accepted norms. It is important to mention here that the UN Guiding Principles on Business and Human Rights “Protect, Respect and Remedy” Framework developed for transnational corporations and business enterprises place the obligation on the corporate sector to include rights-based practices in their operations. Businesses are obliged to do so even in countries where laws and policies are in place to protect human rights of citizens.⁵⁰

Drawing from the legal study conducted for the Indigenous Peoples Network of Malaysia (JOAS), which has been addressed earlier, the following recommendations are aimed at ensuring adequate legal aid and addressing culturally inappropriate procedures and other obstacles which prevent indigenous peoples from obtaining access to justice through the judicial system. The extracts from the legal study also provide relevant insights and recommendations in relation to access to remedy in the context of indigenous peoples in Malaysia:

Many indigenous communities have resorted to filing court cases to determine the validity of their land claims. However, court cases take a long time to be heard and in the meantime evidence on the ground can be destroyed especially if a company or a development agency is not ordered to stop work through a court injunction. This slow process of redress mechanism available through judicial process is a constraint, which impedes the full enjoyment of the indigenous peoples' rights to land. Procedures in court, and particularly cross-examination of witnesses and language barriers, are also daunting to indigenous peoples. In many criminal cases, the accused would rather admit they are guilty and go for plea bargaining because of lack of understanding of the system and funds to hire a lawyer. The lack of financial support is a big barrier even though there are now more opportunities for legal aid and by Sabah and Sarawak Law Associations and the Bar Council. For criminal cases, the accused may be appointed a lawyer under Yayasan Bantuan Guaman (Legal Aid Foundation), but there are less opportunities for civil cases.

Although the Orang Asli legal system is not recognised by the Government, as in the case of Sabah and Sarawak, it is still widely practised in resolving internal disputes within communities. The Orang Asli legal system is closely linked to customs of the respective Orang Asli groups. On the appointment of the *batin* (village headmen), there are differing views among the traditional *batin* (selected by the community) and the 'new' *batin* appointed by the Department of Orang Asli Development (JAKOA). Whereas the 'new' *batin* are usually more educated and follow procedures outlined by JAKOA, the traditional *batin* tend to follow customary ways and the *adat*, and to practise a more collective decision-making process. Orang Asli representatives have been asking for the current policy of appointing *batin* through JAKOA to be amended so as to recognise *batin* selected by the communities themselves, and to ensure that the main role of the *batin* is to promote the *adat* of the Indigenous Peoples.⁵¹

In keeping with these recommendations, a core consideration for any grievance mechanism, whether it is judicial or non-judicial, State or corporate based, is therefore that the customary law and traditional dispute resolution systems of indigenous peoples must be given the necessary consideration in both its design and operation.

¹ Jaringan Orang Asal SeMalaysia or the Indigenous Peoples Network of Malaysia (JOAS) has membership from 87 indigenous community organisations, and five support NGOs namely Partners of Community of Organisation - Sabah (PACOS TRUST), Centre for Orang Asli Concerns (COAC) – Peninsular Malaysia, Borneo Resources Institute Malaysia Sarawak (BRIMAS), Sarawak Dayak Iban Association (SADIA), and Building Initiatives in Indigenous Heritage (BIIH).

² Universal Periodic Review of Malaysia by the Indigenous Peoples Network of Malaysia (JOAS) – 2013, <http://www.iphrdefenders.net/mediabox/docs/Indigenous%20Peoples%20Network%20-%20Malaysia%20UPR%20.pdf> (Date accessed: November 2014).

³ Ibid at 1.

⁴ Ibid at paras 3-5.

⁵ Ibid para 11.

⁶ Ibid para 15.

⁷ Ibid para 20.

⁸ Ibid paras 23, 28.

⁹ Ibid para 29.

¹⁰ Lawyersmen, How does the court system of Malaysia work, http://www.lawyerment.com/library/kb/Legal_Institutions/Judiciary/1002.htm. Date accessed: February 10, 2015.

¹¹ Rights to Religious and other Minorities in Malaysia paper delivered by Justice Raus Sharif, a Judge of the Federal Court of Malaysia at the 17th Commonwealth Law Conference 2011, Hyderabad, India para 14.

¹² Raja Devasish Roy (2005) Traditional Customary Laws and Indigenous Peoples in Asia Minority Rights Group International at 18.

¹³ http://www.nativecourt.sarawak.gov.my/modules/web/page.php?id=64&menu_id=113&sub_id=121.

¹⁴ http://www.nativecourt.sarawak.gov.my/modules/web/page.php?id=92&menu_id=113&sub_id=135; see also <http://www.ictu.tmp.sarawak.gov.my/seg.php?recordID=M0055&contentID=SM0113>.

¹⁵ http://www.nativecourt.sarawak.gov.my/modules/web/page.php?id=89&menu_id=113&sub_id=131.

¹⁶ Ibid.

¹⁷ http://www.nativecourt.sarawak.gov.my/modules/web/page.php?id=63&menu_id=113&sub_id=120.

¹⁸ http://www.nativecourt.sarawak.gov.my/modules/web/page.php?id=89&menu_id=113&sub_id=131.

¹⁹ <http://www.ictu.tmp.sarawak.gov.my/seg.php?recordID=M0055&contentID=SM0113>.

²⁰ Human Rights Commission of Malaysia, Functions and Powers, <http://www.suhakam.org.my/about-suhakam/fungsi-kuasa/>, Date Accessed: February 10, 2015.

²¹ <http://www.suhakam.org.my/national-inquiry/>.

²² First Keynote Address by The Right Honourable Tan Sri Arifin bin Zakaria, Chief Justice of Malaysia, at the 5th China-ASEAN Forum (26-27 Sept 2011).

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ NGOs Urge ADB to Withhold Loan for the Borneo Power Grid October 5, 2014 Letter available at <http://www.internationalrivers.org/resources/8416>.

²⁷ Tanya Lee, Thomas Jalong & Wong Meng-Chuo No Consent to Proceed: Indigenous Peoples' Rights Violations at the Proposed Baram Dam in Sarawak A Fact-Finding Mission Report at 4.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid at 7-8.

³¹ Ibid at 5.

³² Ibid.

³³ Ibid.

³⁴ Ibid at 5.

³⁵ Ibid at 5, 7.

³⁶ Ibid at 8.

³⁷ Ibid at 14.

³⁸ Ibid at 14.

³⁹ Ibid at 14.

⁴⁰ Development for Whom? Safeguard Policies and Projects of International Financial Institutions Affecting Indigenous Peoples in Asia (AIPP, 2014).

⁴¹ Ibid at 2.

⁴² Ibid at 3.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ See SAVE Rivers and Baram Protection Action Committee (BPAC), <http://saveriversnet.blogspot.com>

⁴⁶ See <http://www.iphrdefenders.net/country-updates/malaysia/534-asian-development-bank-urged-to-shelve-loan-for-power-grid-in-sarawak-international-rivers>.

⁴⁷ See also http://adb.org/projects/details?page=details&proj_id=44921-014.

⁴⁸ Lee, Tanya, Attempt to Expel Indigenous Peoples from Proposed Baram Dam Site Denounced By Human Rights Group, October 22, 2014, <http://www.internationalrivers.org/resources/8430>.

⁴⁹ Human Rights Commission of Malaysia (SUHAKAM) Report of the National Inquiry into the Land Rights of Indigenous Peoples. 166-167.

⁵⁰ Ibid. 170.

⁵¹ Jaringan Orang Asal SeMalaysia (JOAS), Red and Raw: Indigenous Rights in Malaysia and the Law, at 82, 83.

Chapter 7 - Access to Remedy for Indigenous Peoples affected by Corporate Activities in Cambodia

Mrs. Mane Yun

1. Background to the research

1.1. Specific Topic of the Research

This case study contributes to addressing the lacuna in the existing body of literature pertaining to indigenous peoples' experiences on access to remedy for alleged corporate infringement on their rights. It does so by focusing on the issues of access to remedy for indigenous peoples whose rights have been affected by the activities of a Vietnamese company, Hoang Anh Gia Lai (HAGL), which operates through a number of subsidiaries in Cambodia. At the time of writing,ⁱ the community was preparing for negotiations with company through the dispute resolution mechanism of the International Financial Corporation (IFC) Compliance Advisor Ombudsman (CAO). The case raises the issue of international financial institution's responsibility in the context of investments via financial intermediaries in projects which have negative impacts on indigenous peoples' rights.

1.2. Research team and participants

The research was conducted by Mrs Yun Mane with the participation of, and contributions from, representatives of the indigenous peoples from affected communities in Kresh and Kanat villages. The following organizations also provided support to this research: Inclusive Development International (IDI), Global Witness (GW), Equitable Cambodia (EC), Cambodia Indigenous Youth Association (CIYA), Indigenous Rights Active Members (IRAM) Network, and Highlanders Association (HA) of Cambodia.

Among the individuals who participated in interviews and assisted in information gathering were Ms. Megan MacInnes, Global Witness; Mr. Eang Vuthy, Executive Director Equitable Cambodia; Ms. Sek Sovanna, programme officer of EC; Ms. Chhoen Sotheavan, researcher with Equitable Cambodia; Mrs. Natalie Bugalski, Executive Director of Inclusive Development International; Mr. Ngach Samin, Human Rights Defender project coordinator of CIYA; Mr. Phon Sotheara, programme coordinator and Ting Kham, project officer of Highlanders Association.

Community representatives, who shared their perspectives and experiences with regards to indigenous peoples' access to remedy in the Cambodian context, included Mrs. Kha Sros, of Indigenous Rights Activist Members, Mr. Sro Nok, the chief of community committee in Kresh village and Mr. Sal Nheu, the community representative of Kanat village.

ⁱ Case study completed in September 2014

1.3. Research Methodology

The research methodology consisted of a combination of desk based research and review of existing documents, together with individual interviews, observations, and analysis of indigenous and civil society perspectives and experiences with regards to access to remedy of the communities affected by the operations of Hoang Anh Gia Lai (HAGL).

The desk based research and review aimed to compile and analyse all the existing supporting documents from the affected indigenous peoples' communities and support organizations pertaining to the related issues. The documents were collected through direct contact with indigenous representatives in the community and with focal persons of support organizations who have been involved in providing technical and financial assistance to the communities. Two of the primary sources for the chapter were the 2013 Global Witness report *Rubber Barons*¹ and the complaint letter on behalf of the affected communities to IFC's Compliance Advisor Ombudsman (CAO).

Individual interviews were conducted with NGOs representatives, traditional leaders, community representatives and also community activists in the affected communities, including Kanat and Kresh, to obtain their perspectives on experiences with regard to the process of access to remedies concerning their issues with the government and the companies involved in the HAGL operations.

1.4. Case overview

The purpose of the case study is to analyse the issue of the access to justice and to appropriate remedies, or their lack thereof, in a concrete case where indigenous peoples' fundamental rights, including their rights to their land, territories and resources, have been affected by business corporations. This was realized by examining a specific case in Rattanakiri, Cambodia where indigenous peoples were affected by the activities of a Vietnamese company, HAGL, operating through a number of subsidiaries in Cambodia. Among HAGL's investors is Dragon Capital Group Ltd (DCGL), which invests in HAGL through Vietnamese Enterprise Investments Ltd (VEIL) fund. DCGL receives investments from the IFC, the financial lending arm of the World Bank Group, through the VEIL fund, primarily for rubber plantations.

The indigenous communities in Rattanakiri are affected by three concessions held by Heng Brothers, CRD Rubber Company and Hoang Anh Oyadav. Other known concessions currently or previously held by HAGL subsidiaries are Hoang Anh Andong Meas in Virachey, Hoang Anh Andong Meas in Lumphat, Hoang Anh Lumphat, and Hoang Anh Mang Yang K Rubber Group.

The findings of the research reveal that HAGL's operations resulted in adverse environmental impacts and harm to the affected villages. The complainant villagers are from 17 indigenous communities located in the districts of Andong Meas and O'Chum, Ratanakiri Province and are of Jarai, Kachok, Tampuon, Cham, Kreung, Laos, and Vietnamese and Khmer ethnicities (see Annex 1 providing details of the villages).² They experienced loss and damage of both communal and household land and resources as a result of the operations. Communal land losses include collectively held and used

lands, such as community forest, grazing land, land reserved for future generations and shifting cultivation, and areas of spiritual significance, such as forests and burial grounds. Communal resources to which access has been affected include: resin and other non-timber forest products (NTFP), wildlife, fish resources and water sources, with the lack of access to the latter in part due to water pollution. At the household level, losses include rice fields and orchard/farming land (chamka) and crops such as rice, cashew, cassava and a variety of fruit trees. In at least two cases, houses or other shelters have been destroyed by the company. No compensation has been provided for the communal losses. In some cases households received compensation for rice fields and farming land. However, in all such cases the amount of compensation received was inadequate and was accepted under duress as the villagers were informed that the alternative was to receive no compensation at all.

In addition, HAGL's operations breached a number of Cambodian laws and regulations, and failed to comply with the IFC policies and procedures, including its pre-2006 safeguard policies and its 1998 Environmental and Social Review Procedure. Illustrative of this is the fact that the operations did not comply with the IFC and the DCGL/VEIL minimum requirements for transparency, and they also failed to ensure the establishment of an Environmental & Social Management System and to make environmental assessment reports publicly available. In addition to non-compliance with the relevant safeguard policies the operations also failed to adhere to Cambodian laws. The IFC for its part failed to ensure adequate client institutional capacity for "category A subprojects" or to ensure such subprojects were subject to prior review and approval.³

Many of the 17 impacted communities chose to only engage with non-judicial mechanisms when seeking remedies. They did this through the submission of complaints to the commune councils, district and provincial authorities and also to mechanisms at the national level. They also organised a non-violent demonstration at the government's provincial office and brought the case to the attention of indigenous parliamentarians who visited the affected communities. However, no action was taken by the concerned government agencies/officials to effectively address the issue, and the solutions proposed offered inadequate protection for the rights of indigenous peoples to land, natural resources and to maintain traditional identities. When questioned as to why they did not use judicial mechanisms, the response of the communities was that the outcome would have been the same, as it is not realistic to seek justice in a context where judicial mechanisms are not independent but are instead corrupted. It was also noted that the court system has been used as a tool by land grabbers to legitimize forced evictions and prosecute human/land rights defenders on the basis of false accusations.⁴

As the result, in February 2014, the representatives of 17 affected indigenous communities decided to file a complaint to the IFC-CAO, describing illegal seizures of their farming and grazing lands and destruction of their forests and sacred sites. The complaint, submitted on behalf of the affected communities by EC, CIYA, IRAM, HA and IDI, aimed to seek remedies and justice after the villagers had lost hope in using the non-judicial and judicial mechanisms available to them within their country.

The complaint met the IFC-CAO's three eligibility criteria for further assessment which concluded in May 2014. Based on stakeholders' discussions held as part of the CAO's assessment, the complainants and the company have agreed to engage in a voluntary dispute resolution process. The CAO is leading the dispute resolution process which includes a capacity building component to provide representatives from affected communities with negotiation and bargaining skills before the negotiation starts, and also involves working with the parties on establishing ground rules. In addition, a commitment was made by the general director of HAGL to a moratorium on the reclamation decision on 28 April 2014. This included suspending reclamations for the Heng Brother Project, CRD Project, and the Hoang Anh Oyadav project in Ratanakiri Province from 1 May 2014 to 30 November 2014. However, as reported by the community, the reality on the ground is that HAGL subsidiaries, including CRD, are violating the general director's decision because workers continue to be hired to clear the forests of some of the affected communities.

The case study emphasises the importance of all good faith participation on behalf of all actors in the ongoing IFC-CAO facilitated dispute resolution process if justice is to be achieved for the affected communities. Recommendations are provided in the last section addressing the government of Cambodia, the IFC-CAO, investors, the international community, non-governmental organizations and HAGL. They point to the necessary measures to ensure that HAGL investment projects in Cambodia and Laos are implemented in accordance with national laws and international human rights standards, and that the lands taken by HAGL are returned to the complainant communities.

2. Introduction

2.1. Context of human rights and business in Cambodia

As stated by the Cambodian Centre for Human Rights (CCHR), business and human rights obligations include the requirement for private sector respect for universal human rights. As all human rights can be violated by corporate activities, corporations must ensure that all human rights are respected in their operations. Depending on the particular business sector some human rights are of more relevance, such as the right to freedom of assembly and association and the right of indigenous peoples to possession of their ancestral lands and resources, among others.⁵

In December 2011, the OHCHR in Cambodia also noted that business enterprises have the potential to become a key enabler for the enjoyment of human rights. They can, for example, contribute to the respect and realization of human rights through employment creation, local development and innovation. However, the adverse impacts on human rights resulting from some activities of businesses continue to be a key challenge. New normative rules clarifying the role and responsibilities of States and business enterprises have emerged and have been endorsed by the UN Human Rights Council with the adoption of a set of Guiding Principles on Business and Human Rights (henceforth Guiding Principles) in June 2011.

In Cambodia, investments by national and international businesses are seen as a key driver for national development, and the impacts on local communities need not necessarily be adverse, provided human rights principles are adhered to. The Guiding Principles provide a roadmap for States and businesses, as well as civil society, affected individuals and communities, donors, development partners, to better manage this new wave of investment driven development, while contributing to the value and sustainability of business enterprises. Some of the key business sectors in the Cambodian context rely on land and natural resources and play important social, economic and political roles. Those business sectors include, but are not limited to: agribusiness (such as sugar, rubber, cassava, acacia plantations); industrial production in both urban and rural areas (especially related to factories and economic land concessions); extractive industries (such as mining, oil, and gas); tourism and hospitality (such as hotels and restaurants); infrastructures and other development projects (such as the building of roads and railroads); employment services (including agencies for recruitment of domestic work); energy projects (such as hydropower dam and coal-fired plants); and other small and medium enterprises, including family-run businesses.⁶

Article 31 of the Constitution of the Kingdom of Cambodia enshrines international human rights obligations as follows: “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights...”. The Guiding Principles are grounded in recognition of States “existing obligation to respect, protect and fulfil human rights and fundamental freedoms.” Therefore, international standards on business and human rights are directly applicable to the Kingdom of Cambodia through their international legal commitments and domestic law.

The predominant business and human rights issue currently in Cambodia concerns economic land concessions for the rubber plantations which encroach on indigenous peoples’ land. As a result, land disputes remain the most contentious issue when talking about indigenous peoples and their rights.

In this connection, the May 2013 *Rubber Baron* report of Global Witness revealed for the first time the extent to which the rubber industry acts as a key driver of this problem. Vast amounts of lands have been acquired for rubber plantations in Laos and Cambodia by two of Vietnam’s largest companies, HAGL and the Vietnam Rubber Group (VRG). These “rubber barons” are financed by reputable international investors, including Deutsche Bank and the IFC. The *Rubber Baron* report detailed how HAGL was routinely bulldozing local communities’ land and clearing large areas of intact forest in Cambodia and Laos to make way for its plantations and highlights the devastating consequences for those who find themselves to be in the way of the land grabbers. It also revealed how a range of investors, including CBR Investments, Deutsche Bank and the IFC, held shares in HAGL. Swiss-based CBR Investments divested its shares within days of the report’s publication.

It is estimated that 700,000 Cambodians have already been negatively affected by land grabs, with at least 400,000 people having been evicted from their lands since 2003,

usually without any prior consultation or compensation. Repression and violence against those who speak out is increasingly severe, as evidenced by the murder of the activist, Chut Wutty, in April 2012 and the shooting of a 14 year old girl during a land eviction a month later. Problems around lands are threatening to reach boiling point and have been prominent in anti-government protests following the July 2013 general election - demonstrations which have been met with excessive use of force by the authorities.⁷

2.2. Remedial mechanisms available to indigenous peoples to seek justice and redress

In Cambodia, both judicial and non-judicial system mechanisms are in place and in theory are accessible to indigenous peoples. The Cambodian judicial system is composed of courts of first instance, appeal courts, and a Supreme Court. According to article 128 of the Constitution, the Judiciary is “independent,” guaranteeing and upholding impartiality and protecting the rights and freedoms of all citizens. The Constitution also states that the judicial power should not be granted to the legislative or executive branches and should cover all lawsuits, including administrative ones. The Constitution of Cambodia leaves the functioning of the judiciary to be determined in a separate law. The Law on the organization and the activities of the adjudicate courts was promulgated in 1993.

Trials are conducted in the name of the Khmer citizens in accordance with the legal procedures and laws in force. Only judges have the right to adjudicate. A judge must fulfil this duty with strict respect of laws, wholeheartedly and conscientiously. Trial rights are embedded in a wide range of laws and procedural rules. The presumption of innocence, burden of proof, and rules governing the admissibility and exclusion of evidence are examples of codified fair trial rights afforded to all.

As to non-judicial mechanisms, the Cambodian Government has enhanced the alternative dispute resolution system in keeping with the objectives of the administration and the government’s rectangular strategy of justice reform. These mechanisms aim to provide conciliation or mediation of disputes and there exist a number of non-judicial mechanisms which can be accessed to address human rights and business issues, especially those concerning indigenous peoples in Cambodia. The non-judicial mechanisms include the *Maison de la Justice* and the Council of the Cadastral Commission⁸ if the case relates to the Economic Land Concessions (ELCs) and untitled land. There is also an existing consultation mechanism between the Council for the Development of Cambodia, investors and relevant parties (under the Investment Law of 1994 and the 24 March 2003 amendment to article 20). Among State-based non-judicial mechanisms are the Cambodia Human Rights Committee, which is tasked to promote human rights and rule of law in Cambodia and the National Assembly Commission on Human Rights and Reception of Complaints, where citizens can voice their concerns regarding human rights violations. There are also non-State non-judicial mechanisms in Cambodia such as the Arbitration Council and the CCHR Community Hearings Programme (‘CHP’).

A big question however remains around the effectiveness of the process for access to remedy and the justice which it delivers. To date none of these non-judicial mechanisms

are sufficient or adequate to provide access to justice to the indigenous peoples in relation to human rights violations in the context of business activities.

The Guiding Principles consist of 31 standards or principles developed to support the implementation of the 2008 UN ‘Protect, Respect and Remedy’ Framework. They are based on these three protect, respect and remedy pillars and elaborate on the steps States should take in order to foster business’ respect for human rights. This includes providing a blue print for businesses to become aware of how to, and to demonstrate to others that they do, respect human rights and reduce the risks of causing harm or in any way contributing to human rights violations. In effect they constitute a set of benchmarks for stakeholders to assess business’ respect for human rights. They also stipulate what both States and business enterprises should do to enhance access to effective remedies for those whose rights have been violated.

The research conducted for this chapter on the activities of HAGL clearly indicates a failure to implement the “Protect, Respect, Remedy Framework” in accordance with the Guiding Principles. For instance, principle 26 states that:

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

Likewise principle 27 requires “effective and appropriate non-judicial grievance mechanisms”.

The ineffectiveness of the States implementation of these principles is illustrated by the fact that none of the 17 affected communities, which accessed the country’s judicial and non-judicial mechanisms at local, provincial and national, levels in order to address their land issues, were successful in achieving justice or remedies for their rights violations.

3. Result of the study

3.1. Profile of the Company

As noted above this case study concerns complainant villagers who suffered serious harm as a result of the activities of the Vietnamese company, HAGL, operating through a number of subsidiaries in Cambodia. Among HAGL’s investors is DCGL, which invests in HAGL through VEIL, a fund that was established and managed by HAGL. DCGL receives investments from the IFC, through this VEIL fund, primarily for rubber plantations in Ratanakiri province. The complainants are affected by concessions held by three HAGL subsidiaries - Heng Brothers, CRD and Hoang Anh Oyadav. Other known concessions currently or previously held by HAGL subsidiaries are Hoang Anh Andong Meas in Virachey, Hoang Anh Andong Meas in Lumphat, Hoang Anh Lumphat, and Hoang Anh Mang Yang K Rubber Group.

3.2. Profile of the affected communities

Ratanakiri province is located in Cambodia, bordered on the north by Laos PDR and by Vietnam on the east. Ratanakiri is mostly populated by indigenous peoples, including Tompoun, Kroeung, Proav, Kavet, Loun, Jarai, and Kachak ethnicities. Their livelihoods are based on natural resources which are closely connected with their beliefs and traditions inherited from their ancestors' knowledge and practice. The province is currently targeted for development as part of the triangle development region under the national strategic policy. Since mid-2003, it has suffered from the most severe land crisis in Cambodian history - a problem which is escalating in the face of increasingly aggressive and wide-scale land appropriations.

In recent years, all of the indigenous communities in Ratanakiri have suffered from the impacts of development activities or business operations, particularly in relation to rubber plantations for which land concessions were granted by the Government to foreign investors. There are now 17 communities who are, or will foreseeably be, adversely affected by an IFC sub-project that seriously violates their rights through confiscation of their lands and affects their lives, livelihoods and traditional practices. The villages are located in the districts of Andong Meas and O'Chum and are comprised of individuals from diverse ethnicities - Jarai, Kachok, Tampuon, Cham, Kreung, Laos, and Vietnamese and Khmer. The vast majority of complainants belongs to these ethnic minority groups, each with its own language, and most self-identify as indigenous peoples. They are traditionally animists, and their cultures, livelihoods and identities are intimately tied to their land, forests and other natural resources of the region. The villagers practice shifting cultivation and rely heavily on forest resources for their livelihoods. The name, location and other characteristics of each village are set out in Annex 1. According to a research conducted by EC, three of the 17 affected communities were not even aware of the investment planning and associated potential issues. It was only after EC explained the process to them that they were in a position to understand what the project is about and its implications.



