

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 Guiding Principles”). This was the first time a UN intergovernmental body had endorsed a normative document on the traditionally 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 member representing Europe is Russian veteran indigenous rights activist Pavel Sulyandziga. 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. The Working Group’s mandate and strategy of work can be found on its website.¹

Binding treaty discussion and extension of working group mandate

Major initiatives were underway in the area of business and human rights in 2014 which, to varying degrees, relate to the rights of indigenous peoples.

The topic that gained most publicity internationally was the initiative to create a binding international treaty on business and human rights, which would eventually supersede the 2011 UN Guiding Principles on Business and Human Rights developed under the leadership of Prof. John Ruggie. In 2013, Ecuador proposed the development of a binding international instrument to address corporate human rights abuses. Initiatives to create such a binding treaty have been in existence since the early 1970s; however, a previous attempt to introduce binding human rights norms for transnational corporations was unsuccessful.² Since Ecuador's renewed attempt, heated discussions between proponents and opponents of a binding instrument have dominated the debate on business and human rights. On the side of the states, the most vocal proponents include Ecuador and South Africa, while most EU states, along with Canada, USA and Australia, are among the opponents, clearly favouring the voluntarist approach of the Guiding Principles. Besides states, a large coalition of civil society organisations has also taken up the issue and started its own campaign in favour of a binding instrument.³

During the negotiations, attempts were made to obtain a single Human Rights Council resolution on the issue of business and human rights, including both the work on the Guiding Principles and the future binding treaty. The two camps were, however, ultimately unable to come to an agreement and two separate resolutions were therefore drafted.

In June, during the 26th session of the UN Human Rights Council, the representatives of Ecuador and South Africa introduced a draft resolution⁴ proposing the establishment of an open-ended intergovernmental working group on the elaboration of an international legally-binding instrument on transnational corporations and other business enterprises with respect to human rights. The resolution was co-sponsored by Bolivia, Cuba, Venezuela, Algeria, El Salvador, Nicaragua and Senegal. It was eventually adopted by 20 votes to 14 with 13 abstentions, as resolution 26/9.⁵

In a second resolution, the mandate of the UN Working Group on Business and Human Rights was extended by a further three years (2015-17) in its present composition.⁶

No major steps were taken to implement the first resolution in 2014, and the open-ended working group had not been established by the end of the year. The indigenous peoples' response to the binding treaty initiative has been mixed, with concerns raised over the leading role of Ecuador, as a country allegedly working

to weaken the inter-American human rights system, and over the long, protracted process that is to be expected. One key consideration for indigenous peoples is to ensure that any future treaty on business and human rights properly reflects indigenous peoples' rights as set out in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention 169.⁷

The Outcome Document of the UN World Conference on Indigenous Peoples makes reference to Guiding Principles but does not address the issue of a possible binding instrument.⁸

National action plans on business and human rights

Throughout 2014, a major focus of the UN Working Group on Business and Human Rights was the issue of providing guidance for the development of national action plans (NAP) on business and human rights.

The first countries to come up with such action plans were the United Kingdom in September and the Netherlands in December 2013. In 2014, several other European countries followed suit: Denmark, Finland, Italy and Spain (draft, July 2014).⁹ Of these, most do not stipulate specific action regarding indigenous peoples' rights, with no mention at all in the Dutch NAP, and two casual mentions but no actions stipulated in the Danish NAP. Finland pledges to "continue the dialogue related to the human rights impacts of business activities with the UN bodies for indigenous peoples and ensure that the effects of business activities on the realisation of the rights of indigenous peoples will be brought forward in the World Conference on Indigenous Peoples in autumn 2014"¹⁰ The UK NAP mentions indigenous peoples twice in a laundry list of vulnerable groups entitled to consultation and with regard to whom business awareness should be raised.¹¹ The Italian baseline document makes one rather accidental mention of indigenous peoples in passing.¹² The Spanish Draft NAP was the only one available in 2014, and this makes explicit reference to ILO Convention 169 and the UNDRIP.

In 2014, both the Working Group on Business and Human Rights and a joint effort by the Danish Institute for Human Rights (DIHR) and the International Corporate Accountability (ICAR) sought to address the lack of guidance in the current NAP processes. Firstly, the Working Group on Business and Human Rights developed a guidance document for the development of national action plans. This document includes three references to indigenous peoples, all within laundry lists

of vulnerable groups, without reference to specific rights,¹³ and one footnote referring to the Working Group's 2013 thematic report on indigenous peoples.¹⁴

