

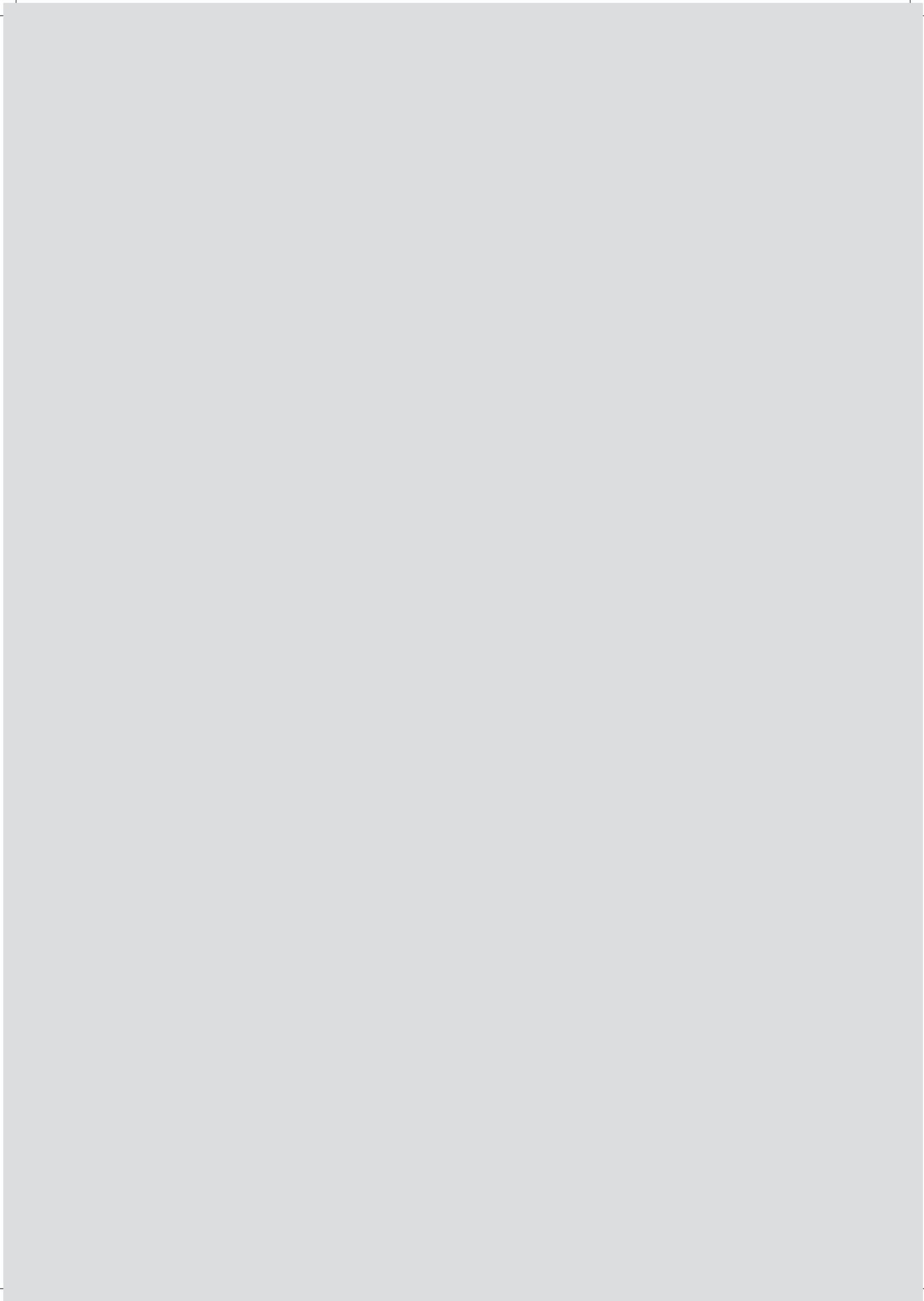
**Business and Human Rights**



**INTERPRETING THE UN GUIDING PRINCIPLES  
FOR INDIGENOUS PEOPLES**

**IWGIA report 16**





# BUSINESS AND HUMAN RIGHTS

## INTERPRETING THE UN GUIDING PRINCIPLES FOR INDIGENOUS PEOPLES

Report 16

IWGIA  
EUROPEAN NETWORK ON INDIGENOUS PEOPLES

2014

## BUSINESS AND HUMAN RIGHTS

Interpreting the UN Guiding Principles for indigenous peoples

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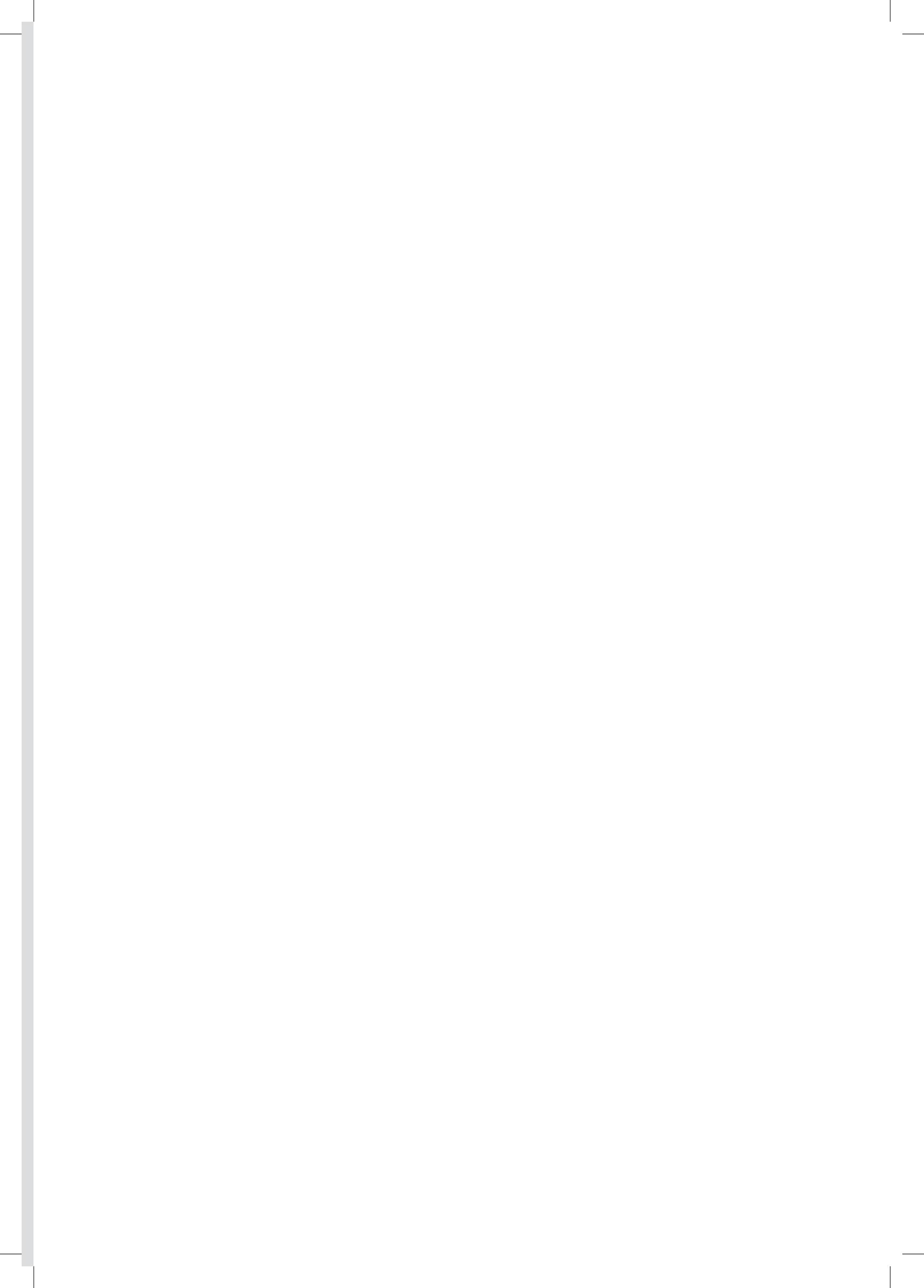
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## GLOSSARY