Photos: Highlanders Association

3.3. Community engagement with national mechanisms

In 2011 and 2012, a number of the 17 communities submitted complaints to the commune council, to the district and provincial authority and also to national level non-judicial mechanisms to seek remedy for their grievances. However, any decisions reached were not effectively implemented. Facing repeated encroachments and no effective response to their complaints, some affected communities decided to mobilize and held a demonstration at the government's provincial office demanding a halt to the clearing of their land and forests by the company. In 2013, an intervention was made by H.E. Bou Than, an indigenous Tompoun from Ratanakiri province and one of the parliamentarians who visited the affected communities. However, during his intervention he suggested the communities accept the "tiger skin land use", something unacceptable to the communities as it would affect their shifting cultivation and reservation lands. The "tiger skin land use" or "leopard skin land use" is a popular term that has been used by the Prime Minister Hun Sen. In May 2012 Hun Sen used the term in Directive 01, which concerned ELCs. The term "tiger skin land use" means that lands within the ELCs that were occupied by the poor or indigenous peoples should be cut out from the ELC, with community lands no longer being a part of the project area but nevertheless reflected in the company maps. The ELC area would, as a result, be similar to a tiger skin, because the map would have gaps or holes all over the place. However with widespread clearing of natural and semi-natural areas, the opposite of the "tiger skin" – in which community lands are cleared by companies irrespective of their presence on the map - seems like a more likely outcome. The land is losing its forests, just like the tigers are losing their skins.

3.4. Initiation and submission of CAO complaint

Global Witness has been engaging with HAGL in relation to the problems associated with their plantations in Cambodia and Laos. The organization first met the company in August 2012. They provided evidence of the social and environmental problems and asked the company to take action on three issues: first, resolve the current disputes with the local affected communities; second, bring their operations in line with the national law; and lastly, publicly disclose key documentation relating to their rubber plantations. By the end of 2012, HAGL had taken no steps to address these problems and as a result Global Witness decided to publish the results of their research and the evidence of the negative impacts of HAGL's operations.

Global Witness published the *Rubber Barons* report in May 2013 which focused on the problems caused by HAGL and VRG's rubber plantations in Cambodia and Laos. The research revealed extensive social and environmental damages in and around HAGL's plantations in Cambodia and Laos, including grabbing land from local communities and the clearing of large areas of forests. Global Witness gave HAGL and its investors six months to address the issues outlined in the *Rubber Barons* report and video. On the day the report was published, it was reported in the Vietnamese media that HAGL's share price value fell by 6%.

During the month of June 2013, Global Witness met with HAGL, Dragon Capital and the IFC. HAGL promised Global Witness that its CEO (Mr. Nguyen Van Su) would visit all impacted villages and hold community consultation meetings in Cambodia and Laos and resolve any disputes. HAGL also promised to disclose the key documentation, review its broader risk management policies and frameworks (to avoid such problems occurring in the future). The company also announced a moratorium on all concession clearing in order for the company to get all its permits and licenses in order. Between July and August, Global Witness monitored the impact of the HAGL commitments through visits to some of the villages and satellite analysis, to check if forest clearance activities were continuing. The outcomes of the monitoring revealed that the moratorium was not implemented. Global Witness interviewed people in seven villages around HAGL's concessions in Cambodia. In three of these, people claimed that the company had not yet visited their village, whilst in the other four, it was reported that HAGL officials had refused to discuss disputes over lands or forests. In six of these villages, people spoke of continued logging in and around HAGL's rubber plantations, despite the moratorium. Independent satellite analysis of forest cover within HAGL's concessions taken between July and August also indicated continued forest loss.

In a press release during this period, Megan MacInnes from Global Witness stated that:

HAGL has been very good at making commitments but very bad at keeping them. It's been busy telling us and everyone else it's serious about changing its ways, but the evidence indicates that logging is still carrying on and the people whose farms were bulldozed are still struggling to feed themselves.⁹

Following that, in September 2013, Global Witness again met with HAGL, Dragon Capital and the IFC. HAGL promised to undertake an independent audit of its concessions as the basis for initiating a dispute resolution process. However, between October and November, the company changed its mind. As a consequence, in November, Global Witness made a public statement that there was evidence that HAGL had no intention of taking the problems with its plantations seriously and recommended that investors in the company divest. When questioned by Global Witness on 13 November 2013, HAGL refuted the lack of progress made towards its commitments to change. The company stated that it had provided jobs and implemented economic and social development projects (including building roads, houses and hospitals), but that the monsoon and Cambodia's national election had prevented it from accessing affected communities. HAGL claimed that their moratorium on logging was being adhered to, describing the satellite evidence provided by Global Witness as "untrustworthy". In addition, HAGL said that it was "looking for an independent consulting firm to help HAGL make the survey and give advice to HAGL to improve the issues related to the communities",¹⁰ but that such consultants must be accompanied by company staff in order to assure the independence of the consultant's findings.

In a further statement Megan MacInnes noted that "November marks the end of the six-month deadline for the company to clean up this mess. HAGL's inaction so far leaves

us no choice but to conclude that it has little intention of taking these problems or its responsibilities seriously”. She added that “[v]illagers suffering everyday as a result of HAGL’s concessions are all too aware of the environmental and social risks the company is taking - we think its investors should be concerned too, and as a result should divest”.

As a result, on 14 November 2013, six months after the launch of the Rubber Barons report, Global Witness called for investors to drop the Vietnamese rubber giant HAGL due to their failure to reform their land-grabbing practices. The press release stated:

The Vietnamese rubber giant Hoang Anh Gia Lai (HAGL) has failed to keep their commitments to address environmental and human rights abuses in its plantations in Cambodia and Laos, Global Witness said today. The campaign group says that the company now poses a financial and reputational risk to its investors, including Deutsche Bank and the International Finance Corporation, and in November 2013 it recommended them to divest.

Following this call, investors withdrew their financial backing from the company.¹¹

However, in parallel to these negotiations between Global Witness and HAGL, Global Witness also held discussions with Cambodian NGOs on the possibility for affected communities to submit a complaint to the IFC about HAGL’s operations. This was not something that Global Witness could do itself, because the organization was based in the UK and didn’t have adequate staff in Cambodia to work directly with the communities in Ratanakiri. Consequently, Global Witness suggested that two organizations, IDI and EC, engage directly with the communities to discuss if they wanted to submit the complaint, as well as discussing the potential pros and cons of such an action. IDI and EC work to promote respect for human rights through monitoring and engaging with companies and government when there are projects that harm instead of benefiting indigenous peoples. So, at end of 2013, having been approached by the Global witness, and have reviewed the *Rubber Barons* report, IDI and EC decided to investigate the situation and conducted an impact assessment to review the livelihood situation both prior to and subsequent to the concession issuance. The research was ongoing at the time of writing this chapter and was expected to be finalized by the end of 2014. The research team visited 15 affected villages and while it found some positive steps had been taken on the part of HAGL, these were insufficient to address the gravity of the issues, leading to the decision to file a complaint with the IFC-CAO.

Before submitting the complaint, representatives of the five NGOs, EC, IDI, HA, CIYA and IRAM, which have filed the complaint on behalf of the communities, did significant preparatory work including:

- organizing a meeting of the indigenous peoples working group (IPWG) at least twice a month to support the 17 affected indigenous communities;
- organizing additional regular meetings within the 17 affected communities in each village to strengthen their commitment and solidarity to confront with HAGL;
- educating the communities on the process of filing a complaint to the IFC through the use of video material,

- building trust to submit the complaint, selecting the community representative to act as a communicator and to develop the appointment letter for the EC, IDI, HA, CIYA and IRAM on behalf of affected communities.

The NGOs also organized several meetings with provincial NGOs, networking groups to support the submission of the complaint to the CAO and held monthly meetings among themselves to follow up on the work and eventually submit the complaint. As part of the process they met with the IFC representatives in their Cambodian office on 7 February 2014, to seek advice on the procedure and to present the outcome of the impact assessment. Prior to its submission a final consultation was held with the affected communities to verify and confirm the complaint's content.

On 10 February 2014 - the day after the complaint concerning the IFC investment in the Dragon Capital Group and VEIL (Project no. 10740 and 20926) was submitted to Meg Taylor, the Vice President Office of the IFC-CAO - IDI and EC issued a statement to the media on behalf of the submitting organizations and communities entitled: "World Bank Group implicated in illegal seizures of indigenous land in Cambodia and Laos". The statement is worth quoting at length as it summarizes the content of the complaint and situation at the time:

Representatives of seventeen indigenous communities from Cambodia's Ratanakiri province filed a complaint to the World Bank's private lending arm, describing illegal seizures of their farming and grazing land and destruction of their forests and sacred sites. The complaint, submitted on behalf of affected communities by Equitable Cambodia, Cambodian Indigenous Youth Association (CIYA), Indigenous Rights Active Members (IRAM), Highlanders Association and Inclusive Development International (IDI), details how the Bank has invested in companies that act in flagrant violation of Cambodian and international law and its own social and environmental safeguard policies. Indigenous communities, including the Jarai, Tampoun, Kachok and Kroeung peoples, have lost territories and suffered devastating impacts to their livelihoods, cultural practices and way of life as a result. ...

The complaint, which was submitted to IFC's internal watchdog, the Compliance Advisor Ombudsman (CAO), describes how the Bank failed to conduct an appropriate level of due diligence commensurate to the high-risk nature of its investment and has thereafter consistently failed to monitor and supervise its end use.

In addition to the illegal land seizures in Cambodia, the complaint also draws attention to reports by Global Witness on rights abuses committed against communities in Laos as a result of HAGL's operations through three rubber concessions. While IDI has been unable to access affected communities in Laos due to the repressive human rights situation there and the serious risks that such engagement could represent to the communities, the complaint urges the CAO to consider initiating a compliance audit of IFC's sub-projects [in Laos as well]...

The complaint sets out a litany of violations experienced by the villages, including the loss of their forest, the grazing land, the reserved land for shifting cultivation and future generations, spirit forests, burial grounds, access to resin trees and other non-timber forest products that they rely upon. While some households have received

inadequate compensation for seized rice fields and farming land, there has been no compensation at all for communal losses. The complaint describes how “the concept of collective ownership over their territory and resources is central to the communities’ identity.” The seizure of their land and destruction of their forests is “particularly devastating” for the communities, because of their reliance on natural sources of food, housing materials, medicines and other needs, and their limited integration into the cash economy.

The complaint lists more than ten violations of Cambodian law, including laws that enshrine the land rights of indigenous communities, protect Cambodia’s forests, including rare tree species, and regulate economic land concessions.

The IFC’s investment was channelled through an intermediary, Dragon Capital Group, which holds an equity stake in HAGL. Last year the CAO released a damning audit report on IFC’s “financial intermediary” investments, which represents nearly half its entire portfolio, finding that the IFC is oblivious to the environmental and social impacts of the end use of its funds.

Natalie Bugalski, Legal Director at IDI, said: ‘This complaint provides hard evidence that IFC’s investment has ultimately been used to grab land and destroy critical natural resources. IFC’s system for managing social and environmental risk is alarmingly inept at tracking the end use of its investments and safeguarding against these violations.’

The IFC is notoriously non-transparent about its investments, allowing the World Bank Group to contribute a significant capital to the private sector, while publicly disclosing only scant information.

David Pred, Managing Director of IDI, said: “IFC operates under a shroud of secrecy, which makes public scrutiny virtually impossible. Meanwhile, it touts its Performance Standards as the gold standard, allowing its clients to use their relationship with the World Bank to attract other investors who may otherwise hold back from high-risk projects in frontier markets like Cambodia.”

“The complete lack of transparency around financial market investments means that it is highly likely that the Bank is financing land grabs around the world that will never be brought to light,” he added.

The complaint says that due to the deep connection to their lands and forests, the communities want their lands, wrongly seized by HAGL, to be returned to them. Complainants say they “do not want cash compensation [for their land] because it cannot be inherited by the next generation”. They say that while land can continue to feed them and their children forever, if they receive money “soon it will be gone.”

Eang Vuthy, Executive Director of Equitable Cambodia said, “We hope that the CAO can help bring the company and its investors around the table to find a resolution that fully respects the rights of the affected indigenous communities and Cambodian law.”¹²

In its summary of the complaint, the IFC-CAO noted that it “especially alleges the non-compliance with the IFC policies and procedures and with the Cambodian laws. The complainants requested that CAO should keep their identities confidential.”¹³

3.5. Events after submission of the complaint to the CAO

Three days after submitting the complaint a meeting was organized between HAGL and IDI, CIYA, EC, IRAM and HA. The purpose of this meeting was for HAGL to a) listen to the opinions of the complainants, b) acknowledge receipt of the letter, c) request a summary of the complaint's content and d) invite five NGOs to visit the project site and the 17 villages in and around the projects in Ratanakiri. HAGL sought input as to how the issues could be resolved and said that they would arrange site visits promptly, while also stressing the positive impacts of their project on the lives of the communities. The company nevertheless apologized for any land rights violations and promised to work toward providing solutions.

Rather than accept the HAGL's apology and proposal, the NGO's insisted that the IFC-CAO mechanism should address the complaint because they believed that, acting alone, HAGL would be unable to take the necessary measures. Instead, they preferred to have a third party professional mediator work with the communities and NGOs representatives on the ground to assist in resolving the problems.

On 28 April 2014 the general director of HAGL also took an important decision declaring a moratorium on reclamations. This stated that reclamations were to be suspended in the period from 1 May 2014 to 30 November 2014 on the projects including the Heng Brother Project, the CRD Project, and the Hoang Anh Oyadav project in Ratanakiri Province, Cambodia. Under the decision, the directors of the subsidiaries plantations and the related sections in Cambodia are responsible for implementing the moratorium, with any individuals or organizations which ignore it being subject to warning, dismissal or termination, depending on the particular context.

In accordance with the CAO's operational guidelines, the CAO vice president, Ms Meg Taylor, responded to the IDI Executive Director in relation to the complaint via-email on the 24 February 2014. The communication confirmed that the complaint met with the CAO's three eligibility criteria for further assessment, including (1) the fact that the complaint pertained to a project that IFC/MIGA was participating in, or was actively considering to participate in, (2) the issues raised in the complaint pertained to the CAO's mandate to address environmental and social impacts of IFC/MIGA projects, (3) the complainant is, or may be, affected by the environmental and/or social impacts raised in the complaint.

A senior specialist in dispute resolution and her team were assigned to conduct an on the ground assessment of the situation within a period limited to a maximum of 120 working days. The purpose of the assessment was to listen to peoples' concerns, to understand the different perspectives, and to gauge whether it would be possible to address the concerns in a collaborative process. It consequently was not intended to be a judgment on the merits of the complaint. The assessment concluded in May 2014 and following discussions between the complainant and the company an agreement was reached to engage in a voluntary dispute resolution process. On 26 May 2014, the IFC management's provided its response to the CAO assessment report "VEIL II" to

the CAO vice president.¹⁴ Meanwhile, the CAO is in the process of working with the national government (the Ministry of land, Agriculture, and Environment) to facilitate the involvement to the affected communities in the dispute resolution process at the local level. A component of this involves assisting the communities in their selection of the community representatives to negotiate on their behalf. As part of this process, on 19 May 2014, a meeting took place between the CAO working group, EC and the HA staff. Later that day the representatives of the 17 affected communities discussed the community representatives' selection process and the ground rules for negotiation preparation planning between the communities and the company.



Meeting of CAO working group and representatives of the 17 affected communities.

Photos: Highlanders Association

The selection process of community representatives has somewhat been delayed due to inadequate budget provision, lack of technical support and poor coordination with the provincial authorities in relation to the process. Once the selection process is complete, the CAO will provide capacity building on the negotiation and bargaining skills to the selected representatives of the affected communities. Negotiations with the company will proceed after the capacity building process, and the CAO will work with both parties to establish the ground rules to guide the process of dispute resolution. In addition, on 16 July 2014 the CAO working group visited the provincial authorities to inform them of the process and seek their support. As a result the dispute resolution process has been initiated and is currently ongoing.

Both parties – the communities and the company - accepted the dispute resolution process as the appropriate remedial mechanism. Nevertheless, according to the report by HA and the affected community, following the submission of the complaint to CAO, the provincial authority, including the commune council and the district level body, misunderstood the communities' complaint and verbally threatened community members. They were informed that they would be jailed if they continued to complain, that meetings between the NGOs and the communities would be restricted, and that the HA organization would be shut down. HA staff are now under investigation by the

provincial authority. Furthermore, in some of the affected communities, including Kanat and Mash Kresh villages, HAGL's subsidiaries still continue forest clearing -in breach of the moratorium commitment made by HAGL's general director.

In addition, unofficial information has been circulated concerning a negotiation process between HAGL and the Cambodian government on the compensation that the company has to pay for destroying the public forest and lake. The compensation amount that was requested by the Cambodian government was approximately of four million US dollars, but following the negotiations it was reduced to one million US dollars. Should this unofficial information be verified, it will have implications for the CAO mediation and dispute resolution process.

To date the five NGOs involved in the complaint continue to provide strong support to the affected communities and are maintaining the other NGO's in their network up to date on the process and the progress of the complaint to the IFC in an effort to strengthen their commitment and solidarity in case there should be further confrontation with the HAGL. Meanwhile, the negotiations between Global Witness and the Vietnam Rubber Group about the action they are taking to address the social and environmental problems associated with their rubber plantations in Laos and Cambodia are also ongoing.

A meeting was held between the CRD company representative, the O'chum cadastral officer and the team leader of the collective registration for indigenous peoples from the Provincial Land Department on 10 July 2014 in the Kresh village hall. They discussed the overlaps between the company and the community boundaries map in order to find a solution to the collective land title demarcation for the Kresh community. This village is the only one that has ongoing processes for both the collective land titling and under the CAO mechanism. The meeting was proposed by the Provincial Land Department and observed by HA and the NTFP organization. There were more than 50 villagers from the Kresh community in attendance, one person from CRD, 15 people from the Land Department, two from HA, and three from the NTFP organization. As a result of the discussion, both parties planned to visit the overlapping site to identify the boundaries between the community and the company for further negotiation in order to reach an agreement. This has not yet been conducted however, as the community decided to wait for the CAO mechanism dispute resolution process to be completed.

4. Perspectives of indigenous peoples on access to justice and remedy

Due to the long running suffering of the indigenous peoples' arising from the confiscation of their lands, and the associated serious violations of their rights and the impact on their lives and traditional practices, strong perspectives were expressed by the affected communities and other indigenous communities on the responsibility of the Cambodian government, investors, the World Bank and IFC to find ways to ensure sustainable development and to provide access to remedy and justice.

As affirmed in the IDI and EC statement:

“We want the World Bank to know that its money is being used destroy our way of life,” said Sal Hneuy, representative of one of the communities that submitted the complaint. “Nowadays, we are surrounded by companies. They have taken our community lands and forests. Soon we fear there will be no more land left for us at all and we will lose our identity. Does the World Bank think this is development?”...¹⁵

According to Pheap Sochea, President of CIYA, “[a]ll the indigenous lands and territories that were illegally seized must be returned to the people. This is their right as Indigenous Peoples under Cambodian and international law.”¹⁶ Mrs. Kha Sros, an indigenous Kui woman from the Stung Treng Province, and an activist and representative who joined the complaint submitted to CAO, outlined her position as follows:

Firstly, I knew the impact on the 17 communities from the impact assessment result shared by Equity Cambodia Organization, stating that communities’ land and forestry were on the process of clearing by a HAGL operation and that the community had no access to any remedy yet. So as an indigenous woman, once I heard about these issues my feeling was not good because I felt pity for those communities as I am also a member of indigenous peoples and we know how difficult our life will be if the land and the forestry are gone. Land and forestry are our main livelihood to survive. So we as indigenous peoples care and help each other to gain more solidarity.

I learnt that the community had submitted a complaint to the local authority, to the provincial authority and also to the national level asking for their intervention and help. However, there was no justice, no solution at all. I understood that in general the non-judicial and judicial systems in Cambodia do not find any solution for the affected community. However, as in my community, there is very little attention given to us by the local authorities. For instance, once the community stopped the illegal logging and submitted it to the Forestry Administration, they took all the value timber without giving any reason to the community and without explaining where they kept the timber and for what use. So once there was an introduction of the EC on the IFC-CAO mechanisms, we as indigenous peoples decided to work together to submit the complaint for their intervention because they are the ones who gave the money to the HAGL Company.

Within this mechanism we were not sure whether the IFC-CAO mechanism could find justice for us or not, but at least we try to let them know how their project had been affecting our traditional livelihood of the indigenous communities including also social and environment issues. We also informed them that their project does not contribute to the poverty reduction, because they have to respect the policy on human rights and also the social and environmental policies so that we want them to fulfill those policies to bring justice to the community. However If the IFC-CAO mechanisms could not bring justice or a solution for us, then the community would continue to work together to fight for an access to remedy and to justice.

The situation in Cambodia ...deserves public attention and urgent government action. The current state of affairs needs to be addressed with a sense of urgency as indigenous peoples are being coerced to acquire private titles and sell them to make way for economic land concessions ... Policies in practice have resulted in greater loss of land rather than to secure the collective land tenure of indigenous peoples. While Cambodia has a law that recognizes the land rights of indigenous peoples, its implementation has been weak and selective.

Asia Indigenous Peoples Pact, 2013

5. Lessons learned and challenges on the utilization of the available mechanisms

The following are some of the primary observations and conclusions which arise from the case study in relation to the Cambodian communities experience with seeking access to remedy:

- After the complaint was submitted, HAGL decided to suspend the plantation while waiting for the outcome of the ongoing dispute resolution. Whilst this is a welcome step, the company had already announced a six-month moratorium on forest clearing and planting in June 2013, following the publication of the Global Witness' report. During this time, the company committed to obtain all of its permits and licenses. However, the Global Witness report concluded from on the ground monitoring and through satellite analysis that this moratorium was never implemented. It remains to be seen if this second moratorium on activities is implemented by the company.
- Following the launch of the *Rubber Barons* report, on 14 November 2013, Global Witness called for investors to disinvest from the Vietnamese rubber giant HAGL over its failure to implement reform on land grabs. Vietnamese rubber giant HAGL had failed to keep its commitments to address environmental and human rights abuses in its plantations in Cambodia and Laos and at least one investor withdrew their financial backing from the company.
- Some of the communities which were threatened were fearful of continuing the confrontation with the company; however some others felt more resolved than before because they believe that they are going to die in any case if they lose their land and resources.
- If the CAO-dispute resolution mechanism is unable to provide an appropriate conciliation mechanism between the communities and the company, then the communities plan to raise their complaint to the CAO-compliance mechanism to seek a remedy. If neither the CAO dispute resolution nor its compliance mechanisms are capable of delivering a solution which is acceptable to the communities, then the complaint will be directed directly to the purchasers of the rubber, which is another option which will be discussed further. In this connection, while the dispute resolution is ongoing, there were many concerns following the unofficial information that the Cambodian government and HAGL were negotiating a compensation settlement separately from the CAO-led process which would lead to confusion and complications if they reach an agreement.

- The communities and NGOs have no plans to deal with the government agencies to seek access to justice/remedy because they lost hope in them and do not consider them to be reliable. However they may involve the CAO in the process of direct negotiations between the community and the company.
- There should be a strong partnership among the NGOs and the communities at all levels and the strategic direction should be clear and based on the impact assessment and aspirations of the affected communities. The communities in Ratanakiri, Cambodia, were able to work with EC and IDI to submit a complaint to the CAO and to initiate the mediation process. However, the communities in Laos, which are facing just as many problems caused by HAGL, have not yet had this opportunity. This highlights a problem with the IFC’s complaints mechanism, which cannot act without the submission of a complaint, even in the context of countries like Laos where the fear of retribution from the government prevents communities from publicly complaining.
- Some of the HAGL subsidiaries still continue forest clearing in some communities, in breach of the commitment to a seven month moratorium made by the general director of HAGL on 28 April 2014.
- One of the affected communities is undergoing the process of the collective land titling in parallel to engaging in the CAO dispute resolution mechanism. This community may face significant challenges in terms of managing the timing of these processes, as the process of collective land titling aims to address land boundary issues while the community has decided to wait for the CAO dispute resolution process outcome before moving forward with delineation activities.
- Given the CAO mechanism’s mandate vis-à-vis HAGL and the Government of Cambodia, it may not be able to enforce decisions or agreements aimed at ensuring access to justice for the affected the communities.

6. Recommendations to address identified gaps in access to remedy

As Mr. Phon Sotheara, one the indigenous Kreung who has provided strong support to the affected community, said: “It is very hard to provide recommendations because I cannot see any access to justice”. However, a review of the facts of the case suggests that the following steps are necessary in order to address the gaps which limit access to effective remedies:

6.1. To IFC-CAO

1. Ensure that negotiations are based on the safeguard principles of the IFC, international human rights standards and on the relevant Cambodian laws.
2. Clarify to the government that a dispute resolution process with the company cannot proceed until it is accepted by both parties.

