NO RIGHTS, NO JUSTICE
EXPERIENCES OF INDIGENOUS PEOPLES AFFECTED BY CORPORATE ACTIVITIES
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Published by:
Asia Indigenous Peoples Pact (AIPP)
108 Moo 5, Tambon Sanpranate, Amphur Sansai
Chiang Mai 50210 Thailand

www.aippnet.org
www.iphrdefenders.net
www.iva.aippnet.org
www.ccmin.aippnet.org

Edited by: Cathal Doyle and Luchie Maranan

Layout and cover design: AIPP Printing Press

Cover Photos: Tanya Lee/International Rivers, Highlanders Association, Manik Soren

This briefing paper is supported by

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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
Two-thirds of the estimated 370 million self-identified indigenous peoples are in Asia, enriching the region’s enormous cultural and linguistic diversity. They have strong cultural attachment to and livelihood dependence on land, forests and waters, and the natural resources therein. Their ownership of, and unique collective historical connections with their territories have continuously been developed and maintained through complex and diverse customary land and resource use management systems that are repositories of tangible and intangible wealth.

In Asia, “indigenous peoples” as a term is contentious. The fact remains, however, that the individual and collective rights of peoples who self-identify as indigenous peoples are being violated on a daily basis. All too often, their lands, territories and resources are sacrificed and expropriated for state-sponsored development and corporate projects that lead to gross and wide-scale violations of their collective rights especially their rights to their lands, territories and resources. The granting of concessions for mining, logging, plantations, and other extractive industries—as well as infrastructure development for national development—have dispossessed and marginalized many indigenous peoples in Asia.

Although all states in Asia voted for the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on September 13, 2007, many refuse to respect and implement indigenous peoples’ collective rights, especially to their lands, territories and resources and to self-determination. Several Asian states, underpinned by legal systems inherited from colonial times, have arrogated to themselves the right to allocate, regulate and determine land and resource ownership, use, control and development. These systems, imposed on indigenous peoples, often do not recognize the historical and customary use of lands and resources that they have nurtured and managed for centuries based upon their inherent rights and traditions. This has also led to the loss of these peoples’ cumulative collective indigenous knowledge and worldview that have enabled them to sustainably develop their fragile homelands and unique cultures over the centuries.

The formal legal recognition and status granted by Asian states to indigenous peoples varies from country to country. In a number of countries, indigenous peoples have constitutional recognition, while in others they are invisible in the fundamental law of the land. Still in other states, the use and applicability of the term indigenous peoples remains contentious. However, legal recognition, even when conferred does not always guarantee the full range and enjoyment of individual and collective rights. In some Asian countries, it is limited, conditional or not properly implemented. It also does not extend to all indigenous peoples within the country, and is often glossed over when state or private business interests prevail. The absence of formal legal recognition often results
in indigenous peoples being denied many basic rights and services including collective rights based upon national and international human rights law.

**Bangladesh**, which abstained in the vote on the adoption of the UNDRIP, has not confered formal legal recognition to indigenous peoples in the manner of their choice. The Constitution of Bangladesh refers to them as “tribes, minor races, ethnics, sects and communities” (Art 23A). The associated constitutional amendment in 2011 has been condemned by indigenous peoples throughout the country.

In **Cambodia**, the 2009 National Policy on Development of Indigenous Peoples uses the term “chuncheat daoem pheak tech” which literally means “minority original ethnicity” in its documents to refer to peoples who are not Khmers, Chams, Chinese, Laos, Thais, or Kinh (Vietnamese). The 2001 Land Law of Cambodia recognizes the collective rights of indigenous communities to their traditional lands. Also, indigenous communities are entitled to register their communal land and receive a collective land title for the protection and management of their traditional lands to meet their needs. It has been more than a decade since the land law was passed in 2001, but only five communal titles have been granted so far to the indigenous communities. The 2002 Forestry Law also makes explicit reference to the rights of indigenous communities.

In **India**, only 461 of the estimated 635 ethnic groups are acknowledged as Scheduled Tribes or adivasi, the terms by which indigenous peoples are known. There is a constitutional provision which recognizes the customary laws in North East India such as Article 371A for Nagaland and Article 371G for Mizoram. Another provision includes the Sixth and Fifth Schedule area, which allows autonomy or local self-governance in tribal/adecimal areas. The Forest Rights Act (FRA) of 2006 recognizes the rights of “forest dwelling communities” to own and use lands that they occupy; use forest resources; and to manage, protect and conserve forests, biodiversity. The FRA stipulates that gram sabhas (village councils) are responsible for granting or withholding consent for all the projects. However, the government of India is now mulling a proposal to amend the FRA and exempt certain projects such as roads, railways, electricity and irrigation from the need for a village council vote. Activists believe this move could damage the environment and affect poor communities including indigenous peoples.