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<b>CERD</b>	UN Committee on Elimination of Racial Discrimination
<b>CESCR</b>	UN Committee on Economic, Social and Cultural Rights
<b>CSR</b>	Corporate Social Responsibility
<b>ECOSOC</b>	UN Economic and Social Council
<b>EMRIP</b>	Expert Mechanism on the Rights of Indigenous Peoples
<b>FPIC</b>	Free, Prior and Informed Consent
<b>ICERD</b>	International Convention on the Elimination of Racial Discrimination
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ILO</b>	International Labour Organisation
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>NHRI</b>	National Human Rights Institution
<b>TNC</b>	Transnational Corporation
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNDRIP</b>	UN Declaration on the Rights of Indigenous Peoples
<b>UNGP</b>	UN Guiding Principles on Business and Human Rights
<b>UNPFII</b>	UN Permanent Forum on Indigenous Issues
<b>UNSR</b>	UN Special Rapporteur on the rights of indigenous peoples
<b>UNWG</b>	UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (commonly known as the Working Group on Business and Human Rights)

## EXECUTIVE SUMMARY

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**This report makes recommendations to states, business enterprises, indigenous peoples and other stakeholders for a more effective operationalisation of the Guiding Principles in relation to the human rights of indigenous peoples. The report concludes that such operationalisation should be prioritised by states, business enterprises and other duty-bearers as a matter of the utmost urgency, to ensure that current widespread and serious abuses of indigenous peoples' human rights linked to business operations are brought to an end and their victims fully restored to justice.**

The UN Guiding Principles on Business and Human Rights (UNGPR) were endorsed by the UN Human Rights Council in 2011 as the first globally-agreed standard on business and human rights. In 2012, the UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises chose the topic of indigenous peoples' rights for its first thematic report to the UN General Assembly.<sup>1</sup> Building on the UNWG report, this review aims to identify opportunities and potential benefits for indigenous peoples arising from the adoption and growing uptake of the UN Guiding Principles. It provides recommendations and guidance to the interested parties, in a rights-based manner, prioritising issues of concern raised by indigenous peoples and representatives during the drafting process.

Part I provides a brief overview of the origins and architecture of the Guiding Principles. It then summarises some of the main human rights challenges facing indigenous peoples and looks at their status under international law. The guiding principles are a framework designed to support protection and respect for human rights in a business context, consisting of three pillars: Pillar I, the State duty to protect human rights from abuse by business enterprises, derived from their obligations under international human rights law; Pillar II, the corporate responsibility to respect human rights; and Pillar III, which requires access to effective remedy for business-related human rights abuses, through judicial and non-judicial mechanisms.

Part II begins by considering Pillar I of this framework in more detail. The Guiding Principles place particular attention on the need to address gaps in legislation and in administrative practice with regard to protection from business-related human rights abuse. Here, the report identifies recognition of indigenous peoples as collective rights-holders and of the rights associated with the status as the principal regulatory gap that states are required to address.

The following chapter concerns the corporate responsibility to respect human rights under Pillar II of the UN framework and attempts to define minimum standards of what constitutes essential elements of a policy commitment and of human rights due diligence procedures concerning indigenous peoples.

The chapter on Pillar III seeks to identify the main opportunities for and obstacles to effective remedy for business-affected indigenous communities. The report considers the fundamental principles of access to remedy set out in the UNGPR and finds that these should be premised on a clear understanding of an indigenous people's *right* to remedy, as ensuing from international law and also that the right of indigenous peoples to redress is a necessary complement which is not explicitly reflected in the UNGPR. Furthermore, the lack of guidance with regard to access to justice in the home states of transnational corporations is identified as a weakness of the Guiding Principles, noting that principles of international law as well as violations experienced by indigenous peoples warrant the provision of such access.

The report further explores the different categories of remedy distinguished within the UNGP – judicial, state-based, non-judicial and non-state-based non-judicial mechanisms. With regard to judicial remedies, it is noted that the lack of recognition of indigenous peoples as collective rights-holders under international law as well as the lack of judicial routes of redress for indigenous peoples' grievances are among the main barriers preventing indigenous peoples' equal access to justice. Recognition and consideration of indigenous peoples' customary law and traditional rights of disposal over commonly administered lands and natural resources is both a human rights obligation and a necessary precondition for effective remedy. Case law from different continents furthermore demonstrates that there are no obstacles, in principle, to the consideration of customary law.

Looking into non-judicial state-based remedy mechanisms, the report examines the OECD Guidelines for Multinational Enterprises. While instruments established under the OECD Guidelines are potentially useful remedies, they need to be equipped with a more robust mandate. Operational grievance mechanisms established at project level offer the advantage of ease of access but at the same time face the challenge of ensuring impartiality when they are operated by the same company against whom complaints are addressed. A potential solution to such challenges is offered by increased use of indigenous peoples' own dispute resolution mechanisms, which have strong yet untapped potential to restore harmonious relationships and

achieve long-lasting culturally appropriate settlements, while at the same time strengthening indigenous peoples' control over their own destinies. The UNGP also establish a set of effectiveness criteria for non-judicial grievance mechanisms. These criteria are process-oriented, i.e. they focus on how grievances are dealt with but are indifferent to the outcome produced by a given process. The report argues that the strongest effectiveness criterion for a grievance mechanism would be whether it produces human rights-compliant outcomes. This chapter therefore concludes by proposing a non-exhaustive set of outcome-oriented effectiveness criteria specific to indigenous peoples.

Finally, the report makes recommendations to states, business enterprises, indigenous peoples and other stakeholders for a more effective operationalisation of the Guiding Principles in relation to the human rights of indigenous peoples. The report concludes that such operationalisation should be prioritised by states, business enterprises and other duty-bearers as a matter of the utmost urgency, to ensure that current widespread and serious abuses of indigenous peoples' human rights linked to business operations are brought to an end and their victims fully restored to justice.

