



PROTECT, RESPECT AND REMEDY: THE RIGHTS OF INDIGENOUS PEOPLES AFFECTED BY BUSINESS

From 5-6 November, an **indigenous preparatory meeting in Copenhagen** discussed Indigenous Peoples' experiences, challenges and opportunities with regard to business and human rights, as well as the Guiding Principles on Business and Human Rights for implementing the UN "Protect, Respect and Remedy" Framework, possible ways of engaging with the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) and participation in the first annual UN Forum on Business and Human Rights.¹ This briefing note summarises the outcomes of the meeting and provides an overview of the challenges and opportunities identified, as well as concrete recommendations to the UNWG.

Indigenous Peoples are rights holders

Indigenous Peoples are rights holders with collective rights as peoples. As such, they have a distinct legal and political status and should not merely be considered as "vulnerable groups" or any other "stakeholders".

Indigenous Peoples' rights are most prominently recognised under international law in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention No. 169 on indigenous and tribal peoples in independent countries.

As a UN body, the UNWG has an obligation to implement the rights of Indigenous Peoples, as enshrined in these instruments, within the scope of its mandate. Within the context of Business and Human Rights, the following are the most important:

- Articles 26 to 28 of the UNDRIP reflect the importance of their **land, territories and resources** for Indigenous Peoples. Article 26 affirms their "right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired".
- The right to Free Prior and Informed Consent (FPIC) is an element of particular importance with

regard to business operations. This right is a right in itself, i.e. a substantive right, as well as a procedural right. FPIC is an element of the fundamental **right to self-determination**, as articulated in Article 3 of the UNDRIP.

- Indigenous Peoples have a **right to development** in their own terms. Article 32 states that "Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands and territories and other resources".

When business ignores and violates Indigenous Peoples' rights, it fosters conflict and increases poverty and dispossession of lands, territories and resources. Respect for all Indigenous Peoples' rights, in particular the right to self-determination, to lands, territories and resources, and the right to self-determined development, can on the other hand prevent conflicts, provide opportunities for poverty reduction and partnerships and ultimately lead to more sustainable business practices.

¹ The meeting was organised by a member of the UNWG, Mr. Pavel Sulyandziga, the Forum for Development Cooperation with Indigenous Peoples and the International Work Group for Indigenous Affairs (IWGIA).

Challenges

Indigenous Peoples face many challenges with regard to business operations affecting their lands, territories and resources. These challenges are diverse, depending on regional and national contexts.

Indigenous Peoples are often categorised, as they are in the Guiding Principles, as vulnerable groups rather than as rights holders. Paradoxically, this reinforces their vulnerability and is a violation of their rights, as it does not reflect the rights enshrined in the UNDRIP.

In some countries, particularly in Asia and Africa, Indigenous Peoples are to this day not recognised as such by the States in which they live. This results in a denial of their collective rights, thereby often violating their individual rights as well, as the two are intimately interconnected.

There is a widespread lack of recognition of the collective rights of Indigenous Peoples to their lands, territories and resources. This undermines their basic right to their physical, cultural and spiritual well-being, thereby threatening their very existence and quite possibly leading to serious conflict. The nature of conflicts related to land, territories and resources has not been recognised properly and there has been no systematic research in this regard.

Indigenous Peoples in many parts of the world do not have the necessary resources (human and financial) and, in some cases, lack the capacity to engage in international, regional, national and even local processes and developments regarding business practices, guidelines and development projects.

Consultation with Indigenous Peoples is often seen as

a procedure within the development and implementation of a project rather than as an exercise of the fundamental right of Indigenous Peoples to decide what happens on their lands and territories and with their natural resources.

There is a tendency to focus the discussion of business and HR on the good practices of business while paying less attention to human rights abuses. In many countries, States work hand-in-hand with business, and government resources are used for securing business operations and for propping up the image of corporations as “good development partners” in spite of their doubtful track records of respecting human rights. Monitoring of the practices of business enterprises must include both good and bad practices, and be conducted in an inclusive and transparent manner by independent bodies that have expertise in human rights and sustainable development concerns.

Little attention is paid to agreements and partnerships with Indigenous Peoples. Public Private Partnership (PPP) arrangements are increasingly being used for big infrastructure projects. It is still, however, a challenge to get safeguards applied to these arrangements.

There is also a lack of clarity with regard to addressing the adverse impacts of projects after completion or when Indigenous Peoples have won remediation. Two issues are particularly important: 1) who will clean-up after project completion and who is responsible for rehabilitation and restoration? 2) how will the restoration of land that has been taken away from Indigenous Peoples be implemented?

