

QUESTIONNAIRE: UN SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS

Theme: "Large-scale development projects and human rights defenders"

To human rights defenders and national institutions - Concise answers will be very much appreciated. Please provide examples to illustrate as much as possible and send additional materials if felt necessary.

- 1. Please indicate what you see as the main challenges and opportunities of a human rights-based approach to development, with particular attention to large-scale development projects and the role, protection and effective participation of human rights defenders. What do you think are the best measures to mitigate the challenges? Kindly provide examples of good practices in this respect.**

Main Challenges

- 1. Non-recognition of the collective rights of indigenous peoples as enshrined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)** – This is the main challenge among indigenous human rights defenders especially now with the increased imposition of the Western development model to indigenous communities also increasing the cases of violations against the civil and political rights and collective rights of indigenous peoples. The non recognition of the right to Free, Prior and Informed Consent (FPIC) of States has sidelined the participation of indigenous peoples to key decision making in matters and projects that affects them and their community. Many indigenous communities are now in struggle to defend their collective rights to their lands and resources against land grabs and extractive industries that will adversely impact their territories. Some country specific cases are cited below.

Indonesia

- The non-recognition of the collective rights of indigenous peoples allows the state to appropriate lands, territories and natural resources without the free prior and informed consent of indigenous peoples. In 2011, the local government of West Kutai District allowed the appropriation of the ancestral lands of the Dayak Benuaq of Kampung Muara Tae, Jempang Sub-district, West Kutai District, East Kalimantan Province, Indonesia in favor of PT. Borneo Surya Mining Jaya, depriving them of their means of subsistence, decent work, and source of identity in favor of palm oil production. The village head who stood by his community has been stripped of his official status without explanation.
- In another case, the Indonesian government has long been ignoring the Cek Bocek indigenous community of Lawin and Labangkar villages, West Nusa Tenggara Province who had been fighting since 1986 against and suffering from the mining operations of PT. Newmont covering over 16,000 hectares of their ancestral territories. This part of their territory was granted to PT. Newmont without their Free, Prior, and Informed Consent. Their right to an adequate standard of living and to the continuous improvement of their living conditions has been impaired with the deprivation of their means of subsistence. Apart from that, their right to remedy by competent tribunal had been denied even with the many efforts made by the community through petitions, pleadings, etc. addressed to district and provincial officials and parliaments, the National Land Agency, regional police and even to the company, and demonstrations which are continuing up to the present.

India

- The Government of India has failed to protect the lands of the indigenous peoples in Meghalaya in spite of the Meghalaya Land Transfer Act passed in 1972, which has totally banned the transfer of land to Non-Tribals and from a Non-Tribal to another Non-Tribal. The dilution of the Land laws is a serious concern in Meghalaya, threatening the survival of the indigenous peoples of Meghalaya. There is a rampant acquisition of land by means of acquisition by Government and parceling off tribal lands to companies, ignoring the survival and livelihood

rights of indigenous peoples. In spite of the Land Act for the indigenous peoples, the government and the people in power have managed to illegally push in amendments, which were never amended in the Assembly as required by the Procedures, laid down in the business rules. This undermines the rights of the indigenous people of the state of Meghalaya and has given opportunity for the various companies to set up base illegally in Meghalaya, violating most of the established norms. This also brings in an influx of non-indigenous peoples from outside Meghalaya, which plays a major part in the alienation of indigenous people from their lands.

- On 3rd November, 2008 a democratic protest was organized under the banner of Mapithel Dam Affected Ching-Tam Organisation (MDACTO) to submit a memorandum to the officers of the Irrigation and Flood Control Department at the Dam site. About five hundred (500) women on approaching the site were stopped by the police and security forces of the Indian Reserve Battalion, Imphal Police Commandos and Policemen from Lamlai Police Station, Imphal East District and not allowed to proceed further. On the insistence of the women folks to submit their memorandum, the security forces resorted to excessive use of force without any warning unleashing a reign of terror. Women that were carrying babies on their backs dispersed and ran in chaos to protect themselves and their babies. However, in an act of cowardice and brutality, the security forces chased them down and were beaten mercilessly that caused severe injuries to 45 women. Many of these women included several from the downstream villages comprising mostly of Meitie community (valley based dominant community of Manipur). The valley is predominantly inhabited by the Meities and the hills by the tribals. Eighty percent (80%) of the affected communities directly depend on farming and resources from the surrounding forests. Official estimate shows that it will submerge an area of 1215 hectares while estimates of NGOs and community organizations go up to 3,568.77 hectares. The area of submergence includes 17 villages, of which 6 villages will be completely submerged.