3. Recognize and respect the fact that:
 - a. the lands and forests of the communities submitting this complaint are central to their livelihoods, culture and identity;
 - b. their customary tenure system is based on collective natural resource management and conservation, and is premised on careful and limited exploitation in accordance with the communities' long term objectives;
 - c. due to their deep connection to, and to their dependence on, their lands, the complainant communities want their lands, wrongly seized by HAGL, to be returned to them;
 - d. complainants that have not yet been impacted want to protect their land and forests and to secure their customary tenure rights for future generations;
 - e. communities are willing to participate in a process of independently facilitated boundary demarcation of their lands in accordance with their rights under the Land Law;
 - f. affected communities will not provide a payment of any kind to HAGL for rubber trees already planted on land wrongly taken from them. Lands should be returned without any conditions adverse to the complainants;
 - g. complainants "do not want cash compensation [for their land] because it cannot be inherited by the next generation. They say that while land can continue to feed them and their children forever, if they receive money "soon it will be gone";¹⁷
 - h. complainants, however, do want cash compensation for the loss of crops, structures, livestock and other chattels. They also want compensation for the income they have lost since their crops, resin trees and other NTFPs were destroyed by the company.
4. Together with DCGL/VEIL bring all resources at their disposal to ensure that the severe violations suffered by communities are redressed in accordance with the outcomes sought by communities. Divestiture prior to remedial action would leave affected communities in a dire situation and would not address adverse human rights impacts experienced while IFC, through its financial intermediary client, held investments in the responsible business entity.
5. Independently investigate the situation of the communities affected by HAGL in Attapue and Mekong provinces of Laos PDR, and if necessary initiate a dispute resolution process there.
6. Undertake a review of all IFC investments throughout Cambodia, Laos and Myanmar (including those held by financial intermediaries, such as DCGL/VEIL) to identify projects which would be considered as high risk according to its performance standards and international human rights standards.

6.2. To the government of Cambodia

1. Make information on land investment, land deals and bidding processes, reviews of proposals for land concessions (and decision-making criteria for acceptance or denial of the proposal) and future plans (including on commencement of concession activity) available and publicly accessible, including via public display at the provincial level and on official governmental web sites. Indigenous peoples' free and informed consent should be sought and respected before any concession is issued in their lands.
2. Ensure that all relevant government bodies adhere to the legal requirements for public consultation and compensation, for example under the 2005 Sub-Decree on Economic Land Concessions. Such consultations should be meaningful, inclusive and accessible to affected people. This means that:
 - Communities on land to be affected by the granting of a land concession should be consulted at the earliest stage on the land use plan and included in the decision-making process.
 - Due consideration should be given to the current livelihood activities of the community and all efforts made to avoid their disruption.
 - The standard of free, prior and informed consent should be rigorously applied when consulting with all indigenous peoples.
 - The government must also ensure that forest and environmental protection legislation is enforced, to prevent for example HAGL from being able to obtain and clear-fell concession areas within areas of recognised biodiversity protection.
3. Desist from entering into dispute resolution or compensation negotiations with companies such as HAGL where a parallel dispute resolution process has already been initiated by the CAO-IFC.
4. Support the IFC-CAO-led dispute resolution process and do everything in its power to ensure that the outcome supports the communities' rights, as protected in national and international law, and is swiftly enforced. This includes taking urgent and swift action against HAGL employees or any of their associates in the case that communities involved in the complaint are receiving threats, intimidation or other retributive action.
5. Respect the request of the affected communities to return the affected land to them.

6.3. To investors

1. Adhere to the legal requirements for public consultation, for example under the 2005 Sub-Decree on Economic Land Concessions, and to the principle of free prior and informed consent. Such consultations should be meaningful, inclusive and accessible to the affected people (in line with the recommendation to the government above).

2. Conduct human rights due diligence, including in relation to indigenous peoples' rights, for all projects that impact on indigenous territories and monitor clients to ensure their compliance with international human rights standards.
3. Ensure, as a component of due diligence and oversight, that relevant business enterprises (and their subsidiaries) adhere to the forest law, protected area laws and other environmental protection legislation. This includes undertaking robust environmental and social impact assessments, and in the case that areas of evergreen, semi-evergreen and other valuable forests are identified within proposed project areas, making sure they are excluded from the concessions.

6.4. To HAGL

1. Provide genuine support to, and participate in, the CAO-led dispute mediation process, and swiftly enforce and adhere to its final conclusions.
2. Cease the clearing of farmland, forest or other areas which are claimed by locally affected communities while the dispute resolution process is ongoing.
3. Refrain undertaking action which could have negative consequences for any of the communities included in the complaint, or any other groups or individuals supporting them. Ensure that all staff and subsidiaries strictly follow these commitments.
4. Take swift action to ensure that all investment projects in Cambodia and Laos are implemented in accordance with national laws and international human rights standards. This includes resolving all disputes with communities in Laos PDR, as well as public disclosure of key documents relating to investment projects.

6.5. To the international community

1. Urge the Cambodian government to suspend all new land investments and to implement reforms that will ensure that the land is managed in a way that benefits the Cambodian people, including Cambodian indigenous peoples, rather than a minority of corrupt elite.
2. Support the affected communities in their complaint to IFC-CAO and reinforce the communities call for the imposition of clear actions for HAGL to implement in order to remedy the rights violations.

6.6. To non-governmental organization

1. Work together to strengthen the affected community capacity, confidence and solidarity during and following the CAO dispute resolution process.
2. Cooperate to maximize their support to the communities and monitor and publically report on any violations of their rights.

6.7. To all actors

Finally, all of the above actors must ensure that the UN Guiding Principles are fully adhered to. This requires, among other things, that: a) the Cambodian State fulfil its duty protect against corporate activities infringing on indigenous peoples' enjoyment of their rights; b) the Vietnamese State ensure that its corporations respect the rights of indigenous peoples' overseas; c) HAGL, and all institutions investing in it, ensure compliance with the independent corporate responsibility to respect indigenous peoples' rights through the enactment of policies recognizing those rights and the conduct of human rights due diligence to avoid negative impacts upon them d) the Cambodian and Vietnamese State guarantee effective and accessible judicial and non-judicial redress mechanisms e) HAGL establish or participate in operational-level grievance mechanisms which are developed in conjunction with the affected communities f) investors and financial institutions ensure the establishment and functioning of independent and transparent monitoring procedures g) the international community ensure the effective oversight of business impacts on indigenous peoples' rights and make recommendations in relation to State and corporate obligations in this regard h) non-governmental organizations track and document corporate related violations of indigenous peoples' rights and assist impacted communities in airing their grievances and seeking access to remedy.

¹ <http://www.globalwitness.org/rubberbarons/>.

² Complaint letter on Feb 10th 2014 to CAO – available at <http://www.cao-ombudsman.org/cases/document-links/documents/ComplainttoCAOreDragonCapital-HAGL.pdf>.

³ Complaint letter on 10 February 2014 to CAO available at <http://www.cao-ombudsman.org/cases/document-links/documents/ComplainttoCAOreDragonCapital-HAGL.pdf>.

⁴ See also Land and Housing Working Group, Cambodia Land and Housing Rights in Cambodia Parallel Report to CESCR April 2009 paragraph 19 available at http://www2.ohchr.org/english/bodies/cescr/docs/ngos/CHRE_Cambodia_CESCR42.pdf.

⁵ See business and human rights project at www.cchrcambodia.org.

⁶ Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework of The Office of the United Nations High Commissioner for Human Rights Cambodia at 10.

⁷ <http://www.globalwitness.org/campaigns/corruption/oil-gas-and-mining/cambodia>.

⁸ Shadow Report to the UN Committee on the Elimination of Racial Discrimination February 2010 submitted by Indigenous Peoples NGO Network (IPNN), coordinated by NGO Forum on Cambodia in cooperation with Asian Indigenous Peoples Pact (AIPP) available at http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/KHM/INT_CERD_NGO_KHM_76_9428_E.pdf.

⁹ <http://www.globalwitness.org/library/credit-suisse-ignored-human-rights-commitments-and-became-major-shareholder-vietnamese>.

¹⁰ <http://www.globalwitness.org/library/global-witness-calls-investors-drop-vietnamese-rubber-giant-hagl-over-failure-reform-land>.

¹¹ <http://www.globalwitness.org/library/credit-suisse-ignored-human-rights-commitments-and-became-major-shareholder-vietnamese>.

¹² <http://www.inclusivedevelopment.net/world-bank-group-implicated-in-illegal-seizures-of-indigenous-land-in-cambodia-and-laos-communities-call-for-banks-help-to-get-their-land-back/>.

¹³ http://www.cao-ombudsman.org/cases/case_detail.aspx?id=212.

¹⁴ <http://www.cao-ombudsman.org/cases/document-links/documents/IFCResponsetoVEILII-01FinalAssessmentReportMay2014.pdf>.

¹⁵ Inclusive Development: ‘World Bank Group implicated in illegal seizures of indigenous land in Cambodia and Lao, communities call for Bank’s help to get their land back’. Available at <http://www.inclusivedevelopment.net/world-bank-group-implicated-in-illegal-seizures-of-indigenous-land-in-cambodia-and-laos-communities-call-for-banks-help-to-get-their-land-back>.

¹⁶ <http://www.inclusivedevelopment.net/world-bank-group-implicated-in-illegal-seizures-of-indigenous-land-in-cambodia-and-laos-communities-call-for-banks-help-to-get-their-land-back>.

¹⁷ World Bank Group implicated in illegal seizures of indigenous land in Cambodia and Laos: Cambodian indigenous communities call for Bank’s help to get their land back. Phnom Penh, February 10, 2014 IDI and EC.

Chapter 8 - Business and Human Rights in Tanzania: Indigenous Peoples' Experiences with Access to Justice and Remedies

Elifuraha Laltaika

1. Background to the study, scope and research methodology

1.1. Background and context

There is a long history in Tanzania of business, or business-related operations, affecting indigenous peoples' rights to land and natural resources, and of indigenous peoples' efforts to access justice and appropriate remedies in relation to violations of those rights. Citing the 1981-1983 case of *National Agricultural and Food Corporation V. Mulbadaw Village Council* for example, Dr. Willy Ringo Tenga recounts that indigenous Barbaig Pastoralists in Hanan'g District, Northern Tanzania, were evicted from their 10,000 acres pastureland to give room to the National Agriculture and Food Corporation (NAFCO) - a defunct Tanzania government owned corporation to cultivate wheat with the financial support from the Government of Canada.¹ Commenting on the court's remedy, Dr. Tenga indicates that pastoralists lost the case because "they could not prove allocation of the land by previous land authorities", and because "Barbaig pastoralists failed to show that they were natives of Tanzania (despite the public fact that Barbaig pastoralists are found nowhere else on earth, and in court some had to get a translator)."² Even though the evictions took place more than thirty years ago, the Bargbaig community has yet to recover from their negative effects. These include landlessness and poverty, as attested by bloody conflicts involving the pastoralists and crop growers in areas to which pastoralists were forced to relocate due to lack of appropriate court remedy, particularly restitution or allocation of alternative lands.³

Although the reason for the eviction was business-related, based on the fact that a government corporation cultivated wheat for sale in the face of an acute food shortage that was then prevailing,⁴ the eviction epitomizes earlier forms of land dispossession through which the government acquired community land in the "public interest", with the aim of implementing ostensibly broader national objectives (as opposed to leasing it to a private investor). This is partly because Tanzania was practicing a policy of socialism and self-reliance, on the basis of which it nationalized foreign-owned private properties, hence rendering it unattractive to Foreign Direct Investment (FDI).⁵ Instead, the country designated government corporations to conduct business. However, following a shift in 1985 onwards to a neo-liberal development policy that entailed a reduced role of the State in the market,⁶ a new wave of indigenous peoples' land dispossession emerged: the government places community land under the control of privately owned business corporations in the guise of facilitating FDI, resulting in direct encounters between communities and transnational corporations (TNCs).

Diverging opinions exist on the significance of "positive externalities spill-overs" of FDI, translating into economic improvement of other sectors resulting directly from presence in a country, of foreign firms.⁷ This notwithstanding, it is generally accepted

that developing countries need FDI because it is “an important source of private external funds.”⁸ In addition, with a good legal and policy environment, business operations generally, including those involving FDI, have the potential to assist in the realization of human rights, a viewpoint to which the former UN Secretary General Kofi Annan strongly subscribes.⁹ In the words of Katarina Weilert, “it is because they have the power to bring about prosperity, progress and... a higher standard of living that TNCs are highly welcome in every country.”¹⁰ And based on data from the UN Conference on Trade and Development (UNCTAD), the inward FDI for Tanzania has been increasing steadily from 640 Million Dollars in 2005-2007 to 1,872 Million Dollars in 2013,¹¹ signifying that the country is determined to attract FDI, presumably to catalyse domestic economic growth.

While the increase in FDI inward flow may be a good thing for the economy, it is not without challenges. Compounding this is the fact that Tanzania’s move to reintroduce FDI in the 1990s (which lead to communities’ direct encounters with transnational corporations) was not accompanied by reforms in access to justice and appropriate remedies necessary to buffer FDI impacts on communities. Similarly, no attempts were made to delineate corporations’ human rights responsibilities. In contrast, enormous incentives extended to foreign investors by means of the Tanzania Investment Centre (TIC), as well as tax holidays offered by the minister for finance, suggest that the country is more concerned with re-writing its bleak history in dealing with FDI as opposed to crafting human rights safeguards against impacts of business corporations. When viewed in a broader context however, lack of clarity on human rights responsibilities of corporations is not unique to Tanzania; it is a long running global policy concern.

In his recent article *Human Rights Standards Concerning Transnational Corporations and other Business Enterprises* Professor David Weissbordt notes that while efforts by the UN to address the matter were marked by the 1974 establishment of the Centre on Transnational Corporations (CTC), the 1948 Universal Declaration of Human Rights (UDHR) “placed human rights responsibilities on individuals, as well as every organ of the society, which would presumably include businesses.”¹² Also noteworthy are the 2011 Guidelines for Multinational Enterprises issued by the Organization for Economic Corporation and Development (OECD) for the same purpose of charting out the contours of corporations’ human rights responsibilities. This article however focuses on recent UN-related initiatives. An exhaustive account of developments in relation to business corporations’ human rights responsibilities in the UN falls outside the purview of this article, but a brief discussion of the ‘protect, respect, and remedy’ framework established by the UN Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, and the associated “Guiding Principles on Human Rights and Business”, is in order, as it will inform the discussion of subsequent parts of this article.

In his capacity as the Special Representative of the Secretary General on issues of human rights and transnational corporations and other business corporations Professor John Ruggie developed the “Guiding Principles on Human Rights and Business”, and annexed them to his final report to the Human Rights Council in June 2011. The report

proposed an overarching framework for business and human rights, and the UN Human Rights Council endorsed it. It is composed of “three core principles: State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective remedies.”¹³ This chapter focuses on the third principle or pillar, namely the need to more effectively remedy for victims of corporate activities.

In order to ensure access to justice and appropriate remedies to victims of alleged human rights violations caused by business corporations, the Special Representative suggested three categories of grievance mechanisms namely judicial, State-based non-judicial and non-State based-non-judicial mechanisms.¹⁴ This is in line with the State's duty to protect against human rights abuses of non-State third parties, referred to as the first pillar. Accordingly, the main purpose of the third pillar is to broaden options on access to justice and effective remedies for victims of corporate activities, beyond the traditional court system. The main function of the State in this regard is to coordinate all the options, both judicial and non-judicial. The third pillar is also related to the second pillar, namely corporate responsibility to respect human rights. In this connection, companies are expected, in the course of respecting human rights, to put in place, or participate in, grievance mechanism for individuals and communities. In particular, Guiding Principle no 31 provides for the corporation's responsibility to establish operational-level grievance mechanisms in cooperation with the affected peoples.

In light of the backdrop above, this case study aims to analyse the issue of access to justice and appropriate remedies in Tanzania in situations where indigenous peoples' fundamental rights, including rights to land, territories and resources, have been affected or will potentially be affected by business operations. With a focus on Sukenya Farm, Loliondo Division, and the Southern Agricultural Growth Corridor of Tanzania (SACGOT), the study addresses indigenous peoples' experiences in seeking access to remedy. In the context of the Sukenya Farm case study, the paper touches on indigenous peoples' engagement with the Tanzanian judiciary, the US courts, and the UN human rights system. It concludes by suggesting how existing gaps in access to remedies could be bridged, and recommends the establishment of some form of grievance mechanism, which is acceptable to the impacted communities in accordance with the Guiding Principles on Business and Human Rights.

1.2. Research Methodology

This chapter is a result of “desk review” conducted between December 2014 and January 2015. The review involved collection and analysis of documents, including laws, policies, books, published and unpublished articles along with reports touching on land rights, business and human rights as well as access to justice, in light of indigenous peoples' fundamental rights as they are impacted by business operations in Tanzania. In addition, the chapter is informed by two field research trips conducted by the author - one to SACGOT, conducted in September 2014, and the other conducted jointly with Emanuel Sulle to the Sukenya Farm. Without prejudice to the aforesaid however, all views and opinions, including the analysis underlying them are solely those of the author.

2. Access to Justice in Tanzania in the context of human rights and business

This section provides an overview of the context of human rights and business in Tanzania. It also describes the remedial mechanisms available to indigenous peoples to seek justice and remedies. In particular, it touches on judicial, State-based non-judicial and non-State-based non-judicial mechanisms both at the local and international levels. While no universally agreed definition of access to justice exists, this paper uses the term to mean availability of an avenue (be it judicial or non-judicial) and the effectiveness of the processes to be followed in order to pursue the avenues and get an effective remedy. It also uses the term to include, “impartiality of the courts [and non-judicial avenues] and public’s trust and confidence in [them]”.¹⁵ Correspondingly, this paper uses the term “remedy” to simply mean “redress” or procedural and substantive measures that an authorized decision maker can take in order to address an actual or threatened violation of human rights.¹⁶

2.1. Human Rights and business in Tanzania: An overview

2.1.1. Human Rights

The Constitution of Tanzania of 1977 contains a Bill of Rights, which stipulates basic rights and duties.¹⁷ The Bill of Rights was entrenched in the Constitution for the first time in 1984, through the Fifth Constitutional amendment Act of 1984 and became operational in 1989 thereby enhancing “peoples’ awareness of their rights and how to defend them by court action”.¹⁸ Prior to the entrenchment, “the government had gone unchecked by the law; governing largely according to political fiat rather than according to law.”¹⁹ In line with the Bill of Rights, constitutionally entrenched rights include the right to equality, the right to life, the right to freedom of conscience, and the right to work. While economic and social rights are not justiciable, meaning they are unenforceable in a court of law, procedures for enforcement of the rights contained in the Bill of Rights are contained in the *Basic Rights and Duties Enforcement Act (Act number 33 of 1994)*. This law has however been authoritatively described as “counterproductive in the smooth operation of the Bill of Rights and the general operation of human rights in the country.”²⁰ In reaching this conclusion, Wambali cites for example the fact that the law was enacted in the wake of a lack of political will on the part of the government of the day to empower the court to check its (government’s) actions. Compounding the inhibiting weakness of the enforcement Act is the fact that the Constitution subordinates itself to legislation; hence making the enjoyment of the rights contingent upon conditions provided by other laws.²¹ However, in addition to the Bill of Rights, Tanzania has ratified or acceded to most of international human rights conventions, signifying the country’s commitment towards the protection of human rights. They include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Rights of the Child (ICRC). Others are the International Convention on the Elimination of all forms of Discrimination against Women (ICEDAW), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) and the International Convention on the Rights of Persons with Disabilities (ICRPD).

At the regional level, Tanzania has ratified the African Charter on Human and Peoples Rights (The Banjul Charter), the African Charter on the Rights and Welfare of the Child (ACRWC), among others. However, domestication and enforcement of international human rights standards is particularly challenging. Being a dualist country, international conventions must await the enactment of an Act of parliament in order to acquire the force of law domestically. Unfortunately, not many Acts of parliament have been enacted for this purpose, hence denying Tanzanians the ability to enforce international human rights in domestic courts.

2.1.2. Business operations

Tanzania's move to reintroduce FDI in the 1990s, as indicated elsewhere in this chapter, was not accompanied by efforts to delineate corporations' human rights responsibilities, including improvements around access to justice and appropriate remedies necessary to prevent negative FDI impacts on the community. This assertion is supported by a comprehensive report by the [Tanzanian] Legal and Human Rights Centre (LHRC), a premier human rights organization, entitled *Human Rights and Business Report-2013*, which notes that "Tanzania does not have specific law governing corporate accountability." Commenting on the implications of the legal gap on the welfare of communities the report further holds that:

Most investors use tricks of promising to contribute into social economic development projects such as provision of employment opportunities, construction of roads, dispensaries and classrooms among others at the time when seeking land or social acceptance of their existence in the investment areas. However, experience shows that many of those promises are not documented nor are there written contracts or agreements to evidence their commitments including terms and conditions, making it easy to avoid fulfilling their obligations while executing their investments.²²

Despite lack of a comprehensive legislation, Tanzania has judicial and non-judicial mechanisms to which indigenous peoples and other victims of corporate operations can resort. Below is a discussion of the judicial (court) system, to be followed by a discussion on non-judicial mechanisms.

2.2. Judicial System

The judiciary in Tanzania comprises of primary courts, district courts, resident magistrate's courts (collectively referred to as lower or subordinate courts), the High Court of Tanzania and the Court of Appeal of Tanzania. The *Magistrate's Court Act* of 1984 establishes subordinate courts while the constitution establishes the High Court and the Court of Appeal of Tanzania. The judicial service commission appoints magistrates who serve in the subordinate courts. The commission is an independent body established by Article 112 of the Constitution. It is composed of the Chief Justice as the chair, the Attorney General, a justice of appeal, appointed by the President in consultation with the Chief Justice, a principal judge and two other members appointed by the President. Initially, one did not need to hold a law degree to qualify for appointment to serve in other courts, except for the resident magistrate's court, the trend is however changing, as all recent appointees have been holders of law degrees.

Established by Article 108(1) of the Constitution, the High Court is manned by judges appointed by the President in consultation with the Chief Justice and headed by the principal judge. To qualify for an appointment as a high court judge, one must possess “special qualifications,” defined to mean holding a degree in law and having practiced law or worked in law-related roles consecutively for ten years. The Court of Appeal is the highest in the judicial hierarchy. It is headed by the Chief Justice and manned by justices of appeal who are appointed by the President in consultation with the Chief Justice. The Constitution provides for security of tenure for both high court judges and justices of the Court of Appeal. They can only be removed on grounds of inability to discharge duties due to illness or for misconduct, proof of which is preceded by a robust procedure.

In relation to human rights violations however, the Constitution explicitly provides that the High Court shall have jurisdiction. The relevant Article 30(3) states:

Where any person alleges that any provision of any part of this chapter [Bill of rights] or any other law involving a basic right and duty is being or likely to be contravened in relation to him in any part of the United Republic, he may, without prejudice to any action or remedy lawfully available to him in respect of the same matter, institute proceedings for relief in the High Court.

The implicit meaning of the provision above is that victims of human rights violations are not restricted to seeking remedies at the High Court alone; rather, they can resort to other institutions. Broadening recourse mechanisms beyond the High Court or the judicial system is significant because procedural requirements that define the country’s adversarial legal system, in most cases prevent courts from effectively discharging their constitutional mandate, namely justice-dispensation and instead over-emphasize technicalities. In one instance, the Court of Appeal held for example that “in any application to this court, the appellant should state clearly in his pleadings, under which law the application is made, section and subsection if any. Failure to comply with this, the application will be struck out with costs.”²³ This is despite the Constitution enjoining courts to dispense justice without undue regards to technicalities of procedures.²⁴

In addition to technicalities of procedures, Professor Chris Maina Peter²⁵ describes two layers of hurdles that systematically inhibit indigenous peoples’ access to court remedies. Firstly, judges zealously uphold the government’s efforts to “assist” indigenous peoples to do away with their “backwardness” and instead join the mainstream society in the “development” process. Secondly, the practice by judges to limit awards which indigenous peoples deserve through restrictive judicial interpretations. Elaborating further, the author explains that while Tanzania’s civil procedure law recognizes the concept of “representative suit”, by which one or more than one person can represent others in a suit having common interest in a matter, courts interpreted this procedure to cover only “those who have sued” or “those who have signed the document.”²⁶ While the court remains the main fountain of justice, these hurdles suggest the importance of other recourse mechanisms from which communities can choose, depending on the prevailing circumstances. Below is a discussion of the non-judicial mechanisms.

2.3. Non-judicial mechanisms

The main non-judicial mechanism available for indigenous peoples and other victims of alleged human rights violations in Tanzania is the Commission for Human Rights and Good Governance (CHRAGG) - the National Human Rights Institution (NHRI). By way of background, the UN introduced the idea of National Human Rights Institutions for the first time in 1946, and subsequently invited its member States “to consider desirability of establishing information groups or local human rights committees within the respective countries to collaborate with them in furthering the work of the Commission of Human Rights.”²⁷ While numerous other processes took place in between,²⁸ it was not until 1990s that the idea gained global traction, following drafting of the “principles relating to the status and functioning of national institutions for the protection and promotion of human rights,” commonly called the “Paris Principles,” and their subsequent endorsement by the UN Commission on Human Rights and the UN General Assembly.

The Constitution of the United Republic of Tanzania through the *Constitutional Amendment Act no. 3 of 2000* establishes the CHRAGG under article 129(1). Its functions are to investigate any matter involving human rights abuse or maladministration either at its own initiative or following receipt of a complaint by an aggrieved person (or the aggrieved person’s representative, including organizations). The CHRAGG is particularly suited to deal with complaints touching on human rights and business because it does not adhere to the strict court procedures that make the judiciary difficult for communities to access without representation by lawyers.²⁹ Additionally, it is empowered to negotiate a compromise between the parties involved upon making an investigation. Further, the CHRAGG may forward findings of the investigation to a responsible authority with recommendations on steps to be taken. More importantly, the CHRAGG may take a matter to a court and seek an appropriate remedy that, in the opinion of the CHRAGG, a court may grant.

