



## **Thematic Report on Freedom of Association and Peaceful Assembly in the context of the exploitation of natural resources**

Contribution of Minority Rights Group International (MRG)

*January 2015*

Minority Rights Group International (MRG) has been working for many years with minorities and indigenous communities across the world to secure their rights when they are affected by state or private sector development projects, such as mining, oil and gas extraction, logging activities or touristic projects. MRG has worked with communities to document abuses, train lawyers and human rights defenders, undertake advocacy work and strategic litigation at the national, regional and international levels.

Through this contribution, MRG would like to share with the Special Rapporteur its experience and analyses on the importance of freedom of peaceful assembly and association (FOAA) in the context of exploitation of natural resources.

Freedom of peaceful assembly and association is key to the safeguard of minorities' and indigenous peoples rights in the context of exploitation of natural resources, in at least two respects:

- 1) FOAA is a condition for the fulfilment of one of the fundamental principles governing the lawfulness of any exploitation of natural resources affecting the rights of indigenous communities: the **principle of free, informed and prior consent**, which arguably developed into a norm of customary international law.
- 2) FOAA is a **condition for the peaceful expression of dissent and opposition** against a project. MRG argues that not allowing a peaceful expression of dissent is not only a violation of human rights law, but it can also prevent companies from obtaining concerned communities' support, that is, a 'social licence' for the company to operate, which can result in increased social tensions and ultimately obstacles to the realisation of the project. In other words, bypassing FOAA is not only illegal, it can also be counter-productive.

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## **Introduction: when views on development projects are diverging, freedom of association and assembly is needed**

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.

Against this backdrop, minority and indigenous communities need to be able 1) to gather and organize themselves freely in order to discuss, internally and with other stakeholders, what future they want for themselves and 2) to express dissent individually or collectively, free from fear of persecution.

### **Outline:**

#### **1) FOAA is an integral part of the free, prior and informed consent principle**

- a. Free, prior and informed consent in the context of exploitation of natural resources: background and legal framework
- b. Free, prior and informed consent of indigenous communities and FOAA
  - i. External consultations: rights-holders should be able to organize themselves in accordance with the traditional procedures and representative institutions of the indigenous peoples
  - ii. Internal consultations: right to gather and discuss a common position free from external coercion, intimidation and manipulation
  - iii. The responsibility of business enterprises: undertake meaningful consultation of potentially affected groups
- c. A protection gap that needs to be addressed: the consent of minorities affected by the exploitation of natural resources

#### **2) FOAA is necessary to the peaceful expression of dissent and to dialogue**

- a. FOAA is often violated to silence opposition to a project
- b. FOAA and the “social licence” argument

## 1) FOAA is an integral part of the free, prior and informed consent principle

### a. Free, prior and informed consent in the context of exploitation of natural resources: background and legal framework

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Labour Organization Convention 169, Indigenous and Tribal Peoples Convention (ILO Convention 169) have served as key legal instruments in the development of the principle of free prior and informed consent.

UNDRIP specifies four situations in which the free prior and informed consent of indigenous peoples must be obtained by a State. Specifically, with respect to:

- removal and relocation of indigenous peoples (article 10; also see ILO Conv. 169, art. 16),
- taking of cultural, intellectual, religious or spiritual property (article 11)
- confiscation, taking, occupation, use or damage of indigenous peoples' lands or territories (article 28), and
- the storage or disposal of hazardous materials on indigenous peoples' lands or territories (article 29).

UNDRIP also provides that States are to consult and cooperate in good faith with indigenous peoples *in order to* obtain their free prior and informed consent in two situations:

- first, prior to adopting legislative and administrative measures that may affect them.<sup>1</sup> Therefore, whether a State adopts legislation governing land use, mining, or the establishment of natural forest reserves or issues a regulatory permit for resource extraction by a company, the State should consult affected indigenous communities.
- second, prior to approving projects that affect indigenous peoples' lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>2</sup>

However, there has been increasing recognition of the significant impact of extractive and development projects on the rights of indigenous peoples as these projects can impact a range of rights of indigenous peoples including the right to life, health, self-determination, development, and culture, among others.

The Inter-American Court of Human Rights expressed the view, in a 2008 decision involving the Saramaka People, that 'when large-scale development or

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<sup>1</sup> UNDRIP, art. 19; also see ILO Convention 169, art. 6.

