

Corporate responsibility to respect the rights of minorities and indigenous peoples

By Corinne Lewis

Minorities and indigenous peoples around the world continue to face eviction from their lands and other violations of their rights caused by private sector development and extractive projects, such as mining, oil and gas, and logging activities.

Governments tend to regard new development and extractive projects as opportunities to contribute to national economic development and bring benefits to the country, such as employment, infrastructure investment and increased tax revenue. However, minorities and indigenous

peoples often view such projects differently. For them, the land that will be developed is an integral part of their lives and culture; the forests, mountains, plains and water resources are not only crucial to the sustenance of their communities, they also have cultural and religious meaning. The negative impacts of development projects – loss of land and livelihoods, environmental and labour issues, and security implications – often far outweigh any positive benefits, such as employment opportunities or new roads. A few examples of a variety of projects illustrate the severity and breadth of the problem:

Extraction of fossil fuels: Etche, Ijaw, Okrika, Ogoni and other minorities who live in the Niger Delta struggle today with the after-effects of extensive and repeated oil spills in the region, which have damaged their health and livelihoods and destroyed the environment. A 2011 report by the United Nations Environment Programme estimates that cleanup and recovery could take 25–30 years.

Mining of precious minerals: Ipili people were evicted from their land to make way for the Porgera gold mine in Papua New Guinea's highlands in 2009. A local joint venture controlled by Canada-based Barrick Gold Corporation housed and fed over 200 troops, who razed Ipili houses. Rapes of women and killings by the mine's security guards have also been documented.

Agribusiness: In Jambi province on the island of Sumatra, local Indonesian police allegedly worked with the staff of a palm oil plantation, controlled by the Singapore-based Wilmar Group, to evict Suku Anak Dalam indigenous people from three settlements and burn down their houses in August 2011.

Dam construction: The ongoing construction of the Ilisu dam on the Tigris River in Turkey will displace as many as 55,000–65,000 Kurds, create environmental pollution, and affect the water supply to communities in Iraq and Syria.



SUKU ANAK DALAM COMMUNITY MEMBERS LIVING IN THE MIDDLE OF AN OIL PLANTATION, JAMBI, INDONESIA. SOPHIE CHAO/FOREST PEOPLES PROGRAMME

Logging: The Penan indigenous community living in the rainforests in Sarawak, Malaysian Borneo, continue to demand the recognition of their customary rights to land in the forests that have been heavily logged by Malaysia-based companies, including Samling, Interhill and Shin Yang. Penan claim that community members who resist logging operations have received death threats and that Penan women have been raped by workers from the logging companies.

Nature reserves: Ogiek have been subject to repeated mass evictions from Kenya's Mau Forest since colonial times. Most recently, in 2009, the Kenyan Parliament authorized the eviction of all inhabitants from the forest, ostensibly for conservation purposes, although this was done without proper consultation. Two Ogiek land-rights activists were brutally attacked in early 2011. The 40,000 hectare forest is seen as a key area for the development of tourism, as well as power generation projects and tea plantations.

The threats to minorities and indigenous peoples, as well as women within these communities, will increase as their lands are coveted for new projects. With the world's population expected to grow from 7 billion today to over 9 billion by 2050, new sources of energy and mineral supplies, food, water and timber will be required. The World Bank estimates that more than 56 million hectares of farmland (worldwide, although 70 per cent is in Africa) was leased to foreign investors in 2009 alone, and over 227 million hectares of land – an area the size of Western Europe – has been sold or leased since 2001. This has been driven in large part by the need of foreign governments to secure food and bio-fuel sources, and by private investors following the 2008 commodity boom.

As the debate concerning the impact of companies on human rights has intensified, pressure has increased to codify their obligations. Two non-binding documents,

approved by the UN Human Rights Council, seek to create a framework for ensuring companies' responsibility to respect human rights: the 2008 UN 'Protect, Respect and Remedy' Framework for Business and Human Rights (Framework), and its supplement, the 2011 Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework. They elaborate on the human rights-related principles contained in the UN Global Compact (see Box 1), a voluntary corporate responsibility initiative that was launched in 2000, and draws on existing standards and practices.

The Framework establishes three key pillars: states' duty to protect against human rights abuses by third parties, including business; corporate responsibility to respect human rights; and access for victims to effective remedy. Under the Framework, companies must avoid infringing upon human rights and address the adverse impacts of their operations. And this refers to all internationally recognized human rights – not only civil and political rights, but also economic, social and cultural rights – plus fundamental labour standards. In addition, companies should respect the rights of individuals belonging to groups which may be adversely affected by their operations. These include the principles set out by the UN with regard to minorities and indigenous peoples.

The Guiding Principles that operationalize the Framework do not specifically mention the rights of minorities and indigenous peoples, although the commentaries to the principles encourage businesses to consider standards for minorities and indigenous peoples as part of broader due diligence procedures. According to another commentary, states should provide guidance to business enterprises on how to consider issues relating to specific challenges faced by minorities and indigenous peoples.

The corporate responsibility to respect human rights is a voluntary commitment made by companies themselves, except where national laws, such as those with respect to labour standards, non-discrimination, indigenous peoples, health and the environment are applicable to companies' operations. However, in many countries where extractive and development projects are located, such national laws are either non-existent or unenforced.

Companies have recently begun to articulate their commitment to respect human rights in corporate codes, policies and reports. Industry associations, such as the International Council on Mining and Metals (ICMM), and the global oil and gas industry association for environmental and social issues (IPIECA) are also encouraging member companies to respect human rights. While these industry associations and companies specifically address the topic of indigenous peoples, they give very little consideration, if any, to minorities.

Yet the real challenge arises from the fact that companies in the extractive and development sectors continue to perpetrate serious rights violations, including

Box 1: Global Compact principles

Human rights

Principle one: Businesses should support and respect the protection of internationally proclaimed human rights; and
Principle two: make sure they are not complicit in human rights abuses.

