

How Finnfund and IFC financing of Hydro Santa Cruz dam hydroelectric project in Guatemala adversely affected human rights of indigenous Maya community

1. Finnfund finances aims to make commercial profit in Latin America through murders and oppression

In Guatemala Finnfund joined in 2014 to fund Hydro Santa Cruz (HSC) dam hydroelectric project on the Cambalam River, in Santa Cruz Barillas in northwestern Guatemala, in an indigenous Q'anjob'al Maya community's traditional lands close to the border with Mexico.

Finnfund joined to finance this hydropower project in Guatemala 2 years after a member of the local Maya community had been murdered by the armed men whom the corporation had ordered to stop the protest of Mayans against this dam construction on their lands - a project which Finnfund then joined to finance after it had led to this murder.

Andrés Pedro Miguel, an indigenous Maya had got thus murdered just 2 years earlier in violent repression of Maya community's protest against this HSC project when Finnfund joined in 2014 to finance this dam project which HSC together with the Guatemalan government continued to try to carry out by the oppression and force in Barillas against the local Maya community who protested against the dam.

Thus a member of the indigenous Maya community got murdered as the community opposed the hydropower project which violated its indigenous rights on its ancestral territories and when the project continued to threaten and oppress the indigenous community to realise the hydropower project in community's ancestral land against community's consent, then Finnfund joined to finance such oppressive project. Similarly Finnfund joined in Honduras to fund Agua Zarca after an indigenous Lenca opponent of the project Tomas Garcia had got murdered by being shot by gunmen ordered by the project to prevent protests.

In both cases Finnfund joined to finance such project maintained via murder and oppression without community's consent and the repression and violations continued during Finnfund's financial involvement and boosted the violence by encouraging those who calculated to benefit from the project by violating indigenous rights to continue such repressive measures which led to further violations. In Honduras the project led to murder of Berta Caceres and in Guatemala to death of Rubén Herrera under oppression, imprisonment and treatment which continued to violate the rights of Mayans and was encouraged by the finance for project's business interests which violated indigenous rights.

2. Finnfund finances projects of non-transparent violent grabbing of indigenous lands by force

In Guatemala in 2008, HSC had bought lands from communities in Barillas saying it would use them for example for coffee and cardamom cultivation without announcing that they intend to build a dam. HSC gathered financing for construction of the dam without consulting the affected indigenous communities about the dam while purchasing land, and this engendered distrust among the predominantly indigenous Mayan population, reliant on subsistence farming.

Indigenous Maya people in Barillas have lived by their traditional subsistence farming and have used and managed the local land and water according to the local life's needs which were however neglected by the dam and its IFC and other financing channelled through the Inter-American Infrastructure Finance Corporation (CIFI) infrastructure project equity fund, which financed the dam in Barillas with \$ 8.2 million and \$ 2.5 million in mezzanine funding.

Mayans found the company cheating them as armed guards, security arrangements, construction equipment and roadworks began to approach near Mayans' holy waterfall. They began to protest in 2011 to demand the company to leave the area and to prevent its agents from operating there. The tension raised further as HSC started to build access roads and surround a waterfall of spiritual significance to local people with construction equipment.

As Mayans then arrested the project workers to prevent the construction work the company began persecuting the Mayans who opposed the project. The conflict escalated into a cycle of community protests, violent crackdowns by state and company, kidnappings, and arrests of local activists.

To stop Mayans from preventing the takeover of their ancestral lands to which they had internationally recognised rights which Guatemalas had ratified under ILO 169 and Inter-American and UN treaties Guatemala declared in 2012 a state of emergency in the area for the first time since the civil war, suspended civil and political rights and accused the invaders of being linked to a drug trafficking cartel.

Many community members saw that however as a move intended to snuff out dissent against the dam project. With martial law in effect, security forces searched homes without warrants and for weeks, government authorities effectively occupied the town. Dozens of Mayans got arrested for defending their rights, which Guatemala's international commitments required the state to protect, but which the state violated.

Similarly in Agua Zarca in Honduras and elsewhere Finnfund has financed 'clean energy' etc. projects which have violated and continue to violate indigenous peoples' rights to the lands and waters they have traditionally used.

3. Indigenous communities' land rights protected only if they resist until they get killed. Threats continue

Andrés Pedro Miguel, was murdered in 1 May 2012 by the HSC security guards of the and also many others project opponents wounded and several community leaders jailed for up to 33 years in prison for defending their rights which the project violated but which were recognised for them as indigenous peoples under the international law.

All suspected for the murder of Andrés Pedro Miguel were instead released already in 2013. Mayans were searched for in their home, and their rights violated by unlawful arrests, sexual violence, harassment, theft, destruction of property and other abuses of power. (1)

In this situation, Finnfund began in 2014 to fund, via CIFI, this dam project, whose opponents had just been murdered, wounded, sexually abused and illegally imprisoned, in order to threaten by force and violence the Maya communities to accept the dam project which violated their rights for the benefit of the corporation and investors. The perpetrators who carried out murder, violence and violations have not been brought to justice and the villagers are suffering from health problems due to the stress caused by violence and arbitrary arrests.

Although dam construction was abandoned, communities are still living with many of the impacts caused by the project: the land taken has not been returned, they have received no compensation for damages, many continue to suffer ill health as a result of the stress caused by the violence and arrests, and there has been little justice served to those who committed violence and murder. Norfund, which has also funded the dam alongside with the IFC and Finnfund, has stated that the project was terminated due to local protests, demonstrations and escalating violence.