**Malaysia**’s Federal Constitution recognises the notion of indigenous peoples to an extent (Articles 160(2) and 161(A). However these articles are contentious (as in the case of Sabah natives), incomplete (as in the case of a number of Sarawak natives being left out in the detailed list), and non-inclusive (as in the case of the Orang Asli being completely omitted). The constitutional recognition, however, does not go hand-in-hand with the measures to ensure they are given the necessary support and respect necessary to realize recognised rights, including rights over lands and territories, to traditional ways of life or rights to papers providing proof of citizenship. Many indigenous peoples, especially from remote areas, have great difficulty getting their citizenship papers due to late registration of birth or poor access to the registration department. On land
rights recognition, the Court of Appeals in Sarawak upheld the ruling of the Sibu High Court that the pemakai menoa (territorial domain) and pulau galau (communal forest reserve) are part of Native Customary Rights (NCR) land. This ruling sets a precedent for the more than 200 NCR land cases in Sarawak, Malaysia which are pending in the high court.

In Nepal where a new Constitution is soon to be promulgated, indigenous peoples are campaigning for the right to self-government under a federal system of government in order to have control of their social, cultural and political development. However in spite of the fact that at least 39% of the total population is recognised as indigenous peoples, and the government has ratified ILO Convention 169 on Indigenous and Tribal Peoples, they continue to have the least meaningful political representation in the country, with their freely chosen representatives largely excluded from the constitution-making process.

In the Philippines, the rights of “indigenous cultural communities/ indigenous peoples” are constitutionally guaranteed (Article 2, section 22) and enabled through Republic Act 8371 or the Indigenous Peoples’ Rights Act (IPRA). The IPRA is supposed to protect and promote indigenous peoples’ cultural integrity, the right to own and develop their ancestral lands/domains, and the right to free and prior informed consent (FPIC). However, the implementation of FPIC and land rights has been very problematic and manipulated resulting in conflicts and gross violations of indigenous peoples’ land rights.

Indigenous peoples’ lands, territories and resources in Asia are alarmingly and increasingly exploited and expropriated by Asian Governments and sold or provided to multi-national and transnational companies involved in the aggressive pursuit of neoliberal globalization. Mining, hydropower dams, large scale plantations, oil exploration, geothermal projects, economic land concessions, special economic zones and economic transformation programs are among the many projects being imposed on indigenous peoples’ territories.

The influx and operation of extractive industries in indigenous territories more often than not gives rise to violations of the individual and collective rights of indigenous peoples, especially in communities where there is opposition to these activities. While indigenous peoples who are free to control developments in their territories do not generally resist extractive industries, their experiences in Asia in dealing with corporations is reflective of a general lack of respect and disregard for the collective rights of indigenous peoples, especially their right to lands, territories and resources and to give or withhold free prior and informed consent. This situation is perpetuated by Asian governments seeking to boost their economies through foreign investments. The entry of foreign corporations, often facilitated through concessions granted by Asian governments is regulated by policies and laws that are often in conflict with their obligations which undermine the rights of indigenous peoples. Thus, the latter show an overwhelming distrust of their own governments and companies who encroach on their lands.
This paper presents the initial findings of the case studies on the impacts of extractive industry projects in six countries in Asia namely Bangladesh, Cambodia, India, Malaysia, Nepal and the Philippines. The data presented herein are primarily sourced from initial data gathering and documentation of indigenous peoples organizations who have conducted focused group discussions, key informant interviews, ocular visits and research on publicly available company information.

It primarily covers projects in three extractive industry sectors that heavily impact on the lives of indigenous peoples, forcing them to leave their ancestral lands, abandon their livelihoods and ways of life and play host to big corporations without their free prior and informed consent.

In the mining sector, the paper looks into the impacts of the operations of four mining companies on the indigenous peoples in Bangladesh, Cambodia, India and the Philippines. The table below provides an overview of the available information on the scope of operation of the four companies vis a vis the affected indigenous peoples.

“We are not against the development. We simply want that our rights to land, territories and resources are respected.” – Laxmi Prasad Shrestha, Secretary of Local Struggle Committee
<table>
<thead>
<tr>
<th>Company: Mining Operation</th>
<th>Area of Operation</th>
<th>Status</th>
<th>Land area</th>
<th>Indigenous Peoples Affected</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Asia Energy: Coal Mining</strong></td>
<td>Phulbari, Birampur, Nawabganj, Parbotipur Upazilas in Dinajpur District, Northwest Bangladesh</td>
<td>Proposed</td>
<td>6,000 hectares</td>
<td>130,000 individuals with 50,000 individuals belonging to indigenous peoples from 167 villages in Bukshi, Belpukur, Chengmari, Paragram, Pakortoli, Dorgahbara, Denga, and South Shabazpur</td>
</tr>
<tr>
<td><strong>Angkor Gold: Gold Exploration</strong></td>
<td>Five areas in Northeastern Ratanakiri Province, Cambodia/ Yatung Commune, Oyaday District, Ratanakiri</td>
<td>Ongoing</td>
<td>1,167 square kilometers</td>
<td>Yatung Commune-127 households belonging to Jarai indigenous community</td>
</tr>
<tr>
<td><strong>Mahan Coal Limited: Coal Mining</strong></td>
<td>Singrauli District, Madhya Pradesh, India</td>
<td>Proposed</td>
<td>12,000 hectares</td>
<td>62 villages or 59,000 individuals of which 19,000 are scheduled tribes belonging to the Baigas, the Gonds, the Agarias, the Khairawas and the Panikas</td>
</tr>
<tr>
<td><strong>Citinickel Mines and Development Corporation (CMDC): Nickel Mining</strong></td>
<td>Sofronio, Española, Palawan, Philippines</td>
<td>Ongoing</td>
<td>2,176 hectares</td>
<td>3,490 families or 14,075 individuals majority of which belong to indigenous Pelawan and Ke’nuy</td>
</tr>
</tbody>
</table>