Labour

Principle three: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
Principle four: the elimination of all forms of forced and compulsory labour;
Principle five: the effective abolition of child labour; and
Principle six: the elimination of discrimination in respect of employment and occupation.

of the rights of minorities and indigenous communities. Consequently, the question is whether the voluntary commitment by companies to respect human rights is sufficient or whether binding legislation and regulations, new governmental policies and other actions are needed.

Concerns

Land issues

The land leased to companies to develop a project is rarely land that belongs to no one. Even where no formal legal title exists, minority or indigenous communities may have ownership rights under customary law. Companies sometimes lease land that is subject to community ownership directly from the community, as Rio Tinto has done for land owned by Aboriginal communities in Western Australia that contains iron ore deposits. However, the agreement should be a consensual one and the process used to arrive at the agreement should be fair, which was not the case with respect to the agreement signed by the Buela forest community in the Democratic Republic of Congo (DRC) (see Box 2).

Box 2: Minority communities at a disadvantage

The Buela, a forest community in the Congo Basin, in the Democratic Republic of Congo, signed an agreement in 2011 with Sodefor (Société de Développement Forestier), a subsidiary of Nordsudtimber, a Liechtenstein-based company, to allow forest areas used by the community to be logged by the company.

However, the process leading up to the signing was skewed in favour of the company. According to a Congolese lawyer working through an initiative of *Avocats Sans Frontières* with forest communities in the region to ensure respect for their rights, no company representative ever came to discuss the agreement with the community. Instead, Sodefor sent an NGO that it engages, PABO (Partisans et Artisans de Bongandanga). PABO told the community members that it supported them, but actually advocated the company's position and failed to inform the community of its rights and options with respect to the company's proposed agreement.

The lawyer also said the community members' inexperience in these matters meant they were unaware they could discuss and negotiate the terms of the agreement. The presence of military personnel at the signing ceremony, coupled with the memory of the military's arrest, torture and killing of some Buela and rape of Buela women following Sodefor's request for military intervention in 2005, allegedly created sufficient fear in the community members that they simply signed the agreement.

Generally, companies purchase or lease the land from the government. However, governments often either appropriate land or force members of minority or indigenous communities to sell their land. For example, palm oil companies, such as Colombia-based Urapalma, acquired land from Afro-descendant communities in the Choco department in western Colombia through forced sales. Company representatives allegedly colluded with paramilitary groups to present the landowners with offers that were well below the estimated market price; these offers were backed up by indirect or direct death threats.

When companies receive land concessions from the government, minority and indigenous communities are frequently displaced; they are not resettled nor do they receive fair compensation for the land or for the adverse effects of the displacement. For example, when the Tanzanian government leased Sukenya Farm in Western Arusha to a US safari tour operator, pastoralists were forcibly ejected from their land, and continue to be subjected to harassment, beatings and extrajudicial arrests when attempting to access their traditional sources of water on the land.

Displacement can have a disproportionate effect on women from minority or indigenous communities, since they lose not only their livelihoods, but also their roles in the family and community. Moreover, displaced women and girls generally are at risk of exploitation, such as trafficking and prostitution, as well as sexual violence. These risks are compounded by the discrimination faced by many minorities and indigenous communities. Companies do not always consider these effects. Vedanta, a London-based company, failed to evaluate properly the impact of its bauxite mine on women in India's Odisha state, despite evidence that other extractive projects in India had led to 'loss of access to resources and livelihood, greater insecurity and increased vulnerability to violence' for women according to a 2011 report of Amnesty International. Amnesty published a further report in 2012 stating that Vedanta has ignored the reality of its impact on the human rights of all members of local communities.

Consultation and free, prior and informed consent

Companies often receive land concessions from governments that did not consult with or obtain the 'free, prior and informed consent' of indigenous communities affected by a project. For example, the Cambodian government granted a land concession for a rubber plantation to Socfin-KCD, a joint venture controlled by a holding company registered in Luxembourg, without obtaining the consent of the indigenous Bunong community, even though the concession partly overlaps with the Bunong's land.

States' duty to consult indigenous peoples is established in international law under Article 6 of the International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries

(ILO 169). Such consultation with a view to agreement must be provided to indigenous communities whenever consideration is being given to legal or administrative measures that may affect them.

The principle of free, prior and informed consent, contained in Article 32 of the UN Declaration on the Rights of Indigenous Peoples is arguably developing into a customary international law standard. The principle has also been found to apply to states in both a 2007 decision of the Inter-American Court of Human Rights, *Saramaka People v. Suriname*, and a 2009 decision of the African Commission on Human and Peoples' Rights concerning Endorois in Kenya. The legal standard articulated by the two decisions is that in the case of:

'any development or investment projects that would have a major impact within the [community's] territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.'

Moreover, these standards are entering into national law. For example, Peru adopted legislation in September 2011 that follows the ILO 169 approach of consultation leading to an agreement. It also provides that where such an agreement or consent cannot be reached, the government must still take all measures to guarantee indigenous rights.

The emerging obligation to obtain the free, prior and informed consent of indigenous communities falls upon states rather than companies. However, a company's failure to ensure that the government has fulfilled its obligations will likely manifest itself in actions of anger and frustration directed at the company. Shuar indigenous people in Peru (also known as Wampis) blockaded the Morona River to stop Canada-based Talisman Energy from conducting exploratory oil drilling in September 2011 in anger over the lack of consultation.

Recently, some lending institutions have begun to articulate the standard as a requirement for extension of financing to a company. The European Bank for Reconstruction and Development (EBRD) and the International Finance Corporation (IFC) require companies to obtain such consent in relation to projects funded by these institutions. In addition, over 70 banks that have adopted the Equator Principles – a set of standards that allow banks to determine, assess and manage environmental and social risks in projects they finance – incorporate the IFC's standards and thus also impose this requirement on their borrowers.