Bangladesh

- In the north-west of Bangladesh, most Indigenous Peoples lost their traditional lands as the administration listed them as ‘Khas’ (state-owned) land. The Government plans to extract coal in Fulbari of Dinajpur district, where indigenous Santal and Oraon people in more than 76 villages live in fear of eviction. Execution of the project will also degrade the environment of the area. In Moulvibazar district, more than 1,000 indigenous Khasi families face eviction from their ancestral land by a government eco-park project initiated in 2001. A similar project taken up in Garo populated areas threatens to evict 20,000 Garos in Madhupur forest.
- a. **Repressive laws and policies of States and militarization** – National internal security and counterinsurgency programs are key hindrances for human rights defenders in general. In the Philippines for example the Oplan Bayanihan counterinsurgency program of the government has been identified as the cause to the rising cases of human rights violations and extrajudicial killings. This is the case in the killing of Juvy Capion and her two children by the elements of 27th Infantry Battalion of the Philippine Army. Juvy’s husband, Daguil Capion, is one of the tribal leaders in Tampakan, South Cotabato who waged a “pangayaw” (tribal war) against the operations of the Tampakan Mining in their ancestral domain. (*see Annex 1: Factsheet of the killing of Juvy Capion, et al*) Further to this, State forces are allegedly serving more the interest of private companies rather than the people as exemplified by the formation of the Task Force KITACOM (Kiblawan, Tampakan, Columbio, Malungon) of the 39th and 27th Infantry Battalion of the Philippine Army to secure the Tampakan project of SMI Xstrata. (*see Annex 2: Philippine Country Report submitted to the Special Rapporteur on the rights of Indigenous Peoples*)

Same goes with India with their Operation Green Hunt that targets the Naxalites but had been allegedly been used against indigenous communities in the mineral resource areas of Chattisgarh, Bihar and Jharkhand. In Northeast India, the Armed Forces Special Powers Act (AFSPA) has been used to quell the self determination movement of the communities in in the said region. Militarization in indigenous communities in the Chittagong Hill Tracts (CHT) in Bangladesh is likewise being legitimized by the Operation Uttoran (Upliftment) and Shantakaran (pacification) project of the government. (*see Annex 3: Bangladesh Country report submitted to the Special Rapporteur on the Rights of Indigenous Peoples*)

Opportunities

The impact of extractive industries to indigenous peoples is gaining ground among many human rights bodies and institutions with the Southeast Asia Forum for National Human Rights Institutions (SEANF) will be conducting a study looking at the impacts of extractive industries to women, indigenous peoples and other marginalized sectors. The Working Group on Business and Human Rights is likewise coming up with a similar study.

Included in the opportunities is the passage of laws and policies that recognizes indigenous peoples rights which includes the Indigenous Peoples Rights Act (IPRA) of 1997 and the Administrative Order of 2012 on the Revised Free and Prior Informed Consent (FPIC) of the National Commission on Indigenous Peoples in the Philippines. These provide a national legal framework for the participation of indigenous peoples to key activities and programs that impacts them and their territories. The implementation of the said milestone legislation in the Philippines though has been very dismal.

In the ASEAN level, the establishment of the ASEAN Intergovernmental Commission (AICHR) though with a very weak protection mandate is a step in the right direction for the ASEAN to start tackling human rights issues that cuts across countries such as issues on statelessness, migration and corporate accountability among others. The AICHR is currently conducting a thematic study on business and human rights in the ASEAN.

Measures to mitigate the challenges

The Member-States of the United Nations who have voted in favor of the adoption of the United Declaration on the Rights of Indigenous Peoples must translate this Declaration into laws, policies, programmes and plans as a measure towards addressing issues faced by indigenous peoples in their respective countries. Several Member-States have laws in place, like the Philippines, but the implementation of these are still problematic especially when it comes to large-scale developments in indigenous territories (e.g., Philippine case in Annex 2).

Among those underway in passing a law on indigenous peoples rights is the government of Indonesia which is currently working on its Draft Act on the Recognition and Protection of the Rights of Indigenous Peoples. The version of the said Act though as of February 2013 still contained discriminatory definition and terms and still did not recognize the term “masyarakat adat” which refers to indigenous peoples in Indonesia. AMAN, Indigenous Peoples Alliance of the Archipelago, has been monitoring developments on this Act and has been actively engaging with policy makers. *(see Annex 4: Indonesia country report submitted to the Special Rapporteur on the rights of indigenous peoples)*

Monitoring of the compliance of State Parties to their human rights obligations under international law with respect to the rights of indigenous peoples to their land, territories and resources, e.g., their right to an adequate standard of living, their right to a means of subsistence, and their right to an effective remedy in cases where the affected indigenous peoples oppose such destructive projects, is important in holding States accountable.