In the Dam sector, the paper presents three case studies on the impacts of dams on indigenous peoples in Cambodia, Nepal and Malaysia. The Lower Sesan II Project is being built by the Hydrolancang International Energy Co. Ltd under a Build-Operate Transfer scheme between the Royal Government of Cambodia’s Ministry of Industry, Mines and Energy (MIME) and the Electricity of Vietnam (EVN). In Malaysia, the Baram Dam is one of the twelve dams planned for the Sarawak Corridor of Renewable Energy (SCORE) Project of the Sarawak Government and the state owned company, Sarawak Energy Berhad (SEB). The Baram Dam in particular is a key component in the SCORE Project as it will be one of the energy sources for the West Kalimantan Power Grid, a project being funded by the Asian Development Bank (ADB). In Nepal, the Kabeli-A Hydroelectric Project of the Kabeli Energy Limited, a subsidiary of Butwal Power Company, is being funded by the World Bank.
The table below shows the areas that will be inundated, and the number of indigenous peoples affected, by the dam projects.

<table>
<thead>
<tr>
<th>Project</th>
<th>Company</th>
<th>Status</th>
<th>Area of Operation</th>
<th>Expected Capacity</th>
<th>Surface Area</th>
<th>Affected indigenous peoples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lower Sesan II</td>
<td>Hydrolancang International Energy Co. Ltd</td>
<td>Proposed</td>
<td>Stung Treng, Cambodia</td>
<td>400 MW</td>
<td>335 sq km</td>
<td>1,000 families or 5,000 individuals including Prov and Phnong indigenous peoples</td>
</tr>
<tr>
<td>Baram Dam</td>
<td>Sarawak Energy Berhad</td>
<td>Proposed</td>
<td>Baram Hydro Electric Dam under the Sarawak Corridor of Renewable Energy Project in Sarawak, Malaysia</td>
<td>1200 MW</td>
<td>8966 sq km</td>
<td>26 villages of indigenous Kenyah, Kayan and Penan. Between 6,000-20,000 individuals</td>
</tr>
<tr>
<td>Kabeli-A Hydroelectric Project</td>
<td>Kabeli Energy Limited</td>
<td>Proposed</td>
<td>Amarpur and Panchami of Pachtar District, Thechambu and Nangkholyang of Taplejung District</td>
<td>37.6 MW</td>
<td>862.3 sq km</td>
<td>18,375 individuals belonging to Limbu, Majhi, Rai, Tamang, Sunuwar, Newar, Gurung, Sherpa as well as Dalits</td>
</tr>
</tbody>
</table>

The third sector addressed in this paper is the rubber and palm oil plantations and their impacts in Cambodia, Malaysia and the Philippines. In Cambodia, Hoang Anh Gia Lai holds an Economic Land Concession granted by the Royal Government of Cambodia covering at least 5% of the total area of Ratanakiri Province. In Malaysia, Genting Plantations converted entire indigenous territories in Tongod, Sabah to a plantation. The community of Sofronio, Española in Palawan, Philippines not only plays host to a mining company but has also seen the massive conversion of lands including indigenous territories into oil palm plantations operated by the Agusan Plantation Group of Companies.
Impacts of Extractive Industry Projects in Indigenous Territories

• Impacts on the collective rights of indigenous peoples

The operations of extractive industries in indigenous territories has alienated the peoples from their lands, and resources and is the greatest source of adverse impact on their enjoyment of their collective and individual rights. These impacts are experienced on several levels:

a. Threat of ethnocide

The territory of indigenous peoples is the material base of their identity. They depend on this for their subsistence, derive their knowledge on survival, create unique cultural symbols attributable to them, and on which both the living and dead co-exist both in physical and spiritual forms. Dead ancestors and spirits of nature are as much part of the community of indigenous peoples as the living. In order for these spirits to continue to guarantee the well-being of the living, it is important not to desecrate their designated space in the community—namely sacred and culturally-significant sites. Alienation from the territory in whatever manner, either through forced eviction, land grabbing, inundation and through other means, would be tantamount to ethnocide, and thus loss of identity.

1 Global Witness, “Rubber Barrons”, May 2013, p.16
2 Arthur Neame and Portia Villarante, The Palm Oil Sector and FPIC in Palawan, Philippines

<table>
<thead>
<tr>
<th>Company: Plantation</th>
<th>Area of Operation</th>
<th>Status</th>
<th>Land area</th>
<th>Affected peoples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hoang Anh Gia Lai: Rubber Plantation</td>
<td>Andon Meas and O’chum Districts, Ratanakiri, Cambodia</td>
<td>In operation</td>
<td>47,340 hectares¹</td>
<td>17 villages consisting mainly of Jarai, Kachok, Tampuoncham, Kreung indigenous groups, Laos, Khmer and Vietnamese</td>
</tr>
<tr>
<td>Genting Plantations: Palm Oil Plantation</td>
<td>Tongod, Sabah, Malaysia</td>
<td>In operation</td>
<td>8,830 hectares</td>
<td>2,660 families or approximately 13,000 people in 7 villages belonging to the Sungai and Dusun peoples</td>
</tr>
<tr>
<td>Agusan Plantation Group of Companies: Palm Oil Plantation</td>
<td>Sofronio, Española, Palawan, Philippines</td>
<td>In operation</td>
<td>1,500 hectares²</td>
<td>Undetermined number of indigenous peoples belonging to the Pelawan and Ke’nyu tribes</td>
</tr>
</tbody>
</table>
The loss of lands, territories and resources also jeopardizes the inter-generational transfer of knowledge. Without land for traditional occupations, resources for food, arts, crafts, medicines, etc., knowledge related to these as part of how their identity is defined will also be lost.