But, too often, companies consult with indigenous peoples in a perfunctory and superficial manner, and so not only undermine the purpose of the process, but also engender distrust and frustration among communities. The original owner of the Marlin Mine in Guatemala, Canada-based Glamis Gold, was required by the IFC to hold consultations with local communities, including indigenous

Mayans, as a condition for receiving a loan from the institution. While the company held workshops, these served only to inform the community about the planned project, rather than providing opportunities for discussion. Once the scope and environmental impact of the project became clear, the communities staged demonstrations and blocked the road leading to the mine.

Women from minority and indigenous communities may not have any significant voice within the community during the consultation process, or be able to complain about the actions of a company. As one Antanosy woman in Madagascar stated: 'If someone, or a woman like me, tries to complain and talk to the mayor, he may say, "What does a woman know about this problem?"'

The Tachara indigenous community found their land, water and sacred groves under threat when the Ghanaian government granted Azumah Resources Limited permission to prospect for gold in the Upper West Region of Ghana, and miners also came into the area. The community decided to take action; with the assistance of the Center for Indigenous Knowledge and Organizational Development, they drafted a community protocol to protect their traditional knowledge and natural resources. As a result, they were able to drive away miners and bring their case to the regional and national government. Communities in many other countries have now adopted such protocols (see Box 3).

Box 3: Strengthening community resistance

The 'community protocol' is gaining recognition as a tool that can be used by indigenous and other communities to protect their natural resources, livelihoods and community traditions.

The protocol can take a variety of forms, depending on the needs of the community, and often includes:

- a description of the group, including its values, relationship with their land and resources, customary laws and governance system;
- a statement of the community's development aspirations;
- their rights and responsibilities under national and international laws; and
- the process for obtaining the community's 'free, prior and informed consent'.

The protocol serves as a guide to companies or others who wish to engage with the community and access their natural resources. In addition, the process of creating the protocol, with support as required, can contribute to a greater sense of community, understanding of their rights, and legal empowerment.

A good resource is UNEP's website on community protocols: www.unep.org/communityprotocols/resources.asp

So far, the right to free, prior and informed consent has been most clearly stated with regard to indigenous peoples rather than to minorities. However, there are some minorities who claim the right because they, like indigenous communities, own land communally, have religious and cultural links to land and natural resources, and suffer from marginalization and a lack of political power within the country.

Freedom of movement

The presence of an extractive or development project on lands used by minorities and indigenous peoples often restricts their freedom of movement and makes it difficult for them to access vital resources, and cultural and religious sites on the land. Kichwa people in Sarayaku, Ecuador have alleged that their freedom of movement was restricted in their own territory by the actions of an Argentinean oil company, Compañía General de Combustibles (CGC). The company placed explosives in over 450 pits along their traditional hunting trails, according to a report by EarthRights. In July 2012, the Inter-American Court of Human Rights found that Ecuador had violated the community's right to prior consultation, communal property, and cultural identity when it approved the prospecting project, and that CGC's activities had threatened their right to life and personal integrity.

Security issues

When tensions arise with the local community, companies frequently hire security personnel or request police assistance to ensure the safety of the company's facilities. The Voluntary Principles on Security and Human Rights were developed in 2000 by a group of governments, companies and NGOs in reaction to incidents in the 1990s, such as when Shell paid military personnel to suppress resistance to its oil activities in Nigeria. The principles provide guidance to companies on how to prevent human rights violations by hired security personnel and avoid corporate complicity in violations committed by government officials. However, recent reports that Shell has fuelled violence in Nigeria by hiring and arming youth militia groups to protect its facilities suggest that such non-binding guidelines are insufficient to ensure that the rights of local people are protected.

Environmental issues

Extractive and development projects inevitably give rise to alterations to the environment, and can cause extensive damage. This begins with the construction of infrastructure, including the roads, housing, power, water and waste facilities, and continues throughout the operation of the project, which may entail use and disposal of toxic chemicals. All this can cause the landscape to be



DONGRIA KONDH PROTEST AGAINST VEDANTA RESOURCES, NIYAMGIRI, INDIA. *SURVIVAL*

transfigured, and the flora, fauna and ecosystem to be disturbed. Even after a project ends, the land and habitat may remain scarred or irreparably damaged. These activities can disrupt the lives and destroy the livelihoods of the minorities and indigenous communities, who often maintain a close relationship to the natural environment for their livelihoods and also because their religious and cultural practices are linked to the land. Dongria Kondh in India's Odisha state, for example, strongly oppose Vedanta's proposed bauxite mine project in the Niyamgiri Hills where they live. They fear that the project will not only destroy the forests and disrupt the rivers upon which they rely, but also the sacred mountain, Niyam Raja, where their god who protects the people from unnatural deaths resides.

Deforestation commonly imposes hardship on local communities as it affects their ability to obtain food and, potentially, their very survival. Penan, an indigenous community of hunter gatherers who live in Sarawak in the Malaysian part of Borneo, rely on the flora and fauna of the rainforests and the rivers that flow through the forest for nourishment. But, as logging operations and, more recently, oil palm plantations have encroached on their land, Penan have become impoverished and are suffering from poor health; Penan children are increasingly afflicted by diarrhoea and influenza. Other indigenous groups in the region, such as Kayan, who have traditionally grown their food on small areas of land in the forest, have had their lands taken over by oil palm plantations as well.

Chemicals used in extractive projects can have serious repercussions on minority and indigenous communities when they are not properly handled and are released into the environment. In the US state of Montana, around the Zortman Landusky gold mine – operated by US-based Pegasus Gold until it went bankrupt in 1998 – there were over a dozen cyanide spills that polluted the land and groundwater of the Fort Belknap tribes. Even after the closure of the mine, acid mine drainage continues to pollute local water resources.

Companies do not always take the necessary steps to reduce such pollution. For example, gas flares, which burn off natural gas from oil extraction processes, release known pollutants that have been blamed for a wide range of illnesses, from respiratory problems to cancer, and create noise pollution. Companies continue to use gas flaring in the Niger Delta and in other oil operations around the world, despite the existence of technology designed to avoid its use, which is 'already available and commonly used in other countries', according to a 2011 European Parliament report.