2.4. Regional and international mechanisms

After exhausting local remedies, indigenous peoples in Tanzania still have two more justice institutions to which they have resort, in addition to the UN human rights system. They are: the African Commission on Human and Peoples Rights (the African Commission) and the African Court on Human and Peoples Rights (the African Court). The “exhaustion of local remedies” rule, which means available remedies at the national level must be sought before resort is made to an international tribunal, is generally considered to be a rule of customary international law. Adherence to the rule not only exhibits “respect for the sovereignty of ...states” but also helps strengthening human rights and the rule of law domestically.³⁰

The exception to this rule applies where the remedy sought is unavailable, ineffective or insufficient.³¹ The African Commission interprets this exception to mean “a remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers prospect of success, and it is found sufficient if it is capable of redressing the complaint.”³² What follows below is a discussion on these two African institutions and an overview of available windows within the UN human rights system.

2.4.1. *The African Commission on Human and Peoples Rights*

Indigenous peoples in Tanzania can seek remedies at the African Commission on Human and Peoples Rights after exhausting local remedies. Charged with promotion and protection of human rights in the continent, decisions of the African Commission are, however, not legally binding as a matter of international law. That said, the Commission can refer cases to the African Court for enforcement in cases where a State party refuses to implement its recommendations. While no case touching on indigenous peoples' rights originating from Tanzania has been before the Commission, indigenous peoples in other African jurisdictions have sought redress of the institution. They include the Ogoni people of Nigeria - *Social and Economic Rights Centre (SERAC) and Centre for Economic and Social Rights (CERS) v Nigeria* and the Endorois of Kenya - *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*. In both cases, the African Commission decided in favour of claimant indigenous communities.

2.4.2. *The African Court on Human and Peoples Rights (the African Court)*

Unlike the African Commission, the African Court has the authority to issue legally binding decisions against State members to the African Union that have ratified the Protocol on the establishment of the Court³³ and made a declaration accepting its jurisdiction.³⁴ Further, the jurisdiction of the Court is wide enough to include disputes submitted to it concerning not only the application and interpretation of the African Charter and the Protocol on the establishment of the Court, but also other relevant human rights instruments ratified by the State.³⁵ Tanzania has made a declaration accepting the jurisdiction of the African Court on Human and Peoples Rights (AfCHPR) to entertain cases filed by individuals and Non-Governmental Organizations. This was a step taken after it ratified the optional protocol on the establishment of the Court. Accordingly, indigenous peoples and their organizations have direct access to the Court in the event their human rights are violated by business operation' impacts which result from State's failure to protect indigenous peoples' rights.

In a recent case of *Tanganyika Law Society and others v The United Republic of Tanzania*, the Court issued a landmark decision holding Tanzania to be in violation of the African Charter. In this case, the applicants challenged a constitutional amendment in Tanzania disallowing private candidates from contesting presidential, parliamentary and local government elections. In particular, applicants wanted the Court to rule that the constitutional amendment violates Tanzanian citizens' rights of freedom of association, the right to participate in governmental affairs and the right against discrimination contrary to Article 2 and 13(1) of the African Charter on Human and Peoples Rights and Article 3 and 25 of the International Covenant on Civil and Political Rights (ICCPR).

2.4.3. *UN Treaty Monitoring bodies*

In addition to the above regional mechanisms, indigenous peoples can also engage with treaty monitoring bodies such as the Committee on Elimination of Racial Discrimination

(CERD) and the Human Rights Committee. It is however worthy of note that Tanzania has not ratified optional protocols to those treaties with optional protocols.

In the next section of this chapter, a concrete case study is presented as to how indigenous peoples have navigated the above mechanisms in a case involving effects of business operations on their ancestral land. The court case on which the case study is based is still pending at the High Court of Tanzania. Accordingly, the paper will confine itself to addressing the case's institutional and procedural aspects, and not on its substantive aspects. The intention is to show that gaps exist in Tanzania with regards to access to remedy by indigenous peoples, when analysed in light of the Guiding Principles on Business and Human Rights. Following this is another case study on the SACGOT, a microcosm of FDI on large tracts of lands, which has the potential to impact enormously on indigenous peoples' livelihoods and human rights. The chapter will also provide recommendations on the establishment of some form of grievance mechanism, which is acceptable to the impacted communities in accordance with the UN Guiding Principles on Business and Human Rights.

3. The case studies of Sukenya Farm and the SACGOT

3.1. The Sukenya Farm, Loliondo-Ngorongoro District



Loliondo-Ngorongoro District Sukenya Farm

3.1.1. An overview of the area and its inhabitants

“Sukenya Farm,” consists of 12,600 hectares of land located in Soitsambu ward, Loliondo Division, northern Tanzania. Inhabited by the Maasai indigenous pastoralists,

the disputed land is ecologically part of the greater Serengeti ecosystem that comprises of the Serengeti National Park, the Ngorongoro Conservation Area and the Maasai Mara national Park in Kenya. The dispute started in 1984 when the Ngorongoro District Council granted Tanzania Breweries Limited (TBL), a partially privatized government owned business corporation, 12,600 hectares of land, belonging to the indigenous pastoralists, to grow barley. It is alleged that such acquisition was made possible by using forged documents.³⁶ For example, while minutes of a meeting at which the decision to grant the land was purportedly made indicate that consent was sought and obtained from Sukenya Village, no such entity called ‘Sukenya Village’ existed at the time. In the Tanzanian context, a village is an administrative unit registered under the provisions of the *Local Government (District Authorities) Act of 1982*. Despite the controversy, TBL acquired a certificate of right of occupancy over the land from the land commissioner in 2003. In 2006, TBL sub-leased their property to Tanzania Conservation Limited (TCL), an offshoot (subsidiary) of Thompson Safaris Ltd, for 96 years. Currently, the TCL is in occupation of the disputed land in which it has established a safari camp and reserved most of it for wildlife, while restricting access by indigenous peoples and their livestock.

Indigenous peoples have consistently maintained that TBL obtained the land using fraudulent means³⁷ and as a result TCL could not acquire an illegal lease. Pastoralists reiterated this position when President Kikwete visited Ngorongoro in 2007, in a speech read to him by elders of the ruling party, Chama Cha Mapinduzi (CCM). The main effect of the land acquisition is interference with the villagers’ peaceful enjoyment of their ancestral land. This is because villagers can no longer access not only pastures and salt lick – natural salt deposits that animals lick for minerals - for their livestock but also water sources on which they have depended for generations. In addition, there are allegations of assaults and harassment by the corporations’ private guards. The indigenous pastoralists navigated various justice institutions seeking remedies as described below.



Sukenya Farm. Photo: Suzanna Noldrum

3.1.2. Mechanisms engaged

3.1.2.1. The Tanzania Judiciary

The dissatisfied indigenous pastoralists instituted the first court case in 1987 at the Resident Magistrate Court in Arusha.³⁸ The case was litigated for five years, and ended with a decision in favour of TBL in 1991. In reaching its decision, the presiding Resident Magistrate drafted two issues for the determination: whether the land was allocated to the defendants by competent authorities, and whether the suit land was occupied before the alleged allocation. Without fully considering indigenous peoples' allegations that documents were forged, he answered the first issue in the affirmative. And based on a reasoning that exhibits lack of the knowledge of pastoralism - the livelihood option of the indigenous peoples of the area - the magistrate decided the second issue in the affirmative as well:

“As regards the second issue, that the land was not occupied before by human beings, it is in evidence that the land was just a virgin forest full of wild animals. It could be true that the villagers used to graze that cattle (sic) in the forests but that position is such that they do not deserve any compensation for unexhausted improvement as they did not in any way improve the land in dispute.”³⁹

Dissatisfied with the above decision, the indigenous community appealed to the High Court of Tanzania Arusha District Registry, vide Civil Appeal No. 18 of 1991. However, the appeal was struck out on 19 June 1995 on technical grounds, thus allowing the 1st Respondent to remain the rightful occupier of the disputed land, as per the judgment of the Resident Magistrate discussed above. Following the land allocation in 1984, TBL utilized only 7000 acres and in 1988, it abandoned the whole land thereby creating room for pastoralists to return to it. The problem arose again when, in 2003, the commissioner for lands issued a certificate of right of occupancy to TBL, which in turn, entered into a 96 years lease agreement with TCL in 2006. It alleged that after acquiring the lease, TCL forcefully evicted pastoralists by burning their homes, leaving them with very little land for pastoralism and human settlement.

In response to the above, the Soitsambu village council with support from the Minority Rights Group International-MRG (A UK based international human rights organization) filed a case at the High Court of Tanzania (land division) against TBL and TCL (land case no. 10 of 2010). Among other things, the claimant village council maintained that indigenous peoples have undisputedly occupied the suit land for more than 12 years and consequently, rules of adverse possession preclude respondents from claiming ownership of the land.

Numerous points of preliminary objections as to the correctness of filing the case emerged immediately. Respondents sought to convince the Court for example that the case is the same as the one that ended in their favour, and according to the rule of *res judicata* which holds that litigation must not continue endlessly, claimants are disqualified from filing a case involving the same or substantially the same issues as those earlier on adjudicated upon. In 2011, the High Court upheld the preliminary objection, dismissing

the case without considering its merits. Indigenous peoples appealed against the ruling at the Court of Appeal of Tanzania. A year later, the Court upheld the appeal, ruling that the case should revert to the High Court for determination. The matter is therefore before the High Court and hearing has commenced.

3.1.2.2. Attempts to mediate out of court

In an attempt to seek an out of court settlement, the indigenous community sent 13 members of the Soitsambu village government to visit the Prime Minister of Tanzania, Hon. Mizengo Pinda, in August 2008. The ‘peace messengers’ informed the Prime Minister about the situation facing pastoralists and requested him to take an administrative action that would resolve the conflict and address their grievances. In response, the Prime Minister formed a probe committee to investigate the matter, including legal aspects of the ownership of the farm as well as allegations of human rights violations resulting from TCL’s business operations. The probe committee did not include any representative of the affected community in its composition. Compounding this lack of representation in the probe committee is the fact that the findings of the committee have never been made public and consequently no actions have been taken. With assistance from the community’s UK based partner, MRG, there was another attempt for an out of court settlement in 2011, but it failed to advance.

3.1.2.3. The United Nations’ Special Procedures

In 2009, the indigenous community took the matter to the attention of the Committee on Elimination of Racial Discrimination (CERD) by invoking the Committee’s Early Warning Urgent Action Procedure. According to CERD, this procedure is aimed at “preventing problems from escalating into conflicts”.⁴⁰ In this case, CERD wrote a letter dated 13 March 2009 requesting the government of Tanzania to provide information about legal proceedings and administrative investigations on the case. Further, CERD asked Tanzania to clarify “measures the State party has taken to investigate thoroughly, all allegations of excessive use of force and crimes by the police and the security guards of the company occupying the farm.”⁴¹ Earlier, in its concluding observations on Tanzania, CERD had recommended that Tanzania provide information on the appropriation of land belonging to some ethnic groups and consequent displacement. Tanzania did not furnish the information in response to either the concluding observations or the letter, prompting CERD to write a follow up letter dated 11 March 2011, which also remains unanswered to date.

In another attempt to seek a remedy, the indigenous pastoralists of Soitsambu village communicated their predicament to the UN Special Rapporteur on the rights of indigenous peoples. In a detailed allegation letter dated 14 November 2013 signed by the UN Special Rapporteur on the rights of indigenous peoples and the Chair-Rapporteur on the working group on the work of mercenaries, Tanzania was requested to explain among other things: “The measures taken to implement the interim measures requested by the Committee on the Elimination of Racial Discrimination (CERD) in 2009 within the framework of its early warning and urgent action procedure with respect to the situation in Sukenya Farm.” Tanzania did not respond to this letter of allegation.

3.1.2.4. The US court

While the domestic court case is on-going at the Tanzanian High Court in Arusha, the indigenous community, with assistance from EarthRights International (ERI), petitioned a US district court in order to receive information from Thomson Safaris (of which Tanzania Conservation Limited is part). The petition was filed under a US Federal Statute called “*Assistance to Foreign and International Tribunals and to Litigants before such Tribunals.*” 28 USC §1782. The court decided in favour of the petitioners. This means that “Thomson Safaris and its owners must turn over all documents by May 9 [2014] and give sworn evidence before the end of June [2014]”.⁴²

Elaborating on the applicability and contours of the statute, Luis A. Perez and Frank Cruz-Alvarez in their article, *28 USC §1782: The Most Powerful Discovery Weapon in the Hands of Foreign Litigant* state:

A district court may grant § 1782 discovery assistance if (1) the person from whom discovery is sought resides or is found in the district court’s jurisdiction (2) the discovery is for use in a proceeding in a foreign tribunal (3) the request is made by a foreign tribunal or interested person (4) the district court in its discretion grants the requested discovery. Courts have broadly interpreted § 1782 and rejected most limitations on its use, which is why §1782 is so powerful in the hands of foreign litigants.⁴³

3.1.2.5. Indigenous peoples’ views

Implicit in their tireless effort to pursue their rights in different forums for twenty eight years, is the view of the affected indigenous peoples that the suit land belongs to them and that they are being dispossessed not by due process of the law but by corporate power, which must be subjected to the rule of law and international human rights standards. Daniel Ngoitiko, the elected councillor for Soitsambu ward confirms this stating that “the court’s decision means that the US companies can’t come to our home, steal our land, and abuse our people without facing accountability in their own home.”⁴⁴ This resonates with optimism of the community lawyer’s position: “[w]e believe the evidence will show that TCL and its owners knew they were buying the land illegally, and that they were complicit in the abuse the Maasai community suffered.”⁴⁵

3.1.2.6. Lessons learned in the utilization of the mechanism

The first lesson in this regard is that for human rights to be realized there is a need to make use of numerous avenues which are available, rather than sticking to local institutions alone. On this, Luis Rodriguez-Pinero Royo explains that “effectiveness of international human rights standards relies on a broad range of techniques and involves a key number of actors that are different and complementary to international bodies...”⁴⁶

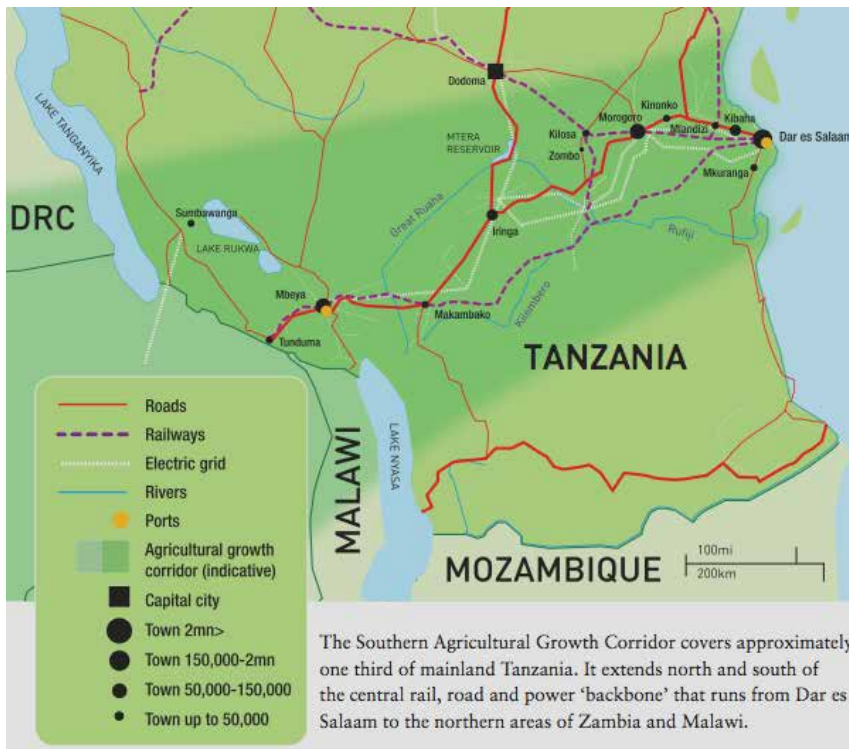
Secondly, it has been evident that some decisions are reached or verdicts issued based on ignorance of indigenous peoples’ livelihood systems as well as their rights as enshrined in various international human rights instruments. While indigenous peoples do not have rights that are not enjoyed by other human beings, indigenous peoples’ rights are context specific and that context must be taken on board in reaching decisions that

affect them. Elaborating further on this point, Korir Sing’Oei, A and Jared Shepherd in their comprehensive article *In Land We Trust: The Endorois’ Communication and the Quest for Indigenous Peoples Rights in Africa* explain that:

human rights supervisory bodies have held that property rights, for instance, acquire an “autonomous meaning” when applied to indigenous peoples. Further, while cultural rights are universal to all human beings, they acquire a unique meaning when applied to indigenous peoples.⁴⁷

The third lesson is that if adhered to robustly and in good faith, the Guiding Principles established by the UN Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, represent a well-thought out framework which has potential for ensuring that indigenous peoples’ rights are not only respected and protected but that indigenous peoples can access remedies that are available without undue impediments, such as unreasonable delay, and are effective and sufficient to address the harm suffered. This is because the Guiding Principles outline the State’s duty to protect and to provide remedies for victims of corporate activities and corporations’ responsibility to respect human rights and to provide for redress mechanisms. Before suggesting how this framework can be applied in the Tanzanian context in relation to indigenous peoples, consideration of another case study is helpful in order to provide further contextual information.

3.2. The SACGOT case study



Source SAGCOT Investment Blueprint

This section presents a case study of the Southern Agricultural Growth Corridor of Tanzania (SACGOT), a 2.1 billion dollar project and the biggest of its kind in Tanzania. It is likely to interfere enormously with indigenous peoples livelihoods, based on an influx of business corporations investing in huge tracks of land that pastoralists use. Prior to describing SAGCOT, a brief background to the concept of “African agricultural growth corridors”, which was coined in the UN, and of which SAGGOT is one example, is in order.

Available literature indicates that Yara, a Norwegian fertilizer company was the first institution to come up with the idea and championed its adoption through different levels of the decision-making chain. In their article ‘African Agricultural Growth Corridor and the New Alliance for Food and Nutrition, who Benefits, Who loses’ Helena Paul and Ricarda Steinbrecher recount that the idea was “first proposed at the UN General Assembly in 2008 and then at the World Economic Forum (WEF) in 2009 and at meetings in Switzerland and WEF Africa in Dar-es-salaam, Tanzania.”⁴⁸ According to the authors, major international development actors, including the world’s major economies (the G8 and G20), the World Economic Forum, the World Bank, and the UN Food and Agriculture Organization strongly supported the idea. Some of these partners have more recently created the Alliance for Food Security and Nutrition, an initiative that envisions working on the same idea of African agricultural growth corridors. While the concept is expected to be extended to other areas, currently there are two agricultural growth corridors in Africa namely the Beira Agricultural Growth Corridor (BRAC) in Mozambique and the SACGOT in Tanzania. This paper focuses on the SACGOT.



SACGOT Corridor. Photo: Elifuraha Laltaika

3.2.1. *An overview of the Area*

Spanning approximately one third of mainland Tanzania's total land area of 947,300 sq. kilometres, the SAGCOT links Dar es Salaam port to Malawi, Zambia and the Democratic Republic of Congo (DRC). While it forms part of the broader UN General Assembly's 2008 proposal for the "African Agricultural Growth Corridor"⁴⁹ as indicated above, SAGCOT was launched during the World Economic Forum for Africa held in Dar-Es-Salaam in 2010. Consistent with the broader objectives of FDI, SAGCOT aims to commercialize agriculture in the hope of "transforming the commercial food production and commercial farming sector into satisfying domestic needs and becoming one of the major export sectors and source of employment and income for both farm and off-farm labour."⁵⁰

However, SAGCOT is not the only investment framework targeting the country's agricultural sector, rather a plethora of policies and frameworks exist, making it hard for an average Tanzanian to know which one constitutes the country's guiding framework in relation to agriculture. In their article published in the *Journal of Sustainable Development*, entitled "Agriculture Sustainability, Inclusive Growth, and Development Assistance: Insights From Tanzania" Emanuel Tumusiime and Edmund Matotay found that, in the period from 2006 to 2013 alone, four different policies had been formulated, with the latest one aimed at catalysing its predecessor which had not produced the expected outcomes.⁵¹

Of all the policies, *Kilimo Kwanza* is the most ambitious, embodying the national resolve to bring about agricultural transformation.⁵² It is also the most well-known by the general public, owing undoubtedly to its Swahili buzzwords. Conceptually, it represents a holistic policy instrument aimed at addressing challenges that impede commercialization and modernization of agriculture in the country. The policy was formed with the effective participation of the Tanzania National Business Council (TNBC). Involvement of the TNBC, comprising of twenty appointees of president from the private sector (and twenty from the public sector), was based on recognition of the crucial importance of the private sector, referred to as the "engine of growth", in boosting the country's agriculture. SAGCOT was therefore launched at the time when there was already a theoretically robust agricultural strategy, and as such the SAGCOT is the vehicle for implementing *Kilimo Kwanza*.

The potential for SAGCOT to implement *Kilimo Kwanza* is seen through the prism of factors that define the entire corridor and are attractive to transnational companies: fertile lands, abundant water for irrigation and reliable rainfall, coupled with good infrastructure including roads and rail ways. In addition, the government is committed to putting in place a facilitative policy environment and, as already indicated elsewhere in this chapter, Tanzania offers a wide range of incentives for multinational companies, including tax holidays. Given these efforts, the optimism that is apparent in the SAGCOT Investment Blue Print, as reflected in the investment of \$ 2.1 billion over a twenty-year period for the purpose of tripling the area's agricultural input, seems well founded. In this connection, while commercial farmers currently farm only 110,000 hectares (mainly

for sugarcane and tea production), SAGCOT expects to raise the number to 350,000. The blue print holds that small-scale farmers will be the primary producers. Despite this optimism, indigenous peoples, notably pastoralists, stand to lose as a result of the huge FDI inflow, unless *the Protect, Respect and Remedy Framework and Guiding Principles* are adopted and implemented in good faith by the government and corporations alike, in order to ensure that the activities of corporations proceed in a manner that is consistent with respect for indigenous peoples' rights. The next part discusses why, in the absence of such an approach, indigenous peoples' rights are likely to be undermined.



SACGOT Corridor. Photo: Elifuraha Laltaika

3.2.2. Impacts of SAGCOT on indigenous peoples

The whole concept of African Agricultural Growth Corridors as conceived by Yara and initially discussed in bodies such as the UN, perpetuates the common narratives that have been repeatedly used to dispossess indigenous peoples of their ancestral land. Specifically, the concept characterizes the potential investment areas in Africa as constituting lands that are “empty,” “underused,” “idle” or “degraded.” Since indigenous pastoral land use patterns have been misunderstood, resulting in their land being categorized as idle or unused, it is evident that indigenous pastoralists have grounds for worrying about SAGCOT implementation. Compounding this is the fact that the misconception about pastoral land use has been entrenched in the Tanzanian legal framework. For example, Section 2 of the *Land Act Number 5 of 1999* interprets “general land” to mean, “all public land which is not reserved land or village land and includes unoccupied or unused village land.”

Additionally, while SACGOT is a relatively new investment strategy in agriculture in the country and it is consequently difficult to separate its impacts on indigenous peoples' land rights from impacts caused by the general legal and policy framework, it will be implemented within a policy framework that is biased in favour of livelihoods of dominant populations that are perceived to contribute more to the economy of the country than pastoralism. The National Land Policy of 1995 and the Strategic Plan for the Implementation of the Land Laws (SPILL) attest to this fact. The National Land Policy provides, in part, that: "...nomadism will be prohibited",⁵³ for its part, the SPILL holds that "Sustainable ownership of land rights requires land users to settle down and discourage nomadism."⁵⁴ Accordingly, this discriminatory attitude may lead to the formulation of policies and strategies aimed at increasing productivity at SACGOT, which have intended or unintended negative effects on indigenous peoples.