Genting Plantation destroyed a portion of the identity of the Sungai and Dusun peoples when they cleared and wiped out Kampung Tekulong which is featured on maps of the British period when they established their occupation of the area prior to the 1930 Sabah Land Ordinance. Distinctive crafts which are part of a peoples’ identity often made from materials sourced from territories, such as rattan which are more sourced from particular territories are now more difficult to obtain, leading to a decline in the practice of craft making like basketry.

In Cambodia, indigenous peoples’ identity is jeopardized by the rapid introduction of Khmer migrant workers of HAGL. These migrant workers are often more articulate, better resourced, and politically savvy and thus quickly dominate the communities. Their behavior is influencing the norms and customs of indigenous communities.

The encroachment of the Genting Plantation on 8,000 hectares of the 8,830 hectares of the Sungai and Dusun peoples composed of 2,660 families living in seven kampongs (villages) in Tongod District in Sabah, Malaysia has resulted in the destruction of the burial sites as a result of clearing and led to the denial of access to areas not yet destroyed. The Sungai and Dusun peoples greatly value their spiritual practice of honoring their dead and their burial sites are highly culturally significant sites thus maintaining these is the material expressions of how they honor the dead who are still considered part of their whole existence. The destruction and denial of access to these burial sites within the contested area is impinging on their right to continue to practice their culture and nurture their identity as peoples. The collective spiritual practice of honoring the dead is an important component of maintaining the integrity of the society because it generates goodwill and well-being not only for the family but to the whole community.

The same is true with the various indigenous peoples affected by the Lower Sesan II dam that is now being constructed between Ratanakiri and Stung Treng Provinces in Cambodia. The indigenous peoples maintain spirit forests and burial sites within the dam impact area. With the on-going clearing for the dam site, some of their spirit forests have been destroyed and more is expected as the construction progresses. The desecration and loss of these spiritual sites has affected the peoples’ ability to conduct propitiation and healing ceremonies that contribute to both the spiritual well-being and cohesion of the community.

b. Fragmentation and internal conflicts

Social relations are important as part of the individual and community’s support system and the fragmentation in the community, and the distrust and conflicts generated by potential projects and on-going nonconsensual extractive
industry projects are weakening the entire social fabric of the society. These effects are particularly notable in the eroding traditional governance systems and structures, and loss of the internal support system.

Projects have created divisions among the people because of perceived economic benefits promised to them and led to confusion and fear of uncertainty due to lack of or limited and distorted information. In the Sabah case, only seven kampongs (villages) decided to push for the recovery of their lands in court while the rest accepted monetary compensation. In the Cambodia case, loss of trust and confidence among indigenous leaders and village members is weakening the solidarity among the villagers and the role of traditional leadership. On the other hand, the traditional leaders are overwhelmed and put in a vulnerable situation by these new developments and demands they place on their skills and knowledge which they are not prepared to take on. In many cases, these traditional leaders do not have the legal literacy and negotiation skills to deal with well-trained and resourced company officials.

In the Philippine case, money is used to bribe tribal leaders to stop their assertion of the need for more equitable benefit-sharing. This is leading to divisions among the Pelawan community leaders and their members on whether to call for outright cessation of Citinickel Mines and Development Corporation (CDMC) operations or settle for compensation for harms caused and accept the benefit-sharing terms and conditions of the company.

Lack of respect for the decision-making processes by companies contributes to the creating generation of mistrust between indigenous leaders and their community members. In Palawan, CDMC invited only panlima [indigenous leader] only to a meeting in their compound, instead of going to the villages to conduct open transparent consultations. Discerning indigenous leaders boycotted succeeding subsequent invitations.
I can already anticipate what will happen in the meeting...they would bribe us to be meek about our rightful assertion to mining shares. It’s unacceptable to my conscience to receive P5,000 if many people are suffering, even P10,000 or P100,000 – I will not betray my indigenous kin for money. Pelawan panlima, Philippines.