## INTRODUCTION

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This report has been developed by means of desk research as well as dialogue with representatives of stakeholder groups. The primary focus was put on an exchange and dialogue with indigenous peoples and their organisations, facilitated through meetings at various international fora during the drafting process, such as the UN Permanent Forum on Indigenous Issues, the Asia consultation of the UN Special Rapporteur on the rights of indigenous peoples and the Alta preparatory meeting for the World Conference on Indigenous Peoples. Furthermore, reports produced by UN bodies mandated to deal with the protection of indigenous peoples' rights were examined as primary sources of guidance with regard to the interpretation and application of those rights. In addition, the views of the business community were explored and considered through participation in related workshops and fora as well as through dialogue with individual business representatives.

### What are the UN Guiding Principles?

The UN Guiding Principles on Business and Human Rights were adopted by the UN Human Rights Council in 2011. They are the first framework for preventing and addressing adverse impacts on human rights linked to business activity agreed upon at a global level.

Efforts to create global human rights standards for transnational corporations (TNC) were first undertaken in the early 1970s, when the UN Secretary General set up a group to study the impact of TNCs on development and international relations.<sup>2</sup> In 1998, the Sub-Commission on the Promotion and Protection of Human Rights, a subsidiary body of the then Human Rights Commission, established a Working Group on Transnational Corporations, which until 2003 developed the draft *“Norms on the Responsibilities of Trans-*

*national Corporations and Other Business Enterprises with Regard to Human Rights”*.<sup>3</sup> The draft norms set out to formulate binding human rights obligations for transnational corporations *“to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law.”* (Art. A.1) This approach was broadly welcomed by the human rights community<sup>4</sup> within civil society, while the echo from states and the business sector was far more reserved. In August 2003, the Sub-Commission on the Promotion and Protection of Human Rights adopted the Draft Norms by a resolution in which it also requested the Working Group on Indigenous Populations *“to gather the views of indigenous peoples and indigenous organizations and communities as well as other interested parties to supplement the Commentary on the Norms and/or to draft a new set of principles which would include further references to indigenous concerns and rights with regard to transnational corporations and other business enterprises”*.<sup>5</sup> Ultimately, however, the idea of imposing binding human rights obligations on non-state actors proved too controversial, such that in 2004, the Sub-Commission's parent body, the Human Rights Commission, dismissed the Draft Norms.<sup>6</sup>

In 2005, Secretary General Kofi Annan appointed Professor John Ruggie as the UN Special Representative for Business and Human Rights. In 2008, Ruggie presented the “Protect, Respect and Remedy” framework, which became the basis for the UN Guiding Principles, developed during his second mandate and unanimously adopted by the Human Rights Council in June 2011.

The Guiding Principles refrain from establishing new obligations. Instead, they attempt to capture those human rights obligations and responsibilities that can be drawn from existing international law. This limited approach allowed the UNGP to pass through the UN system with relative ease.

The design of the UNGP comprises three “pillars” which are subdivided into sections describing foundational principles and sections specifying operational principles. The latter are, in turn, grouped into chapters of between one and five principles. There are 31 principles in all. Each principle is accompanied by a commentary.

The eleven Guiding Principles under Pillar 1 develop the “state duty to protect human rights”, recalling the generally recognised state obligation to protect individuals from abuses by third parties and specifying how this obligation applies in the case of business enterprises. This includes the duty to “*prevent, investigate, punish and redress private actors’ abuse*”. The Guiding Principles call on governments to “*set out clearly the expectation that all business enterprises [...] respect human rights throughout their operations*”, which includes the extraterritorial activities of corporations.

The operational principles of the first pillar deal with the need to enforce and improve legislation conducive to corporate respect for human rights, with the special state duty to ensure that state-owned or state-controlled corporations respect human rights, the need to ensure corporate respect for human rights in conflict-affected areas and the need to ensure policy coherence in both the domestic sphere and in international relations.

Pillar 2 elaborates on the “corporate responsibility to respect human rights”, i.e. avoid harming them. The operational principles under Pillar II propose that business enterprises should develop human rights policy commitments at the most senior level and undertake due diligence to avoid harming human rights and to address the negative impacts of their operations. It defines a process of “human rights due diligence” by which companies should ensure, verify and communicate that they are acting in line with universally recognised human rights norms. It furthermore stipulates that companies must ensure proper remediation of human rights harm suffered as a consequence of their operations.

Comprising Principles 25-31, the third pillar sets out the State’s obligation to provide access to remedy through judicial, administrative and legislative means, and the corporate responsibility to remediate any human rights harm which occurs as

an effect of business operations. While covering both judicial and non-judicial mechanisms, it devotes more attention to non-judicial mechanisms. For these non-judicial mechanisms, it defines a set of process-oriented effectiveness criteria.

The commentary to the Guiding Principles references indigenous peoples three times,<sup>7</sup> twice identifying them as “vulnerable groups” and once alluding to the existence of special human rights instruments for specific groups. No human rights instruments specific to indigenous peoples are referenced. However, all of the principles are relevant to indigenous peoples.

The Guiding Principles affirm that all internationally recognised human rights are included in their scope, as “*business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights.*” (Principle 12). Although the Guiding Principles only refer explicitly to the Universal Declaration of Human Rights, the International Bill of Rights and the core labour rights set out in several ILO Conventions, they also state that “depending on circumstances, business enterprises may need to consider additional standards”, which includes UN human rights instruments relating to indigenous peoples.

The Guiding Principles do not foresee the creation of any particular new mechanism. At the same time, they have been influential in other standard-setting processes such as the revision of the OECD Guidelines for Transnational Corporations. Furthermore, the European Union has called on its Member States to develop national action plans for the implementation of the UNGP. On 4 September 2013, the UK was the first state to officially launch an action plan for the UNGP.<sup>8</sup> Since then, several other European states have presented NAPs (Netherlands, Denmark) and others have published draft plans or preparatory studies, including Spain, Finland and Italy. Generally, the UNGP are intended as a starting point for further development; they do not aspire to be a final all-encompassing framework but instead leave the possibility for further development and initiatives wide open.

## Who are indigenous peoples?

About five percent of the world's population is recognised or self-identify as indigenous peoples. Indigenous peoples live on all continents, in the developing world as well as in industrialised countries and emerging economies.<sup>9</sup> While there is no exclusive definition of "indigenous peoples", a widely used working definition employs four criteria which may be met to varying degrees. These include:

- 1) priority in time, with regard to the occupation of a particular territory;
- 2) voluntary perpetuation of cultural distinctiveness;
- 3) self-identification as a distinct group; and
- 4) a historical or continuing experience of exclusion, marginalisation, dispossession or other forms of oppression.<sup>10</sup>

A distinctive common feature of indigenous cultures is their deeply-rooted spiritual and cultural relationship to the lands, territories and resources which indigenous peoples traditionally occupy or use. Many indigenous peoples inhabit territories with particularly harsh and fragile environments such as the Arctic, arid areas or deserts. In these environments, indigenous peoples have developed highly diverse and adapted livelihood strategies such as pastoralism, shifting cultivation, hunting or gathering. At the same time, due to factors such as displacement or urbanization, many contemporary indigenous communities have, to varying degrees, transitioned towards non-traditional activities. Often, traditional and non-traditional activities are pursued in parallel and complement each other. In either case, indigenous peoples typically face discrimination and other human rights violations related to the economic sphere.