Also of note is that, whereas only a small area of the land earmarked for SACGOT has already been fully developed, the distinctive lifestyles of indigenous peoples as nomadic pastoralists are incompatible with proposals put forward for SAGCOT implementation, namely "out-grower systems" defined by Edwin N. Ambwino and Haike Rieks to mean "schemes that provide production and marketing services to farmers on their own land... where farmer(s) and [private] firm(s) engage in a forward agreement of production and marketing."⁵⁵ According to the authors, the out grower system is particularly suited to "countries that have liberalized marketing through the closing down of marketing firms" because small-scale farmers are vulnerable to middlemen who in the absence of regulations, can manipulate market access.⁵⁶ This also reveals a stark reality that even during the planning stage, land deals put indigenous peoples in a disadvantaged position because instead of being perceived as having something to contribute, they are perceived to be in "transition" to becoming crop-growers who can be co-opted in "out-grower systems." Professor Juan Mwaikusa puts this reality in perspectives,

Pastoralists are often seen and treated as a problem likely to hinder the smooth implementation of one or other of the policies of the government, and in many cases policy implementation has adversely affected pastoral communities. This shows that when charting out policies, the interests of the pastoralists are not taken into account adequately or at all.⁵⁷

Accordingly, development plans do not take into account the need to enhance indigenous livelihoods, as they are seen as archaic and unproductive. It is along these lines that, while acknowledging that pastoralism is better suited to local conditions if left uninterrupted by outside forces, Helena Paul and Ricarda Steinbrecher warn that pressure on pastoralism due to misconceptions about it will increase as FDI inflows in agriculture grows. The authors succinctly elaborate on this point noting that: "Current patterns of land use...often completely misunderstood, may cease to be possible across wide areas. This would threaten to eliminate the livelihoods of local communities that do not wish to collaborate with this externally imposed re-ordering."⁵⁸

4. Conclusion and Recommendations

This study has shown that when corporate activities interfere with indigenous peoples' rights to land and natural resources, access to justice has been impeded by a number of factors. They include the unavailability of other avenues beyond the judiciary, the lack of knowledge of indigenous peoples' rights and livelihood systems on the part of decision makers and restrictive procedures inherent in the country's adversarial system of justice. This situation has forced indigenous pastoralist residents of Soitsambu ward, northern Tanzania, to spend more than 25 years seeking respect for their rights to land and natural resources. While this has been the situation since the attainment of political independence, it is now a cause for alarm because the country has implemented legal and policy reforms geared towards making it one of the most attractive investment destinations in the region and thereby ensure more FDI. This is evident, for example, in the SACGOT region, where a 2 billion-dollar project has the potential to interfere tremendously with the enjoyment of pastoralist's human rights, including their rights to land and natural resources. In all these investment driven developments, indigenous peoples are the main victims due to the impacts on their livelihood options, and because instead of taking into account their rights and interests in the formulation of laws and policies, the government regards them as a hindrance to economic development. This attitude is at variance with international human rights law and standards, including Tanzania's obligations and commitments.

To be in line with these rights and standards, Tanzania must enhance constitutional, legal and administrative safeguards on access to justice and appropriate remedies, in order to protect communities, including indigenous peoples, from impacts of corporate activities on their rights. The Guiding Principles on Business and Human Rights and the "Protect, Respect, and Remedy" Framework which they aim to implement provide authoritative guidance as to how these reforms can be achieved. In particular, since victims of corporate activities in Tanzania have no recourse to access to justice beyond the judicial system, it is recommended that the country empower its national human rights institution - the Commission for Human Rights and Good Governance - (in terms of its technical and financial capacity) to be a robust avenue to which indigenous peoples have resort in order to seek effective remedies. While a national human rights institution and indeed other non-judicial bodies are limited in terms of the remedies they afford, they can nevertheless offer access to a trusted institution where parties can air their rights based grievances and tell their side of the story in relation to a disagreement with more powerful actors. In so doing they can potentially play a role in preventing those problems which arise from escalating into serious conflicts which are associated with violations of indigenous peoples' rights. On the part of business corporations, it is recommended that they establish operational-level grievance mechanisms in consultation with indigenous peoples for the purposes of fostering engagement and dialogue. More importantly, it is recommended that in order to avoid conflicts from arising, or minimizing them, investments in indigenous peoples' lands should, as much as possible and in good faith, adhere to the international human rights standards, including the right to free prior and informed consent.

¹Tenga, R (2011) 'Seeking redress from courts of law by pastoralists in Tanzania', paper presented to the conference on 'Half a century Struggles by Pastoralists for Land Rights and the proposed new constitution as a window of opportunity,' Organized by the Association for Law and Advocacy for Pastoralists (ALAPA) and PINGOS Forum, Arusha, 24-25 November.

² Ibid.

³ Sigalla King, N. (2013) 'Conflict Management among Pastoralists and Farmers in Tanzania' *International SAMMANM Journal of Business and Social Science* [Online] Vol. 1, (2) 40-50. Available at <http://www.samanmjournals.org/wp-content/uploads/CONFLICT-MANAGEMENT-AMONG-THE-FARMERS-AND-PASTORALISTS-IN-TANZANIA.pdf> [Accessed 15/09/2014].

⁴ See for example Charles Lane and Jules N. Pretty 'Displaced Pastoralists and Transferred Wheat Technology in Tanzania', International Institute for Environment and Development, Sustainable Agriculture and Livelihood Program, Gate Keeper Series No. 20, undated. Available at <http://pubs.iied.org/pdfs/6035IIED.pdf> (Accessed 26th/01/2015).

⁵ See Ebenroth, E. T and Chris Maina (1996) 'Peter Protection of Investment in Tanzania: Some new Issues From Zanzibar', 8 *African Journal of International and Comparative Law* 842.

⁶ Ngugi, J. (2005) 'Policing Neo Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse' 26 *Journal of International Law*, (3) 514.

⁷ See Beata K. Smarzynska 'Does Foreign Direct Investment Increase Productivity of Domestic Firms? In Search of Spillovers Through Backward Linkages', World Bank Policy Research Working Paper 2923, October 2002.

⁸ Padma Mallampally and Karl P. Sauvant 'Foreign Direct Investment in Developing Countries', 36 *Finance & Development*/March 1996, p. 35.

⁹ In the words of the former UN Secretary General, Kofi Annan: "It is the absence of broad-based business activity, not its presence that condemns much of humanity to suffering."

¹⁰ Wailer, K 'Taming the untameable? Transnational Corporations in United Nations Law and Practice', In A. von Bogdandy and R. Wolfrum, (eds), *Max Planck Year Book of United Nations Law*, Volume 14, 2010 p. 448. 11 See United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014. Country Fact Sheet: United Republic of Tanzania*, available at: http://unctad.org/sections/dite_dir/docs/wir2014/wir14_fs_tz_en.pdf.

¹² Weissbordt, D (2014) 'Human Rights Standards Concerning Transnational Corporations and other Business Enterprises' 23 *Minnesota Journal of International Law* 135.

¹³ Wynhoven, U (2011) 'The Protect Respect and Remedy Framework and the United Nations Global Compact' 9 *Santa Clara Journal of International Law* 81.

¹⁴ Ibid.

¹⁵ Adopted from Vickrey, W et al (2008-2009) 'Access to Justice: A Broader Perspective' 42 *Loyola of Loyola of Los Angeles Law Review* 1147.

¹⁶ Musila G (2006) 'The right to an effective remedy under the African Charter on Human and Peoples Rights', 6 *African Human Rights Law Journal* 442.

¹⁷ The Constitution of the United Republic of Tanzania 1977 (as amended from time to time), available at <http://www.judiciary.go.tz/downloads/Constitution.pdf> (Accessed on 10 January, 2015).

¹⁸ Mwaikusa, J (1996) 'The Limits of Judicial Enterprise: Judicial Power in the Process of Political Change in Tanzania', 40 *Journal of African Law* 243.

¹⁹ Ibid.

²⁰ Wambali, M (2009) 'The Enforcement of Basic Rights and Freedoms and the state of Judicial Activism in Tanzania,' 53 *Journal of African Law* 34.

²¹ Article 30 of the Constitution of the United Republic of Tanzania 1977 (as amended from time to time). The limiting provision provides, "It is hereby declared that the provisions contained in this part of the

constitution which sets out the Principles or rights, freedoms and duties does not render unlawful any existing law or prohibit the enactment of any law or the doing of lawful act in accordance with such law.”

²² Legal and Human Rights Centre, Business and Human Rights Report (2013), p. 107.

²³ Hussein Mgonja v The Trustees of Tanzania Episcopal Conference, Court of Appeal of Tanzania Revision No. 2 of 2002 [Arusha], unreported.

²⁴ Article 107 A (2) (e).

²⁵ Peter, C.M, (2007) ‘Human Rights of Indigenous Minorities in Tanzania and the Courts of Law’, 4 International Journal of Group and Minority Rights 14.

²⁶ Ibid.

²⁷ de Beco, G (2007), ‘National Human Rights Institutions in Europe,’ 7 Human Rights Law Review 331.

²⁸ For a comprehensive discussion on this, see Leonard Gideon Magawa ‘An Appraisal of the Legal Frameworks of National Human Rights Institutions in Africa: The cases of Tanzania and South Africa.’ Master of Laws (LLM) Thesis, University of Alberta.

²⁹ See Paul Faustin Kihwelu (2004), ‘The Human Rights Commission in Tanzania: An Idea Takes Shape’, 2 East African Journal of Human Rights & Democracy 47.

³⁰ See Note: Requiring exhaustion: An international law perspective of the Alien Tort Claim Act in Sarein V. Rio Tinto. 38 Golden Gate University Law Review 461 (2007-2008) p. 463.

³¹ Musila, G (2006) ‘The Right to an effective remedy under the African Charter on Human and Peoples’ Rights’ 6 African Human Rights Law Journal 442.

³² Constitutional Rights Project (in respect of Akamu and Others) v. Nigeria (2000) AHRLR 180 (ACHPR 1995) para 8. Quoted in Musila, G (2006) Ibid.

³³ Protocol to the African Charter on Human and Peoples Rights on the establishment of an African Court on Human and Peoples Rights Available at <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf> (Accessed on the 10/1/2015).

³⁴ Section 34(6) of the protocol (Ibid), read together with Section 5(3) is to the effect that the court cannot receive cases filed by Non-Governmental Organizations (NGOs) as well as individuals from a State party that has not made a separate declaration accepting such arrangement. Until June 2012, only Tanzania and four other countries namely Bukina-Fasso, Malawi, Ghana and Mali have made such a declaration out of 26 countries that have ratified the protocol. See ‘Foreign Donors Can’t influence the decisions of the African Court.’ Available at <http://www.ippmedia.com/frontend/index.php/arch/function.mysql-select-db?l=42445> (Accessed 6/1/2015).

³⁵ See Article 3(1) of the Protocol.

³⁶ See Ngorongoro NGOs Network (NGONET): Resource Based Conflicts in Ngorongoro: A Report of a Documentation exercise, May/June 2008 p. 8.

³⁷ Ibid.

³⁸ Isata Ole Ndekerei and 14 others v The Tanzania Breweries Ltd and Tanzania Breweries Farm Ltd, Resident Magistrates’ Court of Arusha, Civil Case No 74 of 1987.

³⁹ See p. 4 of the Judgment, Ibid.

⁴⁰ Stavropoulou, M (1996) ‘Human Rights and “Early Warning” in the United Nations’, 14 Netherland Quarterly of Human Rights 419 p. 427.

⁴¹ CERD Early Warning Urgent Action letter to Tanzania 11 March 2011.

⁴² See Press release issued by Earth Rights International, “Tanzania Maasai Villagers win Fight for Information About Land Grabs and Forced Eviction Against Luxury Boston Safari Company.” 21 April, 2014.

⁴³ Perez, L and Frank Cruz-Alvarez (2009-2010) ‘28 USC §1782: The Most Powerful Discovery Weapon in the Hands of Foreign Litigant,’ 5 FIU Law Review 177 p. 191.

⁴⁴ Earth Rights Press release supra.

⁴⁵ Ibid.

⁴⁶ Luis Rodriguez-Pinero Royo, “‘Where Appropriate’: Monitoring/Implementing of Indigenous Peoples’ Rights under the Declaration,” in Claire Chartres and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009).

⁴⁷ Sing’oei, K.A. and Jared Shepherd (2010) ‘In Land We Trust’: The Endorois’ Communication and the Quest for Indigenous Peoples Rights in Africa ‘. 16, *Buffalo Human Rights Law Review* 74.

⁴⁸ Helena Paul and Ricarda Steinbrecher (2013) ‘African Agricultural Growth Corridor and the New Alliance for Food and Nutrition. Who Benefits, Who loses?’ *Econexus Report*, p.2.

⁴⁹ Helena Paul and Ricarda Steinbrecher Ibid.

⁵⁰ 1996, United Republic of Tanzania. (The National Investment Promotion Policy) [pdf] Dar-es-Salaam: President’s Office Planning Commission. Available at <http://www.tzonline.org/pdf/nationalinvestmentpromotionpolicy.pdf> [Accessed 09/01/2015].

⁵¹ Emmanuel Tumusiime and Edmund Matotay (2014), ‘Agriculture Sustainability, Inclusive Growth, and Development Assistance: Insights From Tanzania’, *Journal of Sustainable Development* Vol. 7 No. 4.

⁵² Ibid.

⁵³ United Republic of Tanzania (1997), National Land Policy, Ministry of Lands and Human Settlements, Dar- Es-Salaam, p.36 available at <http://www.tzonline.org/pdf/nationallandpolicy.pdf> (Accessed on 28th/01/2015).

⁵⁴ United Republic of Tanzania (2004), National Land Policy, Ministry of Lands and Human Settlements, Dar- Es-Salaam, Strategic Plan for the Implementation of the Land Laws (SPILL): Roles Capacities and Constraints of Lands Sector Stakeholders in the Context of the Institutional Framework for the Implementation of Land Acts (a brief review), Report by F.N Lugoe, P.43.

⁵⁵ Edwin N. Ambwino and Haike Rieks, Out-grower system through contract farming: Zambia, AGRO ECO Report 2007:04 available http://www.grolink.se/epopa/Publications/Outgrower_System_Zambiac.pdf (Accessed on 23rd of January 2015).

⁵⁶ Ibid.

⁵⁷ Mwaikusa J.T (1993) ‘Community Rights and Land Use Policies in Tanzania: The case of Pastoral Communities’ 37 *Journal of African Law* 144-145.

⁵⁸ Paul, H and Ricarda Steinbrecher, ‘African Agricultural Growth Corridors and the New Alliance for Food Security and Nutrition’, *EcoNexus Report*, 2013.

Chapter 9 - Indigenous Peoples and Access to Remedies in the Context of the LAPSSET Corridor, Kenya

Kanyinke Sena

1. Case overview

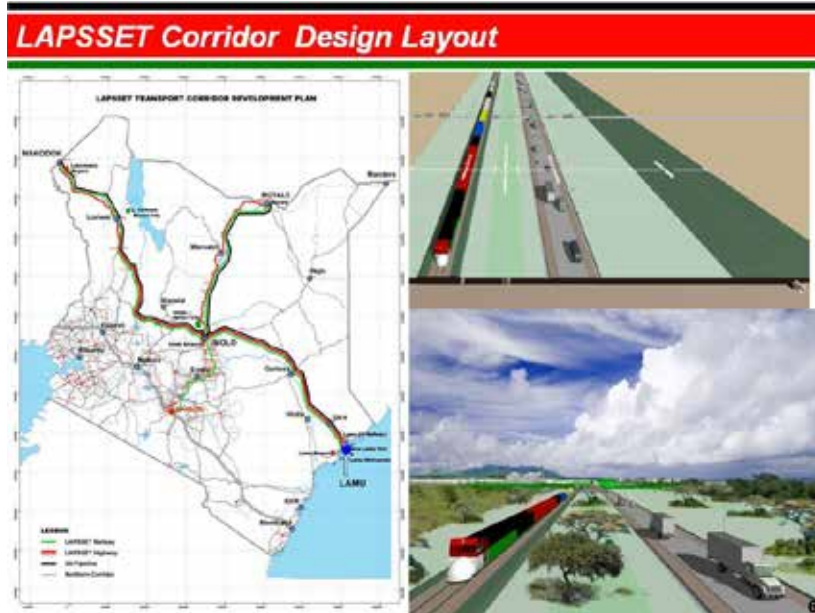
Access to remedies is fundamental to the protection of indigenous peoples' rights along the Lamu-Port-South-Sudan-Ethiopia Transport (LAPSSET) Corridor. The remedies can be sought both through judicial and non-judicial processes and include local dialogues, courts, tribunals and international mechanisms. Indigenous peoples along the LAPSSET Corridor have utilized and continue to utilize both judicial and non-judicial processes to seek remedies for violations or threats of violations of their rights. To tell this story of indigenous communities and remedies, this paper looks at three case studies from different parts of the LAPSSET Corridor. The first case study explores how the Turkana community has used local remedies in its struggles against Tullow Oil Plc. The second case study looks at access to judicial remedies by the Ajuran community against Taipan Resources and its partners, and the third case study explores the use of international mechanisms by communities in their efforts to stop the construction of a port in Lamu.

In undertaking the study, both primary and secondary sources of information were utilized. This included analysis of various laws and policies, newspapers and other publications and interviews, both electronic and face-to-face, with activists from the LAPSSET Corridor. The paper focuses on how the communities were able to utilize different processes, the kind of support they got and the responses they received. But as the LAPSSET Corridor is still developing, the issues discussed in the case studies are yet to be determined conclusively.

Several useful lessons are drawn from the case studies. Key among them is the need for communities to be better organized internally. Communities also need to pursue remedies utilizing all processes available from the local to the international in order to ensure that their issues receive the necessary attention. However, judicial and some quasi-judicial processes, for example international mechanisms, are expensive to pursue. This calls for the strengthening of locally available mechanisms, as access is cheap and fast. For local remedies to be effective there is need for deliberate and focussed partnerships between the government (both national and county), corporations, the international community and the communities along the LAPSSET Corridor.

Local political interests are a key challenge in any efforts to seek remedies for indigenous peoples' rights violations. This can only be addressed through a deeper understanding of the issues, the development of a collective community vision that will bind all politicians, holding of leaders accountable and generally moving from the standard approach to development to a more nation building approach. Another challenge revolves around the effectiveness of mechanisms being utilized by communities to pursue remedies. While judicial mechanisms are effective, non-judicial mechanisms, for example, the UN

Special Rapporteur on the rights of indigenous peoples, are seen as ineffective as they only provide recommendations, which the government regularly ignores. International mechanisms have the potential to be very useful in the struggle for indigenous peoples' rights not only along the LAPSSET Corridor but globally. There is therefore a need to strengthen them to be more effective.



The LAPSSET Corridor Design Layout <http://www.vision2030.go.ke/>

2. Background of the Research

The Lamu-Port-South-Sudan-Ethiopia Transport (LAPSSET) Corridor is a trans-boundary infrastructure project that will link Kenya, Uganda, Ethiopia and South Sudan via a railway, road and oil pipeline network. The oil pipeline is meant to transport South Sudan's, Kenya's and Uganda's newly discovered oil to global markets via the Indian Ocean.



It will run from the Northern parts of South Sudan, across Kenya and into ships docked in Lamu, a Kenyan coastal town on the Indian Ocean. Uganda's oil will be linked to the LAPSSET Corridor via an additional oil pipeline that will run from Hoima in western Uganda to Juba in South Sudan. The road and railway will run from Juba to Lamu, with a connection running from Isiolo in central Kenya to Addis Ababa, Ethiopia. In Kenya, numerous other projects are being implemented as part of the

LAPSSET Corridor project. This includes a 32-berth port in Lamu, three resort cities and airports in Lamu, Isiolo and Turkana respectively, dams, a large-scale irrigation project in the Tana Delta among others.

For the pastoralists and hunter-gatherer communities along the LAPSSET Corridor, the project will be both a blessing and a curse. A blessing in the sense that it brings much needed infrastructure to a historically marginalized part of Kenya, but a curse in that the communities risk losing their land and resources to the LAPSSET Corridor infrastructure projects and to the extractive industries developing along its path. Numerous conflicts, some of which are directly attributed to the LAPSSET Corridor development programme, already plague the region and are expected to escalate and increase in number. And while remedies are available to indigenous communities through constitutional and traditional means, research is necessary to shed light on how the affected communities have pursued these remedies. This study aims to provide some insights in that regard.

3. Study team and research methodology

Time, distance and resource constraints served to limit the scope and depth of the study. It was therefore undertaken by the author, Kanyinke Sena, a former member of the UN Permanent Forum on Indigenous Issues, in consultation with a number of activists from the LAPSSET Corridor area. However, having been directly involved in organizing indigenous communities along the LAPSSET Corridor, the author has in-depth information and experience on the issues they face. The study was undertaken through literature review of various sources that include published documents, newspapers and websites. Information was also gathered through emails, phone calls and face-to-face interviews with eight activists from the LAPSSET Corridor.

4. Introduction

The Constitution of Kenya (2010) establishes the framework for the protection of human rights for all. The recognition and protection of human rights is a collective need and aspiration of all Kenyans. The term “all Kenyans” encompasses the diverse ethnic and cultural backgrounds of all communities in Kenya. The preamble of the Constitution reflects this by stating that: -

We, the people of Kenya;

PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation:

RESPECTFUL of the environment, which is our heritage, and determined to sustain it for the benefit of future generations:

COMMITTED to nurturing and protecting the well-being of the individual, the family, communities and the nation:

RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law

Further, the Constitution provides for a bill of rights that applies “to all law and binds all State organs and all persons” (Article 20). Consequently, the State has a duty to ensure that human rights are recognized and respected by all persons. The Constitution defines “a person” as including “*a company, association or other body of persons whether incorporated or unincorporated*” (Article 260) thus clarifying the need for the State to ensure business enterprises respect human rights. Businesses also have an independent responsibility to respect human rights under the UN Guiding Principles on Business and Human Rights. Some of the rights that must be observed when undertaking business operations include, but are not limited to, the right to life, equality before the law and equal protection of the law (Article 27), access to information held by the State and to information held by another person and required for the exercise or protection of any right or fundamental freedom (Article 35).

The Constitution also explicitly recognizes the “right to acquire and own property either individually or in association with others” (Article 40). According to Roger Pillon, there is an intimate relationship between secure property rights and the enjoyment of other human rights. In his essay, *Property Rights and the Constitution*, Pillon holds that “the right to property is the foundation of every right including the right to be free”.¹ By recognizing the right to own property “in association with others” (Article 40), the Constitution therefore provides a framework for the recognition and protection of community property and other human rights of indigenous peoples along the LAPSSET Corridor. Since Kenya’s establishment at the Berlin Conference (1885) in the form of the East Africa Protectorate and during its status as a British protectorate and then colony (1890 – 1963), the recognition of communal property rights has remained a challenge.² This remained the case even after Kenya was granted independence in 1963. Kenya’s post-independence regimes have continued with the policy of non-recognition of the existence and property rights of indigenous communities, resulting in their political, social and economic exclusion.³ Communities along the LAPSSET Corridor have, in particular, suffered the most from these exclusionist policies as the Truth, Justice and Reconciliation Commission Report notes,

...the state discriminated against minority and indigenous communities, specifically those residing in North Eastern, Upper Eastern, Rift Valley and Coast provinces, through emergency laws and regulations that violated their rights to equality before the law and due process of law.⁴

The laws and policies that entrenched denial and violations of indigenous communities’ property rights along the LAPSSET Corridor include the *1897 East African Land in Council* and the *Crown Land Ordinances* of 1902 and 1915. Through these laws, the British colonial government declared all “unoccupied”⁵ land as “Crown Land”, governed allocations of land for agricultural, residential, commercial and other purpose and asserted the Crown’s title to all land in Kenya for distribution at the Crown’s pleasure.⁶ This was despite existing communal tenure regimes.⁷ The Independence Constitution also

provided opportunities for denial and dispossession of indigenous communities of their lands and territories in the LAPSSET Corridor. First and foremost, instead of recognizing community land rights, it simply categorized most of their lands as Trust lands vested in local governments to hold on behalf of the communities. The Constitution then vested local governments with the powers to set aside Trust lands for use and occupation by a public body or authority for public purposes that included the prospecting or extraction of minerals or mineral oils.⁸ Trust lands could also be set aside for government purposes where the President is satisfied that the use and occupation of an area of Trust land is required for any purposes that may include government purposes, purposes of a body corporate established for a public purpose, or purposes of a company in which shares are held by or on behalf of the Government of Kenya.⁹ Through these provisions, communities in the LAPSSET Corridor lost much of their land to national parks and game reserves, oil and gas exploration, large-scale agriculture and private developers.

The new Constitution, adopted in 2010 recognizes indigenous communities albeit within the context of marginalization (Article 260). It also recognizes community land (Article 61 (2)) which vests in communities identified on the basis of ethnicity, culture or similar community of interest (Article 63 (1)). But though the right to property is guaranteed, it's not absolute and can be deprived for a public purpose or in the public interest (Article 40 (3) (a)). However, deprivation can only be done in the accordance with the Constitution or any Act of parliament and upon "prompt payment, in full, of just compensation to the person ... or occupants in good faith who may not hold title to the land" (Article 40 (4)).

If a property right is infringed, the Constitution allows any person who has an interest in, or right over, that property, a right of access to a court of law.¹⁰ The courts include subordinate courts in all the 47 counties, the High Court, Court of Appeal and the Supreme Court.¹¹ To enable access to these Courts, "the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."¹² Besides the Courts, the Constitution also recognizes independent tribunals¹³ in resolving disputes arising out of their respective constitutive law. In exercising judicial authority, courts and tribunals shall be guided by the principles of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Throughout the LAPSSET Corridor, indigenous communities have utilized the courts, tribunals and alternative dispute resolution mechanism to seek remedies where their rights have been violated or at risk of being violated. Besides these national mechanisms, they have also approached international mechanisms within the UN system such as the UN Permanent Forum on Indigenous Issues, the UNESCO World Heritage Committee and mechanisms that are part of financial institutions including the World Bank and Africa Development Bank, as the following case studies illustrate.

5. Case Studies

Indigenous communities along the LAPSSET Corridor have pursued different mechanisms in the quest for remedies for issues affecting them in the planning and development of the project. The issues are diverse but revolve around the threats to their

land rights, cultures and livelihoods. Consultation and participation is a core demand of indigenous communities along the LAPSSET Corridor. Indigenous communities rights are at risk of being negatively impacted by the all the various projects under the LAPSSET Corridor development programme. With no intention of diminishing the value and importance of impacts of other LAPSSET projects on indigenous communities' rights, this paper will focus on oil exploration and the development of port that will be used to transport the oil to international markets. The first case will look at the oil exploration and non-judicial remedies in Turkana, the second will look at oil exploration and judicial remedies in Wajir and the third will briefly look at the development of a port in Lamu and international mechanisms utilized by communities in Lamu to seek remedies.