Secondly, in June, the DIHR and ICAR released a detailed toolkit aimed at providing guidance and quality control for the elaboration of NAPs.¹⁵ It introduces the concept of National Baseline Assessments to be carried out before the actual NAP development. The baseline assessment measures the current state of human rights and human rights impacts of businesses, aiding the later step of identifying specific needs and appropriate actions. The toolkit is largely process-oriented and does not premeditate specific outcomes or reference specific rights and frameworks such as the UNDRIP. However, it puts strong emphasis on the need to adequately consult groups that are at increased risk of human rights violations. In December, the DIHR and ICAR undertook a joint assessment of existing NAPs in relation to the toolkit, and for which IWGIA contributed an assessment of the Danish NAP with a view to indigenous peoples' rights.¹⁶

In 2014, several states launched their NAP processes, including Germany, which envisages a two-year process starting with a National Baseline Assessment, as proposed by the toolkit. In September, the USA launched its NAP process, starting with a civil society consultation phase until 15 January 2015.¹⁷ While the trend is still dominated by wealthy industrial nations, several African, Latin American and Asian states have also committed to developing NAPs or are in the process of doing so, including Colombia, Mozambique, Myanmar and Mexico.¹⁸

Business initiatives regarding Free, Prior and Informed Consent

In 2014, two business associations, the International Council on Mining and Metals and IPIECA, the global oil and gas industry association for environmental and social issues, undertook activities related to indigenous peoples' right to Free, Prior and Informed Consent (FPIC). Both processes were informed by the project "Making Free, Prior and Informed Consent a Reality" carried out by the UK-based group Philippine Indigenous Peoples Links (Piplinks) and its partners.¹⁹ In 2013, the ICMM adopted a position statement on indigenous peoples and mining²⁰ and, in 2014, worked on developing guidance for its practical application to come into effect in May 2015.²¹ IPIECA has been running a project on FPIC, announced in late 2013, although this has not yet produced any public outputs.²²

European Network on Indigenous Peoples

During the 2014 session of the UN Expert Mechanism on the Rights of Indigenous Peoples, the European Network on Indigenous Peoples (ENIP), which comprises IWGIA (Denmark), Piplinks (UK), Forest Peoples Programme (UK), Almaciga (Spain) and INFOE (Germany), launched a study on the UN Guiding Principles and their interpretation with regard to indigenous peoples' rights. The launch included presentations by the UN Special Rapporteur on the rights of indigenous peoples, along with representatives of the UN EMRIP and the Permanent Forum on Indigenous Issues.²³ Indigenous peoples also actively participated in the 3rd UN Forum on Business and Human Rights, held in Geneva from 1-3 December, after a one-day indigenous preparatory caucus meeting. Indigenous peoples' issues were not, however, a particular focus of the meeting. Unlike in 2013, no dedicated panel discussion on indigenous issues was scheduled and the model of holding per-group pre-sessions was abandoned because it was limiting the level of interaction between the groups. By implication, there was no dedicated indigenous pre-session either. However, several side events addressed various aspects of indigenous peoples' rights. A high-profile event featuring the UN Special Rapporteur on the rights of indigenous peoples, Ms Vicky Tauli-Corpus, the President of the UN Permanent Forum on Indigenous Issues, Dalee Sambo Dorough, and Working Group member Mr. Pavel Sulyandziga, addressed the issue of indigenous peoples' access to justice and reparation within the context of the UN Guiding Principles. The Asia Indigenous Peoples Network on Extractive Industries and Energy (AIPNEE) hosted a side event on challenges concerning extractive industries and FPIC as an approach to solutions.

Policy reviews of development banks

On 30 July 2014, the World Bank opened its new draft Environmental and Social Framework (ESF) for consultation.²⁴ Environmental and Social Standard (ESS) 7 spells out the Bank's future policy regarding indigenous peoples. On the positive side, the draft framework strengthens indigenous peoples' right to give or withhold their Free, Prior and Informed Consent and increases protection against forced relocation.²⁵ On the downside, it dilutes established safeguards in several key

areas. ESS 7, para 9 contains a clause which allows governments to completely opt out of its application and take an “alternative approach”, if “applying this ESS would create a serious risk of exacerbating ethnic tension or civil strife, or where the identification of culturally-distinct groups as envisioned in this ESS is inconsistent with the provisions of the national constitution”. This clause is a loophole of amazing magnitude and has drawn widespread criticism, as it would effectively allow the Bank and its borrowers to completely sidestep its own policy and the provisions of the UNDRIP. Apart from ESS 7, the standard dealing with “Land Acquisition, Restrictions on Land Use and Involuntary Resettlement” has been blasted by rights groups, as it is seen to contain major dilutions in regard to proper resettlement planning and exempts land rights and land-use regulation activities from its application, meaning that that “people whose land rights are made insecure through a Bank-financed land administration project, because, for example, they are not determined to have ownership rights, are left completely vulnerable to forced eviction by their government, without any safeguards protections from the Bank.”²⁶ This opt-out clause was also among the changes criticised in a joint letter by 29 UN mandate holders and experts submitted to the Bank on 12 December 2014. The signatories included the UN Special Rapporteur on the rights of indigenous peoples and the UN Working Group on Business and Human Rights.²⁷ ○