<sup>2</sup> UNDRIP, article 32(2)

investment projects could affect the integrity of the Saramaka people's lands and natural resources, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior and informed consent in accordance with their customs and traditions'.<sup>3</sup> In a similar decision regarding Kenya's Endorois people, the African Commission on Human and Peoples' Rights noted the similarities to the Saramaka case and held that, "*In terms of consultation the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded.*"<sup>4</sup> The Commission also held that, in respect of "*any development or investment projects that would have a major impact within the... 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.*"<sup>5</sup>

The UN treaty bodies also have supported the obligation of States to obtain the free prior and informed consent of indigenous peoples. For example, the Committee on Economic, Social and Cultural Rights, in its general comment No. 21 (2009) on the right of everyone to take part in cultural life, has stated (in paragraph 37) that States should respect the FPIC of indigenous peoples 'in all matters covered by their specific rights.' The Committee on the Elimination of Racial Discrimination (CERD), in its general recommendation 23 (1997) (para. 4d), calls upon all States to ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent. CERD also has issued numerous concluding observations that note that FPIC is necessary in connection with development activities.<sup>6</sup>

James Anaya, the former Special Rapporteur on the rights of indigenous peoples, has stated in his report to the UN Human Rights Council in 2012: 'Where the rights implicated are essential to the survival of indigenous groups and foreseen impacts on the rights are significant, indigenous consent to those impacts is required, beyond simply being an objective of consultations.'<sup>7</sup>

With this growing understanding and acknowledgement of the negative effects of natural resource projects on indigenous peoples, FPIC is developing into a customary law standard that is applicable whenever there is an impact on indigenous peoples' substantive rights. The UN Global Compact Business Reference Guide on UNDRIP articulates the current standard quite succinctly in stating that 'FPIC should be obtained whenever there is an impact on indigenous

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<sup>3</sup> Inter-American Court of Human Rights, *Saramaka People v. Suriname*. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of 12 August 2008, para. 17.

<sup>4</sup> African Commission on Human Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, para. 226 (February 2010).

<sup>5</sup> *Ibid*, para 29.

<sup>6</sup> See compilation UN REDD Programme, 'Legal Companion to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC): International Law and Jurisprudence Affirming the Requirement of FPIC (January 2013).

<sup>7</sup> A/HRC/21/4, para. 85 (2012)

peoples' substantive rights (including rights to land, territories and resources, and rights to cultural, economic and political self-determination)'.<sup>8</sup>

**b. Free, prior and informed consent of indigenous communities and FOAA**

Practically speaking, the free, prior and informed consent cannot be granted without both **internal consultations** (within the indigenous community) and **external consultations** (those between the community and governmental representatives, and perhaps involving company representatives). These consultations require a certain degree of freedom of association and peaceful assembly. Both states and business enterprises have responsibilities in that respect.

**i. External consultations: rights-holders should be able to organize themselves in accordance with the traditional procedures and representative institutions of the indigenous peoples**

Consultation is viewed as a crucial component of the consent process for indigenous peoples.<sup>9</sup> UNDRIP specifically provides for the State's consultation with indigenous communities in order to obtain their FPIC prior to adoption of legislative and administrative measures that may affect them and prior to approval of projects that affect their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>10</sup> UN treaty bodies also have explicitly recognized the importance of consultation in connection with FPIC<sup>11</sup> as have the Inter-American Court of Human Rights and the African Commission on Human Rights.<sup>12</sup>

Where a project involves natural resource exploitation that will affect indigenous peoples, consultations need to be undertaken between the community of indigenous peoples and representatives of the State. The representatives may be from the local, regional and/or national level, depending on the nature, scope and impacts of the project, and the State may seek the participation of

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<sup>8</sup> UN Global Compact, 'A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples', at 45 (2013).

<sup>9</sup> See UN office of the High Commissioner for Human Rights, 'Free, Prior and Informed Consent of Indigenous Peoples' (2013).

<sup>10</sup> UNDRIP, articles 19 and 32(2). Also see ILO Convention 169, article 6

<sup>11</sup> See compilation UN REDD Programme, 'Legal Companion to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC): International Law and Jurisprudence Affirming the Requirement of FPIC (January 2013).

<sup>12</sup> See Inter-American Court of Human Rights, *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 27 November 2007 para. 133, and African Commission on Human Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, para. 281 (February 2010).

representatives from companies carrying out the project. These consultations permit the community to obtain additional information about the project and its impacts, to solicit and receive answers to specific questions, and to express its views in a collective manner on the risks and impacts as well as measures taken to prevent, avoid and mitigate such impacts.

The consultations by the State with indigenous peoples' should be carried out in accordance with the traditional procedures and representative institutions of the indigenous peoples and consistent with the guidance provided to businesses in

**Manipulated consent: The case of the Buela community in DRC**

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.

the Consultation section of the UN Global Compact's 'A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples' provided to businesses, which guidance is largely equally applicable to States. During such consultations, indigenous peoples should also be provided with an explanation as to why large-scale development projects are justified by a compelling and over-riding public interest, as provided in principle 6.2 of the UN Guiding Principles for Internally Displaced persons.

**ii. Internal consultations: right to gather and discuss a common position free from external coercion, intimidation and manipulation**

Indigenous communities will also need to carry out internal consultations. The consultations within the community involve opportunities to understand, reflect upon and discuss the information about the project and its impacts and to exchange views.

Both internal consultations, that is those within the indigenous community, and external consultations, those between the community and governmental representatives, and perhaps involving company representatives, where appropriate, need to be carried out **free of external coercion, intimidation**

**and manipulation.**<sup>13</sup> Thus, efforts to influence members of the indigenous community through measures such as bribes, offers of jobs or benefits not offered to the entire community, or threats to the physical security of individuals in the indigenous community can place unwarranted pressure on indigenous peoples in the community and unduly influence both internal and external consultation processes.