The UN Working Group on the Issue of Human Rights and Transnational and other Business Enterprises has been considering the issue of indigenous peoples within its mandate of giving special attention to persons living in vulnerable situations. Within this mandate, it produced a thematic report on the issue of indigenous peoples and the Guiding Principles, which was published in August 2013.<sup>11</sup>

## Indigenous peoples – a vulnerable group?

While there is broad agreement that indigenous peoples are, in many regards, particularly vulnerable, approaching this issue merely or primarily under the premise of vulnerability alone would be incomplete as it disregards the status of indigenous peoples as collective rights-holders and subjects of international law and thus risks overlooking the need to protect and respect specific rights ensuing from this status. It would also ignore the enormous contribution made by indigenous peoples in terms of sustainable practices, contributions to national economies, knowledge, conservation of biodiversity etc.<sup>12</sup> Fortunately, the Working Group's report does acknowledge indigenous peoples as rights-holders and therefore goes beyond the vulnerability-based approach.<sup>13</sup>

In recent decades, international recognition of indigenous peoples as peoples endowed with the right to self-determination like all other peoples has made progress, expressed most clearly in the 2007 adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). There has also been increasing recognition of indigenous peoples and their human rights in the development and practice of regional human rights mechanisms such as the Inter-American Human Rights Commission and Court and the African Commission on Human and Peoples' Rights as well as in the jurisprudence of international human rights monitoring bodies such as the UN Committee on the Elimination of Racial Discrimination (CERD). However, at the state level, the degree of recognition of indigenous peoples varies greatly, from states granting far-reaching autonomy to indigenous peoples to others rejecting the very existence of indigenous peoples within their boundaries or refusing to acknowledge their rights set out in the UNDRIP.

International human rights bodies and courts have consistently reaffirmed the central significance of two instruments that reflect a global consensus with regard to the definition of indigenous peoples' rights.

**ILO Convention No. 169** concerning Indigenous and Tribal Peoples in Independent Countries of 1989 sets out rights to consultation, participation and consent, the right to their own social organisation and political institutions, as well as rights to lands, territories and natural resources.

The **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**, adopted by the UN General Assembly on 13 September 2007, acknowledges indigenous peoples as collective rights-holders endowed with the right to self-determination, by virtue of which they freely determine their economic development (Art. 3), the right to autonomy in matters relating to their own internal and local affairs (Art.4) and the right to determine their priorities for exercising their right to development (Art.23). As a consequence of the right to self-determination, certain actions, such as measures affecting their ancestral territories and livelihood, are not permissible without their Free, Prior and Informed Consent (FPIC).

The UNDRIP and the Convention 169 are fully compatible and reinforce each other. In addition, the core conventions of the International Labour Organization have specific applications with regard to indigenous peoples. These include the conventions on forced labour (29 and 105) and discrimination (111).

Under the premise of ensuring non-discrimination, UN treaty bodies have, in General Comments, stressed the obligation of states to devote special attention to indigenous peoples. This concerns inter alia the fundamental right to self-determination (ICCPR and ICESCR common article 1) from which their right to cultural, social and economic development flows, the right to housing, which implies the right to be protected against forced eviction,<sup>14</sup> the right to water<sup>15</sup> and the right of indigenous children to enjoy their own culture, practise their own religion and language, along with the use of traditional territory and the use of its resources.<sup>16</sup>

### **Risks of human rights abuses affecting indigenous peoples in connection with business operations**

International human rights law recognises that indigenous peoples have historically been, and remain, victims of grave injustice, ranging from involuntary relocation to acts of genocide, and that these injustices warrant reparation by means of restitution, compensation, satisfaction or others.<sup>17</sup> Such human rights violations have been perpetrated both by state and non-state actors. To this day, the overall social and economic marginalisation of indigenous peoples limits their ability to successfully assert their rights. In the labour sphere, for ex-

ample, indigenous peoples are among the groups most at risk of being subjected to various forms of forced labour. Furthermore, while they constitute approximately 5 percent of the world's population, indigenous peoples account for around 15 percent of the world's poor.<sup>18</sup>

The material and spiritual well-being of indigenous peoples is closely connected to their lands and territories. Because of this special relationship, developments or investments undertaken on indigenous peoples' lands often affect their right to maintain their chosen traditional way of life, with their distinct cultural identity. This circumstance has been acknowledged in the jurisprudence of different human rights treaty bodies.<sup>19</sup>

**Extractive sector:** Today, in Latin America, Africa and Asia, but also in Europe and North America, resource extraction is having a severe impact on indigenous peoples' rights to lands and resources, a healthy environment and culture.<sup>20</sup> A survey undertaken by the Special Representative, Professor John Ruggie, on reported business-related human rights abuses in 2006 found that: *“The extractive industries also account for most allegations of the worst abuses, up to and including complicity in crimes against humanity. These are typically for acts committed by public and private security forces protecting company assets and property; large-scale corruption; violations of labour rights; and a broad array of abuses in relation to local communities, especially indigenous people.”*<sup>21</sup>

**Land-grab:** Another area of major concern are large-scale land acquisitions or “land-grabbing”, for instance, for palm oil and other plantations, which are displacing indigenous peoples through either forced resettlement or economic pressure. These occurrences are frequently associated with serious abuses of civil and political rights, and often involve threats to the right to life and bodily integrity.<sup>22</sup>

**Remoteness:** Sometimes, the remoteness of their territories aggravates the risk of conflict, violence and impunity, as law enforcement and administrative oversight may be weaker and corruption more prevalent. Given the lack of civil society observers, there is less deterrence against the use of military or paramilitary force.

**Gender, age and sex-related discrimination:** In addition, certain members of indigenous peoples are even more vulnerable to human rights abuses in relation to business activities. These include in-

igenous women, who are often subjected to multiple forms of discrimination based on their gender and race/ethnicity to the extent that their status has been described as that of “third class citizens”.<sup>23</sup> In some situations, economic development offers opportunities for some indigenous women to advance their economic and social status. However, in many other instances, it deprives indigenous women of their existing livelihood. Generally, in poverty-affected rural areas, women tend to be in charge of most of the food production. They *“grow most of the crops for domestic consumption and are primarily responsible for preparing, storing and processing food. They also handle livestock, gather food, fodder and fuelwood and manage the domestic water supply.”*<sup>24</sup> Deprivation of land and territories, forced relocation etc. therefore often affect indigenous women in a particularly severe manner and, through them, jeopardize the food security of affected communities. Social changes associated with the arrival of large business enterprises may also increase their vulnerability to abuse and violence and undermine their social status. Further groups at risk of multiple discrimination include indigenous children and youth, the elderly, indigenous people with disabilities and LGBT people.