4. Complaint of Mayans against Hydro Santa Cruz and IFC regarding project financed by IFC and Finnfund

In 2015, the affected communities whose rights were violated by the project filed a complaint about the project to the IFC's accountability mechanism, the IFC's Compliance Adviser Ombudsman (CAO) alleging a number of serious impacts to their human rights as the project was funded also by the IFC, the World Bank lending arm to the private sector. (2) The CAO investigation on the project has been completed and found that (3) but the World Bank problems of human rights abusive funding. (4)

IFC provided \$20m in loans and \$10m in equity to CIFI, a private equity fund that invests in small and mid-sized infrastructure projects in Latin America. CIFI, in turn, provided Hidro Santa Cruz (HSC) with a \$8.2m loan and up to \$2.5m for a mezzanine facility. The CAO's audit investigation into this case is due to be published soon and we are writing to request that Finnfund considers the CAO's findings, especially at the project level, and responds appropriately to those findings. We are in touch with the affected communities who have asked that we convey to you their concerns about the lasting harms from the project and their request that Finnfund, as an indirect financier of the project, supports efforts to remedy those harms.

Also the murder investigation was started again and 2 armed guards Ricardo García López and Armando Ortiz Solares who were paid by Hidro Santa Cruzin have been in court as charged for the murder of Andrés Pedro Miguel based on statements of eye-witnesses. (5)

Although the project did not succeed to produce hydroelectric power in Barillas, the project had an impact of violating rights of Maya communities whose land has not been returned to them and who have not been compensated for the damage and violations. Those who have been jailed for defending their rights and their families have continued to suffer. Ruben Herrera, the community leader opposing the project, human rights defender who was jailed as part of the oppression, died July 2020. His widow holds IFC and Finnfund partly accountable for his death as his health was so badly affected by his imprisonment (his heart suffered) that when he caught Covid he died. It was another death to lay at the door of this project that never realised anything good but only nice-looking plans.

This all has continued a long history of conflict between hydroelectric companies and indigenous groups forcibly removed for projects which violate their human rights - like also another IFC-funded hydroelectric dam in Monte Olivos

in northeastern Guatemala. (6) Similarly resistance to a 1980s hydroelectric dam project financed by the World Bank resulted in the Rio Negro massacre, in which some 400 people were killed in northeastern Guatemala. "Our people couldn't oppose the project because if they did, they'd be killed," said Jose Sucup, a survivor of Rio Negro.

5. IFC financing standards and Finnish financing linked and used in human rights violations

As the violations in Guatemala would not have happened without financing of the capture of Mayas' traditional land without their free, prior and informed consent, such finance is linked to the human rights violations that occurred, even though the financed project did not succeed in its planned capture of ancestral land.

Finnfund and Finland are on their part responsible for the ongoing suffering and human rights violations and the lasting harms that the project caused compliant to their share in financing the project. The responsibilities and obligations regarding the human rights impact of the funding will not disappear when the funding ends or is interrupted.

In as much as Finnfund or other funders can finance projects without obligation to guarantee in their financing contracts adequate leverage and monitoring to be able to prevent negative human rights impacts and to secure compensation from clients should harms occur, such lack of due financing contract is itself a crucial connection to the negative impacts of such finance.

Because of their resistance to the project, the community faced sustained violent oppression which was still ongoing when Finnfund joined the funding consortium for the project. The IFC Compliance Advisor Ombudsman (CAO) examined a complaint on the IFC's responsibility for violations of human rights against the Mayan community, which in 2020 concluded that the project had violated IFC's own Performance Standards on many counts. As not even IFC can duly implement its own IFC Performance Standards, how then can Finnfund or others hope to do that better?

"The population of Santa Cruz Barillas is predominately (86 percent) indigenous", mainly Q'anjob'al Maya communities "many of whom live in poverty or extreme poverty". (7) While IFC notes that it "is committed to ensuring that the costs of economic development do not fall disproportionately on those who are poor or vulnerable" (8), the poor and vulnerable Q'anjob'al Maya communities suffered most from the dam project in Santa Cruz Barillas as the project led to violations of their human rights to life, security, subsistence and life-heritage without compensation.

Human rights due diligence is neglected if it is approved as sufficient for a project to "address many relevant human rights issues" as some "elements related to human rights dimensions" (9), while making profit by neglecting or violating many other human rights.

Finland has to direct Finnfund to compensate for the damage caused by its financing to the Maya communities on the basis of negotiations with these communities on how to remedy those harms. These harms were caused while Finnfund was an investor in CIFI. Finnfund thus bears a responsibility for the continuing suffering of the communities.

The community members have asked Finnfund to respond appropriately to CAO's findings at the project level and to commit to address the harms, in consultation with affected communities and to repair the financing procedures which caused the damages.

It is not justified to imagine IFC performance requirements to be a valid system for verifying the financial responsibility of Finnfund and others if IFC can not verify even its own funding to meet the performance requirements, which it has created. The Supreme Court of the USA also ordered in February 2019 that loan financiers like IFC of the World Bank have also legal responsibilities in respect to the violations caused by such business of the private corporations which they have financed. (10)

The report by more than 20 news organizations found that dams, power plants, conservation programs and other programs and projects sponsored by the World Bank Group have pushed at least 3.4 million people out of their homes and threatened their livelihoods between 2004-2013. According to official complaints and interviews, in some cases governments that received the group's money have arrested, beaten and even killed people who objected to being forced from their homes.

6. Compliance Advisor Ombudsman (CAO) findings on violations of IFC Performance Standards

The Government of Guatemala declared a state of siege in Santa Cruz Barillas and mobilized police and military to the area for almost three weeks against Maya communities. While one of the alleged perpetrators was an earlier security guard hired by the HSC project, no one got punished in the Guatemalan courts for the murder but one person was

convicted in 2020 of committing serious injury. Project's "Social Monitoring Report (Oct 2012) raised concern with the project's compliance with" IFC Performance Standards 1 and 7 "requirements on disclosure, consultation, a process demonstrating community support and free of manipulation". (11)

As "assessment documentation identified the project area as majority Indigenous Peoples" area and as in June 2007, Maya communities' referendum at Barillas overwhelmingly had opposed mining and foreign natural resources exploitation projects in the area by 46,481 votes against 9 votes (12), any accountable project would have started by transparent participatory assessment and consultation.