Coercion oftentimes accompanies engagement of companies with indigenous leaders and communities. In their attempts to conduct an ‘SEIA process’ at Baram, SEB and their consultants engage in coercive tactics including closed-door meetings with selected individuals in each community, verbal threats to elders, pressure on the youth with monetary incentives and premature acquisition of land without the consent of affected individuals.[1]

The overall effect of these company erodes the traditional-making processes and undermine community leadership structures.

d. Threat to well-being and a life of dignity

“They are gradually killing us ... it is exactly what they want... but it’s them that should get out of our land” Panlima Malasan, Pelawan leader, Philippines

The territory is the source of subsistence for indigenous peoples as it provides food security, medicinal needs, economic opportunities especially from non-timber products and their derivatives, culturally appropriate and quality house-building materials, unpolluted ambient air, among others. Alienation from this territory impinges on the right to life, and the right to an adequate standard of living. The Genting Plantation destroyed the forests where the Sungai and Dusun practiced rotational farming and gathered both timber and non-timber products upon which they relied for their subsistence needs, supplemented by fishing from waterways. However, with the operations of Genting Plantation, water sources both for domestic and farm use has also been polluted, and reduced. Because of lack of land and water to subsist, the Sungai and Dusun in Tongod are forced to use gazetted protected forests for their farming and as their burial grounds. This leads to their coming in conflict with the state authorities thereby exacerbating their situation.

In Amarpur village of Pachthar district in eastern Nepal along the Kabeli River, the husband of Mrs. Nhema Doma Lama died due to stress over the loss of about 90 ropanies of land forcibly acquired for the construction of an access road for the Kabeli-A Hydropower Project. She has become the sole breadwinner for her family of 10. She and other affected families, lost their traditional means of livelihood as a result of the project. They have been displaced and cannot observe their cultural rituals and fallen into poverty.3

The Pelawan of Sofronio Española municipality of Palawan Province, Philippines are forced to practice their rotational farming farther inland away from the mines of CDMC and oil palm plantations. Environmental pollution is
Children suffer from various skin diseases because of the contaminated river. Photo: by IDPI-P-ST

Mining operations have led to decrease in quantity, quality, and diversity of food. The Pelawan also observed that even the bees that pollinate their rice plants are gone because of the noise pollution. Directly impacted by the mining operations of CDMC are about 9,000 hectares of agricultural lands, 50 hectares of aquatic resources, and more than 20,000 hectares of other natural resources. In all cases, the food sources that they used to get freely from the forest and rivers are now hard to obtain, affecting their food security and well-being.

Psychological well-being is affected with the destruction of natural and cultural resources. In Cambodia, indigenous communities believe that the destruction of these forests and other natural resources has angered spirits, causing some sickness and is a source of considerable anxiety. The impact on the psychological well-being of affected individuals is also seen among the Pelawan, for example, in feelings of hopelessness, despair and constant fear as a result of intimidation and uncertainty of the future.

“We are losing heart, frustrated, they were able to proceed operations although many are not really in favor...what did as some leaders allowed it, people did not assert anymore...I feel hapless...” a Pelawan, Philippines.

The reduction in and/or destruction of livelihood sources, and traditional occupations is forcing indigenous peoples to integrate into the cash economy.

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1 Report of Kabeli ‘A’ hydropower project Fact Finding mission of LAHURNIP team conducted in July 2014
Since they are used to subsistence production, they have limited skills in cash crop production or industrial work and thus tend to become very poorly paid daily laborers. On the other hand, since their subsistence production areas are now destroyed or inaccessible, they have to earn enough to meet their subsistence needs. The Pelawan claim that they cannot stand the ill treatment of workers in the mines or palm oil plantations.

“The wild game are now almost all gone and the fish have been depleted, there are few birds left, and there is no honey anymore, which usually had their hives in the tall menggaris trees.” Jaafar Dorong and Lius Meliton, Sungai leaders, Malaysia

The influx of the companies’ migrant workers to supply for labor often results to anti-social behavior and other social issues. In Sabah, workers of Genting Plantation, mostly from Indonesia, have caused some security concerns for locals like thievery, pilfering of the villagers’ crops, and physical violence when drunk during village festivals. These behaviours are new to the villagers and creating unnecessary tension and conflict that need attention. It had been observed that illegal drugs have been increasingly introduced. The application of customary law, traditionally used to resolve any such issues in the communities, is now threatened since the workers do not respect the local culture. In Cambodia, on the other hand, some migrants are acting as middle traders for indigenous products thereby making themselves more economically and politically powerful than the indigenous peoples whose products they are benefiting from.

c. Impacts on indigenous women

Indigenous women are the main subsistence food producers. In Sabah, the entry of migrant workers employed at the palm oil plantation has led to some cases of workers getting involved with the local women who were subsequently left on their own when the workers moved on. In one case, a Bugis estate worker allegedly involved in dealing drugs, cut his wife’s throat and he is now serving a jail sentence. In the Philippines, the Pelawan women, as homemakers, are additionally burdened with the care of children who get sick from the water and air pollution. Girls report having to go farther to fetch water for their cooking needs.

Indigenous women in areas where they are impacted by extractive industries are even more vulnerable than men because of their gender and gender roles. The women of Pulbhari described what may happen when the community is evicted. Mainly responsible for ensuring food on the family table, moving to a new place will severely hamper their ability to engage in subsistence and economic activities which will contribute to their impoverishment.

“You may collect pretty much whatever you need from the place you know, but you cannot find your necessities from an unknown place.” Shapla Mardi, Phulbari, Bangladesh
Dislocation, lack of access to traditional occupations, and limited skills to enter the dominant labour market, may also force indigenous women and girls into exploitative work or prostitution and increase the risk of human trafficking. The safety, security and privacy of indigenous women is often undermined as a result. While indigenous women face increased risks of disease and serious health condition due to contaminated water, air and soil, they also fear that gender-based violence could possibly increase. They expressed their concern about limited mobility that would affect their household activities, travelling to and from the workplace, travelling to schools etc.