**Cumulative discrimination:** Another way of describing the experience of indigenous peoples would be as “cumulative” discrimination, since they are simultaneously affected by a variety of human rights risks which individually affect other groups: such as small peasants, who are affected by land-grabbing and eviction; such as seasonal workers, who are often excluded from the regular labour market; such as the landless, who are denied legal title to their means of existence; and such as ethnic minorities, who are often targets of racial discrimination.

# INDIGENOUS PEOPLES AND THE UN GUIDING PRINCIPLES

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The next three sections will explore how each of the three pillars of the Guiding Principles interfaces with the rights of indigenous peoples and relates to violations of these rights in connection with business operations. The sections follow the structure of the Guiding Principles, without necessarily covering each of them exhaustively. Primarily, the sections look at:

- the applicability of the individual principles with regard to the typical human rights challenges facing indigenous peoples,
- which additional human rights norms, standards and instruments beyond those referenced in the Guiding Principles directly relate to individual principles, bringing greater specificity to their understanding and application,
- what related guidance coming from human rights mechanisms or judicial bodies should be taken into consideration,
- how working **mechanisms** suggested by the Guiding Principles could be adapted and extended, building on the current experience of indigenous peoples,
- whether there are inherent limitations to individual principles which need to be kept in mind for realistic expectations,
- which specific opportunities are there for indigenous peoples and stakeholders to seize.

## PILLAR 1: The State Duty to Protect

### Foundational Principle (Principle 1)

The first principle outlines basic elements of the state duty to protect against human rights abuse by businesses by means of policies, legislation, regulations and adjudication. The state duty to protect is predicated on the fact that states, as parties to international human rights treaties, are the principal bearers of human rights obligations. Every state is duty-bound to respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. The duty to respect implies that states must not take actions that infringe upon the enjoyment of human rights, such as the forced relocation of an indigenous community. The duty to protect implies that states must take measures to prevent or terminate any infringement of the enjoyment of a given human right caused by third parties, for example, pre-

venting business enterprises from harming indigenous peoples' means of existence. The duty to fulfil obliges the state to take active steps to enable a given right, e.g. to ensure that an indigenous people has sufficient access to territories and resources that will allow them to achieve an adequate standard of living. In relation to states, the guiding principles are primarily related to the second type of state obligation, i.e., the obligation to protect from third parties.

The commentary to Principle 1 notes that the state duty to protect is a "standard of conduct", which implies that "*States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take ap-*

*appropriate steps to prevent, investigate, punish and redress private actors' abuse."*

Even though the qualification "not per se responsible" appears to limit state responsibility with regard to human rights abuse by private actors, it does not diminish the overarching duty of the state to take immediate and effective action whenever such abuse occurs or is at risk of occurring. In line with their obligations under the two international human rights Covenants on Civil and Political Rights (CCPR) and Economic, Social and Cultural Rights (CESCR), states are duty-bound to terminate violations of human rights in the shortest possible time, using the maximum available resources. This includes appropriate steps to "prevent, investigate, punishing and redress private actors' abuse" (Commentary to Principle 1). The implication is that the state is duty-bound to be proactive in addressing such violations and that a state's inaction may in itself constitute a violation of its obligations under international law.

## **Extraterritorial dimension of the duty to protect (Principle 2)**

Principle 2 specifies that states "*should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations*".

The wording "set out the expectation" indicates that the UNGP do not acknowledge a legal duty on the part of the home states of transnational corporations to impose binding regulations ensuring that these corporations do not abuse human rights abroad. The official commentary rejects such a duty, noting that states are not generally obliged to undertake such measures. It acknowledges merely that "*there are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad*". What precisely does "*set out clearly the expectation*" mean? Certainly, this is not the same as forcing companies through binding regulations to respect human rights throughout their extraterritorial operations. If states "set out the expectation", then what should be the consequence for corporations that fail to meet that expectation? Here, the UNGP make no

general prescription and leave it to the discretion of the state to define its approach.

There are many situations where a purely voluntarist approach has been shown to be insufficient to ensure protection of indigenous peoples' rights. The UN Special Rapporteur on the rights of indigenous peoples has observed that "*in many cases in which extractive companies have been identified as responsible for, or at least associated with, violations of the rights of indigenous peoples, those violations occur in countries with weak regulatory regimes, and the responsible companies are domiciled in other, typically much more developed, countries.*"<sup>25</sup>

While the UNGP do not prescribe state measures to control extraterritorial business operations, neither do they preclude them. They are therefore not incompatible with the stronger regulatory regimes that are being proposed and discussed. In order to ensure protection when host states are either unwilling or unable to comply with their human rights obligations, two possible avenues have been proposed:

The first is the direct imposition of human rights obligations on non-state actors by international agreement and the institution of a liability mechanism within the United Nations. Such a mechanism was *inter alia* proposed to the UN Human Rights Council by the Government of Ecuador in October 2013. It has however been met with strong opposition from many home states of TNCs and will therefore take considerable time to be agreed, if ever. The second possible avenue is that home states exercise effective control over TNCs under their jurisdiction, including their subsidiaries registered as distinct legal entities in the host states. Since, for home states, protection of human rights abroad may often be a secondary consideration to the economic interest of home states, this second avenue requires the concept of extraterritorial state obligations to gain global recognition and acceptance.

This consideration has led the international human rights community to develop the "Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights". The Maastricht Principles argue that home states are required, under their existing human rights obligations, to take regulatory action if hu-

man rights violations would otherwise result. This document, while lacking endorsement from the UN Human Rights Council, has been endorsed by a large number of present or past UN mandate hold-

ers, including the Special Rapporteur on the Right to Food, members and former members of treaty bodies as well as members of academia and many civil society organisations.

### **Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights**

The Maastricht Principles were adopted at a meeting convened in late 2011 at the University of Maastricht, the Netherlands, by a group of former and current UN mandate holders, members of treaty bodies, representatives of human rights organisations and academic legal experts. They hold that “a state has obligations to respect, protect and fulfil economic, social and cultural rights” whenever it asserts effective control or influence over a given situation. This includes situations outside of its national jurisdiction and/or boundaries.

The legal underpinning for this obligation is derived from a variety of sources. One foundational principle is the state duty to cooperate implied in, *inter alia*, Art 28 of the Universal Declaration of Human Rights, which provides that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” Other sources include articles of the International Covenant on Economic, Social and Cultural Rights (CESCR) as well as the provisions of the Convention on the Rights of the Child (CRC).