The vulnerability of minorities and indigenous communities, when their lands and the air they breathe are being polluted by a company, is compounded by their inability to access information about such harms, or to access adequate health care. When a truck from the Yanacocha mine in Peru spilled 151 kg of mercury over a

40 km stretch of road in 2000, indigenous people picked up the glittering liquid in their bare hands and consequently suffered adverse health effects, including blindness, neurological damage and memory loss. The government estimated that more than 900 people were poisoned.

Though the contract for the sale or lease of land to a company may not explicitly cover use of water, companies generally want to secure water rights as part of the deal; water is essential to most operations. But when enterprises consume significant quantities, this leaves less water available for local communities and their livestock, which is a particular problem in regions subject to long dry periods and seasonal rains. In Chile, a national mining company, Soquimich, bought up and polluted so much of the water in Quillagua town that local Aymara indigenous groups can no longer produce crops, and the majority of people have been forced to migrate elsewhere.

The construction of dams not only displaces local people and destroys biodiversity of an area through flooding, but can also drastically alter the availability of water resources to a community. Two Canadian First Nations communities claim that the Kenney Dam on the Nechako River in Canada, owned by Rio Tinto-Alcan, a subsidiary of the Anglo-Australian Rio Tinto group, has caused a decline in the fish stocks upon which they rely.

Labour issues

Individuals within minority or indigenous communities often have very divergent views of the arrival of a company on or near their lands. Some individuals may see it as a threat to their culture, livelihoods and control over resources, while others consider it as an opportunity for jobs and a welcome move away from their traditional livelihoods. The Organization for Economic Co-operation and Development (OECD), whose 34 member countries formulate policies to improve the economic and social well-being of people throughout the world, encourages companies to employ local workers to the greatest extent possible.

But all too often the hopes of minorities are dashed upon realizing that the available jobs are fewer than promised or expected, are mainly low-paid unskilled positions and are only short term. Forest communities in Madagascar were reportedly angry with Rio Tinto's Canadian subsidiary, QIT Fer et Titane, which controls the ilmenite mine project on the east coast of Madagascar, for breaking promises about employment and training, and instead hiring skilled workers from outside the region.

In some cases, when land is purchased by foreign investors for large-scale agricultural purposes, farmers have lost their livelihoods due to the mechanization of farm processes; for example, when Indian agricultural businesses have bought up land in Africa. In other cases, minorities such as Uighurs in Xinjiang Uighur Autonomous Region,

China, were forced by the government to perform labour on resource development projects, such as agricultural projects, without compensation.

Destabilization of communities

The presence of companies on lands traditionally owned or used by minorities and indigenous peoples can destabilize communities when jobs, profits and benefits, such as the construction of roads and schools, are seen to be unequally distributed among different groups, leading to conflict within communities. Vedanta's planned bauxite mine in Odisha state, India, was opposed by Dongria Kondh people, who are farmers, but was supported by other villagers who are wage labourers. The other communities blocked routes into the area, essentially holding Dongria Kondh under siege. Dongria Kondh drew international attention to their situation and, as a result of widespread criticism of Vedanta, the Indian government suspended the project in 2010. The decision is currently pending appeal.

Companies have also abetted conflicts within minority and indigenous communities by providing assistance to members who support their projects. Achuar spokespersons, in the Peruvian Amazon, allege that Talisman Energy, a Canadian-owned oil company, transported a group of armed members of their community who support Talisman's oil drilling, to confront community protesters in May 2009. Such incidents undermine community traditions of collective decision-making.

In addition, projects can divide different generations in a community as younger people obtain jobs with the company, and thus money and independence, while the older generation risks losing its traditional influence and role. New development and extractive projects have also served to attract significant influxes of individuals from outside communities, as well as the creation of new businesses, including unwanted ones, such as prostitution, alcohol supply and drug trafficking, which significantly disrupt the local social fabric.

Weaknesses in the existing framework to ensure corporate respect for human rights

While the Guiding Principles are a positive step forward, corporate responsibility standards still have some way to go. This is partly due to the fact that international initiatives have so far been voluntary, and partly because local enforcement of national legislation continues to be patchy. Consequently, some of the most vulnerable groups – particularly minorities and indigenous peoples – are not protected from harmful corporate behaviour. This section will explore some aspects of these failings.

Legal redress of violations

Minorities and indigenous peoples who have had their rights violated in connection with a development or extractive project should be able to access legal procedures within their state. However, many of these violations occur in countries with inoperative or ineffective judicial systems, weak governance or internal conflicts. In countries where a fair local judiciary system exists, legal procedures can be costly, time-consuming, psychologically daunting and require expert legal assistance. For many marginalized communities, long travel distances and language barriers are further potential obstacles. These difficulties render national legal procedures practically inaccessible to most minorities and indigenous peoples who have suffered violations of their rights.

The laws of the country in which the ultimate parent company is incorporated may permit criminal as well as civil, tort and negligence claims, but the problems mentioned above for minorities and indigenous communities seeking legal redress are multiplied to a daunting degree when envisioning legal claims in another country. Legal principles, such as the 'corporate veil' that regards a parent company as distinct from its subsidiaries, and thus not liable for the wrongdoings of the subsidiary, also serve as significant obstacles to claims by minorities and indigenous peoples.

Another option is for minorities and indigenous peoples to submit complaints to regional human rights bodies and UN treaty bodies. However, the claimant must normally have exhausted domestic remedies. In addition, the claim must be made against the state rather than the company. The claimants should assert that the state failed to provide sufficient protection against acts by the company and that the state has not implemented systems that permit it to prevent, investigate, punish, and redress human rights violations by businesses. Even where regional human rights bodies and UN treaty bodies issue decisions that protect the rights of minorities and indigenous peoples, there can be problems of ensuring compliance and enforcement, not least when development and extractive projects are involved.