“... (due to the fear of possible violence) women may not be able to fetch adequate water regularly, which is very important for household activities... women would have problem taking bath in that unknown place.” Martina Mardi, Phulbari, Bangladesh

d. Impacts on the civil and political rights

A trend that emerges from many indigenous communities asserting and defending their rights to their lands, territories and resources is the punitive response from government authorities and companies.

In Sabah, the Sungai and Dusun peoples movements in the contested area is restricted as gates have been placed in entrances and company guards often report ‘trespassers’ to the police. The same is true of the Pelawan who are restricted entry to coastal areas. These restrictions are enforced against their efforts to access their traditional territories.

In Mahan, India two Mahan Sanghharsh Samiti (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. 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) 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 while the cases filed by the communities are un-acted upon and the government and company continue to violate the rights of the indigenous peoples’ human rights defenders and their communities.

In the Kabeli-A dam case, a project official blamed Mr. Netra Prasad Dhakal, a supporter of affected families, of inciting the people against the project and threatening that there would be bad consequences if he did not get them to
revoke the case filed against the company for the harmful consequences of its operations. This is how the company has responded to demands to account for their responsibility.

These impacts on the lives, well-being and dignity of indigenous peoples resonate with some other indigenous communities across Asia who are facing similar issues. In all the cases, the concerned indigenous peoples’ genuine free prior and informed consent was not sought on the projects in all its stages. Thus, the indigenous peoples of the Phulbari region in Bangladesh, in the Baram area in Sabah, in Sindhuli in Nepal, in the Mahan forest area in India, and those along the Lower Sesan river in Cambodia, chose to defend their collective rights to their lands, territories and resources through various actions, including through accessing international remedies.

**Access to remedy of indigenous peoples affected by EI projects**

In general, obtaining access to remedy for affected indigenous communities has been very challenging. Information on available grievance mechanisms is not provided by either the government or the companies concerned. The fact finding mission on the Baram Dam project affirmed this pointing out the absence of “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”. The absence of a “safe or effective process” through which they could seek to have their project related grievances addressed is a major deficiency in the context of the power dynamics which are at play where joint State and corporate interests are at stake.
a. National Legal system

A legal study conducted by the Indigenous Peoples Network of Malaysia (JOAS) provides an insight into the indigenous peoples’ difficulty in engaging with the judicial system, despite the legal aid available to some of them:

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.

In Nepal, access to the formal justice system, which includes courts and other quasi-judicial entities, has been very restricted due to its limited accessibility especially for the marginalized groups who live in far flung villages, their lack of understanding of the court system, the high processing costs and the tedious procedures of the court. There is also a deficiency in the capacity and professionalism of the judiciary that undermine public perceptions of judicial fairness and independence. Further, the government’s failure to respect or enforce court decisions undermines the respect for the law thus fueling impunity that impedes law enforcement. Added to this is the weakened confidence of the people on the justice sector due to the historical exclusion of many groups in this institution as well as in the legal profession. The police force, courts and prosecutor staff are also almost entirely from the high castes. Women and other excluded groups often face obstacles in entering these professions as a result of cultural resistance and structural barriers.

In Cambodia, the affected communities submitted complaints to relevant local, provincial and national authorities and sought their intervention on the ELC case but all these were futile.

b. Regional and National Human Rights Mechanisms/Institutions

National Human Rights Institutions (NHRIs) provide avenue for redress not fully capitalized by the affected communities. This can be attributed to their lack of awareness on the role of NHRIs, lack of capacity and understanding of NHRIs to handle collective rights violations against indigenous peoples and the lack of independence of NHRIs. Added to this is the absence of enforcement powers of these institutions with in many instances governments failing to implement or simply ignoring their recommendations.

In the case of Nepal, the National Human Rights Commission (NHRC) stated that indigenous peoples have not yet lodged any complaint regarding violations of their collective rights. The only case which it has handled to date is the case of high tension transmission line in Sindhuli district. In this, the Nepal Government, with support from the World Bank, is determined to implement the project but the indigenous peoples and other community members are opposing it. The World Bank has sent several missions to study the situation but conflict is
mounting between the World Bank and the government on the one hand and indigenous peoples and other local people on the other. The NHRC sent a team to study the situation and recommended to the government not to use force against indigenous peoples and other community members.

ASEAN Intergovernmental Commission on Human Rights

In 2009, the Association of Southeast Asian Nations (ASEAN) established the ASEAN Intergovernmental Commission on Human Rights (AICHR) to promote and protect human rights and fundamental freedoms of the ASEAN peoples. As a human rights institution, the AICHR, in its terms of reference is mandated among others to: “(4.8) engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organisations and other stakeholders; (4.9) to consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights; and (4.10) to obtain information from ASEAN Member States on the promotion and protection of human rights.”

In its five years of existence, however, the AICHR as a human rights body has been criticized widely as more promotional and lacking a concrete protection mandate and does not equip it with any concrete role in human rights protection. Even its mandate to engage and consult with ASEAN member states, other human rights bodies, and civil society and other stakeholders had not been maximized by the present body to address emerging human rights issues in the region. The ASEAN principle of non-interference has always impeded the raising of concerns on alarming issues within the ASEAN countries. As a body, it has refused to engage with civil society organizations, citing the lack of terms of engagement and dialogue with the latter. Moreover, the AICHR, much as the other ASEAN bodies, have been very secretive about its work. More often than not, civil society organizations are left in limbo on how the AICHR takes into account submissions and recommendations they provide to the body.