Q'anjob'al communities made thus in 2015 complaint to the CAO on how HSC project never duly consulted them, how the land was captured non-transparently, how the "impacts on land and natural resources" violated their rights, on "persecution and criminalization of leaders who have protested the project; threats, intimidations, and abuse of community members", "project's use of a private security force", how "project security force killed one community member and injured two", how "during state of siege that followed this incident, 17 community members were detained and nine sent to jail" for overlong periods and how "threats and persecution continue" over years. (13)

CAO's investigation found that "IFC's pre-investment environmental and social (E&S) review of the company's E&S management system (ESMS) was not commensurate to risk" and IFC assessments failed regarding "the client's track record of ESMS implementation" and "the client's capacity to implement its ESMS to IFC standards". "Project activities were allowed to commence in advance of an adequate risk assessment and implementation of mitigation" and without consultation of the community. (14) As "the path used by the project had been initially opened by the communities", "they chose to block it" by protest. (15)

Even when the protests were violently suppressed and IFC was responsible "to ensure that the root cause of the incident is assessed, and measures put in place to prevent reoccurrence", IFC still "did not engage with the client" or "comply with its procedures on responding to serious incidents, nor did it take measures needed to ensure that the client's response reflected Performance Standards requirements". (16)

Project lacked also by IFC due "assessment of social impacts", "disclosure of information", due benefit sharing for the indigenous community and "Free, Prior and Informed Consultation with the affected communities" to reach their consent. Also "the effect on the water quality and river level [...] was not well documented" and as "Q'anb'alam River and its waterfalls [...] have cultural and spiritual significance for the Indigenous Peoples in the area" (17), these were not duly assessed or taken into account.

As "project activities were allowed to commence" before "adequate risk assessment and implementation of mitigation measures envisaged by the Performance Standards" (18) without "adequate social impact assessment or socio-economic baseline study" (19) thus "it was not possible to reach sound conclusions on project compliance with Performance Standards (PS) requirements".(20) "There is no evidence that IFC assured itself that an adequate assessment [...] was conducted (PS7, para 11.)" in respect to the impacts on rights of indigenous peoples. (21)

What kind of human rights impact assessment did Finnfund make when it joined to fund such project soon after the murder of Mayan person and various human rights violations had taken place ?

Even where IFC saw possible problems, **"IFC did not [...] ensure that residual impacts of the project were assessed, reduced, mitigated, or compensated for [...] as required by the Performance Standards"**. (22) Maya communities have suffered violence, intimidation and repression since the project began, as their human rights as indigenous people were violated, their "traditional access to land and natural resources" got disturbed and negative "residual impacts remain" - even though the IFC principle of "do no harm" are central to IFC's development mission". IFC would have been responsible for "ensuring that the costs of economic development do not fall disproportionately on those who are poor and vulnerable" and to "work with its client to ensure that impacts are assessed, reduced, mitigated or compensated for". (23)

Where is now the compensation from the HSC project and from the IFC and Finnfund, which were to follow that IFC Performance Standard requirement on compensation?

It is nowhere as "IFC did not engage with its client to ensure that residual impacts of the project were assessed, reduced, mitigated, or compensated for" as IFC's standards would require. CAO has thus found that "adverse impacts have been left to fall on the community" (24) under the plan where the energy generated would not be used to supply the local people even though almost half households lack access to electricity.

"CAO finds that IFC's policies and procedures do not provide an adequate level of protection" and are thus not adequate "to identify and correct non-compliance" (25) and even where its procedures could be helpful, "IFC did not comply with its procedures" and thus the "gaps in the client's response to Performance Standards requirements were not addressed" regarding the "assessment of project social impacts, including impacts on Indigenous Peoples as required by PS1 and PS7." (26)

"CAO finds that IFC's review and supervision of its investment in CIFI were not sufficient" "to ensure that the" financed client is "applying the Performance Standards to its investments". As IFC can misuse its own Performance Standards in this way, so can also Finnfund and countless others because their voluntary structure enables the corporations define the content of such standards in practical implementation. "IFC's lack of engagement with the client in relation to the conflict around the project meant that" project did not duly "assess and mitigate risk" or "impacts on land and natural resources including cultural resources of Indigenous Peoples". (27)

The financiers do not understand the diversity of the less commercial sources and practices of indigenous life and livelihood and when their investments tend to transfer such sources away from sustainable indigenous use under commercial control they present these as positive results without monitoring the impacts on indigenous life or on how indigenous peoples rights are endangered when they are deprived of their own, less commercial means of subsistence.

7. The problems of IFC's response to CAO findings

As companies, financiers and investors have widely used IFC Performance Standards as a model for how to carry out business accountably in respect to human rights, environment, indigenous peoples and their lands, it is sad how CAO as IFC's own accountability monitoring body has to recognise that IFC does not itself follow its standards.

Authorised to monitor IFC, CAO's investigation shows such IFC's non-compliance with its Performance Standards which contributed also to the violation of rights of the indigenous Maya communities. The IFC failed in its standard to ensure that its investments in lands traditionally used by Mayas 'do no harm' their vulnerable communities.

It is however even more unfortunate if the official significance of IFC Performance Standards is what IFC itself tells it to be (in IFC's reply to CAO) such that they can be adequately followed by such contentless formalities which even its own accountability monitoring body can not find adequate - not to even speak about what human rights treaty monitoring bodies would see as respecting or protecting human rights.

If IFC's reply to CAO gives true picture about the real function of the IFC standards, then IFC Performance Standards are not accountable instrument in making financing/business to respect human rights. IFC's reply does not verify or demonstrate how the procedural formalities which it claims to be adequate would get business to respect, protect or fulfil affected communities' human rights as recognised in the international human rights law.