Minorities and indigenous peoples who have been victims of human rights violations also have the possibility of submitting a complaint to a 'National Contact Point' (NCP), a governmental body established by OECD member states who adhere to the OECD Guidelines for Multinational Enterprises (OECD Guidelines). NCPs investigate complaints of potential breaches of guidelines. Once the complaint is determined to be admissible by the NCP, mediation is normally instituted between the complainant and the company. But the NCP has limited investigative capacity and no enforcement powers. Thus, this process does not necessarily guarantee a remedy of the violation, and the procedure is heavily dependent upon the integrity and commitment of the individual NCPs.

Voluntary initiatives

In the absence of sufficient means to ensure compliance, companies are largely left to self-regulate. The Guiding Principles and the OECD Guidelines establish a number of approaches for companies; the question is whether such self-regulation is sufficient.

Due diligence

The Guiding Principles encourage companies to establish due diligence processes that assess ‘actual and potential human rights impacts’. But while companies commonly conduct an environmental impact assessment, such assessments do not generally consider past human rights violations which have affected minority or indigenous communities, ongoing violations that should be remedied, or the future potential harm to such communities as a result of the project. Nor does such due diligence usually consider the different risks faced by women and men.

Grievance mechanisms

The Guiding Principles affirm that businesses ‘should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted’. Company grievance procedures are not a replacement for effective judicial mechanisms. Nevertheless, they do permit local persons to communicate their concerns and complaints, which they may not necessarily express as violations of rights, directly to the company, thereby opening up the possibility of redress of such issues.

But few companies have instituted such mechanisms. While the IFC’s revised performance standards on environmental and social sustainability, which became effective on 1 January 2012 and are also incorporated into the Equator Principles, require borrowers to create a complaints procedure, this only applies to new investments. Therefore, companies that already have loans in place with the IFC or a bank subscribing to the Equator Principles are not required to create grievance mechanisms unless they obtain a new loan for a project.

In order to constitute a satisfactory option for the resolution of issues and problems raised by minorities and indigenous peoples, the grievance procedure must be an effective one. According to the Guiding Principles, this means that such a mechanism must be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning. The key question is not only whether the procedure is ‘effective’ in procedural terms, but also whether it serves to remedy the problem as well as prevent future violations of rights.

Community engagement

While for indigenous peoples, the right to free, prior and informed consent to a project is developing into a customary international law standard, this principle has not yet been applied to minorities. Instead, the general

principle of ‘engagement’ by the company with the local community is becoming the principle relevant to minorities. The OECD Guidelines encourage companies to ‘[e]ngage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects’. The EBRD, the IFC and consequently the Equator Principles also require borrowers to engage with persons affected by their projects. As the notion of ‘engagement’ is vague and there is no legally binding obligation to ‘engage’, in reality minorities have little international legal basis to influence corporate behaviour.

Nevertheless, there are strong arguments in favour of companies taking the views of minorities seriously. Engaging local communities can lead to the company obtaining their support, that is, a ‘social licence’ for the company to operate. Poor community relations at any point in the life of an extractive or development project can lead to demonstrations, road blockages and other acts by the community that are expressions of its frustration about unaddressed concerns, such as the effects of the project on the natural environment or on their access to land. Companies’ continual disregard of such concerns can even result in the suspension of their projects, as has occurred with, for example, Vedanta’s planned bauxite mine project in Odisha, India, China Power Investment Corporation’s Myitsone hydroelectric dam in Burma and Newmont Mining’s Conga gold mine operation in Peru.

Minorities and indigenous peoples are rarely provided with information about the proposed project and plans in their own languages. Mayan indigenous people in the Western Highlands of Guatemala did not fully understand the implications of the proposed plans for Canada-based Goldcorp’s Marlin gold and silver mine project since the Environmental Impact Assessment was produced only in Spanish, whereas the local indigenous Mayan communities speak Mayan, and it was only made available to them by the Guatemalan government for one week. Therefore, language issues alone may block meaningful participation in discussions with companies.

Similar issues arise when companies seek to implement social projects but then fail to consult local communities properly. This generally wastes funds and engenders frustration and resentment in communities. For example, in the Congo Basin in the DRC, the company Sodefor failed to consult with Buela on their needs, and consequently provided unsuitable schools rather than urgently needed medical facilities. The company also coerced the community into granting Sodefor the right to log forest areas used by the community (see Box 2), resulting in tensions that could erupt into actions to block Sodefor’s access to the forest.

Companies’ engagement with minorities and indigenous peoples is only the first step; the essential issue is whether a company acts upon input from local communities. Where the company has engaged with individuals at the local level

who are affected by the project, but then fails to respect the written agreement or its oral promises, the company only fosters a climate of distrust, which can lead to demonstrations to block the company's operations and lawsuits. The people of Etiema, in the Niger Delta in Nigeria, claim that Agip Oil Company made promises – such as compensation payments for deaths of young people – that were never fulfilled, and have threatened a lawsuit against the company.

Reporting

The Guiding Principles state that companies should communicate externally as to 'how they address their human rights impacts' and formally report 'where risks of severe human rights impacts exist'. The number of companies reporting on their respect for human rights is increasing. Such reporting is frequently contained in a social responsibility report that is issued separately from the company's annual report. According to international accounting and advisory firm KPMG, while reporting is quite high for the mining, oil and gas, forestry, and pulp and paper sectors, and nearly 70 per cent of all publicly owned companies issue social responsibility reports, the figure is less than 50 per cent for privately owned firms, which are not subject to as much shareholder and media pressure.

Some governments are adopting regulations that require annual reporting on corporate social responsibility. For example, Denmark updated its law in 2008, and France did the same in 2010. The European Commission is also considering legislation in this area.

