

Submission to the UN Special Rapporteur on the Rights of Indigenous Peoples, Ms Victoria Tauli-Corpuz

Thematic Report on the Criminalisation of Indigenous Peoples

16 March 2018

1. Summary

This submission has been prepared by the Forest Peoples Programme¹ and BothENDS² to contribute to the UN Special Rapporteur on the Rights of Indigenous Peoples' study on the criminalisation of and attacks against indigenous rights defenders and indigenous leaders. Whilst countless examples exist globally of such cases, this submission focuses on the larger patterns and forces behind the observable trend of increasing pressure on indigenous peoples, whilst providing a sample of cases that are emblematic. These larger patterns implicate external and powerful interests involved in the expropriation of lands and resources of indigenous peoples and underlying causes, including non-recognition of customary land rights.

Indigenous people fighting for recognition of their land and territorial rights are at extremely high risk of violence and killings.³ Despite increasing recognition of the scale and horror of this situation, widespread impunity for those that violate indigenous peoples' rights continues to exist while those that work to defend land rights and human rights are criminalised, harassed and smeared in public media outlets. Accordingly, this submission also addresses the issue of impunity – the lack of investigation, charges and cases brought against those implicated in violence against indigenous peoples for defending their rights and lands. The flip-side of the criminalisation of indigenous peoples is the *non*-criminalisation of those who violate the rights of indigenous peoples without fear of criminal sanction.

2. Non-recognition of customary rights in land

In many cases, the criminalisation of indigenous peoples and persons can be traced to the underlying denial of their rights to their lands and resources. Even in countries where indigenous peoples' land rights are formally recognised, the form, scope and nature of those rights is often incommensurable with the rights asserted by the peoples themselves. This leads to situations where national laws are inconsistent with, or directly contravene, customary laws, rendering the activities of indigenous peoples practiced in accordance with their customary laws 'illegal' under national law.

For example, the 1974 Land Law in Cameroon does not treat customary lands as private property unless formally registered. All *unregistered* customary lands are considered State property. While the law envisages the possibility of registering customary lands,

¹ Forest Peoples Programme supports the rights of peoples who live in forests and depend on them for their livelihoods. We work to create political space for forest peoples to secure their rights, control their lands and decide their own futures. www.forestpeoples.org

² Together with environmental justice groups from poor and developing countries, Both ENDS works towards a sustainable, fair and inclusive world. We gather and share information about policy and investments that have a direct impact on people and their livelihood, we engage in joint advocacy, we stimulate dialogue between stakeholders and we promote and support sustainable local alternatives. www.bothends.org/en/

³ <https://www.globalwitness.org/en/campaigns/environmental-activists/dangerous-ground/>

this option is only available if the community can demonstrate that it has visibly developed the land with houses and farms, which excludes hunter-gatherer groups as they do not use land in that way. Lack of legal recognition of customary ownership means that indigenous peoples (as well as local Bantu communities) hold only insecure user rights that are subject to extinguishment by the State if the land is allocated for a different purpose, without any of the protections which international law requires. Non-recognition of land rights and, in some cases, extinguishment of even minimal access rights is tantamount to forcible eviction and makes indigenous peoples vulnerable to criminalisation if they attempt to continue essential livelihood activities that have in effect been made illegal.

Similarly, in Indonesia there are no effective mechanisms for recognising indigenous peoples' rights in land.⁴ Over 70% of Indonesia is classed as 'forest areas' (*kawasan hutan*) and administered as 'State Forest Areas' (*kawasan hutan negara*), defined as areas where there are no rights. The Ministry of Environment and Forestry now admits that there are some 33,000 administrative villages whose lands are in or overlap State Forest Areas. Despite a ruling of the Constitutional Court in 2013 that 'customary forests' (*hutan adat*) exist where customary territories (*wilayah adat*) overlap 'forests' and that those areas cannot be included in 'State Forest Areas', a process for recognition of customary rights has not been pursued effectively by either the Agrarian or the Environment and Forestry Ministries. Some positive signs exist: a few customary forests and customary territories have been declared by local legislative acts; and a draft law on indigenous peoples' rights has been discussed in parliamentary committees. However this law is yet to be debated in Parliament. In the meantime, communities and peoples continue to face uncertainty or criminalisation when they assert rights over land.