To cite, the AICHR announced its plan to conduct a study on corporate social responsibility, however, the conduct of the study has not been made public. The lack of participation of civil society and other stakeholders in the development of the study was also noted. The study could have a significant contribution to the development of standards in the duties and responsibilities of governments and companies in the promotion and protection of human rights in the conduct of businesses. While the study has been reported as completed, the AICHR has not made the study public, thereby limiting the opportunities for dialogue and collaboration in the development of standards in the region.

In 2011, the AICHR drafted the ASEAN Human Rights Declaration (AHRD) which was adopted by the ASEAN Heads of States in November 2012. The process of drafting was again mired with criticisms due to its secrecy, lack of genuine consultation and inclusiveness. Moreover, civil society, human rights bodies and even governments raised concern on the very weak nature of its contents. The declaration failed to include the rights of indigenous peoples despite all member states having supported the adoption of the UNDRIP. Moreover, its general principles mean that the whole declaration is flawed as it includes “balancing” of rights with government imposed duties on individuals, and subjects the universality of human rights to regional and national contexts.
c. Customary Laws and Traditional Governance Systems
The findings of most of the case studies indicate that the traditional governance systems of the affected communities were undermined and were neither recognized nor respected both either the government or the companies involved.

In the case of the Pelawan and Ke’nuy in the Philippines, their traditional leadership structures and rites are still integral parts of their agricultural activities including the *kaingin* or fallow swidden agriculture. These are however threatened as their traditional livelihoods and economic resource-base are eclipsed by large mines and vast oil palm plantations.

In Cambodia, the traditional practice of collective leadership and land and resource management are being eroded due to the modernized new administrative system set up by the government. Further, elders and traditional leaders were unable to solve the increasing division within the affected communities brought about by accusations against community members who were pro-ELCs for individual benefits.

In Malaysia, 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.  

4 Draft legal study conducted by the Jaringan Orang Osal SeMalaysia (JOAS).

d. Grievance Mechanisms of Companies and International Financial Institutions (IFIs)

Almost all of the case studies point to the non-existence of company based grievance mechanisms. Furthermore, in the consultations conducted by the government or companies relating to projects no information were provided on available grievance mechanisms.

In most cases, communities came to know about the existence of redress mechanisms of IFIs from support groups. In Cambodia, the affected communities filed a complaint to the Compliance Advisor Ombudsman (CAO) of the IFC after failing to get response and actions from the government on their concern regarding the operations of HAGL. The CAO conducted an investigation which led to the temporary suspension of company activities. No compliance monitoring system was set up though, thus even with the temporary suspension, the company has still been continuing land clearing discreetly.
e. Community Initiatives

Given the expense involved in accessing remedial mechanisms and the extended timeframes it takes 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.

In 2010 in Palawan, the Pinagtibukan Kaundaundangan et Palaw-an (PKP), a provincial tribal federation was organized. This strengthened the resolve of the Palaw-an communities to organize themselves, file a complaint against Citinickel Mining Corporation and assert the need for the conduct of a genuine FPIC process. They likewise asserted the need for respect of customary laws, particularly since Mt. Gimbalen is a sacred mountain.

The communities impacted by the Baram Dam have also been conducting blockades for more than a year now to prevent company equipment from entering the project area.

RECOMMENDATIONS

a. To the WG on the issue of human rights and transnational corporations and other business enterprises

- Ensure the compliance of companies to with the UN Guiding Principles on Business and Human Rights as they pertain to indigenous peoples
- Continue to focus on indigenous peoples rights and extend this to address the issue of access to remedy and the role of States, companies and indigenous peoples in realizing this
- Encourage companies to engage with indigenous peoples’ traditional
dispute resolution systems in the context of operational-level grievance mechanism

- Remind companies that grievance mechanisms have to operate within a framework of on-going rights-holder engagement, which in the case of indigenous peoples requires that the principles of self-determination, customary land tenure and free prior and informed consent be respected
- Encourage States to include a specific section on indigenous peoples’ rights in their national action plans and to address the need for culturally appropriate, effective and accessible remedies
- Encourage corporations to adopt policies that affirm their commitment to respect indigenous peoples rights as affirmed under international standards such as the UNDRIP and ILO Convention 169

b. To National and Regional Human Rights Mechanisms

**National Human Rights Institutions**

* Raise the awareness and capacity of those within the institution in relation to indigenous peoples’ rights and in handling cases involving violations of indigenous peoples’ rights
* Conduct awareness raising among communities on the role of NHRIs
* Conduct national land rights inquiries similar to those conducted in Malaysia and Indonesia; and develop strategies to promote the implementation of their recommendations by governments
* Establish a monitoring system to monitor oversight compliance of government agencies with the recommendations provided by NHRIs and to monitor corporate related indigenous rights harms
* Ensure the compliance of States with international human rights instruments/treaties that they are a party to, including monitoring their implementation of the recommendations of the relevant treaty bodies. which in particular for the case of indigenous peoples includes their obligation to implement the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