IFC's reply shows how the use of IFC Performance Standards in a way which IFC claims to be adequate endangers human rights in various ways and is deeply problematic also in how it misleads public understanding about what is respect or protection for human rights. Such IFC's application of its standards can be used for legitimizing the violations after they have happened by denying any link or connection between the violations and the financed project without which those violations would not have taken place.

As violations of Maya community's human rights followed from the IFC financed project without which they would not have happened and took place through repression of community's protests against the HSC project's use of the territory which ignored their rights to their traditional use of the land and water, the project was 'link' to violations or that its financing would have had no 'leverage' over the violations

IFC says that its management system formalities were ok, based on acceptable information on how the project managed to "address stakeholder concerns promptly and transparently, in a culturally appropriate manner which is accessible to the community" so that "no operational non-compliance" was identified" (28) and "the United Nations investigations did not identify HSC as responsible for any abuses." (29)

8. What had the IFC-referred UN report required in respect to the cases like HSC-Maya conflict in Barillas?

IFC says the violations "have not been attributed to HSC" when "investigated and reviewed by the relevant authorities" including how "the United Nations review did not identify HSC as a responsible party, while the Guatemalan Human Rights Ombudsman references the HSC project as contributing to the wider conflict in Barillas." (30)

But in reality the UN review by OHCHR concerned the wider human rights situation in Guatemala and expressed trust to the competence Guatemalan Human Rights Ombudsman in efforts to "reduce social conflicts, and in contributing to the follow-up of the recommendations by the international human rights protection mechanisms", requiring that:

- When human rights violations have taken place "allegedly by a private security guard" or private actors who "perform policing functions and have even committed abuses" - like claimed in Barillas - , there is an obligation "to investigate and prosecute those responsible for such abuses" particularly so as "private security agents continue to far outnumber the police force. However, none of the existing companies had completed the compulsory registration" (31)

- At Barillas the "decree establishing the state of siege lacked a clear justification", "necessity, exceptionality and proportionality" while "protests [...] in the land conflicts in [...] Santa Cruz Barillas [...] resulted in the use of disproportionate criminal charges" and "the involvement of non-State actors in practices that could result in the vulnerability of or direct attacks against human rights defenders needs to be investigated" in a due manner. (32)

- "To avoid the risk of potentially ungovernable situations and violence, social conflicts relating to the exploitation of natural resources in or around ancestral indigenous territories require a decisive response" to "be addressed from a human rights perspective, focusing on the rights of indigenous peoples to property (including collective property) [...] and to establish their own forms of development as part of their right to free determination." (33)

Thus this statement of the UN High Commissioner office in Guatemala to which IFC referred, also stated in respect to the social conflicts, to business activities and to the position of Guatemala's Human Rights Ombudsman :

a) "Calls on companies to fulfil their responsibility to respect the rights of indigenous peoples and to evaluate the possible negative impacts of their activities on those rights" and "urges the Government to strengthen the mechanism and institutions to resolve social conflicts by incorporating a human rights approach, so that they may address the root causes of such conflicts and guarantee indigenous peoples' rights"

b) "Encourages the Human Rights Ombudsman to continue efforts to strengthen his Office's presence [...] in helping reduce social conflicts, and in contributing to the follow-up of the recommendations by the international human rights protection mechanisms" (34)

Thus by noting "the HSC project as contributing to the wider conflict in Barillas", the Human Rights Ombudsman of Guatemala (35) contributed "to the follow-up of the recommendations by the international human rights protection mechanisms" just as the High Commissioner requested (36) - in respect to how IACHR made explicit already in 2009:

Insofar as the government and domestic laws of Guatemala neglect human rights obligations, under the international human rights law however the "duty to guarantee the right to indigenous comunal property is autonomous from domestic legal provisions, and operates even in the absence of recognition of the right in States' domestic legal systems". (37)

And as business enterprises' "responsibility to respect human rights" as internationally recognised rights, "exists independently of States' abilities and/or willingness to fulfil their own human rights obligations", "it exists over and above compliance with national laws and regulations protecting human rights." Thus "the responsibility of business enterprises to respect human rights refers to internationally recognized human rights" and "applies to all such rights" also regarding how international human rights law and "United Nations instruments have elaborated further on the rights of indigenous peoples" and also where under national law and governance "indigenous peoples [...] are excluded from the same level of legal protection of their human rights that applies to the wider population". (38)

Thus in respect to such responsibilities regarding investments under the international law and "human rights protection mechanisms", the IFC-referred UN High Commissioner's report itself required the indigenous communities' rights have to be respected as recognised in international human rights law, including that:

- In HSC-type cases where "legal gaps and deficiencies in the procedures to grant licences persisted", "social-impact studies [...] are not demanded by the authorities" and "the approval process of environmental-impact studies lacks the consultation required by international standards" and in production of "energy resources, indigenous territories are especially affected" (like in Barillas), what is needed to respect indigenous rights, is "to reopen a dialogue on projects already approved" to ensure that the licenses have to "respect all individual and collective rights of indigenous peoples" and "indigenous people must therefore be consulted" (39)

- Where the laws "fail to recognize the right to communal property and the principles of ancestral tenure of indigenous peoples" and "the right of indigenous peoples to participate in decision-making processes in the exploitation of natural resources [...] is not guaranteed by the State", there is a need to respect the way how international law "recognizes traditional forms of collective land tenure, possession and use by indigenous communities needs to be adopted" (40)

- There has been provided "important criteria [...] for both the Government and the companies to take into account" regarding the "social licence" as presented "by the Special Rapporteur on the rights of indigenous peoples in his 2012 report to the Human Rights Council (A/HRC/21/47)" (41) - namely "social license" from the community whether or not the project counts among a significant part of the population of indigenous communities in that municipality" "in view of the results of the self-organized popular consultation by such peoples and their refusal to dialogue with the Government and the company" who need "to make a decision regarding the project, based and framed in the international human rights standards of indigenous peoples". (42)

9. What kind of rights did the Maya community in Barillas have under the International and Inter-American human rights law and what it would have required to respect them?

