

BUSINESS AND HUMAN RIGHTS

In June 2011, the Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (hereafter: “the UN-GP”). That was the first time a UN intergovernmental body had endorsed a normative document on the very divisive issue of how the human rights responsibility of transnational and other enterprises can be framed in international law. The Council’s endorsement effectively established the Guiding Principles as the authoritative global standard for preventing and addressing adverse impacts on human rights arising from business-related activity.

The Council also decided to establish a Working Group on the issue of human rights and transnational corporations and other business enterprises (the Working Group) with a mandate, inter alia, to promote the effective and comprehensive dissemination and implementation of the Guiding Principles worldwide. At its 18th session in September 2011, the Council appointed five independent experts, of balanced geographical representation, for a period of three years, as members of the Working Group. The Working Group started its work in January 2012. The Working Group meets three times a year in closed sessions, within which it can organise stakeholder consultations. Furthermore, it is responsible for organising a yearly Forum on Business and Human Rights.¹ One of its members is Russian veteran indigenous rights activist Pavel Sulyandziga.

As reported in *The Indigenous World 2013*, the Working Group decided during the first Forum on Business and Human Rights to declare the issue of indigenous peoples a priority in the work of implementing the Guiding Principles and to prepare its first thematic report to the UN General Assembly in 2013 on the topic of indigenous peoples’ human rights and business.

Report to the UN General Assembly on Indigenous Peoples, Business and Human Rights

In its work on the draft report to the UN General Assembly, Working Group member Pavel Sulyandziga met with a number of indigenous representatives and organised side-events during international meetings in order to include an indigenous perspective in his report. Dialogue meetings were held in Salekhard for Russia, in Kuala Lumpur for the Asian region, during the UN Permanent Forum on Indigenous Issues in New York and at the indigenous peoples' preparatory conference to the World Conference on Indigenous Peoples in Alta, Norway. The final report was released on 7 August 2013² and presented during the 68th Session of the UN General Assembly on 28 October 2013.³ It analyses the UNGP in an indigenous context, mainly focusing on the need for businesses and governments to fully embrace indigenous rights, as set out in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) as the framework of reference on indigenous peoples and business, as well as on the need to fully acknowledge and consider indigenous peoples' customary law and the principle of Free, Prior and Informed Consent (FPIC).

During the interactive discussion in the Third Committee of the UN General Assembly, South Africa expressed its concern over the UN's continued reliance on voluntary means of addressing the human rights impact of businesses and underlined the need for additional capacity building for judges and courts so that they are able to deal with indigenous peoples' business-related grievances. It also expressed its support for a binding international instrument on business and human rights. The European Union and other European States expressed their strong support for the UNGP but were clearly in favour of a voluntary approach. Switzerland drew a connection with the Voluntary Principles on Security and Human Rights and the need to ensure indigenous peoples' access to non-judicial remedies.

Indigenous peoples, who gathered prior to the 2nd UN Forum on Business and Human Rights (see below), broadly welcomed the report, especially its reaffirmation of their fundamental rights and the principle of Free, Prior and Informed Consent, and underlined the need for the UN system to promote and implement the recommendations contained in the report. However, the Report's shortcomings have also been highlighted from a civil society perspective. According to the NGOs Dejusticia, Conectas and Justicia Global, the report "neglects the fact that

in certain circumstances, international human rights law requires that free, prior informed consent (FPIC) be obtained from indigenous peoples”. Moreover, the Report states that the FPIC does not necessarily require unanimity and does not distinguish clearly enough between consultation and consent. Further, the groups criticize the report for being “unduly sympathetic to the views of States and corporations and is more concerned with listing the difficulties faced by such actors in conducting consultation processes than in exposing the harm caused to indigenous peoples every time their right to free, prior and informed consent and/or consultation is not respected.”⁴

Country visits

The Working Group carried out two country visits during 2013, to Ghana and the United States. A visit to Russia was scheduled for late 2013 but postponed, officially due to visa complications. It is unlikely to take place before the current mandate expires at the end of 2014.

During its country visit to the United States, the WG visited the Navajo Nation in West Virginia and looked at the conflicting issue of surface coal mining in the region. The Working Group heard allegations from the Navajo Nation on human rights impacts in the context of the environment, land and water, as well as with regard to the cultural and religious significance of this. In its statement at the end of the visit, the Working Group concluded: “The Working Group suggests that the UNGPs and the *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)* offer concrete guidance to the Government and Congress on how to address remaining gaps”.⁵ The Working Group also noted that, in the context of indigenous peoples, companies often have a poor understanding of a human rights framework and recommended that: “There should be more awareness and training of businesses on relevant national and international standards, and peer-exchange with companies that have experience in implementing the UNGPs and UNDRIP”.⁶

Regional forum in Medellín

The Working Group held its first Regional Forum on Business and Human Rights in Latin America and the Caribbean from 28-30 August in Medellín, Colombia.