Other governments are introducing rules that require reporting related to specific human rights issues. The US recently instituted annual reporting requirements on US companies investing in Burma. Reports must contain information on the company's corporate social responsibility policies, including those related to human rights, its policies and procedures for community engagement, as well as information on involuntary resettlement or dislocation of people in connection with property purchased or leased by the company in Burma. In August 2012 the US, as directed by Section 1502 of the Dodd-Frank Act, also issued rules on disclosure requirements for companies using 'conflict minerals' –that is, tantalum, tungsten, tin and gold – in order to address concerns that such minerals originating in the Democratic Republic of Congo (DRC) or neighbouring countries are fuelling conflict in the region.

Companies do not always apply in practice the express commitments that they make in their reports (see Box 4). Moreover, these reports suffer from several significant weaknesses. First, there is no formal system to monitor the content of such reports at the national or international level, or an external body to evaluate the accuracy of

Box 4: Beware the 'bluewash'

The 2011 sustainability report of Newmont Mining Company, the world's largest gold producer based in the United States, states:

- 'the safeguarding of human rights ... guides our approach to working with our many stakeholder groups, including local communities.
- '[W]e invest in understanding the impacts of our operations from the perspective of indigenous peoples
- Engage with these communities throughout the mine life cycle, building cross-cultural understanding in the process
- Design projects and seek agreement with these stakeholders on programs to create net benefits in their communities.'

However, in practice, throughout 2011 Newmont continued to push forward with its plans for the Conga gold and copper mine project in the Peruvian Andes despite the opposition of indigenous communities in the region.

These communities are concerned about potential pollution from the mine and its effects on their water supply, particularly as it involves the destruction of four mountain lakes and is situated at the headwaters of several river basins.

'Getting rid of the lakes would be like dynamiting the glaciers in the Andes, we'd be creating a problem that impacts the ecosystem', Environment Minister Ricardo Giesecke said in November 2011.

Amidst numerous demonstrations and the objections and concerns of the campesinos, Newmont was forced to suspend construction on the project at the end of 2011. Newmont pledges on its website that work "will continue provided it can be done in a safe, socially and environmentally responsible manner."

But the scale of protest suggest that there is a serious gap between the company's express commitment and its actual practice.

reporting. Many companies express a commitment to respect human rights but do not provide sufficiently detailed information to allow a determination as to whether they have actually implemented such a commitment. Second, minorities and indigenous peoples also have difficulty verifying reports that may use unintelligible business terminology and be written in a language which the communities do not understand.

Third, while some companies report on their impact on the rights of indigenous peoples, there is generally very little information about the rights of minorities, except

with respect to labour rights. This suggests a lack of awareness within companies of the specific rights of minorities, but is also due to the fact that commonly used performance indicators, such as those established by the Global Reporting Initiative, focus on indigenous rights but not minority rights. In any event, these performance indicators are more of a quantitative accounting process rather than a measure of compliance with human rights.

Case study

Corporate abuse flows along BP's oil pipeline

By Kata Halasz

Early in 2011, the UK government ruled that a BP-led oil consortium was not carrying out the human rights responsibilities of multinational companies in its operations on the controversial Baku–Tbilisi–Ceyhan (BTC) oil pipeline.

The 1,770 km pipeline runs from offshore oil fields in the Caspian Sea near Azerbaijan's capital Baku, to Tbilisi, the capital of Georgia, and on to the port of Ceyhan on the southern shores of Turkey in the Mediterranean Sea. Construction of the BP flagship project started in 1993 and was completed in 2006. BP has consistently promoted the BTC pipeline project as exemplary in its approach to human rights.

The ruling followed a complaint lodged in 2003 by a group of six NGOs and human rights organizations under the Organisation for Economic Co-operation and Development's (OECD's) Guidelines for Multinational Enterprises. The BTC pipeline passes through areas with significant ethnic and religious minorities; Kurdish villagers living in north-eastern Turkey have struggled to hold the consortium accountable for alleged human rights abuses associated with its development. Between 2003 and 2005, the NGO coalition conducted annual fact-finding missions to areas along the route of the BTC pipeline in the three countries.

The coalition found that the BTC consortium had failed to ensure that the project complied with OECD guidelines and the Voluntary Principles on Security and Human Rights, which say that: '[C]ompanies should record and report any credible allegations of human rights abuses by public security ... Where appropriate, companies should urge investigation and that action be taken to prevent any recurrence.'

Since the inception of the project, human rights campaigners in Turkey and the UK have been alarmed that Kurds and members of other local communities have faced intimidation and interrogation by security forces when they have raised objections to the pipeline. Ferhat Kaya, a local human rights defender, was reported to have been detained and tortured by the paramilitary police for insisting on fair

compensation. The coalition argued that intimidation deterred local people from participating in BP's consultations about the BTC pipeline's route and from seeking compensation for loss of their land and livelihoods.

The group also found that, in Turkey, the BTC project has contributed to displacement of Kurds, who have been subject to state repression for decades. In north-eastern Turkey, where Kurds constitute an estimated 30–40 per cent of the local population, displacement has been less a result of direct military action against the supporters of the Kurdistan Workers' Party (PKK) – which was more the case in other parts of the country – but was due to gradual economic pressure and state harassment.

Affected villagers described the BTC pipeline as an added pressure on them to leave; it disrupted their subsistence agricultural production without providing any compensation or alternative source of income. There were also allegations that the BTC project discriminated against ethnic minorities in relation to employment practices and in the carrying out of development programmes.

In Georgia, concerns were raised about expropriation of land, poor environmental standards, lack of consultation or compensation for damage caused, unacceptable use of untested materials during construction and labour violations. In Azerbaijan, serious concerns were raised over compensation for land, corruption and restrictions on local press and affected communities regarding criticism of the project. But the most serious issues relating to minorities were raised in Turkey.

The UK government ruled that, despite widespread awareness of the heightened risk of intimidation, BP failed adequately to respond or to investigate allegations brought to its attention of cases of abuse by state security forces in Turkey guarding the pipeline.