Source: Kanyinke Sena

5.1. Oil, conflicts and remedies along the LAPSSET Corridor

5.1.1. Oil in the LAPSSET Corridor

Before embarking on an examination of the remedies being utilized by the affected communities, it is important first to understand oil development in the context of the LAPSSET Corridor. Oil exports are at the centre of the LAPSSET Corridor development project. Initially, the aim was to take advantage of the conflict between Sudan and South Sudan by creating an alternative route for South Sudan's oil through Kenya.¹⁴ But after major oil discoveries were made in Kenya, the LAPSSET project become more urgent for Kenya's own strategic interests.¹⁵ Further prospects for LAPSSET as a major oil infrastructure project were boosted when Uganda identified it as a transport route for

its oil deposits and joined efforts to fundraise for the LAPSSET Corridor development project.¹⁶ The bulk of the LAPSSET Corridor development programme is in Kenya.

According to the National Oil Corporation,¹⁷ oil exploration in Kenya began in the 1950's and was conducted by British Petroleum and Shell BP around Lamu. But, like in other parts of Kenya, "none of the wells were fully evaluated or completed for production despite several indications of oil staining and untested zones with gas shows".¹⁸ Kenya has four prospective sedimentary basins: Anza, Lamu (which extends offshore), Mandera and the Tertiary Rift. For oil exploration purposes, these basins have been subdivided into 42 prospecting blocks (see map below) and exploration permits issued to different oil companies. About 30 of these exploratory blocks lie along the LAPSSET Corridor.

The first major oil discovery in Kenya was announced by Tullow Oil, a British oil corporation, in March 2012, in Ngamia 1 in block 10BB in Turkana.¹⁹ Between March 2012 and July 2013, Tullow Oil and its partner Africa Oil, announced further discoveries in Twiga, Ekales, Etuko and Agete 1, all in Turkana County. Further discoveries have also been made in Isiolo and Garisa respectively, with exploration on-going in all the oil blocks. Kenya hopes to become an oil producer by 2017.²⁰

Oil exploration activities in Kenya are governed by the Petroleum (Exploration and Production) Act (1985), last revised in 2012. Under the Section 3 of the Act,

"all petroleum existing in its natural condition in strata lying within Kenya and the continental shelf is vested in the Government, subject to any rights in respect thereof which, by or under any other written law, have been or are granted or recognized as being vested, in any other person."

While the Act does not mention community land, Section 10 provides for access to private land which it defines as "land privately owned and land the subject of a grant, lease or licence from the Government.

Section 10 of the Petroleum Act provides that

(1) Where a contractor intends to enter upon any private land for the purposes of conducting petroleum operations, he shall give not less than forty-eight hours' notice of his intention to the occupier, and if practicable to the owner, of the land and shall, if required by the owner or occupier, give security in such sum and by way of such means as the Minister may direct for meeting any compensation payable under subsection (2).

(2) Whenever, in the course of carrying out petroleum operations, any disturbance of the rights of the owner or occupier of private land, or damage to the land, or to any crops, trees, buildings, stock or works therein or thereon is caused, the contractor shall be liable on demand to pay to the owner or occupier such compensation as is fair and reasonable having regard to the extent of the disturbance or damage and to the interest of the owner or occupier in the land.

(3) If the contractor fails to pay compensation when demanded under subsection (2), or if the owner or occupier is dissatisfied with the amount of compensation offered to him, the owner or occupier may, within six months of the

date on which the demand or offer is made, take proceedings before a court of competent jurisdiction for the determination and recovery of compensation (if any) properly payable under subsection (2).

The Act also requires a contractor to give “preference in training and employment to Kenyan nationals and to locally available goods and services” (Section 9, 1985) but there is no definition of what “locally available” means and no specific percentage of local content is prescribed.²¹

5.1.2. Oil Conflicts and non-judicial remedies in Turkana

Through these provisions of the Petroleum Act coupled with the Trust Land act previously discussed, oil exploration activities of Tullow Oil have clashed with the rights of the Turkana peoples, a nomadic pastoralist community found in North Western Kenya. According to Kenya National Population census (2009), the Turkana population is 855,399. In efforts to seek remedies from Tullow Oil activities, the Turkana have utilized local remedies in efforts to resolve conflicts with Tullow Oil Plc.

5.1.2.1. Land ownership conflicts

According to Friends of Lake Turkana (2012), a community trust based in Lodwar, Tullow Oil B.V was, in 2007, awarded by the Ministry of Energy, five exploratory blocks including 10BB, 13T and 11, totalling approximately 63,000 square kilometres in Turkana County. But when Tullow Oil, through the then President of Kenya, Mwai Kibaki, announced an oil find in Ngamia 1, reports immediately emerged that the land had been leased off for oil exploration without the consent of the Turkana community.²² The Greater Turkana Civil Society Network immediately raised concerns over the ownership of oil exploration fields in Turkana. They alleged that “many organizations, including churches, were in possession of title deeds for mineral exploration sites in Turkana South and East districts”.²³

These concerns received varied responses from politicians. The then Turkana South member of parliament, who is currently the Turkana County governor, dismissed the concerns and insisted that the firms operating in Turkana were licensed to conduct mineral exploration and prospecting in specific areas, but do not own any land as Turkana is a trust land owned by the community under the jurisdiction of the Turkana county council. He urged the public to ignore baseless and malicious claims.²⁴ The same media source quotes the MP claiming that:

We expect to benefit directly and indirectly from the commercialization of oil and other mineral discoveries. Our infrastructure will be developed and social amenities provided to the people of Turkana. As a community, we will have a higher bargaining power.²⁵

However, several weeks later, the then MP and his colleague, who is the current speaker of the senate, joined the community in questioning the status of ownership of the land that comprises the oil exploration sites.²⁶ Tullow Oil has attempted to have the community relocated from Ngamia 1 where it struck oil but the community has strongly resisted this attempt.²⁷

The national government and other actors are also engaged in this on-going land rights discussion in Turkana. For example, the immediate former President Hon. Mwai Kibaki has even warned land-grabbers, out to fleece gullible residents, to keep off oil-rich Turkana.²⁸ While senior officials from the Ministries of Internal Security and Energy, among others, have visited Turkana regularly, President Uhuru Kenyatta has been quoted as inviting landowners in northern Kenya to own part of the proposed Lokichar-Lamu oil pipeline, in a move aimed at defusing tensions over compensation for the land taken up by the LAPSSET project. However, while this offer of shares in the project through wayleaves is noble, experts have raised concerns that “there is no precedence or legal framework to guide the exchange of land for equity stakes.”²⁹

Generally, there seems to be no serious effort to address the land rights issue in Turkana, despite community efforts. This discussion on land continues.

5.1.2.2. Consultations and benefit sharing

Besides land issues, the Turkana have also consistently raised concerns of not being consulted and being side lined in the distribution of contracts and other benefits from oil exploration.³⁰ Tullow Oil and the Ministry of Energy consulted with the community through the Turkana County Council (now Turkana County government) and the provincial administration. But there is a feeling that community interests are not well represented by the leadership as some engage in secretive deals with Tullow Oil.³¹ As a result of the lack of genuine consultation, participation and transparency and the prevalence of corruption, members of the Turkana community were neither being employed nor granted contracts by Tullow Oil. According to Friends of Lake Turkana,³² Tullow Oil operated a small corporate social responsibility programme (CSR) that included a scholarship scheme.

However, Friends of Lake Turkana intimates that the CSR fund

is run under the politicians/ councillors with district based committees which only served the interests of their cronies. There is consensus that the amount offered by Tullow is generally little and cannot be used for any meaningful investments. The bursary fund that has been established is being administered without the involvement of the civil society thus opening it to abuse.³³

It also notes that the scholarships/training programme is not reaching local people.

Community agitation on these issues intensified so much that in October 2013, Tullow Oil shut down its operations in Turkana due to “demonstrations by local people regarding concerns around employment”.³⁴ This prompted more focussed discussions “between Tullow Oil, the Turkana peoples, the local Government and the national Government so that the company can resume work on Blocks 10BB and 13T as soon as possible”.³⁵ Tullow issued a press release declaring that it is

fully committed to utilizing as many local workers and local services as possible and currently employs over 800 people from the Turkana region out of the 1,400 people currently employed on Tullow’s Kenyan operations.³⁶

After successful negotiations with the national and county government and Turkana leaders, Tullow Oil resumed its operations in Block 10BB and Block 13T on 8 November 2013. According to Tullow:

the suspension of operations allowed all parties to discuss and understand the complex operating environment in Northern Kenya and commit to taking the necessary action to allow exploration operations to resume. Further to these discussions, Tullow has signed a Memorandum of Understanding (MoU) with the Minister for Energy. The MoU clearly lays out a plan for the Government of Kenya, county government, local communities in Northern Kenya and Tullow to work together inclusively over the long-term and to ensure that operations can continue without disruption in the future.³⁷

In furtherance of this agreement, “the Turkana County government and Tullow Oil have agreed to hold quarterly meetings and cooperate to end disputes over job opportunities in the company”.³⁸



LAPSET corridor project.

Source: Kanyinke Sena

5.1.3. Oil, conflicts and judicial remedies in Wajir

The Ajuran are a pastoralist community found in parts of Wajir, Kenya. A sub tribe of the Somali, the Ajuran population is about 30,000. Ajuran territory lies in the Southeastern part of the Anza basin that forms part of the rift valley system. Oil prospecting in Ajuran territory began in 1961 when British Petroleum and Shell drilled the first exploratory well, with Amoco Oil and Total drilling further

wells in 1989 and 1990 respectively.³⁹ Currently, the Anza basin is classified as oil exploration “block 2 b” and measures 5,458 square kilometres.⁴⁰ Through its subsidiary Lion Petroleum Corporation, Taipan Resources is carrying out oil exploration in the Anza basin. Though Taipan Resources is headquartered in Nairobi, it has offices in London, UK, and Vancouver, Canada, and is listed on the Toronto Venture Exchange under the ticker symbol TSX.V: TPN.⁴¹ Lion Petroleum Corporation has entered into partnerships with Premier Oil Investments Ltd and Tower Resources in the Anza basin. Taipan’s exploration license, first issued in 2006, was renewed in 2012 and runs until June 2015.⁴²

In October 2014, the Anjuran community, through their lawyer, complained to the national and county governments that Taipan Resources was not consulting them and that they were being side lined in the award of contracts or jobs. They also raised concerns over compensation and potential environmental degradation. The Ajuran asked for the suspension of the oil exploration activities until their issues are resolved.⁴³ It is not clear how the national government or the company responded to the Ajuran community. However, the Wajir County director of communication, Mr. Yahya Mohamed, is quoted to have responded:

Oil exploration is [a] national government issue and any community, which feels it has some concerns over the activity, should seek redress with the Ministry of Energy, National Environment Management Authority (NEMA) and the company involved.⁴⁴

The community responded by going to the High Court in November 2014. They argued that oil prospecting was not only interfering with their unique way of life but also with their pastoralist livelihood system by limiting the movement of livestock. Oil prospecting was interfering with the ecosystem too. Further prospecting would therefore be a danger to their culture and survival and is likely to result in violence.⁴⁵ Taipan Resources responded and claimed that it had all the necessary permits including from the Wajir County government and the National Environment Management Agency (NEMA). It insisted that:

The community has approached the court with unclean hands and should not be entitled to any order. They lied that the companies had not undertaken any environmental impact assessment when they are aware of the measures taken to address any adverse impact. That the company had carried out an environmental assessment and its activities would be limited to the 200 square metres where the exploration well will be drilled. The 200 metres will also serve as the base where personnel will be housed and all drilling equipment will be stored.⁴⁶

The companies have also “invested over Sh1.2 billion in the project and stopping them will expose them to losses and penalties for contracts they have entered with third parties.”

The High Court issued a temporary injunction against Taipan Resources on 17 November 2014 directing the company to stop all exploration activities in Ajuran territory. But it reversed the decision on 21 November 2014 and allowed the oil exploration to continue pending final determination of the case. However, the exploration should continue only “within designated areas and without interfering with the nomadic life of the residents”.⁴⁷ The Court opined that:

the companies and the residents both have rights to be protected. For the balance to protect each interest, they should continue mining within the 36 hectares they are occupying without subjecting the residents to any mass eviction.⁴⁸

Both Taipan Resources and its subsidiaries and partners and the community are expected to file written arguments for a hearing scheduled for 16 March 2015.⁴⁹



LAPSET corridor project. Source: Kanyinke Sena

5.1.4. Lamu port, conflicts and international mechanisms

The port at Lamu is the backbone of the LAPSSET Corridor development project. According to the LAPSSET Corridor Development Authority,⁵⁰ the port is being developed at Manda bay, a well-sheltered bay off Lamu that has deep waters of around 18m along the main channel and from 5m to 60m in the Bay. The port will therefore be able to accommodate large ships. Once complete, the port will comprise of 32 berths. The development of Lamu port will also include the construction of port-associated infrastructure such as a causeway, port access roads, railway yards, water and electricity supply, port buildings and other port related services.⁵¹

The impact of the port will be enormous. Besides the environmental harms that will result during the development of all the above projects, the population of Lamu is expected to increase from the current 100,000 to 1.25 million people.⁵² Such a large influx of migrants will have an irreversible impact on the cultural properties of Lamu Old Town, a UNESCO World Heritage Site. Lamu Old Town was inscribed as a World Heritage site in 2001 on the basis of its cultural properties.⁵³ According to UNESCO World Heritage Centre,

Lamu Old Town is the oldest and best-preserved Swahili settlement in East Africa, retaining its traditional functions. Built in coral stone and mangrove timber, the town is characterized by the simplicity of structural forms enriched by such features as inner courtyards, verandas, and elaborately carved wooden doors. Lamu has hosted major Muslim religious festivals since the 19th century, and has become a significant centre for the study of Islamic and Swahili cultures.⁵⁴

As soon as the news of a proposed port reached the local Bajuni, Orma and Boni communities, one of their few community based organizations, the Lamu Environmental Protection and Conservation (LEPAC) organization, spearheaded an initiative to unite groups and individuals in a campaign to save the Lamu Archipelago.⁵⁵ Out of this initiative, a coalition of groups came together under the banner “Save Lamu”. The coalition includes community members from a variety of local and national organizations.⁵⁶ Save Lamu raised numerous issues that ranged from the land rights of the indigenous communities in Lamu, consultation and participation in the port development, destruction of Lamu Old Town’s cultural properties and the need for an Environmental and Social Impact Assessment prior to the commencement of the port project.

Besides pursuit of local remedies in relation to these issues, Save Lamu also sought international remedies through the UN Permanent Forum on Indigenous Issues (UNPFII). On 1 February 2012, Save Lamu wrote an “Urgent Call to Protect the Indigenous Lamu Communities and their Environs” to the then African indigenous peoples representative to the UNPFII.⁵⁷ In consultation with other UNPFII members and the secretariat, the UNPFII member requested support from the International Work Group for Indigenous Affairs (IWGIA) enabling him to undertake a mission in March 2012 not only to Lamu but also to various parts of the LAPSSET Corridor. He developed a report⁵⁸ with recommendations targeting the government, UN agencies and indigenous communities.

IWGIA followed up on the recommendations and supported Save Lamu and other representatives from the LAPSSET Corridor communities to participate at the 11th session of the UNPFII in New York in May 2012. The representatives made a joint statement and held meetings with UNESCO, the UN Environment Agency (UNEA that was then known as UNEP at the time), the UN Development Programme (UNDP), the International Fund for Agricultural Development (IFAD) and the UN Special Rapporteur on the rights of indigenous peoples. They also held meetings and shared experiences with other civil society organizations that included, International Land Coalition, Oxfam, Forest Peoples Programme, and the Rain Forest Foundation. In addition, they learnt from and shared experiences with indigenous peoples from all over the world.⁵⁹

The representatives also met with staff of the Kenya mission to the UN in New York. However, they noted that:

The Kenyan Mission to the UN was unsupportive of the lobbying efforts of the Kenyan participants at the forum on LAPSSET. They were highly misinformed on the on-going issues and concerns of the communities, claiming that an EIA and consultation have been completed. They had a lot of misconceptions on the objectives of Save Lamu and other advocacy groups across Kenya.⁶⁰

This collaboration and meetings at the UNPFII had a variety of positive results. Notably, communities along the corridor began working more closely together and formed the LAPSSET Communities Forum (LCF). Through LCF, the communities along the corridor have met repeatedly and developed LAPSSET Corridor wide advocacy strategies. They have also organized meetings with various partners and with the LAPSSET Corridor Development Authority among other government agencies.⁶¹ This collaboration and coordination with the UNPFII also resulted in the greater mobilization of UN agencies around the LAPSSET Corridor issue from a human rights perspective. Many of the UN agencies wrote letters to the government seeking clarification on issues. The UN Special Rapporteur on the rights of indigenous peoples, for example, issued two communications to the government of Kenya over issues pertaining to the LAPSSET Corridor. The rapporteur's first communication was on 16 August 2012. In his second communication dated 2 April 2013, the rapporteur concluded that:

The Lamu Port-South Sudan-Ethiopia Transport Corridor (LAPSSET) project could have potential to provide much needed infrastructural, trade and economic development benefits to the population of Kenya, including the indigenous communities inhabiting the project area and its surroundings. However, at the same time, your Excellency's Government must ensure that all decision-making related to this project is done in the most inclusive and participatory manner possible, with special attention to the social, cultural, environmental and any other concerns that potentially affected indigenous peoples and communities may have with regards to the LAPSSET project. The project should not only avoid undermining indigenous peoples' rights, but should also aim to strengthen their own cultures and social, political and economic systems and institutions. In cases where impacts to indigenous peoples are unavoidable, just and fair redress must be provided. To this end, your Government needs to ensure that the rights of indigenous peoples possibly

affected by the LAPSSSET project are given proper attention and that the necessary safeguards to those rights, as outlined in this communication, are in place.⁶²

However, the government response to UN agencies does not inspire enthusiasm. This is best exemplified through its engagement with the UNESCO World Heritage Committee.

5.1.4.1. UNESCO World Heritage Committee

In addition to interacting with the UNESCO at the UNPFII, Save Lamu followed up with a letter dated 21 June 2012 to the UNESCO World Heritage Committee. The letter highlighted the threats faced by Lamu Old Town as a result of the LAPSSSET Corridor project and called for its “urgent protection as a world heritage site”.⁶³ Specifically, the letter urged the World Heritage Committee to:

Include Lamu Old Town on the List of World Heritage sites in Danger and to call upon the Government of Kenya to halt the construction of LAPSSSET until the Government (a) publicly shares all information on the proposed project with the local communities (b) carries out an independent strategic environmental impact assessment of LAPSSSET Corridor, and facilitates a comprehensive environmental and social impact assessment of the Lamu Port (c) undertakes a participatory mitigation planning process that includes the affected communities (d) investigates and addresses the land rights violations in Lamu, including the illegal land allocation in the Shela water catchment area.

The letter also requested the World Heritage Committee to undertake a joint World Heritage Centre/ICOMOS reactive monitoring mission to be supplemented by a Heritage Impact Assessment as per ICOMOS Guidelines on Heritage Impact Assessments for Cultural World Heritage properties.

If, upon the completion of the mission and the heritage impact assessment, it is found that the LAPSSSET project would threaten the property’s Outstanding Universal Value, the Director-General of UNESCO in consultation with the World Heritage Committee should consult with the government, to develop urgent mitigation measures and monitoring programmes.

Apparently, the World Heritage Committee was already seized of the matter. In its 34th session the Committee requested Kenya to:

at the earliest possible opportunity, inform the World Heritage Centre in accordance with Paragraph 172 of the *Operational Guidelines* as to their intentions with regard to the proposed port project and to provide the necessary details of the project for evaluation by the Advisory Bodies, including a full heritage impact assessment of the potential impact of the project on the Outstanding Universal Value of the property, before any formal commitment to the project has been made.⁶⁴

The State did not submit the required information by the 36th session of the Committee in 2012. At this session, the World Heritage Committee expressed “strong concerns at Kenya’s failure to provide detailed information on the LAPSSSET Corridor and Lamu Port project”.⁶⁵ While reiterating the call for detailed information, the Committee also asked Kenya to “halt and prevent any further construction of the new Lamu Port and

LAPSSET facilities at Lamu until a comprehensive Environmental Impact Assessment (EIA) and Heritage Impact Assessment has been done. The Committee further asked Kenya “to submit to the World Heritage Centre, by 1 February 2013, a detailed report on the state of conservation of the property and the implementation of the above directive, for examination by the World Heritage Committee at its 37th session in 2013.”

Kenya submitted the information required by the Committee, however, while noting the submission of the information, the Committee at its 37th session reiterated its “deep concern about the likely negative impact of the LAPSSET Corridor and the new Lamu Port”, and urged Kenya to “urgently carry out a full Heritage Impact Assessment (HIA)” and “to halt all work on the LAPSSET Corridor and the new Lamu Port until the assessment is complete”.⁶⁶ No information is available as to whether the assessment has been done to date. However, the development of the port and other LAPSSET Corridor components are on-going. It is also important to note that the National Environment Management Authority (NEMA), when issuing an Environmental Impact Assessment License for the construction of the first three berths of Lamu port, had also insisted on the Heritage Impact Assessment.⁶⁷



Source: Kanyinke Sena

6. Lessons learned

The three case studies exemplify the different strategies indigenous peoples use in seeking remedies when their rights are violated or threatened. There are many lessons that can be learned from these case studies. While all are important and useful, the following are notable.

6.1. Organized communities utilize available remedies better

The Turkana, Ajuran and Lamu communities' stories emphasize the need for community organizing in the pursuit of remedies. The Turkana organized demonstrations to force Tullow Oil and both the national and county governments to be more responsive to their needs. The Ajuran organized and hired a lawyer to help them pursue judicial remedies after local processes failed, and communities in Lamu formed "Save Lamu" to pursue local, national and international remedies.

Organized community structures are crucial assets to the communities, the State and corporations. Unfortunately, the State and corporations tend to utilize only formal structures like local government and elected leaders. However, formal structures might not necessarily be representative or responsive to community needs and aspirations. They are also susceptible to corruption. This puts corporate investments at risk as seen in the three case studies. As part of their human rights due diligence, corporations should therefore identify and strengthen community consultation structures when designing and implementing their projects.

6.2. Need to pursue all available mechanisms to seek remedies

To seek remedies when rights are violated or threatened, indigenous communities need to pursue all available mechanisms. In the case studies, the communities pursued local, national (judicial) and international mechanisms in seeking remedies. In the Kenyan context, the Constitution recognizes that access to justice is critical for the attainment of the aspirations of the people of Kenya. It therefore obligates the State to "ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice" (Article 48).

Access to justice for all is ensured through courts, tribunals and alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.⁶⁸ The case studies show that it is not only important for communities to be aware of these mechanisms, but also to pursue either or all of them in the quest for remedies to injustices. Obviously, the various mechanisms will have different results. While communities begin by seeking local remedies, the case studies indicate that the State and/or corporations ignore this until communities resort to violence or courts force them to the negotiating table. Encouragingly, courts are beginning to strongly recognize indigenous communities' economic, social and cultural rights. For example, in the Ajuran case, the court insisted on protecting the "nomadic life" of the Ajuran.

In the past, the lack of *locus standi* and expenses involved in judicial processes has been an impediment for indigenous peoples' access to justice through courts. To have *locus standi* the community needed to demonstrate to the court that they have sufficient connection to and suffered harm from the challenged action in order to support their involvement in the case. This has always been a key issue, especially in the LAPSSSET Corridor area, where many communities were considered squatters in the land they lived and therefore had no legal standing to challenge any actions in relation to the lands. *Locus standi* has also been a challenge for organizations wanting to assist indigenous

communities. But in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* (2012),⁶⁹ the Court of Appeal was emphatic that:

we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process.

Further, anyone can now seek judicial remedies for or on behalf of indigenous communities in Kenya. Article 258 of the Constitution provides that

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.”

This development provides greater opportunities for remedies for indigenous communities along the LAPSSET Corridor.

6.3. Legal assistance and partnerships

In the quest for justice, communities need legal assistance. The Ajuran case shows how a lawyer is necessary in enabling communities to pursue judicial remedies. Similarly, the role of the UNPFII, IWGIA, and other organizations like Natural Justice, in networking and organizing communities along the LAPSSET Corridor has given them greater visibility both nationally and internationally. Elites from indigenous communities should also be encouraged to work for their communities. In many instances, indigenous elites move away from their communities due to the lack of opportunities or involvement in local issues. The county government and the corporations along the LAPSSET Corridor should design programmes that provide opportunities for elites from indigenous communities to remain and work for the affected communities. Experiences of Native American communities indicate that when educated individuals go back to assist their communities, they utilize available mechanisms strategically and productively for the rights of their peoples.