According to the Working Group, the Forum was intended to be a space in which multiple actors could create a constructive dialogue on how governments and companies are addressing the impacts of business activities on human rights in the region. More than 400 people from 27 countries attended this regional Forum. The expectations of civil society and indigenous organisations from the region, however, were frustrated. According to them, of the 47 people who participated in panels, only 10% came from communities affected by business activities or human rights NGOs working with such communities, in contrast to 43% who represented companies or consulting firms, and 26% who represented governments.⁷ Funding was not available to enable the participation of civil society and indigenous peoples. Moreover, panels were guided by strict rules which prevented civil society and indigenous peoples from raising questions before the group. Finally, as civil society organisations expressed after the Forum, despite requests from victims' organisations and NGOs to move forward on effective standards and practices aimed at remedying violations of human rights caused by businesses, the Working Group upheld a narrow interpretation of their mandate, concentrating exclusively on the dissemination of the UN Guiding Principles on Business and Human Rights and best practices. By contrast, civil society organisations have maintained that the UN Human Rights Council's resolution establishing the Working Group's mandate leaves room for more active engagement to address and mitigate ongoing human rights violations.⁸

The 2nd UN Forum on Business and Human Rights

The second UN Forum on B&HR took place from 3-4 December 2013. While these dates were set aside for the official meeting, a pre-Forum meeting day was also organised by the Working Group, with the purpose of providing information on the UN Guiding Principles, as well as allowing stakeholders to organise their pre-forum meetings in order to discuss issues in advance of the meeting. In this context, indigenous peoples were identified as a separate stakeholder group from civil society organisations and hence organised their own meeting. Indigenous peoples also decided to organise a Caucus meeting, which was to be completely independent of the UN Forum and the WG, which took place on 1 December and included around 30 indigenous representatives and support organisations. During this Caucus meeting, indigenous representatives received an introduction to

the UNGP, and were informed about the WG's report to the UN General Assembly. They also discussed their strategy for the Forum meeting and developed a set of recommendations.

During the Stakeholder pre-Forum session, which was organised by the Asia Indigenous Peoples Pact (AIPP) and the Andean Coordinating Body of Indigenous Organisations (CAOI), presentations were made by the UN Special Rapporteur on the Right of Indigenous Peoples, the chair of the UN Permanent Forum on Indigenous Issues, the secretary to the Expert Mechanism on the Rights of Indigenous Peoples, a representative of the International Council on Mining and Metals (ICMM) and the Norwegian Contact Point of the OECD. Indigenous peoples decided that their stakeholder meeting would be open to everybody in order to encourage a dialogue with those interested in an indigenous position⁹.

Luis Vittor, from CAOI, presented indigenous peoples' issues and recommendations at the opening of the official Forum. Furthermore a 1 hour panel took place on the issue of "Indigenous peoples and business operations: taking steps towards implementing the UN Guiding Principles" with the participation of indigenous, business and state representatives.

It should also be stressed that indigenous representatives were present on a number of other panels that were not strictly dealing with indigenous peoples' rights and so the concerns and issues of indigenous peoples were raised throughout the Forum meeting. However, considering that the total number of participants in the Forum was around 1,500, indigenous peoples were few and there is still a need for further participation by indigenous representatives in order to truly use the potential of the Forum.

Other developments

A number of other developments took place during 2013 that are important in the context of indigenous peoples, business and human rights. The UN Global Compact, a private sector policy initiative within the United Nations, undertook the development of a reference guide to the UN Declaration for business enterprises, which "aims to increase understanding among business of the rights of indigenous peoples and to provide practical suggestions for respecting and supporting these rights".¹⁰ The guide was developed with input from indigenous peoples and was officially launched during the UN Forum in December 2013.

The British-based NGO, Philippines Indigenous Peoples Link (PIPLinks), launched its first report on indigenous peoples' and business enterprises' perspectives on how to make the principle of Free, Prior and Informed Consent (FPIC) a reality, on the basis of comprehensive research conducted in May 2013.¹¹ The International Council on Mining and Metals, which was part of the project, adopted a position statement on indigenous peoples giving, among other things, limited recognition to the principle of FPIC.¹² ○

Notes and references

- 1 The Working Group's mandate and strategy of work can be found on its website: <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>
- 2 The full report is available for download at <http://undocs.org/A/68/279>
- 3 UN webcast of session at <http://webtv.un.org/meetings-events/general-assembly/main-committees/3rd-committee/watch/third-committee-30th-meeting-68th-general-assembly/2780828312001>, written statement at <https://papersmart.unmeetings.org/media2/703514/statement-by-mr-pavel-sulyandziga-item-69.pdf>
- 4 **Dejusticia, Conectas and Justicia Global, 2014**: Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: A review of the first two and a half years of work. November 2014, available at http://www.conectas.org/arquivos/editor/files/6_Dej_Con_JG_WG2years_Nov2013.pdf
- 5 Statement at the end of visit to the United States. UN Working Group on Business and Human Rights, Washington D.C., 1 May 2013: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13284&LangID=E>
- 6 Ibid.
- 7 Declaration of Civil Society Organizations that Participated in the First Regional Forum on Business and Human Rights in Latin America and the Caribbean. Available at <http://www.business-humanrights.org/Links/Repository/1022144>. It should be recalled that the WG is a special procedure of the UN Human Rights Council. As such, it should address individual complaints, an activity which has not been prioritized since its creation.
- 8 Ibid.
- 9 Other stakeholders, such as for example Business, were more closed in terms of who could participate in their meetings.
- 10 http://www.unglobalcompact.org/Issues/human_rights/indigenous_peoples_rights.html
- 11 <http://www.piplinks.org/report%3A-making-free-prior-%2526amp%3B-informed-consent-reality-indigenous-peoples-and-extractive-sector>
- 12 <https://www.icmm.com/publications/icmm-position-statement-on-indigenous-peoples-and-mining>

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