CAO notes how by the IACHR the area where Santa Cruz Barillas is located, "Huehuetenango is observed to have one of the highest incidences of land disputes in Guatemala" where "the situation of indigenous property rights [...] is marked by the failure to recognize historic rights to the land". The "main obstacle to respecting and ensuring indigenous property rights in Guatemala is the failure to recognize historical use and occupation as the basis of Indigenous Peoples' and communities' collective rights to the land, territory, and natural resources." (43)

It would be thus crucial to ensure in approving any project there that it can not worsen the land conflict or violations of indigenous land rights of Maya communities who have "communal property rights over the lands they inhabited, rights that had arisen "from the longstanding use and occupancy of the territory by the Maya people, which [...] predated European colonization, and have extended to the use of the land and its resources for purposes relating to the physical and cultural survival of the Maya communities." And given that the foundation of territorial property lies in the historical use and occupation which gave rise to customary land tenure systems, indigenous and tribal peoples' territorial rights "exist even without State actions which specify them" or without a formal title to property." (44)

Mayas have under international and Inter-American law rights to lands they have traditionally used and rights to their various ways of using and holding them, to "their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property, and the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied". (45) This covers forms of holding the land, "springing from the culture, uses, customs, and beliefs", "settlements or sporadic cultivation; seasonal or nomadic gathering" or uses "associated with their customs and any other element characterizing their culture". "productive systems based on extensive use of territory, on temporary use of crops, along with crop rotation and leaving fields fallow" all of those lands and resources that indigenous peoples currently use [...] that they possessed and of which they were deprived". (46)

Such rights to diverse indigenous ways of using or holding the land must "be protected against [...] trumping by third parties' property rights" so that "prior consultation with, and the consent of, the relevant indigenous people are required". "Disregarding these systems, or considering that they are tantamount to abandonment of the land, deprives the communities of effective security and legal stability in respect to their property rights" (47) These all must thus to be respected equally as commercial property also in respect to investments by business also where the domestic law or administration do not respect them.

Indigenous communities "have the right to possession and control their territory without any type of external interference" to secure "the maintenance of their culture" so that under the international law indigenous communities "traditional possession of ancestral territories has effects equivalent to those of State-issued full ownership property titles". (48)

Q'anjob'al Maya community of Santa Cruz Barillas has traditionally lived thus crucially as such shifting cultivators and gatherers in the area by "sowing milpa fields with maize, beans, coffee, cardamom and tending livestock" (49) in hills around rivers and gathering there minor forest produce sustained by rotation of cultivation and forests regenerating in fallows, thus sustaining their biodiverse environment by which they live but which is now threatened. (50)

As milpa is such type of shifting cultivation and subsistence use of land which is rotating in wider areas in ways which

sustains diverse ages of regenerating forests in its fallows, Milpa can not be duly managed or determined by individually or commercially titled ownership of settled agricultural lands. Such private or commercial ownership titling of settled lands comes from outside.

When such commercial ownership titling of land displaces the possession of traditional rotationally used milpa shifting cultivation lands and fallows from where people have been able to gather edible or healing wild plants, other MFP, fodder, fiber, wood for fuel and construction, etc., it violates indigenous rights to land and to self-determined autonomy of food and subsistence, because:

- Indigenous peoples' rights to lands are "derived in the first place from the traditional use and occupation of the land and resources necessary for the physical and cultural subsistence of indigenous and tribal peoples and their members". (51) As rotational milpa shifting cultivations and forest gardens belong to Maya peoples' means of subsistence, "in no case may a people be deprived of its own means of subsistence" (52) and thus also "indigenous peoples have the right [...] to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional [...] economic activities" of their lands with a right to self-determine the development of the lands they have traditionally used. (53)

- Indigenous peoples have "rights of ownership and possession [...] over the lands which they traditionally occupy" and "measures shall be taken" also "to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of [...] shifting cultivators in this respect" (54) like in case of Santa Cruz Barillas.

The complainants of the Maya community of Barillas raised "allegations of economic displacement because land acquired was used by community members to plant subsistence crops" and "the families who rented the land to grow crops are poor" "a particularly vulnerable group" and "do not own sufficient land themselves". (55) Thus "special care must be taken in adopting measures to guarantee territories of sufficient extent and quality to [...] shifting cultivators" and "the right to a territory of sufficient quality and extent is particularly relevant for certain types of indigenous and tribal peoples whose sociocultural specificity" of their life and their subsistence depend directly on such indigenous access to and control of the land like by gatherers, "shifting cultivators or pastoralist peoples, nomadic or semi-nomadic" foragers. (56) What is crucial, is whether the way how the land is captured "results in effectively excluding land used by indigenous groups for foraging [...] or land used in rotational agriculture, whereby land is left fallow for a number of years before people [...] return to it" like the UN Special Rapporteur on the right to food has observed. (57)

Thus the conflict here does not concern only the area which HSC bought for the dam construction but it concerns Maya peoples' fundamental right to their own life-heritage of their self-determined subsistence based on their natural wealth as a part of "an essential condition for the effective guarantee and observance of individual human rights". (58)

UN Human Rights Committee "is also concerned about the granting of exploration and resource development permits for activities in indigenous peoples' territories without those peoples having been consulted and without taking into account the results of the consultations convened by those communities themselves." When communities do not approve projects CCPR "is further concerned" in Guatemala about "the excessive use of states of emergency as a social control mechanism." There should be "meaningful consultations [...] held with the indigenous peoples concerned with a view to obtaining their free and informed prior consent before the adoption or application of any measure that may have a substantial impact on their way of life and culture". (59)