7. Challenges

7.1. Politics

Local politics remain a major challenge for communities seeking remedies.⁷⁰ When communities rise up to demand justice, both the national and county governments

interpret this as political efforts to unseat them from office.⁷¹ Individuals leading and/or supporting communities are also threatened with arrest. In Turkana, a member of parliament who supported community agitations against Tullow Oil was investigated for incitement.⁷² In Lamu, local politicians were opposed to Save Lamu's calls for halting of Lamu Port development until an environmental impact assessment is conducted.⁷³

7.2. Ineffective remedies

As evidenced by the case studies, communities are actively pursuing both judicial and non-judicial remedies. However, the effectiveness of the pursued remedies is debatable. For example, decisions by international mechanisms are rarely taken seriously as evidenced by Kenya's reluctance to act on the World Heritage Committee directives despite repeated calls. Decisions by courts and tribunals are also rarely implemented. This raises the question as to the effectiveness of the remedies and whether there could be alternatives.

7.3. Remedies are expensive

Though the Constitution obligates the State "to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice", access to justice in Kenya is still very expensive. Lawyers charge high legal fees that communities can rarely afford. Very few lawyers are willing to work pro bono. LAPSSET Corridor counties are also vast and the courts and tribunals are located far away from the areas where conflicts occur.⁷⁴ Travel expenses make access to remedies expensive for communities along the LAPSSET Corridor, especially since courts and tribunals take a long time to decide on cases. International mechanisms are also far away.⁷⁵ And though these mechanisms are accessible via email and letters, illiteracy and lack of access to the internet hampers LAPSSET Corridor communities' efforts to seek justice through international mechanisms.⁷⁶ International mechanisms also frequently have an "exhaustion of local remedies" rule that often delays communities' efforts to utilize them in seeking remedies.⁷⁷

8. Recommendations to address the gaps identified in ensuring access to remedy

8.1. Enhance State and corporate respect for the rights of the communities.

Under the UN Guiding Principles on Business and Human Rights, States have a duty to protect human rights while corporations have a responsibility to respect human rights. The duty to protect human rights extends to abuses by third parties, including business enterprises along the LAPSSET Corridor. While the State is discharging this duty, it is clear from the case studies that more needs to be done. The State should encourage and, where appropriate, require human rights due diligence by the agencies along the LAPSSET Corridor. This will be a departure from the current approach where protecting the investor seems to be the key focus with community rights being secondary. Corporations along the LAPSSET Corridor should also "avoid causing or contributing to adverse human rights

impacts through their own activities, and address such impacts when they occur.” This requires the undertaking of human rights due diligence, something that corporations along the LAPSSET Corridor have not done. Their main focus is exclusively on Environmental Impact Assessments.

8.2. Strengthening local remedies

All communities along LAPSSET Corridor have traditional dispute resolution structures that could be instrumental in resolving inter-communal disputes fuelled by the LAPSSET Corridor projects.⁷⁸ These mechanisms can also effectively resolve disputes among communities and with the county governments. However, as communities change due to modern education and religion, these structures are weakening. New local structures that include peace committees and religious institutions led, or other civil society group led, dialogues are increasingly replacing traditional dispute resolution structures.⁷⁹ These traditional and new structures need financial support from the government, project developers along LAPSSET Corridor and other partners to make them function effectively. In pursuit of investments opportunities along the LAPSSET corridor, corporations, at their own cost and for their own good, should invest in operational-level grievance mechanisms in accordance with Guiding Principle no 31 in the UN Guiding Principle on Business and Human Rights.

8.3. Consultation and participation

Absence of consultation and the prevalence of exclusion are the primary source of conflict between indigenous communities the government and project developers in the LAPSSET Corridor. Guaranteeing good faith consultations and effective participation will be fundamental to reducing conflicts.

8.4. Mobile courts

As already mentioned, the vastness of some of the LAPSSET Corridor counties makes access to remedial mechanism challenging. It is therefore important for the government to establish mobile courts as part of its mandate to make justice accessible.⁸⁰ Kenya recently established mobile traffic courts in efforts to reduce road accidents.⁸¹ Kenya could therefore borrow from these experiences and facilitate judges going to the communities to hear a case when it has been filed, rather than expect the communities to repeatedly come to the courts. This way, judicial remedies will be cheaper and more accessible to indigenous communities.

8.5. Speed up legislative process

Kenya has several important legislative measures in the pipeline. Among many others, these include a Community Land Bill, a Mining Bill, and a Natural Resources Benefit Sharing Bill.⁸² Enhancing the consultation process, with a goal of speeding the adoption of these bills, will reduce conflicts and by extension the need for access to remedies.

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**PART III:
CONCLUSION AND
RECOMMENDATIONS**

Conclusion

Conclusion: Lessons Emerging from Indigenous Peoples' Experiences

Dr. Cathal M Doyle

The adoption of the UN Framework and Guiding Principles on Business and Human Rights by the Human Rights Council signalled an expansion of UN human rights regime into the arena of corporate responsibility. The objective of the Guiding Principles is to have a meaningful and practical impact on the lives of those whose rights are most affected by business activities. To meet this objective, the UN Human Rights regime, and the States which it comprises, must ensure that indigenous peoples – who suffer disproportionately from corporate related human rights abuses - have access to effective and culturally appropriate remedies. Failing to do so would undermine the credibility of the rights framework and principles which the UN has adopted. The case studies in this book paint a bleak picture of the current reality with regard to access to remedy as experienced by indigenous peoples. They suggest that improvements in the rhetoric around ensuring respect for their rights and access to effective remedy have yet to be reflected in State and corporate practice. This concluding chapter highlights some of the lessons and key finding which emerge from these experiences and provides a synthesis of the case study recommendations.

One of the important themes emerging from Dr. Dorough's chapter is that the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP) provides indispensable guidance with regard to indigenous peoples' enjoyment of their right to remedy. The Declaration's provisions are supported by, and reflective of, a growing body of human rights standards and jurisprudence. Its provisions are mutually reinforcing and must be read together if they are to realize their goal of furthering indigenous peoples' exercise of their right to self-determination. A number of those provisions specifically address the issue of redress and remedy in relation to violations of indigenous peoples' collective rights, providing a cultural appropriate framework for redress. This is particularly so in the context of impacts on lands, territories and resources, as well as impacts which are of a cultural or spiritual nature. The language of the Declaration provides the necessary flexibility to ensure that consideration is given to the affected indigenous peoples' perspectives in relation to how culturally appropriate remedial mechanisms should be structured and the outcomes they should deliver. This flexibility ensures that remedies will be consistent with the rights and status of the indigenous peoples in question. An important point which the chapter highlights is that under no circumstances should the right to redress under Article 28 of the Declaration be interpreted as legitimizing non-consensual taking of lands, territories and resources. Interpreting the right to remedy in this way would, as pointed out by Dr. Dorough, be ill-informed, intellectually dishonest and

allow profit motives to override respect for rights. A central purpose of the Declaration is to remedy past wrongs and protect against future rights violations by requiring free prior and informed consent, and ensure that there is a right to remedy where such violations occur. Implementation of the access to remedy pillar of the UN Framework and Guiding Principles, as it pertains to indigenous peoples, therefore must proceed in a manner that is consistent with the indigenous rights framework as encapsulated within the UNDRIP.

The UN Guiding Principles include operational-level grievance mechanisms as a core component of the corporate responsibility to ensure access to remedy. These mechanisms are gaining increased attention and, if implemented in a manner that is consistent with indigenous rights, may contribute to redressing certain issues faced by indigenous peoples. The experiences of indigenous peoples in the cases studies presented in this book indicate an absence of such mechanisms on the ground. Where they do exist, they appear to be inadequate to address the core rights violations which the indigenous communities want remedied. At Cerrejón an operational-level grievance mechanism exists, and was included in the 2011 pilot project for the UN Guiding Principles. However, as the Wayuu case (chapter three) illustrates, community members, and their representative organizations, are either unaware of the mechanism, or perceive it as irrelevant or inadequate in terms of addressing their primary and underlying concerns in relation to the mining operation. In the Peruvian Pluspetrol case (chapter four), multi-sectorial roundtables have been established involving the State and the company, however, they have not resulted in active engagement by the company. One of the core recommendations made to the company is that it create and facilitate community access to effective remedial mechanisms.¹ In the Mahan coal mining case in India (chapter five), Hindalco plans to create a grievance mechanism are noted. However, no information is provided by the company as to the mechanism's scope or how it will be established. Likewise in the Malaysian Baram Dam case (chapter six) it was noted that Sarawak Energy Berhad (SEB) does not have a functioning, accessible grievance mechanism. The Vietnamese company, Hoang Anh Gia Lai (HAGL), operating in Cambodia and Laos PDR (chapter seven), appears to have no operational-level grievance mechanism in place. The recommendations targeted at HAGL focus on the need for it to participate in the dispute mediation process led by the IFC-Compliance Advisor Ombudsman (CAO) in relation to the complaint of Cambodian communities, and to resolve disputes with communities in Laos PDR. The case also points to the need for international financial institutions to have effective grievance mechanisms in place to address allegations of rights abuses in projects which they fund directly or through financial intermediaries. Similarly, the recommendation emerging from the Tanzanian experience (chapter eight) is that companies "establish operational-level grievance mechanisms in consultation with indigenous peoples for the purposes of fostering engagement and dialogue" while adhering to international human rights standards, including the right to free prior and informed consent (FPIC). The Kenyan case (chapter nine) points to the need for greater corporate investment in operational-level grievance mechanisms in accordance with the Guiding Principles, while simultaneously ensuring that the role of traditional and other community-based dispute resolution mechanisms is recognized and supported.

The practice of implementing operational-level grievance mechanisms was explored by Dr. Doyle in chapter two which briefly addresses four cases. The Guiding Principles' 2011 pilot project in relation to Cerrejón's grievance mechanism in the territory of the Wayuu in Colombia demonstrates how internal company acceptance of the operational-level grievance mechanism can be realized. However, it points to the importance of ensuring indigenous participation in the development of the mechanism if it is to have legitimacy and relevance for indigenous rights holders. This view was reaffirmed in chapter three, which suggests that the Wayuu do not see the current mechanism as relevant to their primary concerns. The grievance mechanism which Sakhalin Energy operates in the territory of indigenous communities in Russia's far-east provides an example of the importance of culturally appropriate mechanisms that address all of the issues relevant to indigenous peoples from the outset of operations. It also illustrates the role which donor agency requirements can play in promoting corporate respect for indigenous rights and the establishment of grievance mechanisms. Concerns which arise are the mechanism's ineffectiveness in addressing power imbalances and the extent to which the company has benefited from the actions of the regional authorities which have served to undermine indigenous self-determination. The experience of the Subanon of Mt Canatuan in the Philippines with TVIRD is positive in so far as it demonstrates the potential for corporate engagement with indigenous peoples' customary dispute resolution and judicial systems. However, the Subanon are still awaiting culturally appropriate reparations, as demanded by the UN Committee on the Elimination of Racial Discrimination, for the destruction of their sacred mountain. The case therefore raises concerns around the failure of States and corporations to provide adequate reparations for violations of indigenous peoples' territorial, cultural and self-determination rights. Finally, the experiences of the women and men whose rights were seriously violated by Barrick Gold Corporation's security and police in Papua New Guinea and Tanzania raise serious concerns around the use of legal waivers, which foreclose an individual's access to judicial avenues of redress, as part of settlements under operational-level grievance mechanisms. The key learning from these cases is that such waivers are inconsistent with the objectives of the Guiding Principles when viewed in light of indigenous rights standards, and that their use in the context of vulnerable groups can serve to further distort power relations and deny rights to remedy and justice.

The analysis of Mr. Berraondo and Wayuu women's association in chapter three, of the effects of the Cerrejón coal mine on the Wayuu communities' rights, suggests that there are two parallel realities in La Guajira, Colombia. One is that presented by the Wayuu communities - a reality of unremedied wrongs, on-going harms, including major environmental problems impacting on water and food and contributing to extreme poverty and huge discontent. The other reality, presented by Cerrejón, is one in which the company has contributed to the wealth of Guajira. It paints a picture of a world in which there are no problems as the company takes care of everything, including through its policy commitment to respect the Guiding Principles. However, Cerrejón's policies do not include any reference to the rights of indigenous peoples, even though the company's entire operation is located in indigenous peoples' territories. From the perspective of the

Wayuu, Cerrejón's actions are also inadequate as they failed to prevent negative impacts on their rights and consist of inadequate due diligence and remediation processes. Cerrejón has plans to further expand its operations. This would necessitate the rerouting of the Ranchería River and result in further major adverse impacts on the Wayuu. The company is attempting to proceed with these plans despite its legacy, the associated ongoing unremediated issues, and the absence of any guarantee of non-repetition of similar harm. The case demonstrates the range and nature of rights violations which arise in contexts where complaints of indigenous and tribal communities go unaddressed over extended periods. It highlights, not only the need for human rights due diligence to address indigenous peoples' rights prior to any further expansion plans, but also the fundamental importance of publically recognizing legacy issues and addressing them in a manner that is satisfactory to the affected indigenous communities.

In chapter four Ms. Raynal provided a detailed account of the serious impact of oil exploration on Peruvian Amazonian peoples in whose territories blocks 1AB and 8 are located. Despite the communities' longstanding protests, neither the Peruvian State nor Pluspetrol have taken the appropriate actions to provide redress. At the State level significant obstacles exist to access to remedy, including a lack of information and a lack of willingness of the responsible bodies to engage with the complaints made by the communities. As a result, there have been no remedies forthcoming to date in relation to the cases they filed. In addition, environmental oversight bodies are weak, and Pluspetrol has refused to accept their determinations where it has been sanctioned by them. Meanwhile, the actions of more powerful state bodies are geared towards implementing reforms and policies which promote extractive industries to the detriment of indigenous peoples' rights. This is reflected in the fact that 30% of the country's landmass is under mining, oil and gas concessions, with 60% of the oil concessions located in the Amazon. In 2012, following community pressure, the State finally conducted its first environmental assessment of the project. Based on this, it declared that the area was in a state of environmental and sanitary emergency, and initiated a process of dialogue involving the affected communities and the company. While this constituted a step towards ensuring redress, compliance with the declarations has been inadequate. In addition, Pluspetrol has withdrawn from the dialogue process, significantly weakening its potential to deliver effective remedies. Remedial actions taken to date have all been short term measures, such as the distribution of water and the provision of limited compensation to certain communities. They are disproportionate to the harms suffered and the damage caused, and lack measures to ensure that no further harm is caused. A particular concern relates to the uncertainty surrounding consultations on the renewal of the licence for block 1AB (now referred to as block 192). Finally, as the case study points out, from the communities' perspective the issues which arise revolve around protection of territory and consequently are of a strategic nature. As a result, the conflicts which these operations have generated will not be resolved by focusing exclusively on environmental analysis or access to water for consumption and health. Instead their resolution will have to involve addressing the fundamental territorial and self-governance rights of the affected indigenous peoples.

It is worth noting that the Peruvian “law on the right to prior consultation” (la Ley del derecho al consulta previa), which aims to give effect to Peru’s international obligations under ILO Convention 169, has to be interpreted in a manner that is consistent with international human rights standards. Like ILO Convention 169, the Peruvian law acknowledges in article 3 that consent is the objective of consultations. Unlike ILO Convention 169 - which is silent on what should happen with consent is not obtained - article 15 of the Peruvian law states that following consultations and impact assessments a final decision will be taken by the State. This is interpreted by some in Peru as implying that extractive industry projects located in indigenous territories can proceed in the absence of indigenous peoples’ FPIC. However, that same article 15 requires that, when taking such decisions, the State must ensure respect for indigenous peoples’ rights in accordance with the treaties it has ratified. The jurisprudence of the Human Rights Committee (HRC) in relation to the International Covenant on Civil and Political Rights (ICCPR) is of particular relevance in such contexts. In 2009, in its decision in *Poma Poma v Peru* the HRC instructed Peru that, under its ICCPR treaty obligations pertaining to indigenous peoples’ rights, “participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.” In light of this, the right to prior consultation as affirmed under the Peruvian law has to be understood as protecting the right of indigenous peoples to withhold their FPIC for activities which have potentially significant impacts on their rights, such as any extractive industry projects located in their territories. This interpretation is further bolstered by the affirmation by the Inter American Court on Human Rights of the requirement for FPIC as flowing from the American Convention on Human Rights in its 2007 decision in *Saramaka v Suriname* and by the requirement for FPIC in the UNDRIP, the adoption of which in 2007 was actively supported by Peru.

Mr. Gopalakrishnan’s analysis in chapter five of the Indian State’s actions in response to indigenous communities’ effort to obtain access to remedy in the context of the Mahan coal mine points to the ineffectiveness of the responsible institutions to fulfil their duty to protect rights and remedy wrongs. This ineffectiveness is as a result of their inaccessibility, abdication of responsibility, and being subverted or ignored by more powerful State and corporate actors. One of the clearest examples of this is the subversion of the *gram sabhas* (village assemblies) by the district administration. As a result the *gram sabhas* have been prevented from adopting resolutions protecting community forests as envisaged under the Forest Rights Act. Instead, forged resolutions have been issued in favour of the project legitimizing permits to use the forest land for mining purposes. Even the denouncement of the forgery by the Minister of Tribal Affairs and the mobilization of the communities failed to trigger action by the police. On the other hand, district officials and the company have filed civil and criminal charges against the villagers, leading to four arrests in May 2014. Defamatory articles have also appeared in the media citing a leaked Intelligence Bureau report in relation to those opposing the project, alleging they are merely acting on behalf of “foreign funded NGOs”, in particular Greenpeace India. The case demonstrates the corrosive role which the power of corporate actors, and State actors aligned with corporate interests, plays in denying access to remedies and

undermining of State institutions, even in contexts where constitutional and legislative frameworks afford protections to indigenous and tribal peoples' rights, as is the case with the powers of the *gram sabhas* under the Forest Rights Act. The case points to the need to shift the locus of power from centralized State institutions to community controlled structures and processes, such as the *gram sabhas*. This, rather than the creation of new State institutions and legislation, is what is required for genuine empowerment of indigenous communities. The case also addresses the implications for the financial sector of this process of subversion of State institutions. As a counterbalance, and to reduce the risk exposure in the sector, it proposes that greater attention be accorded to the responsibilities of financial actors funding such projects to ensure respect for indigenous peoples' rights, including the requirement for their free prior and informed consent.

The Baram Dam case in Malaysia, outlined in chapter six by Asia Indigenous Peoples Pact, describes the harsh reality which community members face in the absence of effective rights safeguards and remedial mechanisms. Facing the prospect of 6,000 to 20,000 people being displaced, community members have resorted to physically preventing the dam construction from proceeding by blockading the site for over a year. Financial inducements to accept the project, harassment and detention of those who oppose the project, and interference in the appointment of village headmen and chiefs, have rendered consultation processes ineffective. According to the Indigenous Peoples Network of Malaysia (JOAS) many of the country's indigenous communities have filed court cases in order to have their land claims validated. However, these cases are rendered moot due to delays, as injunctions are not issued, thereby enabling development projects to proceed and cause irreversible harm before claims are addressed. In addition, language barriers and culturally inadequate court procedures, in particular around cross examination, constitute major obstacles for indigenous peoples to access to remedy through the courts. The case therefore highlights the challenges to access to remedy where indigenous peoples are not afforded an opportunity to meaningful participation in the planning of large-scale projects, and deficiencies in judicial process prevent them from ensuring that indigenous rights safeguards are respected before project are implemented. It also highlights the important role which customary law should play in any dispute resolution process if barriers to access to justice are to be addressed. Another interesting aspect of the case is that the dam will serve to provide energy for export to Indonesia via cross-border power transmission lines which the Asian Development Bank (ADB) is funding. The ADB rejects the argument of the affected indigenous peoples and their support organizations that it bears some responsibility to ensure that the associated dam building project proceeds in accordance with its safeguards in relation to indigenous peoples' rights. It holds that the dam is not an "associated facility" of the power lines, and therefore the safeguards do not apply. However, the communities argue that the dams are by definition "associated facilities", given that the viability of the transmission line project depends entirely on their construction. This is related to the question as to the extent of the ADB's responsibility as a result of its business relationships with other parties. The requirement under the Guiding Principle 19 is of relevance here, as it holds that responsibility in such scenarios is a function of the "enterprise's leverage over the

entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences". Given the leverage which the ADB holds in this context, the potential severity of the abuse for the affected communities, and the absence of any remedy from the State or corporation, a strong argument can be made that the Bank does indeed have a subsidiary responsibility to use its influence in order to ensure respect for the communities' rights and that its safeguard consequently should apply.

Chapter seven also addresses the responsibilities of financial institutions, in this case the International Financial Institution (IFC), the private sector arm of the World Bank. Mrs Yun Mane describes how HAGL's operations have been associated with illegal seizures of farming and grazing lands and the destruction of forests and sacred sites, and the adverse environmental impacts in 17 indigenous communities located in the districts of Andong Meas and O'Chum, Ratanakiri Province, Cambodia. No compensation was provided for the communal losses and compensation at the household level was inadequate and only accepted due to the absence of any alternatives. The operations were in breach of Cambodian laws and IFC safeguard policies (in particular in relation to transparency, indigenous peoples rights and environmental protections), while IFC itself failed to ensure that the project was subject to prior review and approval and that the client had the capacity to implement it in an appropriate manner. A range of non-judicial mechanisms were pursued, however, the proposed solutions offered inadequate protection to indigenous peoples' land and cultural rights. Judicial remedies were not pursued, as the communities perceived the mechanisms to be ineffective and corrupted, serving primarily to legitimize forced evictions and prosecute human and land rights defenders. International attention following the 2013 Global Witness report entitled *Rubber Barons* led to disinvestment by Swiss-based CBR Investments and attention being focused on Deutsche Bank and the IFC. In February 2014, the communities and their supporting organizations lodged a complaint with the IFC-Compliance Advisor Ombudsman (CAO). The CAO's assessment was concluded in May 2014 and led to the complainants and the company agreeing to engage in a voluntary dispute resolution process, which the CAO is leading. Part of that process is to provide community representatives with capacity building around negotiation and bargaining and to establish the ground rules for negotiations. In addition, HAGL committed to a moratorium for a number of its projects until 30 November 2014. However, community reports indicate that a number of its subsidiaries are nevertheless continuing to clear community forests. One of the important lessons from the case is the constructive role which the dispute resolution processes of financial institutions can play in providing a trusted mechanism to which communities have access. The case also points to the need for greater due diligence in relation to indigenous peoples' rights and more effective oversight of project implementation by financial institutions, in particular where financial intermediaries are involved.

The Tanzanian experience addressed in chapter eight by Mr. Laltaika points to the need for measures which are aimed at facilitating Foreign Direct Investment (FDI) to go hand in hand with the recognition of the rights of those indigenous communities who stand to be most impacted by investment projects. The 25 year struggle of the communities

in the Sukenya Farm case demonstrates that the failure to ensure rights are adequately safeguarded during the project planning stages creates a legacy of rights violations with long term effects. This threatens the pastoralist's way of life, undermines legal certainty for investors and creates significant reputational risk for companies involved in the project. The case also highlights the barriers which indigenous peoples in Tanzania face when engaging with the judicial system and the importance of ensuring access to courts in the home country of corporations if remedies are to be realized. A second, extremely important, point which emerges from the case study is that discriminatory perspectives in relation to indigenous peoples – such as those which belittle their contribution to society or their right to exist as distinct peoples with their own way of life – facilitate rights violations and serve as major barriers to any prospect of access to remedy. A significant divergence exists between the duties which States such as Tanzania have accepted under human rights law and their – frequently rights denying - interpretation of the conditions under which economic development should, or can, proceed. This indicates the urgent need for education of legislators, policy makers and the judiciary with regard to human rights standards, in particular those related to the rights of indigenous and tribal peoples within their borders. In these contexts, the independent responsibility of corporations to respect indigenous peoples' rights gives rise to a heightened due diligence requirement and the need for corporations to ensure that their development projects only proceed in a manner that is consistent with the rights of indigenous peoples. This can be guaranteed by holding good faith consultations to obtain their free prior and informed consent during the project planning phase when the initial investment decisions are being made. Within such a framework, the development of operational-level grievance mechanisms in conjunction with the affected indigenous peoples has the potential to act as an important contribution to effective access to remedy.

A number of important lessons emerge from the experiences of indigenous peoples in Kenya in the context of the Lamu-Port-South-Sudan-Ethiopia Transport (LAPSSET) Corridor. The case study by Mr. Sena highlights the experiences of three distinct communities all of which chose to engage different remedial mechanisms – ranging from traditional dispute resolution systems, to judicial proceedings, to international human rights mechanisms. While different lessons emerge from each of the three experiences, one of the important overarching findings is that the more organized a community is, and the stronger its local governance structures are, the better it is placed to capitalize on the available redress mechanisms - be they at the local, national or international levels. This has implications for companies and the State, as well as communities, as the certainty associated with decisions made by strong community structures provides a context within which investment risk is reduced and enables communities to negotiate from a position of greater unity and power. A second important lesson from the case is that it is essential for communities to have access to a broad range of remedial mechanisms. There is no “one size fits all” in terms of addressing the range of rights violations and issues which indigenous peoples face even within a single project, let alone within a given national or regional jurisdiction. This implies that respect for local level traditional dispute resolution processes is essential, as is the strengthening of judicial and non-judicial avenues at the

national level. The latter, necessitates the removal of any barriers to access to the courts and to justice, such as issues around *locus standi*, for indigenous peoples or discriminatory perspectives in relation to their way of life. Improving the landscape of remedies also implies that States need to be more reactive to recommendations and decisions of regional and international mechanisms. Access to the range of remedial mechanisms which operate in isolation from one another is also insufficient to ensure effective outcomes. To realize this mechanisms have to work in a complementary manner, with escalation channels available where a particular mechanism is ill suited or inadequate to address a particular grievance or complaint. The third lesson which emerges from the three experiences with access to remedy is the importance of access to independent legal assistance and expert advice. In the Kenyan context this is something that could be improved by providing incentives to educated community members to return to assist their communities in their pursuit of access to remedy.