Further, to mitigate the challenges faced by indigenous human rights defenders, sustained advocacy and lobby with policy makers and key decision makers by indigenous peoples at the country level should be conducted particularly in the passage of laws and policies containing the provisions of the UNDRIP. To be able to achieve this, capacity building on human rights documentation, advocacy, lobby and negotiation have to be conducted intensively at the country and community level for them to be able to advocate for their rights and their community's concerns effectively. Support for resource mobilization for the lobby and advocacy activities at the country level likewise has to be looked into.

- 2. Please explain how, in your view, large-scale development projects can best be elaborated in order to the effective participation of human rights defenders. Please describe participation/ consultation mechanisms in place and provide examples of good practices.**

For indigenous peoples, the recognition and respect of their right to Free Prior and Informed Consent (FPIC); right to their lands, territories and resources and their right to development is very crucial in ensuring that development projects do not exclude/further marginalize any sector of the society.

The principles of FPIC have already been integrated/mentioned in the safeguard policies of the World Bank, Asia Development Bank, International Financial Corporation and IFAD among others. The UNREDD likewise has already issued their guideline on FPIC. The implementation on the ground of the said safeguard policies of the various international financial institutions is still very dismal though. Project staffs at the national and local levels have to be provided with the needed knowledge and capacity to be able to effectively implement the policies.

- 3. How do you think that human rights defenders can effectively monitor the impact of large-scale development projects? Please provide examples of successful experiences/ mechanisms in this regard and kindly address the issues below.**

- a. *Kindly indicate how relevant information about large-scale development projects is made available and accessible to the public. Provide concrete examples if applicable.*

The Public Communications Policy of the ADB and the Policy on Disclosure of Information of the World Bank are among the key avenues for human rights defenders to be able to gain access to information on large scale development projects that these Banks are funding or providing technical assistance to. The information disclosed in their websites though is too difficult to follow and there are still restrictions stipulated in the said policies on information that can and cannot be accessed by the public.

The right to freedom of information is still undeveloped in many countries depriving human rights defenders of access to information related to large-scale development projects. In countries where laws and procedures provide access to information, the process and timing in the provision of such information is problematic. In the Philippines, although the Administrative Order on the conduct of obtaining the free, prior and informed consent of indigenous peoples requires the provision of information, the quality, adequacy, process and timeliness of such information is often contentious (please refer to Annex 2). In many instances, indigenous communities only come to know of the projects when the bulldozers arrive to destroy their farms and forests.

The case of the Jarai in Kung Yuk Village, Pate Commune, Ou Yadav District, Rattanakiri Province, Cambodia, who were fooled into signing out 450 hectares of their ancestral territory in 2007 by the sister of the Minister of Finance, is not uncommon (*refer to Annex 5*).

For indigenous peoples in general, information about large-scale development projects adversely impacting their lands and way of life has not been made available and accessible to them. Many communities were only being provided with information on the benefits that they can get from the project.¹

¹ Check the cases in the following publications: *Tilting the Balance: Indigenous Women, Development and Access to Justice* at <http://www.aippnet.org/home/publication/human-rights/102-human-rights-reports/1266-tilting-the-balance-indigenous-women-development-and-access-to-justice>]; Development Aggression as Economic Growth: A Report by the Asia Indigenous Peoples Pact <http://www.aippnet.org/home/publication/human-rights/102-human-rights-reports/1057-development-aggression-as-economic-growth-a-report-by-the-asia-indigenous-peoples-pact>; Indigenous Peoples and

b. How can defenders complain if they feel that human rights are unduly restricted or violated in the context of the implementation of large-scale development projects? Kindly provide concrete examples of mechanisms in place to seek redress at every stage of the process, that is, assessment, design, implementation, monitoring and evaluation.

The Accountability Mechanism, the Country Safeguard System and the built in grievance mechanisms of each project of the ADB; the Inspection Panel of the World Bank and various national (National Human Rights Institutions); UN Human Rights Mechanisms and Procedures such as the communications procedure of the Special rapporteurs and treaty bodies such as the Committee on the Elimination of Racial Discrimination (CERD) are among the grievance mechanisms available and utilized by indigenous human rights defenders. Most of the complaints from indigenous communities submitted to the Banks though were deemed ineligible due to technical reasons even if the complaint was valid.

Indigenous peoples likewise find it difficult to submit to these mechanisms given that English is not a common language for many indigenous communities. Terms used in many project documents are likewise too technical and is not easily understood the affected communities. These mechanisms should thus provide support for the translation and simplification of their key documents to languages understood by communities. Further, translation support should be provided for submissions other than English to make these mechanisms more accessible to human rights defenders and affected communities at the country and local level.