The ruling could set a new precedent for multinationals to implement more robust human rights impact assessments. Rachel Bernu of the Kurdish Human Rights Project reflected on the ruling, saying that:

'It has taken eight years for the claims of villagers facing repression in this isolated area of Turkey to be recognized. We hope this ruling marks a turning point for the governments and companies involved so that villagers receive just compensation, and human rights are not only respected but also promoted through investment in future.'

Case study

Botswana: Diamonds bring no benefits to Basarwa

By Rahnuma Hassan

While Botswana's government has never officially admitted to forcibly relocating the G/wi and G//ana communities of

Baku-Tblisi-Ceyhan oil pipeline



the Basarwa indigenous group to make way for diamond-mining operations in the Central Kalahari Game Reserve (CKGR), critics have long suspected this to be the main motivation for the removals. When it became known in late 2010 that Gem Diamonds would begin mining operations in the CKGR, suspicions seem to have been confirmed.

Basarwa were granted the rights to occupy land within the CKGR, as a result of a court ruling in 2006, after years of attempted negotiations, struggle and litigation. Unfortunately, the victory was bitter-sweet as the government interpreted the ruling in the strictest way possible, only allowing the 189 actual applicants to return to the reserve. They also refused to provide services within the park or to re-open the waterholes that had been closed since 2002. The justification for this was that the Basarwa communities had already been adequately compensated through the provision of land and services in the form of settlements outside of the park.

In its press releases about the opening of its US\$3 billion Gope mine, Gem Diamonds made it clear that they would work with the CKGR residents to ensure that the communities benefited from the mine.

However, many of the promises made by Gem Diamonds have yet to be delivered. In addition to promising to drill four new waterholes for the communities, the company told representatives of Botswana Khwedom Council (BKC), a local NGO, that they would establish a community trust so that communities could benefit from the mining operations.

The Gope mine management also met with community representatives and asked for advice regarding hiring members of the indigenous group. As of mid-2012, only one of the waterholes is fully operational, no trust had been established, and only a few members of the communities have been hired.

Furthermore, there is concern over monitoring and ensuring that the needs of the communities in the CKGR are met, as organizations such as the BKC are refused permission to enter the reserve and speak to residents about the conditions they live in.

With the mine officially opening in 2013, it is uncertain when the communities will begin to reap the benefits of diamond-mining on their land. In the meantime, they continue to live in abject poverty still cut off from government services.



BASARWA CHILD IN BOTSWANA. JON RAWLINSON

Case study

India: Mining, conflict and Adivasis

By Sabtir Singh

Numbering 85 million, India's 600 Scheduled Tribes or *Adivasis* ('original people') are kaleidoscopically diverse and make up nearly a quarter of the world's indigenous peoples. Concentrated in an area of central and eastern India that stretches from Maharashtra to West Bengal, many tribal groups share their homelands with some of the most significant mineral deposits in the world – resources which have attracted increasing interest in recent years, precipitating mass displacement, worsening poverty and fuelling one of the world's longest-running conflicts.

Adivasis are by far the most vulnerable and marginalized socio-economic group in India; gaps in poverty, literacy and mortality between tribal and non-tribal groups are widening, despite the economic changes sweeping the country. These challenges have been compounded in recent years by the arrival of global mining giants, for whom governments have used the colonial Land Acquisition Act of 1894 to forcibly displace millions from their ancestral lands. This deepening poverty and alienation have fuelled the decades-old Maoist-Naxalite insurgency, with the 100,000-strong militia consolidating its grip in areas of weak government, high malnutrition and mass displacement. The government's security response has in

turn brought an influx of personnel and weapons into the region. With poor accountability and an often blurred boundary between the counter-insurgency mandate and broader economic imperatives, civilian populations are often caught in the crossfire and fall victim to atrocities on both sides of the conflict.

Child soldiers are routinely recruited on both sides of the conflict. In addition to the 50,000-strong security force deployed under 'Operation Green Hunt', up to 7,000 youths – many Adivasis themselves – have been armed by the Chhattisgarh state government as 'Special Police Officers' with the Salwa Judum or 'purification hunt'. In July 2011, the Supreme Court ordered the Chhattisgarh state government to dismantle the Salwa Judum and investigate all allegations of human rights violations, including the recruitment of child soldiers. Chhattisgarh Chief Minister Raman Singh responded that his government is not inclined to disarm its Special Police Officers and has not yet taken any steps toward investigating atrocities.

In January 2011, in the state of Odisha, the central Ministry of Environment and Forests gave final clearance to Korean steel giant POSCO for a US\$ 12 billion refinery and captive port. A number of panchayats (village councils) who have expressed their opposition to the acquisition of their lands have seen their constitutional right to consultation undermined by the deployment of

state security forces. In the village of Dhinkia, state officials described the panchayat leaders as 'encroachers', calling in state troopers and threatening to 'use force if necessary'. Abhay Sahu, leader of the anti-POSCO movement in Odisha, was arrested in November and journalists, activists and academics are now unable to enter the proposed displacement zone.

Elsewhere in India, opposition to mining-related displacement continued to be a dangerous undertaking throughout 2011. In August, 38-year-old activist Shehla Masood, was shot dead after calling for an investigation into allegations of illegal mining by Rio Tinto. In Chhattisgarh, Soni Sori was arrested for alleged involvement in a Maoist protection racket. The Adivasi schoolteacher and human rights activist was stripped, beaten, repeatedly raped and electrocuted, and remains in custody despite demands from domestic and international human rights groups for her release. No investigation has been initiated and the Dantewada police chief Ankit Garg, an officer named by Sori as being involved in her torture, was awarded a medal for gallantry by the President of India in January 2012.

Such disregard for serious allegations is commonplace and, along with the intimidation, disappearance and persecution of opposing voices, it has contributed to a culture of impunity within the security forces in the region. Political and mining interests have become fused through a complex web of campaign financing and corruption, which has led to security forces frequently

straying from their mandates. Some individual units of both state and rebel forces have independently formed relations with private bodies. In 2011, Indian multinational Essar Group was arrested for paying Maoist rebels to secure 267 km of pipeline through Odisha and Chhattisgarh.