In HSC project these conditions were not respected as most people did not even know about a transnational hydroelectric plans when lands were bought. As there have been practice of renting the land for cheap price for shifting milpa subsistence cultivations some Mayas got to understand that the acquired land would be used for example for coffee and cardamom cultivation as during 2008 unknown persons in the municipality carried out measurements and start buying and registering land as "the lands for the project were bought through a front man with a lack of transparency about what the lands would be used for". When people understood what was going on plans were rejected by Communal Development Councils as communities "felt they were being deceived" (60)

10. How IFC's response demonstrates further the violations which IFC and Finnfund financing did

Thus what is crucial in HSC land acquisition for the rights of the Maya people is not how vast the HSC captured area was or how wide areas there happened to be cultivated just on the year of acquisition or who happened to have ownership titles to that land according to the national law.

What is crucial, is how rotating milpa lands, their fallow forests and other lands in the river area belong to Mayas' own means of subsistence, and to their cultural and spiritual life-heritage and to the sustenance of their biodiverse environment and whether Maya will have adequate lands for these purposes and whether the criteria or conditions under which the lands get captured away from the Maya violate their rights and can become repeatedly used to capture their lands, because:

If traditional milpa lands and areas which are integral to their life-heritage can be sold or rented for other, foreign commercial purposes in the way aimed by the HSC project, then Maya peoples' own means of subsistence, their food sovereignty, their environment of their Maya life and their survival as peoples are threatened. The community complained as "all the q'anjob'al territory is threatened by businesses that do not consult the communities, but rather divide them, prosecute their leaders, and resort to violence to impose their projects on them." (61)

As far as Maya are deprived of ways how they can sustain their life in the area autonomously by their self-determined life-heritage, also in case of "conflict between those who depend on land for subsistence and other stakeholders who may want to use natural resources for other purposes, including for profit", "no one should be deprived of his or her own means of subsistence, including those deriving from land" like the UN High Commissioner for Human Rights have noted. (62) The cumulative "impacts on the environment due to additional proposed hydroelectric power plants" of such land acquisitions have to be assessed as this dam project was 'Canbalam I' while to the same river "the project developer sought approval for Canbalam II in April 2012" to expand the land grab through the violent repression. (63)

"Indigenous peoples' consent is also required [...] in cases where the execution of development or investment plans or of concessions for the exploitation of natural resources would deprive indigenous peoples of the capacity to use and enjoy their lands and other natural resources necessary for their subsistence" or otherwise affect "the right to life, to cultural identity and other essential human rights" of indigenous people or displace them from their means of living or from land of their life-heritage. (64)

Maya complainants of Santa Cruz Barillas complained over inadequate "transparency of the land acquisition process and project-related economic displacement" (65) including how "land acquired was used by community members to plant subsistence crops" in lands which they have traditionally used for this and have rights to continue to do so if lands would not be sold for the project against their will violating their rights. They complained that in these respects "the land acquisition process lacked transparency and was not fully voluntary." As there is now also "concern about current status of acquired lands, since the project developer has cancelled the project"(66), IFC is responsible to ensure that the vulnerable families get all the lands back to their milpa cultivation and gathering livelihood needs.

UN High Commissioner has noted that in areas of Guatemala "where indigenous peoples live there are also exploration projects and natural resources exploitation" leaving "families without land, housing or means of subsistence" and 92 % of people depending on subsistence use of land "occupy only 21.86% of arable land". "Exploitation of natural resources continued in indigenous territories without appropriate consultation with the concerned communities, thereby affecting the rights of indigenous peoples to lands and territories as well as to their traditional collective ways of life and social organization." (67)

What is crucial is whether the Maya can sustain the the lands, forests and their diverse life by which Mayas live as milpa "has worked with tropical forests becoming integral to their sustainability" as "mega diverse tropical forests [...] as a human managed environment via cultural practices around food production", maintaining "a diverse and abundant ecosystem, with numerous trees and plants species directly beneficial to humans". "Forest and milpa gardens are thus integral" to each other so that "in the meso-American Maya area, where milpa has been practiced, "in the last 8,000 years, the region has indeed drastically changed from arid to humid and temperate with long periods of irregular precipitation". (68)

When IFC says its performance standards require free, prior, and informed consent regarding "impacts on lands and natural resources subject to traditional ownership or under customary use", so that "while Indigenous Peoples may not possess legal title to these lands as defined by national law, their use of these lands, including seasonal or cyclical use, for their livelihoods, or cultural, ceremonial, and spiritual purposes that define their identity and community" are crucial (69), IFC can not thus rely on Guatemala's domestic law or authorities in defining what land is under traditional ownership or under customary use.

When IFC reply however says "none of the land near the Sub-project site or in nearby areas of the Canbalam River watershed were communal or indigenous territories" or "used by local residents for any productive, domestic or cultural purpose" and that around 2008 each land "was acquired or leased from private owners on a willing-buyer-

willing-seller basis" based on "details about each individual sale and documented the previous use of the properties" (70) on what authority or competence on indigenous customary law and traditional land use, is IFC's such assumption based ?

While IFC has asserted that "allegations of improper customary land use and coercive land acquisition practices by the project operator were not substantiated by available evidence" CAO has found however that "Limited discussion or evidence is presented [...] to support the determination that allegations of improper customary land use were not substantiated" . "Land purchase agreements provided by IFC to CAO dated September and October 2010 demonstrate that land was purchased but not that PS5 and PS7 requirements were met." (71) Required impact assessments and consultations have not been demonstrated.