**ASEAN Intergovernmental Commission on Human Rights**

* Assign a focal point to work towards the creation of a working group for indigenous peoples
* Interpret its current mandate in a manner that maximises its role in protecting human rights
* Work to strengthen its mandate to include receiving and investigating information/communications on human rights violations
c. To governments

* Ensure that national laws and policies are in line with international human rights standards such as the UNDRIP.
* Build the capacity of indigenous peoples as well government and corporate representatives to with the objective of empowering indigenous peoples to assert their rights and ensuring that they are, respected and protected indigenous peoples rights by all State and corporate actors. Provide a mechanism for dialogue between states and indigenous peoples in order to ensure the implementation of indigenous peoples’ rights in their respective countries.
* Ensure Free, Prior and Informed Consent (FPIC) as is a minimum requirement for any project proposed to be implemented in the territories of indigenous peoples. States and project proponents should respect the final decision of communities to either give or withhold consent in line with the UN Declaration on the Rights of Indigenous Peoples and the Outcome Document of the World Conference on Indigenous Peoples (WCIP)
* Ensure adequate legal aid and address culturally inappropriate procedures and other barriers which prevent indigenous peoples from obtaining access to justice through the judicial system.
* Ensure the independence of NHRIs with an authority to take actions against human rights violators.
* Recognize and respect the traditional governance systems of indigenous peoples
* Recognize and acknowledge the roles, contributions, perspectives and aspiration of indigenous women, their equal participation in decision making and representation, their protection against all forms of violence and their rights as women.
* Exercise political will to end impunity and undertake concrete measures to stop human rights violations and militarization of indigenous territories, prosecute human rights violators, protect indigenous peoples’ human rights defenders and ensure justice, and reparation for the victims
* Malaysia: Implement the recommendations of SUHAKAM in relation to the respect for land rights and access to remedy of indigenous peoples in Malaysia, including their recommendation on the review and amendment of relevant laws to align them to internationally accepted norms

d. To Companies and International Financial Institutions

* Include the requirement for Free Prior and Informed Consent (FPIC) in company policies especially when implementing projects impacting on indigenous peoples
* Ensure the establishment of effective, culturally appropriate, grievance mechanisms as part of project design and guarantee indigenous participation in its development
* Furnish available information about the project, its positive and negative aspects, studies in the local languages, and then conduct genuine consultations with the project affected locals and indigenous peoples and obtain and maintain FPIC, in order to avoid the potential conflict, protest and possible actions taken against the project.
* Be transparent in the design, planning and implementation process thereby preventing possible misinformation and confusion about the project.
* Ensure just, culturally appropriate compensation and adequate rehabilitation
**World Bank**

The new proposed draft World Bank Environmental and Social Safeguards particularly the standards for indigenous peoples (contained in ESS7) is still below internationally accepted practice and international human rights law. The activities funded by the World Bank, either directly or through financial intermediaries, must be required to meet the same internationally established human rights standards for indigenous peoples. It is urgent that the following issues in relation to ESS7 be taken into consideration and effectively responded to:

- Immediately remove the proposal that governments can simply “opt-out” of applying the policy requirements intended to protect indigenous peoples (ESS7)
- ESS7 should be the main reference of the Bank and the Borrower for projects affecting indigenous peoples. All other ESS should give reference to ESS7 when it is identified that indigenous peoples will be affected. Further, there is a need to ensure that the provisions in ESS7 are aligned with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) particularly on the recognition of the rights of indigenous peoples to their land, territories and resources, development, Free Prior and Informed Consent (FPIC) and cultural heritage among others.
- The identification of the presence of indigenous peoples in a proposed project area and the formulation of the Indigenous Peoples Plan or the broader integrated community development shall involve the meaningful participation of the affected indigenous peoples and indigenous experts and the plan shall have specific indicators and measures for indigenous peoples to be able to have equitable access to project benefits. This must include, at a minimum, the following characteristics: written agreement on project benefits; the establishment of a project-level grievance mechanism for non-compliance; and clear sanctions and enforcement mechanisms to resolve conflicts at the project level and ensure compliance with agreed plans. The terms of the project benefits included in the plan must be established as part of the process of obtaining and maintaining Free, Prior and Informed Consent.
- Customary decision-making processes of indigenous peoples respect and recognize collective decision of the community, resulting to an independent decision free from coercion or manipulation. Conflicting views shall be resolved by community members and the Bank and Borrower shall adhere to the final outcome of the decision making process taking into account the legitimate views and issues raised by community members as bases for their decision.
- The use of a country’s own laws and policies in place of Bank standards must be allowed only after a higher threshold is met. This includes assessment of the actual practice of that country in meeting the standards incorporated into its national laws and policies and their alignment with international standards, and must also include open consultation with the affected peoples or communities for whom the Bank standards would be set aside.

**Asian Development Bank**

- Share reports and review on the implementation of the Safeguard Policy Statement in projects affecting indigenous peoples
- Conduct an independent evaluation on the implementation of the Safeguard Policy Requirements for Indigenous Peoples
- Ensure that it does not fund projects that are dependent on (or serve to facilitate) other projects which are inconsistent with its own safeguards on indigenous peoples rights