In a commentary on the Maastricht Principles, UN Special Rapporteur on the Right to Food, Olivier de Schutter explains the sources that extraterritorial state obligations are derived from: “Economic, social, and cultural rights and correlative state obligations are included in a wide range of instruments [...]. Some of the most important instruments include: [...] the International Convention on the Elimination of All Forms of Racial Discrimination [...] and the conventions adopted in the framework of the International Labour Organization.”<sup>26</sup> He notes that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) “may also be the source of extraterritorial obligations, to the extent that it reflects customary international law.”<sup>27</sup>

The Maastricht Principles stipulate that human rights obligations take effect whenever a state “exercises authority or effective control” and where its actions or omissions “bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory”, i.e. they are not limited to situations or people under the jurisdiction of a given state but instead exist *vis-à-vis* all people whose human rights are affected by a state’s actions or omissions.

This does not imply that a state has a general obligation to ensure the protection of all human rights world-wide; however, it does mean that such an obligation takes effect whenever a given state asserts influence.

According to the Maastricht Principles, regulation of the extraterritorial activities of business enterprises that have a potential adverse impact on human rights thus clearly fall within the scope of state obligations, rather than being merely desirable for policy reasons as stated in the commentary to the Guiding Principles.

Neither the Maastricht Principles nor the UNGP establish new legal regimes but instead seek to clarify existing norms of international law. The

Maastricht Principles make a strong and compelling case that extraterritorial state obligations are a reality and need to be adhered to by states.

In doing so, they help to shape the global debate in favour of those who have no access to remedy. It is hoped that, gradually, home states will embrace the existence of extraterritorial obligations and thus begin to exercise control over TNCs domiciled in their territories. Furthermore, since they have been endorsed by many UN human rights experts and mandate holders, the Maastricht Principles provide useful interpretive guidance for indigenous peoples wishing to use existing UN human rights mechanisms such as the treaty bodies to pressure home states to rein in human rights abuses by TNCs under their jurisdiction.

However, in situations where neither the host nor the home state are willing or able to comply with their duty to protect, a protection gap exists that needs to be addressed by the international community. A UN-based liability mechanism for TNCs would still therefore be a necessary component of a global human rights regime, even when the existence of extraterritorial state obligations has gained wider recognition.

### General State Regulatory and Policy Functions (Principle 3)

Principle 3 specifies that, in order to fulfil their obligation to protect, states have to act on four fronts:

1. enforce laws that require business enterprises to respect human rights,
2. ensure that other legislation and policies do not constrain but are conducive to business respect of human rights,
3. provide guidance to business enterprises on how to respect human rights, and
4. encourage business enterprises to communicate how they address their human rights impacts.

Of these four types of action, the first two concern exclusive and hard state regulatory measures while the latter two are concerned with soft regulation and capacity building.

### Addressing gaps in legislation

#### Ensuring full recognition of indigenous peoples

The commentary points out the need to enforce laws conducive to business respect for human rights and to address legislative gaps. This is especially relevant to indigenous peoples in most countries. Legal protection of their rights in a business context is only possible when these rights have been recognised in the first place. The first step is therefore for states to ensure legal recognition of indigenous peoples, endowed with inalienable rights, as stipulated in Art. 42 of the UNDRIP.

This step needs to be taken by all states whose actions or omissions potentially affect indigenous peoples and not only by those within whose boundaries indigenous peoples reside. Indigenous peoples in many countries continue to have to struggle for full enjoyment of their internationally recognised rights, including rights to lands, territories and natural resources.

The following are some legal obstacles which need to be addressed in order to fill existing gaps in legislation:

- Some states will need to overcome their reservations regarding the distinct identification of individual ethnic groups as indigenous. Such reservations are often based on an ill-conceived understanding of non-discrimination: some claim that their entire population should be considered indigenous due to their colonial past while some use specific terminology, avoiding the term “indigenous peoples” altogether.
- Many states which have, to varying degrees, acknowledged indigenous peoples, will have to ensure that this recognition is complete, has full legal standing and cannot be revoked, is neither subject to reservations limiting their rights nor subordinate to the interests of third parties or the general interest of the state.
- Many states will have to ensure that sectoral laws, in particular those related to subsoil resources and land, are fully consistent with legislation concerning indigenous peoples and their human rights, since the former of-

ten fail to include provisions ensuring respect for indigenous peoples' traditional ownership rights.

### **Free, Prior and Informed Consent and the duty to consult**

Another foundational aspect of indigenous peoples' rights whose legal protection is warranted by Principle 3 is the duty to consult indigenous peoples in good faith, prior to the authorisation of business activities that have a potential impact on them. In accordance with the UNDRIP, governments are required to obtain the free, prior and informed consent of indigenous peoples (FPIC) prior to "*adopting and implementing legislative or administrative measures that may affect them*" (Art. 19) as well as the approval of "*any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*" (Art. 32). Further specific cases where states are compelled to obtain the FPIC of indigenous peoples include the removal of indigenous peoples from their lands and territories (Art. 10), storage or disposal of hazardous materials on lands and territories of indigenous peoples (Art. 29.2) and any military activities on their territories (Art. 30). These stipulations are mirrored by similar provisions in ILO Convention No. 169. Legal recognition and protection of the right to FPIC by states is therefore an indispensable component of the implementation of the UNGP.

The right to FPIC is firmly grounded in the broader framework of indigenous peoples' rights as expressed in the UNDRIP, starting with the right of self-determination. The jurisprudence of international and regional human rights monitoring bodies as well as human rights courts has repeatedly and clearly identified FPIC as the standard that states must oblige corporations to adhere to.

The UN Committee on the Elimination of Racial Discrimination (CERD) General Recommendation XXIII on indigenous peoples urges that no decisions directly affecting these peoples' interests be taken without their consent. Similarly, the UN Human Rights Committee (HRC) supports FPIC in its concluding observations to states, as well as in

specific complaints made by indigenous peoples to this treaty body.<sup>28</sup>

The Nagoya Protocol on Access and Benefit-Sharing of 29 October 2010 obliges all signatories to seek the FPIC of indigenous peoples in connection with the use of their "traditional knowledge associated with genetic resources".<sup>29</sup>

States often hope to discharge their human rights obligations vis-à-vis indigenous peoples through mere consultation, without eventually obtaining their consent. However, while good faith consultation is an indispensable prerequisite, it is just one step within an FPIC process which remains incomplete until the actual free and informed consent is granted (or ultimately withheld). The duty to obtain FPIC in cases of impacts on their natural resources in their ancestral lands has been clearly recognised by the Inter-American Court of Human Rights (IACHR) in the *Saramaka v. Surinam* decision (2007). The Saramaka are an Afro-descendant tribal community living in Surinam. In its ruling, the Court affirmed that large-scale development projects within indigenous peoples' ancestral territories that have a significant impact on their property rights and on their use and enjoyment of such territories require states not only to consult them but also to obtain their Free, Prior and Informed Consent, in accordance with their customs and traditions.<sup>30</sup>

FPIC is thus both an indicator of whether the duty to protect has been observed and an instrument to prevent adverse impacts on human rights. Indigenous peoples have stated that they view FPIC as an expression of their right to self-determination and, consequently, as an element in ensuring control over their own territories, resources and destinies. Any FPIC process should thus be primarily determined and controlled by the given indigenous community.<sup>31</sup> This includes the identification of legitimate representatives in accordance with their own customs and traditions.