In respect to such lands which Mayas have traditionally used "the ultimate purpose of environmental and social impact assessments is "to preserve, protect and guarantee the special relationship" of indigenous peoples with their territories, and guaranteeing their subsistence as peoples." "In connection with their milieu, their integration with nature and their history, the members of the indigenous communities transmit this nonmaterial cultural heritage from one generation to the next, and it is constantly recreated by the members of the indigenous groups and communities". (72) "A legal system which subjects the exercise and defense of the property rights of indigenous and tribal peoples' members to the existence of a title of private, personal or real ownership over ancestral territories, is inadequate to make such rights effective". "Indigenous rights and liberties are frequently exercised and enjoyed in a collective manner, in the sense that they can only be properly ensured through their guarantee to an indigenous community as a whole." (73)

As "Indigenous property rights based on customary use or possession, regardless of the existence of state recognition, exist not only in cases of state claims to property, but also in relation to third parties who purport to hold real property titles over the same areas", "such traditional systems for the control and use of territory" are in many instances essential to the [...] the survival of, indigenous peoples" and to "the geographic space necessary for the cultural and social reproduction of the group." (74)

Impact assessments for these kind of cases require deep knowledge on Maya life-heritage and a thorough investigation. IFC, CIFI or HSC have nowhere made required assessments or demonstrated how they would have investigated and assessed project's impact on these human rights of Mayas. In addition, for the Maya communities "the land acquisition process lacked transparency and was not fully voluntary." (75)

IFC's reply shows the HSC financing process has neglected these dimensions of human rights and obligations on environmental and social impacts related to territories which indigenous peoples have traditionally used. This is a problem as the Performance Standard 7 on indigenous Peoples says that its "applicability [...] is established during the environmental and social risks and impacts identification process" - where indigenous peoples' rights on their traditional territories were neglected - and "the implementation of the actions necessary to meet the requirements of this Performance Standard is managed through the client's Environmental and Social Management System [...] outlined in Performance Standard 1". (76)

Accordingly "business should respect human rights" but only so that "each of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations. Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project" (77)

As this may be also an approach which covers only some "elements related to human rights dimensions" and "many relevant human rights issues", it does not need to treat all human rights as indivisible whole to be all equally respected. Business can use such standards thus to select and "address many relevant human rights issues in its project" (78) even when it tries to make profit by neglecting or violating many other human rights.

IFC Performance Standard 7 says that "If the client proposes to locate a project on, or commercially develop natural resources on lands traditionally owned by, or under the customary use of, Indigenous Peoples, and adverse impacts can be expected, the client will " for example "assess and document the Affected Communities of Indigenous Peoples' resource use without prejudicing any Indigenous Peoples' land claim. The assessment of land and natural resource use should be gender inclusive and specifically consider women's role in the management and use of these resources".(79)

But when Mayans started to claim their rights, which Guatemala's international commitments required the state to protect, they became arrested. The conflict escalated and in 2012 Guatemala declared a state of emergency in the area for the first time since the civil war and suspended civil and political rights.

Under IFC Performance Standard 7 the client would also "offer Affected Communities of Indigenous Peoples compensation and due process in the case of commercial development of their land and natural resources, together with culturally appropriate sustainable development opportunities, including:

- Providing land-based compensation or compensation-in-kind in lieu of cash compensation where feasible.
- Ensuring continued access to natural resources, identifying the equivalent replacement resources, or, as a last option, providing compensation and identifying alternative livelihoods if project development results in the loss of access to and the loss of natural resources independent of project land acquisition.
- Ensuring fair and equitable sharing of benefits associated with project usage of the resources where the client intends to utilize natural resources that are central to the identity and livelihood of Affected Communities of Indigenous People and their usage thereof exacerbates livelihood risk.
- Providing Affected Communities of Indigenous Peoples with access, usage, and transit on land it is developing subject to overriding health, safety, and security considerations". (80)

As such conditions can not be fulfilled without FPIC of the community, as far as one decides to finance private business in lands which indigenous communities have traditionally used in Guatemala, one has to ensure that such business does not profit by violation or neglectance of their rights by the government or by the company. But the consent of Maya community was not reached when the activity started.

And "where a project may significantly impact on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples lives, priority will be given to the avoidance of such impacts. Where significant project impacts on critical cultural heritage are unavoidable, the client will obtain the FPIC of the Affected Communities of Indigenous Peoples". (81) But the integrity of cultural heritage of the area was not duly addressed. IFC's documents which it has made public on HSC project do not demonstrate serious considerations on how it would have secured the above referred human rights of Mayas in the project.

IFC's reply does not verify how it would not have had "leverage" over such IFC financed HSC buying of lands compliant to their domestic legal status without the free, prior and informed consent of the community. Without those IFC financed sales of lands which Mayas had traditionally used, the violations would not have happened. The lands which Mayas had traditionally used for their subsistence and as integral to their life-heritage, were bought by IFC finance without due assessments of how that may affect the rights of the indigenous community - without due consultation and without the consent of the community even though internationally recognised rights of Mayas would have required these.

When IFC reply describes the different roles of itself "as a shareholder and lender" "accountable for requiring CIFI to develop an environmental and social management system", of CIFI "as an IFC client [...] accountable for implementing" such management and "requiring its borrowers to progressively align their operations with the Performance Standards" and of "HSC, as a borrower of CIFI [...] accountable for its **compliance with local laws** and for progressively aligning its operations with IFC's Performance Standards" (82), IFC does not say: Who was then responsible to secure that international human rights are not violated through the financed project ?

It has been IFC's responsibility - already before agreeing financing contract with the CIFI and before CIFI's contract with the HSC - to ensure that it can agree only contracts and roles under which IFC will have full leverage to ensure that human rights - and particularly indigenous peoples' rights shall not be violated through the project. As the IFC says now that it did not have 'leverage' to ensure that the acquisition of lands which Mayas had traditionally used would fully respect the internationally recognised rights of indigenous peoples, it says in fact that IFC did not care to ensure in agreeing its financing contracts that the internationally recognised rights will be respected in land acquisition. Nothing could have forced IFC to agree such contracts without due 'leverage' if IFC would not have been ready to make such contracts without adequate leverage to secure human rights protection.