3. Conservation

Indigenous forest communities in Central Africa have been significantly impacted by conservation activities through the creation of 'protected areas' and reserves on their traditionally occupied lands. There is significant evidence of human rights abuses perpetrated on indigenous peoples within these reserves. They not only lose their lands and access rights, and suffer impoverishment as a result, but also suffer serious physical abuse, killings, arrest, detention, criminal prosecution and fines for carrying out traditional activities or even just being present. They are unable to practice culture and religion as a result.⁵ Baka, Bagyeli and other forest-dependent indigenous peoples are extorted or intimidated when going into the forest, including in areas traditionally used under customary law and in areas in which they are legally entitled to go. When they hunt, they are regularly detained and beaten, whether or not they have acted within the law. Even lawfully hunted game is confiscated by eco-guards.

Evictions and criminalisation for the sake of 'conservation' also occurs in Kenya. Indigenous peoples such as the Sengwer and Ogiek have been subjected to evictions and denial of their rights to their lands since British colonial rule. In recent decades the justification has turned to environmental conservation and the need to preserve forests because of the watershed function they provide in country that is water-insecure. Using this justification, the Kenya Forest Service (KFS) has repeatedly arrested and detained indigenous peoples just for being on their lands, subjecting them to criminal prosecution, the costs of bail, prison and fines they cannot afford to pay. In addition, KFS has burned thousands of indigenous people's homes, destroying possessions like school books and uniforms, as well as cooking utensils, food stores and standing crops, in an

⁴ For instance: the Basic Agrarian Law mentions *ulayat* rights (collective customary rights) but provides no procedure for their recognition, and a relatively new Ministerial Regulation on *hak komunal* (communal rights) has not been implemented.

⁵ In DRC: <http://bit.ly/2p97za4>; in Cameroon: <http://bit.ly/2p7P86L>; in Kenya: <http://bit.ly/2FY5acV>

attempt to evict indigenous communities from forest areas. These forests are the ancestral homes of several indigenous peoples, as confirmed by the African human rights system.⁶

The scale of violence in Kenya is escalating. During evictions in April 2017 a Sengwer youth leader, **Elias Kimaiyo**, was shot at and had his arm broken by a KFS guard.⁷ The police subsequently refused to take a statement from him or begin an investigation, instead they led him to believe that if he tried to pursue justice, he would be arrested and subject to criminal prosecution. Although the Sengwer have been subject to evictions before,⁸ now evictions increasingly involve live ammunition shooting. On 16 January 2018, **Robert Kirotych**, an indigenous Sengwer man, was attacked by a group of 40 guards who shot and killed him while he was herding cattle. A week before Robert was murdered, another Sengwer man, **Paul Kitum Kiptuga**, was shot at in his home by KFS guards some of whom were shouting “kill him, kill him.”⁹

Despite international attention,¹⁰ no effort has been made to engage in meaningful consultation with the communities to obtain their free, prior and informed consent.¹¹ Immediately afterwards, the Regional Commandant told the Sengwer that KFS will continue with the evictions and shootings, claiming they are acting within the law and Constitution of Kenya.¹² These evictions continue despite the fact that the Constitution (Article 63) explicitly recognises the community land rights of peoples such as the Sengwer, and despite the fact that the Sengwer have a pending lawsuit challenging the evictions, with an injunctive order in place preventing such evictions in the interim.¹³

4. Large-scale expansion of industrial activity, including agri-industrial monoculture plantations and extractive industries

FPP and BothENDS recently co-hosted a major international seminar on human rights, deforestation and supply chains involving 14 representatives of indigenous peoples' communities and organisations from 11 agri-commodity producing countries. Issues of violence and threats against Human Rights Defenders were raised repeatedly, as was the criminalisation of indigenous peoples for defending their lands and ways of life.¹⁴ The testimonies and cases presented from these indigenous leaders shared strong common experiences related to the use (and misuse) of legal sanctions against peoples fighting to retain their lands and resources in the face of external interest. In many cases, those external interests were driven by commercial agriculture operations and supported by the misuse political, judicial and executive power.

In Indonesia, some 50 million hectares of forests have been leased to logging companies (some now lapsed) and a further 10 million hectares have been leased to companies for timber plantations, all without regard for indigenous peoples' rights. About 23 million hectares have been leased to companies for oil palm plantations and other cash crops like sugar, again without regard for indigenous peoples' rights. As a result of the long-history of official indifference to indigenous peoples' land rights, there are several

⁶ On 26th May 2017 the African Court on Human and Peoples Rights in Arusha ruled both that the Ogiek of Mau had been wrongfully evicted from their ancestral lands, and that evicting them had not helped protect the Mau forests. For more information see: <http://bit.ly/2pamlsw>