For their part, mining giants responded to growing hostility in 2011 with aggressive public relations campaigns. Vedanta Resources launched a short film, 'Creating Happiness', broadcast daily across television networks. It trumpets the philanthropic efforts of the company, whose bauxite projects in Odisha have attracted international condemnation for destroying the sacred Niyamgiri hills and driving the Dongria Kondh tribe to near-extinction. Tata Steel similarly launched an advertising campaign highlighting the employment generated by mining. Their new tag-line, 'Values stronger than steel' does little for the 12 Adivasis shot dead in 2006 by police in Kalinganagar for protesting against the construction of the Tata steel plant.

Though they do not provide redress, these campaigns are proving remarkably successful in shifting public opinion outside the region in favour of big mining and driving a wedge between tribal and non-tribal communities. In this state of exception, displacement becomes 'creating a good investment environment' and any opposition to the violation of domestic and international law becomes an act of terrorism, never to be spoken of out loud.



DEMONSTRATION AGAINST DAMS IN SUBANSIRI VALLEY, INDIA. *INTERNATIONAL RIVERS*

Conclusions

While the principle of corporate responsibility for human rights is gaining ground, the rights of minorities and indigenous peoples have not been sufficiently articulated as part of this principle. This is in part due to the fact that the impact of human rights violations on minority and indigenous communities by companies in the development and extractive sectors is not yet widely or sufficiently understood.

Despite express commitments by many companies to respect human rights, significant violations of the rights of minorities and indigenous peoples continue to occur in practice. The non-binding nature of the principle of corporate respect for human rights, coupled with the lack of means of enforcement, means that many violations continue and victims are unable to obtain redress or remedies for such violations. Companies are in the process of adopting an array of approaches, drawing on international initiatives such as the Guiding Principles and the OECD Guidelines; these include due diligence, grievance mechanisms, community engagement and corporate reporting. However, these are under the control of the companies themselves and cannot fill the void left by the lack of a means of enforcement.

Thus, a great deal more needs to be done to create awareness of the impact of development and extractive projects on the rights of minorities and indigenous communities, to include protection for them in the emerging principles and standards, and to ensure respect for their rights by companies and enforcement of such rights.

The following recommendations could be used to further corporate respect for human rights in practice.

Recommendations

Creating greater awareness

- There is a need for greater awareness of violations of the rights of minorities and indigenous peoples by companies in the development and extractive sectors. This is especially true of their adverse impact on minority and indigenous women. The dearth of documentation as to the effects of such projects on minorities is particularly notable.
- The UN Working Group on Business and Human Rights should encourage further research in this area, and coordinate with relevant UN monitoring mechanisms, including the Independent Expert on Minority Issues and the Special Rapporteur on the rights of indigenous peoples.

Empowering minorities and indigenous peoples

- Minority and indigenous communities should consider drafting community protocols that include statements as to the basis upon which they will agree to projects that affect the community, and outlining their cultural traditions and the natural resources on which they depend. Community leaders must ensure that all members – including women – can participate meaningfully in this process.
- Civil society organizations should work towards greater inclusion of minorities and indigenous peoples in processes such as the creation of legislative standards, industry principles, reporting indicators, and judicial and non-judicial mechanisms related to corporate responsibility to respect human rights.

Standards and principles

- States should adopt legislation that provides for the free, prior and informed consent of indigenous peoples regarding development that will have an impact on them.
- States should also recognize the customary land rights of minorities and indigenous peoples and seek to adopt any necessary enabling legislation. These customary land rights should be respected in negotiations with companies in pursuit of development or extractive projects on minority or indigenous lands.
- The UN Working Group on Business and Human Rights and the Global Compact Governance Framework should consider developing principles specifically on businesses and minority and indigenous peoples. Companies and industry associations should also incorporate human rights principles related to minorities and indigenous peoples into their own policies and guidelines.

Companies

- Companies should promote an understanding of minorities and indigenous peoples, including women in these populations, and their rights through training of management and employees.
- In addition, companies should commit to respect their rights, including the principles of effective consultation and of free, prior and informed consent of indigenous peoples to companies' activities.
- Companies should provide appropriate grievance mechanisms and report on their commitments and implementation of respect for the rights of minorities and indigenous communities, including women in these populations, in their corporate reports.
- Companies should also engage in effective consultation with minorities and indigenous communities who are impacted by their operations.

Enforcement

- States should foster corporate respect for the rights of minorities and indigenous peoples through the enforcement of existing laws and regulations and the adoption of any necessary new legislation, including with respect to the extraterritorial activities of businesses domiciled in their countries.
- States should also provide accessible, transparent and effective legal mechanisms to which minorities and indigenous peoples have access in case of violations of their rights.
- States should divest from companies that commit serious and systematic human rights violations, including those of minorities and indigenous peoples.

Encouraging corporate respect through lending agreements

- International, regional and national financial institutions and private banks should include provisions in their loan agreements that the obligation to respect human rights, including with respect to minority and indigenous rights, is not only an initial condition to obtaining the loan but also an ongoing undertaking.
- These institutions and banks should establish mechanisms to monitor the behaviour of companies and alert company directors if they are in serious breach of their loan agreements.
- Where companies do not comply with such standards, and do not rectify serious breaches despite receiving warnings, the institutions and banks should move to require repayment of the loan provided to such entities.

working to secure the rights of minorities and indigenous peoples

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Corporate responsibility to respect the rights of minorities and indigenous peoples

An earlier version of this briefing was published in MRG's flagship annual publication, *State of the World's Minorities and Indigenous Peoples 2012*, which documents hundreds of case studies about marginalized

groups who have been adversely affected by exploitation of the resources found on, or under, their ancestral lands.

Download the full report at www.minorityrights.org.

Corporate responsibility to respect the rights of minorities and indigenous peoples

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