Notes and references

- 1 <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandother-business.aspx>
- 2 The “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”, E/CN.4/Sub.2/2003/12 (2003) were rejected by the Human Rights Commission in 2004, see <http://business-humanrights.org/en/united-nations-sub-commission-norms-on-business-human-rights-explanatory-materials>
- 3 See <http://www.treatymovement.com/>
- 4 A/HRC/26/L.22/Rev.1.
- 5 See Report of the Human Rights Council on its twenty-sixth session, A/HRC/26/2, 11 December 2014, resolution regarding the binding instrument: A/HRC/26/L.22/Rev.1.
- 6 Human Rights Council Resolution 26/22 “ Human rights and transnational corporations and other business enterprises”, A/HRC/RES/26/22, dated 15 July 2014.
- 7 For an analysis from an indigenous perspective, see Luis Vittor: Los pueblos indígenas y el tratado sobre empresas transnacionales y derechos humanos, 2 February 2015, <http://alainet.org/active/80526>

- 8 Para 24: "We recall the responsibility of transnational corporations and other business enterprises to respect all applicable laws and international principles, including the United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, and to operate transparently and in a socially and environmentally responsible manner. In this regard, we commit ourselves to taking further steps, as appropriate, to prevent abuses of the rights of indigenous peoples." A/69/2, 15 September 2014.
- 9 See overview at <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>
- 10 Ministry of Employment and the Economy: "National Action Plan for the implementation of the UN Guiding Principles on Business and Human Rights" http://www.tem.fi/files/41214/TEM-jul_46_2014_web_EN_21102014.pdf
- 11 Good Business: Implementing the UN Guiding Principles on Business and Human Rights <https://www.gov.uk/government/publications/bhr-action-plan>
- 12 Indigenous peoples are mentioned once, where the document discusses differences between the original and a revised version of the OECD "Common Approaches on Environment and Officially Supported Export Credits". The Foundations of the Italian Action Plan on the United Nations "Guiding Principles On Business And Human Rights", <http://business-humanrights.org/sites/default/files/media/documents/foundations-ungps-nap-italy.pdf>
- 13 Guidance on National Action Plans on Business and Human Rights http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf
- 14 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises A/68/279, 7 August 2013.
- 15 National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Framework <http://accountabilityroundtable.org/analysis/napsreport/>
- 16 ICAR & ECCJ Release Assessments of Current National Action Plans on Business & Human Rights <http://accountabilityroundtable.org/analysis/napsassessments/>
- 17 See dedicated ICAR website <http://nationalactionplan.us/>
- 18 Full list at <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>
- 19 Report: Making Free Prior & Informed Consent a Reality - Indigenous Peoples and the Extractive Sector, <http://www.piplinks.org/report%3A-making-free-prior-%2526amp%3B-informed-consent-reality-indigenous-peoples-and-extractive-sector>
- 20 Indigenous Peoples and Mining Position Statement <http://www.icmm.com/publications/icmm-position-statement-on-indigenous-peoples-and-mining>
- 21 ICMM to launch public consultation on updated Indigenous Peoples & Mining Good Practice Guide on 30 January, 14 January 2015 <http://goxi.org/profiles/blogs/icmm-to-launch-public-consultation-on-updated-indigenous-peoples>
- 22 New project on Free, Prior and Informed Consent, 06 Sep 2013, <http://www.ipieca.org/news/20130906/new-project-free-prior-and-informed-consent>
- 23 ENIP launches study on UN Guiding Principles 11 July 2014, <http://www.enip.eu/web/enip-launches-study-on-un-guiding-principles-at-emrip-7th-session/>
- 24 Available from <http://documents.worldbank.org/curated/en/2014/07/19898916/environmental-social-framework-setting-standards-sustainable-development>
- 25 cf. Land, Housing and Indigenous Peoples' Rights in the Draft World Bank Environmental & Social Framework ROUNDTABLE OUTCOME DOCUMENT, October 6, 2014. Washington DC,

- http://consultations.worldbank.org/Data/hub/files/land_rights_in_the_draft_esf_roundtable_outcome_document_final.pdf
- 26 Forest Peoples Programme: “World Bank’s Draft Safeguards Fail to Protect Land Rights and Prevent Impoverishment: Major Revisions Required <http://www.forestpeoples.org/sites/fpp/files/news/2014/07/Statement%20on%20Land%20Rights%20in%20Draft%20World%20Bank%20ESF%20%28FINAL%29.pdf>
- 27 <http://www.forestpeoples.org/sites/fpp/files/news/2014/12/OL%20Other%20%28World%20Bank%29%2011.12.14%20%2813.2014%29%20FINAL.pdf>

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