The role and voice of indigenous women in ensuring access to remedy, in assessing impacts and in decision-making processes arose in a number of the case studies. In the Cambodian case one of the key activists in seeking access to remedy on behalf of indigenous peoples is Mrs. Kha Sros, an indigenous Kui. In Colombia, the Wayuu women's association are at the forefront of protecting their communities' rights and demanding control over decisions impacting on their future. In the Peruvian case it was noted that there are particularly profound impacts on the rights of women to health as a result of pollution arising from oil exploration. The rape of women by security at Barrick Gold Corporation's mine in Papua New Guinea offers a clear example of the need for culturally appropriate gender sensitive judicial and non-judicial mechanisms. As the author and Jill Carino have noted in the context FPIC processes there is a need for them to be

comprehensive and respect the collective and individual rights of indigenous peoples, including the rights of indigenous women. Corporations and other actors should not, however, generalize and assume that women are excluded in all indigenous peoples' decision-making processes. There are many indigenous peoples where women have leading roles in decision making. It is also possible for communities to institute their own mechanisms to address issues around the lack of women's participation where such issues exist. Women should be empowered to participate, but this must happen through internal procedures in a culturally appropriate manner and not be as a result of imposed procedures. Indigenous cultures are not static, and capacity-building with communities through culturally appropriate mechanisms can help them in addressing such issues.²

A similar logic applies to the issue of remedial mechanisms which should be gender sensitive and respect the collective and individual rights of indigenous women in their design and operation. However, in the exercise of their right to self-determination indigenous communities themselves, and in particular the women who form a part of them, should be the ones to determine how these processes should operate and what they deem to be culturally appropriate and gender sensitive in terms of structures, processes and outcomes.

Each of the cases addressed in the book shed light on difference aspects of the multiple challenges and barriers indigenous peoples face when seeking access to remedy and justice. Some of the communities in the case studies were relatively fortunate, in so far as they had access to some legal or technical assistance from international NGOs. That said, even in the case of those communities, it is extremely rare that they have an opportunity to present their experiences to a broader audience and to share their important lessons and insights. The number of indigenous communities throughout the world who are facing similar issues, and the incommensurability of their urgent need for legal assistance with the limited legal support available to them, indicates that significant financial commitments are required to ensure access to remedy. Home and host States and corporations whose activities impact on indigenous peoples, have an obligation to ensure that funding mechanisms are established, and independently administered, to provide these communities with the necessary legal and technical assistance. This deficiency in legal assistance also demonstrates the need for more effective, accessible and culturally appropriate non-judicial mechanisms. By working in respectful partnerships with indigenous peoples such mechanisms can be designed, enhanced and operated in a manner which can facilitate greater respect for indigenous peoples' rights and the realization of their right to redress.

Finally, a common underlying theme which emerges from all of the case studies is that power, rather than law, remains the dominant force in shaping relations between indigenous peoples and corporate and State actors. This is why judicial remedies, laws and institutions continue to be regarded by indigenous peoples as serving the interests of business but as inaccessible to them and ineffective for their needs. The obstacles and barriers to access to effective remedy can only be tackled when the implications of this power dynamic are acknowledged and addressed. This calls for a far greater focus than currently exists on investment in, and support for, the empowerment of indigenous peoples. Through genuine empowerment strategies developed in partnership with indigenous peoples, concrete steps can be taken to address these power imbalances and create a context within which self-determination rights can be asserted and meaningful remedies accessed.

¹ Author's translation, original recommendation to the company in Spanish was: "Crear y facilitar el acceso de las comunidades a mecanismos de reclamación eficaces".

² Doyle C. & J. Cariño (2013) Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector (London: Middlesex University, PIPLinks, ECCR)

Recommendations

Recommendations

Each of the case studies concluded with a number of recommendations in relation to access to remedy in the particular context in question. This closing section provides a consolidated synthesis of those recommendations, grouped according to the actors to which they are targeted.

To corporations:

1. publically recognize negative impacts caused by their operations, commit to providing remediation, and take tangible steps to realize this, including through reaching agreements with the affected communities in accordance with the Guiding Principles;
2. revise policies to recognize international indigenous rights standards, including FPIC, and perform updated impact assessments in conjunction with the affected communities, making them publically available as soon as they are completed;
3. establish, in conjunction with directly and indirectly affected communities:
 - protocols for dialogue, consultation and participation in accordance with international standards as affirmed in ILO Convention 169 and the UNDRIP;
 - mitigation plans and permanent monitoring systems with the participation of indigenous authorities;
4. decontaminate and rehabilitate affected areas and take urgent measures to prevent further environmental harms, in particular oil spills and water pollution, ensuring transparency when and where contamination occurs;
5. comply with State imposed sanctions and avoid contesting them or inappropriately influencing the State when it is attempting to ensure compliance with indigenous peoples' rights;
6. condition investment on State compliance with the duty to consult with, and obtain the FPIC of, directly and indirectly affected indigenous peoples;
7. ensure the public disclosure of key documents relating to investment projects and make information on investments and bidding processes for concessions, as well as on future plans, accessible to indigenous peoples and their support organizations in a language and form understood by them;

8. ensure that consultations are meaningful, inclusive and accessible to all affected peoples and communities with due consideration given to their rights, perspectives and current livelihood activities;
9. support and participate in dispute mediation process and adhere to their recommendations and avoid all potentially harmful activities, in particular in relation to land and resource usage, while dispute resolution processes are ongoing;
10. ensure that communities are fully informed about all accessible grievance mechanisms, including those of financial institutions, during FPIC processes; and
11. ensure that operational-level grievance mechanisms:
 - function from the project outset within a framework of due diligence, participatory impact assessments, and benefit sharing agreements;
 - are formalized in FPIC based agreements giving rise to contractual obligations to address rights violations;
 - are developed, operated and overseen in conjunction with indigenous peoples;
 - are based on respect for their judicial institutions, customary laws and practices;
 - address all grievances irrespective of the means through which they are submitted;
 - provide agreed channels for escalation and adjudication of disputes in a timely manner;
 - interface effectively and efficiently with existing judicial and non-judicial mechanisms and under no circumstances obstruct access to these mechanisms;
 - are transparent and based on trusted independent third party monitoring;
 - guarantee culturally appropriate compensation that is fair, just and equitable; and
 - are gender sensitive and designed with the rights and interests of women, youth and the elderly in mind.

To host States:

1. promptly revise legislative frameworks, including those which relate to settlements and compensation, so that they are compliant with indigenous peoples' rights and fully enforce them, including obliging businesses to ensure that their operations are rights-based;
2. adopt urgent measures to avoid environmental harms and require companies to decontaminate lands and water, suspending the issuance of concessions until environmentally affected areas are fully rehabilitated and legal protections guaranteed;

3. demarcate and title indigenous territories, recognize their governance structures and investigate with the indigenous peoples concerned alternative non-extractive forms of development and ensure their effective participation in strategic land and resource use planning;
4. recognize and protect the self-determination rights of indigenous authorities and communities, in particular their right to give or withhold FPIC for land use and mining activities;
5. protect and fulfil the economic, social, cultural, environmental, civil and political rights in accordance with the indigenous peoples' own perspectives on their needs and ensure that they are provided with basic services in a manner acceptable to them;
6. conduct participatory assessments addressing health, environmental, social, cultural and economic impacts of proposed projects;
7. hold good faith consultations with indigenous peoples and obtain their FPIC before issuing concessions or licences for projects impacting on indigenous peoples' rights;
8. establish an independent participatory monitoring mechanism to oversee project operations and the effectiveness of grievance mechanisms with the participation of the indigenous experts and the affected indigenous peoples;
9. require corporations to conduct due diligence addressing indigenous peoples' rights and to conduct participatory environmental, social and cultural impact assessments, wherever they may potentially be impacted by a proposed project;
10. require corporations to prepare a plan in conjunction with indigenous peoples providing culturally appropriate timeframes and adequate budgets and oversight and grievance mechanisms for FPIC seeking processes;
11. publically apologize for harms caused as a result of business activities in indigenous peoples' territories and investigate and sanction companies for violations of rights, obliging them to properly compensate communities and rehabilitate areas, based on the communities own recommendations, for harms caused and the use of their lands;
12. stop criminalization, or any form of harassment of community members who assert their rights and seek redress in the context of business related human rights violations, and take urgent action to punish those responsible in cases where harassment or intimidation occurs;
13. speed up the processing of complaints by establishing special courts, or tribunals staffed by trusted legal experts on indigenous rights, which could serve as escalation channels for other grievance mechanisms. In the case of nomadic peoples establishing mobile courts (i.e. courts which go to the communities) should be considered;

14. create independent credible mediation mechanisms, making use of indigenous customary law as appropriate, in order to support judicial processes aimed at addressing disputes;
15. strengthen the role of National Human Rights Institutions in addressing indigenous peoples rights in the context of corporate activities impacting on them, and ensure that indigenous peoples rights are adequately addressed in National Action Plans aimed at implementing the Guiding Principles;
16. facilitate community access to effective judicial and non-judicial mechanisms and provide them with the necessary financial and technical assistance, including legal aid and advice in the context of strategic litigation and efforts to obtain redress;
17. adopt financial regulations to ensure that investment funding is only authorized for projects which respect indigenous rights, including the requirements for FPIC and effective grievance mechanisms;
18. support dispute resolution processes of international financial institutions and ensure that outcomes respect internationally recognized indigenous rights and are swiftly enforced;
19. respect the requests of affected communities for land restitution and ensure that all compensation and reparations are culturally appropriate and acceptable to the affected communities; and
20. ensure adequate financing of indigenous peoples' autonomous governance structures in accordance with article four of the UNDRIP.

To home States:

1. where necessary modify legal frameworks to facilitate companies registered in their jurisdictions being brought to account for violations of indigenous peoples' rights overseas;
2. conduct and publicize participatory evaluations of the risks and impacts of their companies' operations on the rights of affected indigenous peoples overseas;
3. guarantee the enjoyment of the right to effective, accessible and timely remedy through both judicial and non-judicial mechanisms which ensure adequate reparations in the form of restitution, compensation, rehabilitation and non-repetition;
4. provide communities alleging corporate related human rights violations with the necessary legal and technical expertise, as well as financial resources, to access these judicial and non-judicial mechanisms and conduct civil and criminal investigations of companies, where appropriate sanctioning them for rights violations;

5. participate in the on-going UN process aimed at ensuring that transnational corporations and other business enterprises are held to accountable for violations of human rights (this recommendation applies to both home and host States).

To international and regional human rights systems:

1. request information from home and host States, and where appropriate companies, in relation to measures that have been adopted to enable victims to access effective remedial mechanisms;
2. issue findings and recommendations on measures that should be adopted to address the situation of indigenous peoples whose human rights are affected by corporate activities;
3. support the establishment of effective grievance mechanisms addressing complaints of indigenous peoples on business operations affecting them; and
4. include the establishment of a complaints mechanism in mandate of the ASEAN Intergovernmental Commission on Human Rights.

To industry bodies and certification schemes:

1. develop policies and safeguards which are consistent with international indigenous rights standards, including FPIC, and provide indigenous peoples with access to grievance mechanism which offer mediation and where sought adjudication in relation to alleged human rights harms caused by their members.

To financial institutions and investors:

1. ensure that due diligence addressing indigenous peoples' rights is conducted for all projects impacting on them and monitor client compliance with international standards;
2. ensure that robust environmental, cultural, spiritual and social impact assessments are conducted and that indigenous peoples FPIC is obtained for projects impacting on their rights;
3. review all direct and indirect (i.e. through financial intermediaries) investments to identify any projects with potential impacts on indigenous peoples and ensure access to effective culturally appropriate grievance mechanisms;
4. ensure that the violations are redressed in accordance with the process and outcomes sought by communities, including maintaining investments until disputes are resolved if communities hold that divestment would be disadvantageous for redress;
5. be proactive and initiate investigations in situations where communities are not in a position to raise their grievances and facilitate dispute resolution processes where appropriate;
6. require clients to fully inform indigenous peoples of all grievance mechanisms, including those of financial institutions, as part of their FPIC seeking processes;

7. grievance mechanisms should

- clearly identify sanctions for any violations committed
- result in disinvestment from projects where requested by indigenous peoples in the context of significant adverse impacts on their rights.
- ensure compensation of victims and rehabilitation of lands and resources in a manner identified by the affected indigenous peoples themselves;
- provide for negotiation and mediation on mutually agreed terms and the participation of independent third parties;
- reach a determination where mediation is not possible or is not seen as appropriate by those filing the complaint.

8. ensure the proper implementation of policies and safeguards on indigenous peoples and guarantee that they are fully aligned with the UNDRIP and apply irrespective of the terms used by States to categorize indigenous peoples.

To the international community:

1. urge States to suspend all new projects until the legislative, policy and institutional reforms necessary to uphold indigenous peoples have been fully implemented; and
2. support communities in their complaints to judicial and non-judicial mechanisms and advocate for these mechanisms to ensure that remedies are adequate, culturally appropriate and proportionate to harms.

To the UN Work Group on Business and Human Rights (in keeping with Human Rights Council resolution A/HRC/26/L.1 2014):

1. include a specific focus on indigenous peoples' rights in its agenda item on the issue of access to remedy, judicial and non-judicial, for indigenous victims of business-related human rights abuses, in order to achieve more effective access to judicial remedies at the Forum on Business and Human Rights, and
2. ensure the full and effective participation of indigenous peoples in the consultative process with States in 2015, to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses, including the benefits and limitations of a legally binding instrument.

To civil society organizations:

1. cooperate with indigenous communities to strengthen their capacity to engage in dispute resolution processes and support them in monitoring activities and publically reporting on violations of their rights.

Finally, good faith dialogue is necessary between corporations, international financial institutions, representatives of indigenous peoples, civil society, States and the international community in relation to grievance mechanisms and access to remedy, addressing:

1. the role which the international community, civil society actors and academia could play in the development, oversight and scaling up of indigenous rights-compliant operational-level grievance mechanisms;
2. how to ensure that indigenous peoples' customary institutions and laws, or hybrid dispute resolution systems developed by indigenous communities, are accorded appropriate respect and resourcing in dispute resolution processes and that operational-level grievance mechanisms are entrenched in contractually binding FPIC agreements;
3. government and corporate respect for the collective and individual rights of indigenous women, youth and the elderly, ensuring, through the use of indigenous peoples' own mechanisms, their effective participation in impact assessments and consultation and consent seeking processes;
4. financial management and oversight structures to ensure that company financed grievance mechanisms operate in a truly independent manner;
5. mechanisms and financial resources to ensure empowerment of indigenous peoples;
6. capacity building in relation to indigenous peoples' rights in corporations and States; and
7. steps to acknowledge the legacy of extractive industry activities and initiate processes of reconciliation, in cooperation with indigenous peoples, with the aim of providing culturally appropriate compensation and redress and the building of rights-based relationships.

Annexes

Chapter 4, Annex 1

Declarations of Emergency

Pastaza	Corrientes	Tigre	Marañón
Declaration of 25/03/2013 for 90 working days. Modified 10/05/2013, for 90 working days. ¹	Declaration of 6/09/2013 for 90 working days. Prolonged on 20/01/2014, for 90 working days. ²	Declaration of 29/11/2013 for 90 working days. ³	Declaration of 29/11/2013 for 90 working days. ⁴
District of Andoas and Pastaza (areas indicated on a map) (26 communities)	11 native communities ⁵	10 communities and areas included in the PAC ⁶	17 localities, areas included in the PAC and zones affected by the pipeline ⁷
Water treatment and sanitation for human consumption; health monitoring of drinking water quality; diagnosis of existing water and sanitation treatment systems infrastructure in priority locations.	Water supply for human consumption; improvements in the water treatment systems and in the disinfection of drinking water in priority zones	Water supply for human consumption; health monitoring of drinking water quality; improvement in the water treatment systems; diagnosis of existing water and sanitation treatment systems infrastructure in priority locations	Water supply for human consumption; health monitoring of drinking water quality; diagnosis of existing water and sanitation treatment systems infrastructure in priority locations

¹ 39-2013-MINAM

² 025-2014-MINAM

³ 370-2013-MINAM

⁴ 136-2014-MINAM

⁵ Antioquia, José Olaya, Pampa Hermosa, Sauki, Valencia, Pijuayal, Belén, Sion, San José, Santa Rosa y Nueva Jerusalén

⁶ Ten indigenous communities: Marsella, Andrés Avelino Cáce.es, San Juan de Eartra, Vista Alegre, Nuevo Remanente, Nuevo Cannan, Tenientes Ruiz, El Salvador, 12 de Octubre, Paiche Playa, located along the watershed of the Tjgre River, as well as sites covered by Supplementary Environmental Plan (PAC) for Block 1AB listed below: Location San Jacinto, Forest Location, Ex Refinery Marsella, Location Barira, Location Shiviayacu, Tigre Well 1 X (C/Nuevo Remanenle), located in the province of Loreto, department of Loreto

⁷ Seventeen localities: San Pedro, San José de Saramuro, Alfonso Ugarte, San Gabriel, Nuevo Lima, San Martinde Tipishca, Nuevo Arica, Bolívar, San José de Samiria, Leoncio Prado, San Miguel, San Juan de Lagunillas, Lisboa, Bagazán, Dos de Mayo, Puerto Orlando, Solterito; and the area of Battery 3, the right of way for the pipeline from Bateria 3 to the Marañón Terminal (Yanayacu– Saramuro) in Block 8, the sites not listed in the Supplementary Environmental Plan (PAC) in Yanayacu, right of way for the Yanayacu – Saramuro pipeline for Block 8, and the soil monitoring points envisaged in the Supplementary Environmental Plan (PAC) which corresponds to Yanayacu in the province of Loreto, department of Loreto

<p>Identification of directly and indirectly impacted area for remedial action (OEFA/MINEM)</p>	<p>Identification of impacted zones (Pluspetrol); participatory monitoring and recording of impacted and potentially impacted sites; presentation and implementation of immediate measures addressing contaminated and impacted sites (Protection, isolation and signalling of impacted sites, etc.)</p>	<p>Identification of impacted zones (Pluspetrol); participatory monitoring and recording of impacted and potentially impacted sites; presentation and implementation of immediate measures addressing contaminated and impacted sites (Protection, isolation and signalling of impacted sites, etc.)</p>	<p>Identification of impacted zones (Pluspetrol); participatory monitoring and recording of impacted and potentially impacted sites; presentation and implementation of immediate measures addressing contaminated and impacted sites (Protection, isolation and signalling of impacted sites, etc.)</p>
<p>Presentation and approval of closure plans for impacted areas / contaminated sites (replaced by the following point in May 2013)</p>			
<p>Presentation (Pluspetrol) and approval (MINEM) of soil decontamination plans and implementation of immediate measures to address contamination*</p>			
<p>Epidemiological studies</p>			
<p>Studies on the impact of pollution on species consumed by humans</p>			
<p>Prepare the food safety plan in the environmental emergency area and provide food in the priority communities*</p>			

Evaluation and implementation of environmental management standards and instruments related to emergency declaration processes	Develop a medium and long term action plan for health and environmental measures action plan to ensure the sustainability of the measures taken in this framework	Develop a medium and long term action plan for health and environmental measures to ensure the sustainability of the measures taken in this framework	Develop a medium and long term action plan for health and environmental measures to ensure the sustainability of the measures taken in this framework
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N.B. not all actions are included in the box. We have selected and summarized only those that appeared to be the most relevant to us.

* Actions introduced by the resolution amending the declaration of an environmental emergency

Chapter 7, Annex 1

Annex 1: Village Characteristics

Village Name	Location	No. of HHs	Ethnic Group(s)	Main Livelihood Sources [#]	Land Tenure
1. Inn	Talao commune, Andoung Meas district	78	Kachok	Farming	<ul style="list-style-type: none"> Lived in current location since 1993* No communal title (but regard community forest, spirit forest and grazing land as collectively owned) Approx. 40 HHs have receipts for farming plots and rice fields through D01BB
2. Kachout Leur	Nhang commune, Andoung Meas district	93	Kachok (majority), Khmer, Cham, Lao, Tampoun, Jarai and Vietnamese	Farming, raising livestock, aquaculture, selling timber, selling wild animals	<ul style="list-style-type: none"> Lived in current location since 1998 No communal title (regards residential area, burial ground and protected forest as collectively owned, although not under customary tenure) 84 HHs have receipts for their farming plots through D01BB
3. Kak	Talao commune, Andoung Meas district	89	Kachok	Farming, raising livestock and NTFP	<ul style="list-style-type: none"> Lived in current location since 1998 No communal title but has begun application process HHs with cashew plantation plots close to the concession area have title through D01BB. (Do not want individual title but afraid would lose land.)
4. Kanat Thom	Talao commune, Andoung Meas district	168	Kachok	Farming, raising livestock and NTFP	<ul style="list-style-type: none"> Lived in current location since 2000 No communal title but has begun process and recognized as indigenous community. Most HHs have title over farming plots through D01BB. (Do not want individual title but afraid would lose land.)
5. Kanong (also called Tanong)	Talao commune, Andoung Meas district	80	Kachok (majority), Jarai, Tampoun and Khmer	Farming and raising livestock	<ul style="list-style-type: none"> Lived in current location since 2004 No communal title (regard burial ground, sacred pond and reserved land etc. as collectively owned but attempts to register reserved land was rejected) Some HHs have receipts for farming plots through D01BB. (Do not want individual title because it restricts them from practicing shifting cultivation as per their tradition, and they fear the soil will become unfertile.)
6. Ket	Nhang commune, Andoung Meas district	200	Jarai and Khmer	Farming	<ul style="list-style-type: none"> Lived in current location since 2000 Do not have system of customary/collective land tenure HH have receipts for rice field, farming and residential plots through D01BB.
7. Kresh	Poey commune, O'Chum district	73	Kreong (Majority) and some Tampoun	Farming, hunting, raising livestock, weaving for tourists (women)	<ul style="list-style-type: none"> Lived in current location since 1990 No communal title but have begun process and recognized as indigenous community (regard all land as collectively owned) No other land tenure documentation

Village Name	Location	No. of HHs	Ethnic Group(s)	Main Livelihood Sources [#]	Land Tenure
8. Mailik	Mailik commune, Andoung Meas district	200	Tampoun (majority), Khmer, Jarai and Kachok	Farming	<ul style="list-style-type: none"> Lived in current location since 1985 No communal title (but regard community forest, reserved forest, spirit forest and burial ground as collectively owned) HHs have receipts for their farming plots through D01BB.
9. Mouy	Nhang commune, Andoung Meas district	97	Jarai	Farming, fishing, NTFPs	<ul style="list-style-type: none"> Lived in current location since 2000 No communal title (has not started process but agreed to keep spirit forest, burial ground and communal forest as collective). HHs have receipts for rice fields and farming plots through D01BB.
10. Nay	Nhang commune, Andoung Meas district	100	Kachok (majority), Khmer, Jarai, Tampoun, and Kreong	Farming, raising livestock, logging hunting	<ul style="list-style-type: none"> Lived in current location since 1999 No communal title (tried to register communal forest but rejected by district authorities because its inside a concession area). HHs have receipts for farming and residential plots through D01BB.
11. Nhang	Nhang commune, Andoung Meas district	54	Jarai	Farming, timber and NTFPs and raising livestock	<ul style="list-style-type: none"> Lived in current location since 2000 No communal title Approx. 30 HHs have receipts for farming plots through D01BB.
12. Peng	Nhang commune, Andoung Meas district	64	Jarai (majority) and Khmer	Farming, raising livestock, hunting and collection of forest products	<ul style="list-style-type: none"> Lived in current location since 1996 No communal title (have not started process but residential land, spirit forest, burial ground regarded as collective). HHs have receipts to farming plots and rice fields through D01BB. Do not want individual title but afraid would lose land.
13. Talao	Talao commune, Andoung Meas district	140	Lao (majority), Kachok, Jarai and Khmer	Farming, timber collection	<ul style="list-style-type: none"> No communal title 46 HHs have titles to rice field and farming plots through D01BB. Others have receipts from the commune chief.

[#] Listed are the main livelihood sources practiced traditionally prior to the confiscation of their lands and destruction of their forests. Many of these have been seriously impaired, or are under threat, as a result of the concessions.

^{*} Villagers from time to time move their homes to various locations within the area subject to their customary tenure system. Villages move for a range of reasons such as shifting cultivation, climate conditions, and illness and death in the community prompting relocation to move away from bad spirits. Recorded in the matrix is the year villagers settled in their current location. They have accessed, used and managed the area under their customary tenure system since the time of their ancestors. Displacement from ancestral lands may have occurred during the rule of the Pol Pot regime.

This Annex was included in the Letter dated 10 February 2014 Re: Complaint concerning IFC investment in Dragon Capital Group and VEIL (Project no. 10740 and 20926) from Cambodian NGO's to the IFC-CAO

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“ If the recommendations and lessons which this book offers are given the necessary attention by States and corporations, we will have moved further along the path of implementing the UN Guiding Principles and towards the goal of rights-based engagements with indigenous peoples. ”

Pavel Sulyandziga
Member of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises

