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Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya

Addendum

Preliminary note on the application of the principle of consultation with indigenous peoples in Guatemala and the case of the Marlin mine*

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I. Introduction

1. In response to the Government's invitation, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, visited Guatemala from 14 to 18 June 2010 to assess the application of the principles of consultation with the country's indigenous peoples regarding the extractive industries, particularly the situation of indigenous peoples affected by the Marlin mine in the municipalities of Sipacapa and San Miguel Ixtahuacán.

2. During his visit the Special Rapporteur held meetings with the President of Guatemala, the President of the Constitutional Court, the Committee on Indigenous Peoples of the Congress of the Republic, the Human Rights Ombudsman (*Procurador de los derechos humanos*), the Presidential Commission on Racial Discrimination against Indigenous Peoples (CODISRA), the Minister of the Environment and Natural Resources, the Deputy Minister of Energy and Mines, representatives of the Office for the Defence of Indigenous Women, and a number of high-ranking officials from the executive branch. The Special Rapporteur also visited San Juan Sacatepéquez, San Miguel Ixtahuacán and Huehuetenango, where he had meetings with a large number of delegations of indigenous peoples and organizations, ancestral indigenous authorities, and municipal and local authorities. The Special Rapporteur also had the opportunity to meet representatives of indigenous communities affected by investment and mining projects in Sipacapa, El Estor and Chixoy. In addition, he had contacts with representatives of various branches of the business community, including the Chamber of Industry and representatives of mining companies operating in the country, with the United Nations Country Team in Guatemala and with members of the international diplomatic corps in the country.

3. The Special Rapporteur expresses his sincerest gratitude to the Government of Guatemala for the extensive support it provided at every stage of his visit to the country and to all the stakeholders who played an active part in the visit. In particular, the Special Rapporteur commends the invaluable work carried out by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Guatemala. Lastly, the Special Rapporteur wishes to express his appreciation for the warm welcome he received from the country's indigenous peoples during his visit to their traditional lands and sacred places. The mass attendance at the meetings by the authorities and members of indigenous communities from different parts of the country afforded powerful evidence, in the Special Rapporteur's view, of their human rights awareness and their determination to preserve their identities, based on close bonds with their traditional lands, in a democratic, participatory and multicultural Guatemala.

4. This document reflects the Special Rapporteur's preliminary observations on his visit, which were communicated to the Government and the general public at the end of his visit. These preliminary observations will be developed in the Special Rapporteur's final report to the Human Rights Council, which will include a series of recommendations to the State of Guatemala and other stakeholders.

II. The impact of natural resource investment and development projects on the indigenous peoples

5. During his visit the Special Rapporteur noticed that the business activities under way in the traditional territories of the indigenous peoples of Guatemala have generated a highly unstable atmosphere of social conflict, a situation recognized not only by the affected peoples but also by the public authorities, civil society and the companies themselves. It seems that this situation has not only had harmful repercussions on the indigenous peoples

and communities but has also made it difficult for the Government and for business people themselves to promote investment and economic development in Guatemala. The situation calls for decisive and urgent action by the public authorities to avert the risk of the country becoming ungovernable.

6. The conflicts currently surrounding the projects involving investment in or development of natural resources in indigenous territories, at least all those directly witnessed by the Special Rapporteur, seem to follow a similar pattern. In the Special Rapporteur's opinion, the pattern stems from two fundamental issues.

7. The first issue is the manifest conflict concerning the consultations that ought to precede the approval of such projects. The lack of an applicable legislative and institutional framework has led to consultation processes which are, to say the least, inadequate in terms of the international standards applicable to the rights of indigenous peoples. The question of consultations has a number of implications above and beyond those relating to specific projects. For many indigenous communities, failure to consult is associated with an intergenerational impression of invasion, marginalization and dispossession and a continuous sense of exclusion from and lack of involvement in decisions affecting them.

8. A second basic issue, which seems to have been somewhat neglected in the present debate, is the current regime governing the recognition and protection of the rights of the indigenous peoples of Guatemala to their lands, territories and natural resources. The high degree of legal insecurity as regards land ownership, the lack of collective titles to property in many if not the vast majority of cases, as well as the ongoing consequences of land dispossession during the internal armed conflict, are factors that have a bearing on the present disputes concerning projects involving investment in or development of natural resources, and that are frequently implicit in the requests for consultations.

9. During his visit the Special Rapporteur heard allegations from different authorities and representatives of indigenous communities concerning the impact of extractive projects on their daily lives, including: the contamination of rivers; the drying-up of wells; illnesses affecting infants; deaths of livestock; harassment of, attacks on and even killings of community leaders; enforced removals; damage to and demolition of houses; and horrendous cases of rape and sexual abuse of women. These allegations suggest that responsibility lies with the security forces and also with private companies or other private groups allegedly associated with the companies. They are serious allegations on which it would be inappropriate for the Special Rapporteur to comment for the time being. They will be raised in due course before the competent authorities in the context of the Human Rights Council proceedings. The Special Rapporteur also received worrying allegations to the effect that the projects have led to social disturbances and serious conflicts between communities and even between families.

10. He is also concerned about information concerning judicial action taken against members of indigenous communities who engaged in acts of social protest against companies' activities. The Special Rapporteur notes in this connection the speed with which such proceedings were conducted, compared with the apparent lack of response to community demands for the prosecution of violations of their rights. This could be interpreted as a sign of discrimination in access to justice.

11. The existence of legitimate demands on the part of the indigenous peoples is undeniable. These demands are founded not only on Guatemala's international human rights obligations but also on elementary considerations of humanity, given the impact of the projects on their ancestral lands. There is obviously a considerable degree of opposition among the indigenous peoples to mining and other extractive industry projects. Their opposition is understandable in the light of the repeatedly reiterated perception that such projects invariably have a negative impact, damaging the land on which the affected

communities have always lived and fuelling conflict between communities. On this point, the Special Rapporteur would simply like to convey the content of some of the slogans that he managed to read during the mass meetings he attended in San Juan Sacatepéquez and Huehuetenango. One read "No to mining; we want peace" and another read "I am a Mam and care for my village. All mining contaminates."

12. At the same time, the Special Rapporteur has received comments from some authorities and members of indigenous communities concerning the benefits that have accrued to them in their daily lives from business ventures in the areas in which they live. These views may be based on legitimate positions which should, ideally, be shared by the other people living in the neighbourhood of such ventures. The projects should yield benefits and not just entail undesirable consequences for the persons concerned.

13. All of the foregoing are extremely complex issues and very serious problems that must of necessity be addressed by the Government of Guatemala before situations of escalating conflict such as those experienced in other countries can occur.

III. The duty to consult

14. The Special Rapporteur's visit to Guatemala was motivated by the receipt of numerous communications concerning an alleged failure to consult prior to the approval of some of the main extractive projects that have been authorized or are currently being implemented, such as the Marlin mine run by the Montana-Goldcorp company in the Department of San Marcos or the Progreso cement works project in the Department of San Juan Sacatepéquez.

15. The Special Rapporteur has noted the existence of a high degree of ambiguity or even confusion regarding the content and scope of the State's duty to consult indigenous peoples, in accordance with the international standards that are binding on Guatemala. The Special Rapporteur considers it necessary to make the following observations in this regard:

- The State of Guatemala has a duty to consult the indigenous peoples concerning any legislative or administrative measure that may have a direct impact on them and, in particular, concerning any project involving investment in infrastructure or prospecting or exploitation of natural resources in indigenous territories.
- The duty to consult is recognized in a number of international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples, adopted in 2007 with Guatemala voting in favour, International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989), ratified by Guatemala in 1996, and other international human rights treaties to which Guatemala is a party, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights.
- In line with these standards and with the jurisprudence of the international human rights treaty bodies, consultation is a process of dialogue conducted in good faith between the State and the indigenous peoples, in which the State must make every effort to secure the consent of the peoples concerned to the proposed measures. International standards are not met when the consultation is merely informational or consists solely of a formal procedure involving the signing of a document by the local authorities, especially since the communities' traditional decision-making structures do not always correspond to those of the authorities concerned. The

consultation should not be treated either as a mere referendum to elicit a "yes" or "no" response from the affected communities.

- Like any other procedure aimed at securing consent, a consultation calls for negotiations in which all parties are prepared to give ground and to defend their legitimate interests and in which, as affirmed by the Constitutional Court of Guatemala, the agreements reached are binding on both parties. The State has a special responsibility to balance the different rights and interests affected by the proposed measures, applying criteria of necessity, proportionality and the achievement of legitimate aims in a democratic society. The State must include among these legitimate aims that of protecting the rights of indigenous peoples, especially their rights to traditional territories, lands and natural resources, that of safeguarding the special relationship of indigenous peoples with these territories, lands and resources as part of their world view, and that of promoting a truly multicultural society.

16. The Special Rapporteur has received allegations to the effect that the State has repeatedly granted licences for the building of infrastructure or for natural resource prospecting or exploitation in indigenous territories without undertaking the necessary consultations. Moreover, all parties agree that there is currently no legislative framework regulating the conduct of the consultation procedure in the Guatemalan legal order.

17. The lack of an internal legal order governing the implementation of the consultation procedure has given rise to a response in some cases by the companies themselves. While the companies' efforts to compensate for the lack of formal procedures is commendable, such procedures have been manifestly inadequate. The Special Rapporteur wishes to point out that, given the obligation of due diligence incumbent on them with respect to indigenous rights, companies cannot and should not conduct consultation procedures as an alternative to the obligations in that regard incumbent on the competent authorities, without the latter's active involvement and without their direct supervision. Moreover, it should be borne in mind that the consultation always involves an active dialogue that does not come to an end after the initial round of proceedings, but should constitute an ongoing dialogue based not just on goodwill but on full respect for indigenous peoples' rights in respect of projects that affect their traditional territories.

18. The Special Rapporteur noted that the current discussion in Guatemala concerning the consultations issue may be boiled down to two basic points.

19. On the one hand, the lack of internal regulations implies, in the view of some branches of government, that there is no binding obligation to consult. This position is unsustainable, however, under international human rights law. The provisions of ILO Convention No. 169 are directly applicable and must be complied with by all public officials. This conclusion is borne out by the jurisprudence of the Constitutional Court, which has explicitly stated that consultations are a fundamental right and form part of the corpus of constitutional law on an equal footing with other rights recognized in the Constitution. The argument that there is no duty to consult indigenous peoples has contributed in large measure to the situation of serious legal unreliability currently affecting extractive activities and investment in the country.

20. On the other hand, there is an ongoing debate concerning the validity of the so-called good-faith community consultations conducted by the indigenous communities affected by mining or hydroelectric projects pursuant to the provisions of the Municipal Code. Most of the communities have come out against the projects. The Constitutional Court has reasoned that the consultations are not strictly binding inasmuch as the municipalities are not competent to deal with mining issues. At all events, the Special Rapporteur considers that the importance of community consultations does not depend

solely on whether or not they are binding under domestic law. Such initiatives are valid and relevant inasmuch as they reflect the legitimate aspirations of the indigenous communities to make known their views concerning projects that have a potential impact on their traditional territories. The rejectionist position of most communities in which consultations have taken place reflects both the absence of consent and the lack of a proper consultation procedure. The Special Rapporteur considers, however, that the holding of community consultations should neither preclude the organization nor prejudge the content of fresh consultation procedures that comply with international standards and in which the State actively participates in accordance with its obligations.

21. The adoption of regulations governing consultations would endow them with greater legal certainty and reliability, attributes that are necessary for any action on the part of the public authorities. This is the position adopted by international bodies such as the Committee on the Elimination of Racial Discrimination and the ILO Committee of Experts on the Application of Conventions and Recommendations, and also by the Constitutional Court of Guatemala. Most stakeholders, including various government ministries, indigenous organizations and peoples, and the business sector now seem to agree on the urgent need to take action towards that end.

22. The Special Rapporteur recommends that steps be taken as a matter of urgency to discuss and adopt the Consultation Act Initiative, on which the Congress Committee on Indigenous Peoples has issued a favourable opinion. It should comply with the minimum standards laid down in international norms and the peoples concerned should participate fully in its development. There is an equally urgent need to review sectoral legislation, including the Mining Act, in order to cover all aspects of the duties incumbent on the State in the area of protection of indigenous rights.

23. The Special Rapporteur notes the Government's claim that it has not granted new mining licences in the municipalities that have conducted community consultations and stated their opposition to the mining projects. The Special Rapporteur considers that the State should accord this practice formal status by declaring a moratorium on the granting of new licences within the areas concerned, at least until such time as a law regulating consultations with indigenous peoples is enacted, and should establish a monitoring body to ensure that State entities comply with the moratorium.

IV. The case of the Marlin mine

24. One specific motive for the Special Rapporteur's visit was to analyse the case of the Marlin mine, a gold and silver mine that has been in operation since 2005 and is located in areas corresponding to the municipalities of Sipacapa and San Miguel Ixtahuacán. The case has been the subject of an exchange of correspondence between the Special Rapporteur and the Government of Guatemala concerning a series of allegations made by various affected communities. During his visit the Special Rapporteur had meetings with representatives of communities and organizations from Sipacapa and San Miguel Ixtahuacán and with representatives of the multinational company Goldcorp, and had the opportunity to pay a visit to the mine itself.

25. The Special Rapporteur has received a series of allegations and reports during the past few months from a number of organizations concerning the alleged adverse impact on the environment of the exploitation of the Marlin mine, which has prompted some parties to demand the suspension of the company's operations. The Special Rapporteur supports the view that if the mine poses a significant risk to people's health or physical well-being, the Ministry of Energy and Mines should suspend its activities, at least until any adverse impact can be remedied.

26. On 20 May 2010 the Inter-American Commission on Human Rights (IACHR) adopted a decision granting precautionary measures on behalf of the communities of Mayan people (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities (MC 260-07), requesting the State of Guatemala "to suspend mining of the Marlin I project and other activities related to the concession granted to the company Goldcorp/Montana Exploradora de Guatemala S.A." and "to implement effective measures to prevent environmental contamination, until such time as the Inter-American Commission on Human Rights adopts a decision on the merits of the petition associated with this request for precautionary measures".

27. As a matter of principle and in light of Guatemala's duty to comply in good faith with its international human rights obligations, the State must abide by the decisions of the IACHR, which is one of the main organs of the Organization of American States responsible for promoting and protecting human rights in the region. The Special Rapporteur has been informed that the IACHR intends to visit the country in order to assess the situation on the ground. The Government must act on the guidelines drawn up by the IACHR on completion of its visit and conduct an objective and impartial review of the allegations concerning the adverse impact of the project on the daily lives of indigenous communities in the area.

28. Apart from the mine's potential impact on the environment and on physical well-being, the question of consultations regarding the Marlin mine and indigenous consent must be addressed. There is obviously no consensus within the affected communities in favour of the mining activities. On the contrary, there is significant opposition thereto in the municipalities of Sipacapa and San Miguel Ixtahuacán and a conflict-riven atmosphere has developed as a result of the establishment of the mine in the area.

29. Aside from the company's intention to engage in a consultation process with the affected communities, it has plainly not been possible to achieve a proper or stable understanding among the communities regarding the project or to address the concerns of the communities that are directly affected.

30. It is also clear that the State has not been closely enough involved in the processes of dialogue that the company has so far conducted with the affected communities, and that it failed to consult the communities before granting the prospecting and exploitation licences to the company. The Special Rapporteur has taken note in this regard of the study commissioned by the Goldcorp company, which concludes that the State's failure to participate in the consultation processes renders the consultation inadequate and constitutes lack of respect for the human rights of the affected communities.

31. As a general principle, and in line with the United Nations Declaration on the Rights of Indigenous Peoples, projects that have a significant impact on the rights of indigenous peoples, such as the Marlin mine, should not be implemented without the consent of the affected indigenous communities. This principle is based on practical as well as on moral and legal foundations. As may be seen in the present case, the execution of projects of this kind without the consent of the affected peoples fuels conflict and thus has negative implications both for the social well-being of the communities concerned and for the implementation of the project.

32. The whole of the foregoing demonstrates the need for corrective measures, taking into account the fact that the mining operations have already reached an advanced stage of construction and exploitation. The Special Rapporteur considers that if the mining operations are to continue in the future, they must be based on a consensual agreement with the affected communities. This can only be achieved through a fresh process of consultations that complies with international norms.

33. The Special Rapporteur is aware of the fact that a new consultation process constitutes a challenge in the present circumstances, and that major efforts will be required to build the trust needed to launch an effective dialogue between the parties.

34. The Special Rapporteur recommends in this regard, as a provisional measure, the creation of forums for dialogue in which the indigenous peoples can receive objective and comprehensive information about all aspects of the project that affect them, and are given the opportunity to explain and communicate their concerns to the State and the company. Within these forums the State should adopt an attitude of respect and good faith in responding to the communities' concerns. It should implement all measures that are required to alleviate or offset the harmful effects of the project, and reach an agreement with the affected communities. It would be recommendable, in the context of the procedures needed to build an atmosphere of trust, to undertake an impact study of the Marlin mine, addressing not only environmental and health issues but also the question of human rights and the social impact of the project.

35. The Special Rapporteur is aware of the major difficulties inherent in the question of consultation of indigenous peoples, as demonstrated not only in Guatemala but in many other parts of the world. He also appreciates the efforts being undertaken by various stakeholders to create more propitious conditions for the dialogue required in conducting such consultations, conditions that may also call for the analysis of structural causes and involve lengthy processes that are difficult to resolve.

36. Guatemala has demonstrated its international commitment to the promotion and protection of indigenous rights, as reflected in its prominent role in the drafting and adoption of the United Nations Declaration on the Rights of Indigenous Peoples. The Special Rapporteur hopes that the State will continue to take decisive steps towards the effective implementation of the human rights of indigenous peoples and that the principles enshrined in the Declaration will be put into practice in the daily lives of the peoples concerned.