Opportunities

Many positive developments have taken place in the international arena aimed at promoting respect for and full implementation of the UNDRIP. There is increased awareness and recognition of the rights of Indigenous Peoples. A number of UN bodies and specialised agencies devoted to indigenous issues have been established, such as the UN Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and the Special Rapporteur on the Rights of Indigenous Peoples. These bodies and mechanisms offer an extensive pool of expertise, information and recommendations that must be used and reflected in the work on business and human rights. Some of the relevant work of these bodies includes:

- The Special Rapporteur on the Rights of Indigenous Peoples has elaborated, in his reports, on the State’s duty to consult (A/HRC/12/34) on corporate responsibility with regard to indigenous rights (A/HRC/15/37) and, as part of his ongoing work, on the issue of extractive industries operating within or near indigenous territories (A/HRC/18/35 and A/HRC/21/47);
- The EMRIP’s comment on the UN Guiding Principles as they relate to Indigenous Peoples and the right to participate in decision-making, with a focus on extractive industries (A/HRC/EMRIP/2012/CRP.1);

- The Expert Mechanism's follow-up report on Indigenous Peoples and the right to participate in decision-making, with a focus on extractive industries (A/HRC/EMRIP/2012/2);
- The UN Permanent Forum's Report on Corporations and Indigenous Peoples (E C.19 2010 CRP.1);
- The Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility (E/C.19/2009/CRP.8).

At the regional level, human rights mechanisms such as the African Commission on Human and Peoples' Rights, the Inter-American Court on Human Rights and the Inter-American Commission on Human Rights have also developed studies, comments and decisions affirming States' duties and Indigenous Peoples' rights in the context of business operations affecting their lives, lands, territories and resources.

This increased awareness of the issue of human rights and business, including Indigenous Peoples' rights, has triggered new processes aimed at strengthening existing safeguards:

- The World Bank's review of its policy on Indigenous Peoples, OP/BP 4.10. In this context, the World Bank has committed to cooperate closely with Indigenous Peoples in the conduct of the review;
- In 2011, the OECD updated its Guidelines for multinational enterprises and included a chapter on human rights, based on the UN Guiding Principles. The OECD is currently discussing how best to promote the protection of Indigenous Peoples' rights in the context of the revised OECD Guidelines.

- The Global Compact is preparing a special business reference guide: the UN Declaration on the Rights of Indigenous Peoples: A Business Reference Guide

Indigenous Peoples' full and effective participation in these processes could provide an opportunity to ensure that their rights are duly taken into account.

Other possibilities for promoting the implementation of the Guiding Principles with full respect for Indigenous Peoples' rights include:

- Integrating Indigenous Peoples' rights into activities, programmes and capacity development of national human rights institutions on business and human rights.
- Indigenous Members of Parliament and indigenous Senators could promote adequate implementation of the GP, ensuring Indigenous Peoples' rights are taken into account, and could provide States with the necessary information to fulfil their duty to protect Indigenous Peoples' rights.
- Indigenous and non-indigenous academics working on indigenous rights issues could influence universities and colleges so that they develop research and learning on the GPs, how they are linked to the UNDRIP and how they need to be implemented in an indigenous context.

During the two-day Forum on Business and Human Rights in December 2012, a panel will discuss the challenges of implementing the UN Guiding Principles in the context of Indigenous Peoples. This will offer an opportunity for all parties to learn about the rights of Indigenous Peoples, as enshrined in the UNDRIP, and to reflect on how States and business should meet the obligations and responsibilities set out in the GP in order to fulfil and respect these rights.

Recommendations

Indigenous Peoples recommend that, within the scope of its mandate, the UNWG:

- Uses the UNDRIP as a framework for implementation of the GP and for the work of the UNWG;
- Builds strong cooperation with other UN bodies and mechanisms on indigenous issues, such as the Special Rapporteur, the EMRIP and the UN Permanent Forum on Indigenous Issues;
- Includes Indigenous Peoples as a standing agenda item at the meetings of the UNWG;
- During the next meeting of the UN Permanent Forum on the Rights of Indigenous Peoples, organises a meeting between the UNWG members and UN bodies and mechanisms dealing with indigenous issues, along with indigenous representatives;
- Builds awareness of the work of the UNWG among Indigenous Peoples, thereby contributing to promoting the effective and comprehensive dissemination and implementation of the Guiding Principles;
- Builds awareness of the rights of Indigenous Peoples among States, business and other stakeholders and provides guidance on how the GP could be implemented with full respect for such rights as enshrined in the UNDRIP;
- Assesses the need for capacity building of Indigenous Peoples on the UN Guiding Principles;
- Provides guidance or mechanisms on how Indigenous Peoples can engage in all aspects of the work of the UNWG, including their effective participation in country visits;
- Requests States develop their domestic legislation and policies to implement the GP with the full and effective participation of Indigenous Peoples.

Indigenous Peoples

Over 370 million individuals worldwide are indigenous. Mostly inhabitants of developing countries, they represent more than 5,000 distinct peoples. Indigenous Peoples are particularly vulnerable to industrial development. They are among the poorest of the poor, not only because of their economic marginalisation but also because they are deprived of basic social, cultural and political rights and fundamental freedoms, including rights to their lands, territories and resources. Indigenous Peoples inhabit lands rich in natural resources. Consequently, they are strongly affected by the operations of national and transnational companies. At the same time, Indigenous Peoples' exclusion from political decision-making processes - locally, nationally, regionally and globally - places them in a position of extreme disadvantage vis-à-vis imposed industrial activities that affect their individual and communal lives, territories and resources. This is particularly evident in the case of the extractive sector.

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