The right to FPIC has both procedural and substantive aspects. Its procedural aspects are concerned with how consent is to be reached and determined exist. However, the end goal of any genuine FPIC process is to ensure that indigenous peoples' substantive rights to their lands, territories and resources are protected and respected.<sup>32</sup> The

most fundamental substantive right of indigenous peoples is the right to self-determination as affirmed by the UNDRIP as well as the two international human rights covenants. Thus, the concept of FPIC would be meaningless, unless understood as implying the right to *withhold* consent and the duty to respect such a decision.

Limitations to the right to FPIC may be permissible if a public purpose of exceptional significance is at stake. The Special Rapporteur on the rights of indigenous peoples makes it clear that *“such a valid public purpose is not found in mere commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities are primarily for private gain. [...] Even if a valid public purpose can be established for the limitation of property or other rights related to indigenous territories, the limitation must be necessary and proportional to that purpose. This requirement will generally be difficult to meet for extractive industries that are carried out within the territories of indigenous peoples without their consent.”*<sup>33</sup>

### Addressing implementation gaps

The commentary to Principle 3 emphasises the need for governments to address gaps in state *practice*. This aspect is of considerable importance to indigenous peoples. The first UN Special Rapporteur on the human rights and fundamental freedoms of indigenous people, Professor Rodolfo Stavenhagen, noted the existence of such gaps between the legislation and the administrative, political or juridical practice of states. Such practice, according to Stavenhagen, is framed in an assimilationist legacy, which is expressed in discriminatory attitudes towards indigenous peoples that are visible, among other areas, in land programmes concerning these peoples.<sup>34</sup> This implementation gap unfortunately continues to exist in many states, resulting on many occasions in the violation not only of indigenous peoples' rights to land but also of their civil and political rights. In his recent reports, the second UN Special Rapporteur on the rights of indigenous peoples (2008-2013) visualised the existence of what he identified as

“numerous grey conceptual and legal areas” that have proved to be a source of social conflict and have been a barrier to the effective protection of indigenous peoples' rights in the context of extractive development.<sup>35</sup>

A specific implementation gap has been observed in the few known instances where the right to FPIC has been embedded in national legislation. The best-known case is the Philippine Indigenous Peoples' Rights Act (IPRA) of 1997. Research indicates that FPIC is often implemented in an imperfect manner, with one or more elements not properly observed. Often, no on-site consultations are held, coercion or bribery are used in the process, consent is not obtained before irreversible steps have been taken, information is provided in an insufficient or inaccessible manner, or consent is determined by the authorities, even though according to the community's own view, none has been reached.<sup>36</sup> Such practice may be the result of a misconception of FPIC as a mere compliance mechanism which can be fulfilled through a box-ticking exercise. If practised in this manner, the concept of FPIC loses its grounding in the fundamental rights of indigenous peoples, most notably their customary rights over resources and territories. Genuine FPIC requires authorities and business enterprises to engage in long-term relationship building in the expectation that parties thus engaged will act in good faith to their mutual benefit. FPIC must be understood not as an isolated requirement but as one application of a set of state duties, namely to ensure consultation, participation and consent, which are fundamental to the relationship between indigenous peoples and states in a much wider sense, beyond those cases in which FPIC is required by the UNDRIP.

Closing the gaps in state practice with regard to indigenous peoples may therefore require a rethinking not only of formal procedures and regulations but, indeed, profound attitudinal, political and institutional changes, overcoming the assimilationist legacy observed by Special Rapporteur Stavenhagen.

## The State-Business Nexus (Principles 4-6)

The State-Business Nexus is a term coined to describe sectors and corporations which are tightly controlled, owned or supported by the state, contracted by the state for specific services or with whom states conduct business transactions. With regard to such companies, the Guiding Principles argue that states have greater means and tools within their power to ensure that policies, legislation and regulations regarding respect for the human rights of the affected communities are implemented.

There is evidence that state-owned or controlled corporations are playing an increasing role in the kinds of business activities that are having an adverse impact on indigenous peoples in different regions of the world, including Latin America, Africa and Asia.<sup>37</sup> Enterprises identified as state-owned are those in which the state owns, directly or indirectly, over 50.01% of shares. Currently, more than 10% of the world's largest firms are state-owned (204 firms). They come from 37 different countries and their joint turnover amounted to US\$3.6 trillion in 2011.<sup>38</sup> Many of these enterprises are investing in resource extraction (mining, forestry or oil drilling) or infrastructure projects (dams, roads, pipelines, etc.) that affect indigenous lands and territories.

Large state-driven development programmes, such as infrastructure programmes, construction of hydroelectric dams or the opening up of unexploited energy reserves, are often initiated and planned at senior government levels and implemented in close interaction between government bodies and large private or state-owned corporations, often with massive public funding. In many cases, such programmes affect territories inhabited or used by indigenous communities and carry a high risk of affecting them adversely. When a state gives strategic importance to the realisation of a given project, there is an increased possibility that indigenous communities will be subjected to double marginalisation, by both the political and the economic powers facing them.

Principle 4 stipulates that, in cases of increased human rights risk, human rights due diligence should be made a requirement. It follows that, in

order to be able to reliably detect and address such increased risks for indigenous peoples, states need to develop adequate human rights frameworks. Such a framework should *inter alia* be developed with the full and effective participation of indigenous peoples, based on recognition of their right to self-determination and to participate in decision-making in matters affecting their interests. It should protect their territorial rights and their rights to freely determine their path of development and to give or withhold FPIC. The establishment of effective remedy mechanisms constitutes one indispensable aspect of such a framework, which should be binding on both state authorities and the private or state-owned enterprises involved. In addition, it might be necessary to review other legislative instruments, such as laws governing rights to land and resources, in order to ensure that they do not conflict with the legal safeguards set out in the policy framework.

State-owned corporations should not be allowed to assume state-like authority in the protection of rights of potentially affected indigenous peoples. In particular, even if states choose to delegate the task of consulting in good faith and, where appropriate, obtaining the FPIC of the affected indigenous peoples, the ultimate human rights obligation still rests with the state, which must ensure adequate oversight. On the other hand, state control or participation must not diminish the corporation's responsibility to respect human rights, nor its responsibility to identify, prevent or mitigate its adverse human rights impacts.

## Supporting business respect for human rights in conflict-affected areas (Principle 7)

Guiding Principle 7 states that: "*Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses*". The UN Expert Mechanism on the Rights of Indigenous Peoples points to an abundance of reports of abuses of indigenous peoples' human rights by business taking place in conflict-affected areas. Some cases

*“involve states hiring private security companies, or armies, whose actions violate human rights laws, norms and standards. This has included sexual crimes against indigenous women, including sexual assault and rape as a weapon of war.”* Conflict such as *“land-grabs for mining, tourism, biofuels, dam construction, infrastructure projects, timber and carbon trading [...], turning communities into refugees on their own land.”*<sup>39</sup>

In some cases, business activities can be identified as the root cause of conflict; in other cases, business operations get dragged into a pre-existing conflict. Whatever the root cause, bad business conduct and militarisation are often mutually reinforcing such that business enterprises clearly bear responsibility for either causing or aggravating violent conflict.