⁷ For more information see: <http://bit.ly/2FFfx1S>

⁸ For more information see: <http://bit.ly/1eCydMY>

⁹ <http://bit.ly/2p7yKmx>

¹⁰ “The UN Special Rapporteur on the rights of indigenous peoples, James Anaya, expressed deep concern about reports that police are poised to forcibly evict Sengwer indigenous people from their homes in the Embobut Forest in the Cherangani hills, in western Kenya.” See: <http://bit.ly/2FALqN1>

¹¹ For more information see: <http://bit.ly/2FxlQIN>

¹² For more information see: <http://bit.ly/2FEQ5tt>

¹³ For updates on the Kenya Sengwer case, see: <http://bit.ly/2p7yKmx> and <http://bit.ly/2Ba5LS0>

¹⁴ Close the Gap, <https://rightsanddeforestation.org/>

hundred conflicts between communities and forestry companies and several **thousand** conflicts between communities and agribusiness companies.

In the absence of clear recognition of their land rights, and thus denied remedy through the courts, communities suffering the impacts of these violations have used alternative means to demand redress. Companies whose land developments or extractive operations are impacted by such actions have routinely resorted to repressive actions to quash dissent. These actions have included: paying the local mobile police brigades (BRIMOB) to disperse protestors; bulldozing the houses of protesting peoples; police shootings (sometimes leading to injuries and even deaths); criminalization of complainants, including arrests and imprisonment (sometimes for long period without charge or trial) and; harassment of complainants, protestors and villagers by company security forces.

Some examples of criminalisation related to agri-industry expansion include:

a) **Ayub**, who is one of 43 people from Olak Olak village in Kubu Raya, Indonesia who have been charged with theft after harvesting their own land since 2013. Dozens of others experience intimidation from the police, terror and violence.¹⁵ According to the communities, land has been illegitimately transferred to palm oil company PT. Sintang Raya (PT SR). In their attempts to protect their land, many community members have faced arrest. Community members attempted a non-violent sit-in in 2016 to gain the attention of the government, however several members were accused of assaulting police officers and arrested. Many of those arrested complain that their cases were not properly handled, and they have been left in the dark about the results of their arrests. Ayub remains in jail and has not yet been allowed to see a lawyer.¹⁶

b) The Dayak community of Long Isun in Indonesia had been resisting logging on their ancestral lands by PT Kemakmuran Berkah Timbers (PT KBT), when community member **Theodorus Tekwan** was arrested and jailed without charge for 109 days in 2014. The community, supported by NGOs, carried out a concerted media campaign and eventually persuaded the authorities to release Tekwan. On his release Tekwan was intimidated into signing a document stating he had only spent one evening in jail when in fact he had endured over 3 months without charge. When reflecting on his time in jail, Tekwan stated “in the end it looked like the police and PT KBT were working together, they wanted to trade my sentence for our territory.” The criminalization of Tekwan deterred Long Isun from putting up formal resistance to PT KBT for over 2 years, although they have picked up the fight and had successes in recent months.¹⁷

c) Since 2014 the Kapa community in West Sumatra have been pursuing a complaint against a palm oil company PT PHP1 (a subsidiary of Wilmar). In 2015 a complaint was made to the West Sumatran police against the customary leader of the community, **Mr. Alman Gampo Alam**, who was leading the complaint against the palm oil company. He was detained as a suspect on 29 April 2015 and remains in jail in Padang. During Mr Alman’s interrogations, police repeatedly suggested that they would drop the case against him if he signed a statement renouncing his leadership of the Kapa community. The police also requested that he cancel his contract with the lawyer who has been his legal representative.

5. Impunity

The experiences of criminalisation of indigenous peoples highlight the relationships between the underlying causes discussed above. One key reason why these trends of

¹⁵ <https://www.change.org/p/joko-widodo-free-ayub-the-agrarian-fighter>

¹⁶ At the time of writing, 1st March 2018

¹⁷ For more information see <http://bit.ly/2lvXe0K> and Forest Peoples Programme, 2017, *Protecting Forest Defenders*, <http://bit.ly/2DouSSv>

displacement and violence continue and are *worsening* is that those responsible are rarely, if ever, held to account. Corruption and discrimination are the insidious, crosscutting factors behind this global dynamic. The corruption of regulatory, political, law enforcement, and judicial institutions enables powerful and influential actors to operate with impunity, without regard for the rights of local and indigenous communities, and without fear of repercussions. The worrying trends of displacement and violence towards indigenous peoples by both private and state-sanctioned forces will not stop in the absence of the Rule of Law. This requires institutional resilience to corruption and effective checks and balances on the misuse of official power. These features are essential to protecting the rights of indigenous peoples. If local political and law enforcement institutions are indifferent or hostile to the rights, safety and livelihoods of the communities they ought to represent and protect, indigenous communities will continue to be vulnerable to criminalisation through the misuse of these institutions and corruption of the judicial process to repress and deny their rights.