In addition, as there may be disparate elements and marginalized groups, such as women, the elderly or persons with disabilities, within the indigenous community, special attention needs to be paid to ensure that they have an opportunity to express their views.

The ability of indigenous peoples to obtain information about the proposed project or activity is essential to their ability to carry out both internal and external consultation processes in a meaningful manner and thus implicates their right to receive information.<sup>14</sup> Moreover, indigenous peoples' inclusion of independent legal and other specialist representation within their consultation processes may be necessary to ensure their ability to understand the impacts associated with the project and to be able to fully express their views.

### **iii. The responsibility of business enterprises: undertake meaningful consultation of potentially affected groups**

The OECD Guidelines encourage companies to “*engage 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 European Bank for Construction and Development, the International Finance Corporation and consequently the Equator Principles also require borrowers to engage with persons affected by their projects.

Under the UN Guiding Principles, as part of the due diligence process, businesses are to identify and assess potential adverse human rights impacts associated with a natural resource exploitation project through meaningful consultation with potentially affected groups, including minorities and indigenous peoples.<sup>15</sup> Businesses must therefore provide opportunities to potentially affected persons and communities, including minorities and indigenous peoples, to participate in consultation processes in a meaningful manner.

In order for effective consultation to occur, businesses must ensure the effective participation of affected communities, including indigenous peoples and

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<sup>13</sup> See meaning of 'Free' in the UN office of the High Commissioner for Human Rights, 'Free, Prior and Informed Consent of Indigenous Peoples' (2013) and UN Global Compact, 'A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples' (2013).

<sup>14</sup> International Covenant on Civil and Political Rights, art. 19

<sup>15</sup> UN Guiding Principles on Business and Human Rights, Guiding Principle 18(b)

minorities. The principle of engagement of affected communities is supported by developing good practice as evidenced by the policies of the International Finance Corporation.<sup>16</sup> A company's preparation of a plan of engagement with affected communities, implementation of the plan, and the assessment and monitoring of the company's activities undertaken pursuant to the plan should all involve consultations with affected persons and communities.

Such consultations should be part of an ongoing process of engagement with affected communities that occurs prior to, during and following the project. The nature of the consultations should in practice respect many of the principles elaborated for indigenous peoples in order to ensure effective participation of the affected communities.

In addition, where there is a risk of severe human rights impacts then, pursuant to UN Guiding Principle 21, the business enterprise is to report formally on how it addresses them. One of the forms that the communication of such information can take is that of consultation with affected stakeholders'.<sup>17</sup> In such case, the consultation should enable meaningful participation by such persons.

**c. A protection gap that needs to be addressed: the consent of minorities affected by the exploitation of natural resources**

Natural resource exploitation can impact upon communities of ethnic, religious and linguistic minorities who have close relationships to their lands, based on their livelihoods, cultural and/or religious practices, in ways similar to that of indigenous peoples. While documentation has been developed to provide guidance to businesses with respect to impacts on indigenous communities, minorities have not yet received adequate attention as to the specific nature and scope of impacts upon their rights.

The UN Human Rights Committee, in its general comment no. 23, refers, in paragraph 7, to how the protection of those belonging to minorities to enjoy their own culture, as provided for in Article 27, extends to culture as manifested 'in a particular way of life associated with the use of land resources'. In addition, the UN Human Rights Committee, in the *Poma Poma case*, refers to the need for effective participation in decision-making processes, which includes consultation and FPIC, in connection with measures that 'substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community'.<sup>18</sup> This potential link between the culture of a minority community and its land could be further developed to protect its rights to land and resources.

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<sup>16</sup> International Finance Corporation, Performance Standard 1

<sup>17</sup> UN Guiding Principles on Business and Human Rights, Commentary to Guiding Principle 21

<sup>18</sup> Angela Poma Poma v. Peru, CCPR/C/95/D/1457/2006, 24 April 2009, at para. 7.6.



## **2) FOAA is necessary to the peaceful expression of dissent and to dialogue**

### **a. FOAA is often violated to silence opposition to a project**

Indigenous peoples and minorities have implemented several strategies to resist harmful and unwanted natural resource development.

Various forms of non-violent protest have been used but such actions have often been met with violence, arbitrary arrest, enforced disappearances, torture and even death. For example, the Mapuche in Chile have faced government use of anti-terrorism legislation against community members who have been protesting against exploitation of their lands by extractive industries.

Excessive use of force against peaceful demonstrations, legal and practical impediments targeting NGOs, representative groups and community organizations critical to a specific development project, and other violations of FOAA have been largely documented in other reports. For more example, see inter alia MRG's annual State of the World's Minorities and Indigenous Peoples Report 2012, with a focus on land rights and natural resources:

<http://www.minorityrights.org/download.php?id=1112>

### **b. FOAA and the “social licence” argument**

There are strong arguments in favour of companies taking the views of minorities and indigenous groups 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.