At the country level even with the presence of national human rights institutions and ministries/commissions for indigenous peoples in some countries, many human rights defenders are not accessing these mechanisms for their lack of independence with the States and outreach as well from these agencies on how they can support human rights defenders. The legal system is likewise one of the avenues for redress but the process of filing a case is so tedious and expensive for many human rights defenders. The end result is most often disappointing as well in many court cases as the perpetrators still remain at large. Governments have criminalized the opposition of indigenous communities against large-scale destructive development projects, resulting to indigenous human rights defenders being killed, incarcerated, threatened, disappeared, and/or slapped with false charges. This is the case of the many victims of extrajudicial killings and disappearance in the Philippines. Among which is Markus Bangit, an indigenous human rights activist in the Cordilleras shot to death en route to the city with his son; and James Balao and Jonas Burgos, both victims of enforced disappearance.

c. How do you ensure that human rights defenders can peacefully voice their opposition to development projects without fear of intimidation or violence of any sort?

Being a human rights defender always comes with risks. The best that we can do is ensure that risks management is identified and a support system is in place. Further, continuous advocacy and lobby for the repeal of repressive laws curtailing the rights to freedom of speech and assembly should be conducted, supported and sustained. Paralegal trainings should likewise be intensively conducted to enable human rights defenders to be able to assert their rights and help their communities.

Meaningful dialogues between human rights defenders, States and development actors should be conducted for all parties to thresh out issues and concerns surrounding the implementation of large scale development projects from inception to post-implementation.

Mechanisms that allow safe access to justice for human rights defenders working on issues related to large-scale development projects must be put in place all along the development of the project, from its inception to post-implementation.

4. **How, in your view, can business and corporations involved in large-scale development and investment projects be best monitored regarding corporate social responsibility principles and their engagement with human rights defenders? What is, in your view, the role of defenders in this process and how could their capacity to engage be strengthened?**

The Organization for Economic Cooperation (OECD), the Global CSO Platform for Development Effectiveness (CPDE), Roundtable for Sustainable Palm Oil (RSPO), UN Working Group on Business and Human Rights and the Extractive Industries Transparency Initiative (EITI) among others are among the mechanisms in place already monitoring the compliance of States and companies to international human rights standards. What needs to be ensured here though is the full and effective representation and participation of indigenous peoples and other sectors in these mechanisms/organizations for them to be able to directly provide their insights and recommendations on large scale development projects that are impacting their territories.

At the national and local level, awareness raising on international norms relating to development projects and capacity building on advocacy, lobby and negotiation among human rights defenders have to be conducted. Further, monitoring tools and specific indicators for marginalized sectors such as indigenous peoples and women have to be developed to be able to monitor the compliance of companies to the principles of corporate social responsibility and their engagement with human rights defenders.

5. **How, in your view, should development cooperation programmes integrate the role of human rights defenders and the notion of a safe and enabling environment in recipient countries? How do you think can the expertise of human rights defenders on the ground be best used to design, implement, monitor and evaluate development cooperation programmes? How should security/ protection concerns be addressed when necessary?**

- How, in your view, should development cooperation programmes integrate the role of human rights defenders and the notion of a safe and enabling environment in recipient countries?

Development cooperation programmes should actively seek the participation of communities affected by large-scale development projects from inception to post-implementation. Most often, the affected communities do not even know the surveys done covering their communities which are included in national development plans. Development cooperation should ensure that governments demonstrate that a process of meaningful consultation done through a safe and enabling environment, has been undertaken with affected communities, taking into account the possibility of them saying no to such projects. Development cooperation must ensure that national economic development does not disproportionately impact the enjoyment of particular communities and individuals on all their human rights. It should be noted that among indigenous peoples, in most cases, it is when these large-scale development projects come into their communities that they become active human rights defenders.

- How do you think can the expertise of human rights defenders on the ground be best used to design, implement, monitor and evaluate development cooperation programmes?

Human rights defenders possess the knowledge, skills, experience, and networks which can inform development cooperation programmes. As a matter of fact, at all levels, human rights defenders had been criticizing, putting forward alternatives, engaging and mobilizing on issues related to large-scale development projects. Among indigenous peoples, the news everyday from all over the world are rife with struggles of indigenous communities against, large-scale dams, plantations, mines, parks, etc. The question then is, how has development cooperation taken advantage of these wealth of inputs and lessons into their programmes, instead of re-inventing the wheel?

- How should security/ protection concerns be addressed when necessary?
 - Ensure a functioning independent national/state human rights commission that will be

responsive to violations of the rights of individuals and collectives. This includes strengthening their mandate from just being recommendatory bodies.

- Legislate and/or institute accountability mechanisms on human rights violations and abuses.
- Support system for human rights defenders must be set up at the national and local level. This will include the involvement of the church, academe and lawyers among others to ensure the safety of human rights defenders at risk. Provision of sanctuary is very important and this is where the Church plays a key role.