Some examples of impunity for rights violations include:

- a) **Fernando Salazar Calvo** who was shot dead outside his home in 2015. He had earlier received death threats warning him to stop working to protect his land - the resource-rich Cañamomo Lomaprieta Indigenous Reserve in central Colombia. The Embera Chamí, who collectively own and manage the reserve, have been practicing small-scale, environmentally responsible gold mining for hundreds of years. But despite the traditional authorities declaring the land off-limits to exploitation, the government has approved mining concessions in the area. Large agribusiness, mining and extractive activities are exacerbating already extreme levels of land inequality, poverty and environmental degradation. The principal suspects in much of the violence, according to human rights groups, are paramilitary groups working in collusion with local political and business elites. To date, no one has been arrested for the Fernando's murder.
- b) On 26 August 2017 in the DRC, a 17 year old Batwa boy, **Christian Mbone Nakulire**, and his father, **Munganga Nakulire**, were shot by an eco-guard while collecting medicinal plants on their ancestral land; lands from which Batwa communities were forcibly excluded in the 1970s by the creation of Kahuzi Bièga National Park (PNKB).¹⁸ Christian was killed and Munganga was seriously injured, yet PNKB has not taken responsibility for the shooting. Since the creation of the PKNB, the Batwa have no access or use rights to their lands and are considered criminals for entering the national park. Therefore these acts against them continue with impunity. Christian's murder is currently being investigated by a military court but serious irregularities in the investigation (such as an incomplete coroner's report) and delays to the proceedings mean the Batwa are not hopeful of justice.

Recommendations: ¹⁹

To halt the trend of criminalisation of indigenous peoples and impunity for those that commit crimes and abuse human rights, concerted action is urgently needed to:

- a) Reform national legal systems to recognise and protect indigenous peoples' rights and subject government and commercial land-use concessions to international human rights law with strict, enforceable obligations to respect these rights;
- b) Facilitate the availability of emergency funding and legal advice accessible to indigenous peoples and their civil society support groups so that they can act promptly to take the necessary legal and other measures where criminalisation takes place. When

¹⁸ *Young Batwa Boy killed*, Forest Peoples Programme news article 2017. <http://bit.ly/2HshEGY>

¹⁹ These recommendations are drawn in part from the International Seminar on Closing the Gap: Human Rights, Supply Chains and Deforestation co-hosted by FPP and Both ENDS in Amsterdam in February 2018 and developed by human rights defenders and indigenous and local community leaders from Colombia, Peru, Paraguay, Argentina, Guyana, Suriname, Liberia, Cameroon, DRC, Malaysia and Indonesia. <https://rightsanddeforestation.org/>

indigenous peoples do not have legal representation in relation to criminal proceedings being brought against them, they are particularly vulnerable;

c) Support National Human Rights Institutions (NHRIs) to develop effective systems for providing anonymity and protection to human rights defenders, community leaders and complainants, with advice and resources to provide security where individuals may be criminalised or otherwise threatened;

d) International donors (public and private) involved in providing finance for conservation projects and development or commercial ventures that may impact on the lands and resources of indigenous peoples urgently need regulating (by *both* strengthened internal policies *and* legally binding procedures) in order to ensure that human rights due diligence and impact assessments are properly undertaken with the meaningful participation of the peoples concerned, and that adequate monitoring and responsive measures are put in place so that allegations of human rights abuses are quickly identified and responded to in a way that maximises prevention and deterrence, accountability for perpetrators, and remediation in respect of human rights abuses;

e) Increase support for prevention and protection measures for human rights and forest defenders in their territories at the local level, including support for community-based prevention and protection initiatives and early warning and security systems;

f) Train security and law enforcement officials, including national police and security forces, on human rights and the need to refrain from coercion, false imprisonment, intimidation and criminalisation of peaceful protesters and activists, including indigenous people peacefully defending their rights to lands and resources. They should be made aware for example that simply acting on orders is not a defence and that they can be held individually accountable for human rights abuses or failures to follow due process; and

g) Increase targeted bilateral and global donor support to national initiatives and programmes for protecting from and responding to the criminalisation of indigenous peoples and the impunity of those who abuse indigenous peoples rights (such as the proposed Integrated Programme for the Security and Protection of Human Rights Defenders in local indigenous, ethnic and smallholder territories in Colombia).