11. Will IFC financing continue to violate human rights approved under the UN human rights treaties ?

UN High Commissioner for Human Rights has noted that as Guatemala does not adequately "regulate and supervise the activities of national and international companies to ensure that their activities comply with international human rights standards", the rights of indigenous communities are violated by lack of "recognizing the various systems land tenure and registry regularization and land titling, especially for indigenous peoples and peasants". As state is

responsible for "guaranteeing a rights-based approach to human security" if there however continues instead "institutional weaknesses, corruption and lack of surrender of accounts" thus, in order to make business in Guatemala the companies and investors have to take care that indigenous peoples' rights are respected in their activity. (83)

As business enterprises' "responsibility to respect human rights" "exists independently of States' abilities and/or willingness to fulfil their own human rights obligations" and "over and above compliance with national laws and regulations protecting human rights" (84) thus, if Guatemala did not comply with its human rights obligations, that did not justify IFC, CIFI or HSC to invest in Guatemala to make business over those neglected obligations without the FPIC of the whole Maya community's but - like the CESCR has noted:

- Also "businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired". "The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over" economic, social and cultural human rights" in the context of investment projects. Indigenous peoples' cultural values and rights associated with their ancestral lands are particularly at risk." (85)

- As Guatemala "has no effective legal mechanism for recognizing the rights of indigenous peoples as such to obtain collective land titles" and "the indigenous peoples are still not effectively consulted, nor is their free, prior and informed consent obtained in the decision-making process concerning the exploitation of the natural resources within their traditional lands", the CESCR required in 2014 "mechanisms for recognizing the rights of indigenous peoples over their traditional lands and their natural resources" and to carry out "projects for the exploitation of natural resources, in consultation with the indigenous peoples" so as to "ensure that they do not have a negative impact on the rights of indigenous peoples, their territory and their natural resources." (86)

While in Guatemala "the State party has yet to set up mechanisms to enforce the right of indigenous peoples [...] to be consulted with a view to obtaining their free, prior and informed consent regarding any legislative or administrative measures that could affect their effective enjoyment of their rights", also CERD has noted in respect to Guatemala a need to:

- "Guarantee due respect for the right of indigenous peoples to be consulted with a view to obtaining their free, prior and informed consent regarding economic, industrial, energy, infrastructure and natural resource development projects that may affect their territories and natural resources, ensuring that such consultations are conducted in a timely, systematic and transparent manner, with appropriate representation of the affected peoples"

- "Ensure that, as part of prior consultation processes, impartial independent bodies carry out human rights impact studies that cover the potential social, environmental and cultural effects of economic and natural resource development projects in indigenous territories with the aim of protecting their traditional ways of life and livelihoods"

- "Ensure that indigenous peoples have access to effective and timely judicial remedies and comprehensive reparation based on an intercultural approach" and to specify, in consultation with the indigenous peoples whose territories and resources are affected, the mitigation measures to be put in place, the compensation for damages or losses suffered to be provided and the share in the benefits to be obtained from such activities.

- "Ensure the protection of indigenous peoples' right to own, use, develop and exercise full control over their lands, territories and resources by, inter alia, providing the necessary legal recognition and safeguards" to reach their consent "before the adoption or application of any measure that may have a substantial impact on their way of life and culture". (87)

In case of HSC these kind of conditions were not respected and after Mayans claimed their rights recognised under the international law, they were searched for in their home, and their rights violated by unlawful arrests, sexual violence, theft, harassment, destruction of property and other abuses of power. HSC had bought lands from communities so that some Mayas got to understand it would use them for example for coffee and cardamom cultivation - without announcing that it will build a dam and without the consultation of the community required for this. As armed guards, security arrangements, construction equipment and roadworks began to approach near Mayas' holy waterfall, the Mayas found the company cheating them and began to protest - because their traditional land had been cheated for alien purposes away from their life-heritage.

IACHR has further noted on rights of indigenous people Guatemala that:

- "Participation of indigenous peoples and communities in the processes, in accordance with their practices, customs and methods of participation, is fundamental in order to ensure that they achieve full access to

justice in Guatemala. In a country where more than half of the population identifies itself as indigenous, compliance with said standards must be a priority." "Impairment or negative impact" has to be prevented "regardless of the type of [...] investment project or any other that affects ancestral peoples." (88)

- "The common thread to the violence and insecurity afflicting the indigenous peoples and communities in rural areas of Guatemala is the presence of actors foreign to these communities, and the lack of a process of consultation in keeping with Inter-American standards." On "concessions previously granted or in the process of implementation" there is a need "to preserve the physical and cultural survival of indigenous communities and peoples" and to "adopt the necessary measures to ensure that indigenous peoples and communities, who have suffered the effects of projects about which they had not been consulted, are able to [...] receive adequate reparation, that is culturally appropriate." (89)

It is crucial to "ensure that human rights defenders are not subjected to criminal proceedings for unnecessarily summary and protracted periods of time" that there is no "arrest warrants as mechanisms of punishment or retaliation against human rights defenders" and that "third parties do not manipulate the punitive power of the State and its organs of justice in order to harass human rights defenders and operators of justice." (90)

IFC reply describes how it has carried out some internal formalities without presenting adequate evidence how human rights of the affected indigenous peoples could have been duly secured by such formalities. Even where IFC Performance Standards could have otherwise provided a tool for investments and project financing to respect human rights and integrity of environment if the standards would have been used in ways which fully respect international recognised human rights, IFC's reply to CAO shows, that IFC itself uses and interprets IFC Performance Standards in a manner, which violates human rights, distorts what is publicly meant by human rights - justifying attempts of private profit making even where they violate human rights.

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