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism noted that, in some countries, anti-terrorism laws had led to extensive human rights violations, including killings of indigenous women leaders.<sup>40</sup> States have also criminalised indigenous protests by prosecuting indigenous leaders or by repressing communities that have protested against them.<sup>41</sup>

In one recent case, the Tampakan copper-gold conflict in Mindanao, Philippines, violent conflict between the government and the New Peoples’ Army, the armed wing of the communist party, predated the project by many years. However, the NPA sought to capitalise on the conflict and carried out several attacks against the mining company SMI, such that resistance against the project came to be increasingly associated with the NPA. Many members of the indigenous communities have been falsely accused of supporting the NPA and have thus suffered reprisals. At the same time, the NPA has sought to exploit their grievances and to recruit fighters from the communities. The entire project is being implemented against a backdrop of broad counter-insurgency measures by the Philippine Army. The local residents perceive the army as being deployed to protect foreign investment against their resistance, and a number of community members have been killed. Women feel particularly threatened by the forces and no longer dare to walk to their fields. The mining project has

therefore significantly contributed to a dangerous dynamic, increasing the frequency and severity of human rights violations.

States complicit in such abuses or which are failing to prevent or mitigate them are acting in violation of the UNDRIP, Art. 30 of which states that *“military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.”*

## **Ensuring Policy Coherence (Principles 8-10)**

Principles 8-10 deal with the issue of policy coherence, which is multidimensional: Principle 8 addresses the need for state bodies, agencies and departments that shape business practices to act in a manner consistent with the state’s human rights obligations. Principle 9 calls on states to preserve sufficient domestic policy space, i.e. to ensure that trade agreements entered into, for example, do not restrict their possibility of protecting human rights whereas Principle 10 specifies that states, as members of multilateral institutions, should ensure their human rights compliance.

Coherence between economic and human rights policies, as called for by Principle 10, is of great relevance to indigenous peoples. One element of economic policy that has a significant impact on indigenous peoples is the free trade agreements and bilateral investment agreements entered into by states both in the developed and developing world. While such agreements have proliferated in recent decades,<sup>42</sup> we are not aware of any cases where indigenous peoples were consulted or their Free, Prior and Informed Consent sought before they entered into force. Agreements have resulted in investments in natural resource extraction on their lands and territories, with adverse implications for their communities. In accordance with the terms and conditions of these agreements, laws have been enacted and policies implemented, weakening the protection of indigenous lands and resources.

While aimed at promoting and protecting international trade and investment, free trade agreements

and bilateral investment treaties have the potential to influence states' abilities to regulate domestically and, as a consequence, they can restrict the ability of states to implement their international human rights obligations, or to adhere to new obligations.<sup>43</sup>

The risks of the stabilization clauses that are contained in some of these agreements, which can either insulate investors from new environmental and social laws or entitle them to seek compensation for compliance, were highlighted by the Special Representative John Ruggie. He has encouraged states to ensure a new model of trade agreements that “*combine robust investor protections with allowances for bona fide public interest measures, including human rights, applied in a non-discriminatory manner.*”<sup>44</sup>

Bilateral and multilateral trade and investment agreements often establish arbitral tribunals charged with the resolution of disputes between the parties. These tribunals are vested with far-reaching powers, as set out in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. In contrast to the decisions of the UN human rights mechanisms, their decisions are binding on the parties and non-compliance is penalised. It has been suggested that indigenous peoples should explore the possibility of employing these mechanisms in defence of their human rights. One possible avenue would be to participate in investment arbitration proceedings as an interested third party expert, an “*amicus curiae*” (“Friend of the court”). The principal obstacle is that arbitral tribunals are not mandated

to adjudicate in human rights issues and attempts to invoke international human rights law have thus been rejected, while norms of corporate liability are not yet regarded as part of customary international law. In order to ensure that the tribunals use their authority not merely to protect investment and trade but also to ensure that no human rights violations result from them, the trade and investment agreements that establish them should include references to the rights set out in the UNDRIP. In compliance with their right to participate in decision-making, indigenous peoples should be a party to the negotiation of such agreements. If it is likely that their rights will be affected by the respective agreement, its adoption should not go ahead without their Free, Prior and Informed Consent as stipulated by Art. 19 of the UNDRIP.<sup>45</sup>

The Guiding Principles hold that states “*should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts*” (Principle 9). However, due to imbalances of economic and political power, maintaining adequate policy space may pose a severe challenge to developing countries unless powerful industrialised nations likewise acknowledge and comply with their human rights obligation to ensure coherence of their respective foreign economic policies with their human rights obligations, including their obligation under Art. 28 of the Universal Declaration of Human Rights to work for a “*a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.*”

## PILLAR 2: The Corporate Responsibility to Respect Indigenous Peoples' Rights

### Foundational Principles 11-14

#### The corporate responsibility to respect a “standard of expected conduct”

The concept of the “Corporate Responsibility to Respect Human Rights” as set out in Guiding Principle 11 is an attempt to respond to and address the universal experience that, even though they do not constitute subjects of international human rights

law, business enterprises exert tremendous actual influence on the human rights and lives of populations across the globe.

There is ambiguity as to the binding or voluntary nature of the term “responsibility to protect”. While the term “obligation”, as used in the text of the 2003 “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”,

is clearly intended to be legally binding, there are differing interpretations of what the legal nature of the “responsibilities” is. The language of the UNGP suggests that its authors thought of them as non-binding recommendations, e.g. Principle 11 merely states that “*business enterprises should respect human rights*”. The commentary clarifies that this constitutes a “global standard of expected conduct”, again alluding to a non-binding nature. Clearly, there is no concept of anything resembling criminal liability attached to them.

In the absence of a binding mechanism relating to the international liability of transnational corporations, ensuring corporate compliance with the standards set out in the Guiding Principles remains the responsibility of states who, as parties to international human rights treaties, are duty-bound to ensure protection for, respect and fulfilment of human rights through legislation, administrative oversight and the judiciary.

The UN Special Rapporteur on the rights of indigenous peoples underlines that “[...] *the Guiding Principles on Business and Human Rights specify that business enterprises have a responsibility to respect internationally recognized human rights and that this responsibility is independent of State obligations.*”<sup>46</sup> When states are either unable or unwilling to comply with their human rights obligations, the expectation that corporations should live up to their responsibility to respect human rights thus remains fully in place. Despite its undefined legal status, the responsibility to respect can therefore be hoped to impose restraint on the harmful conduct of companies as well as encourage their rights-compliant conduct by providing a clear set of standards along with a methodological framework for achieving compliance with these standards.

For indigenous peoples seeking to influence harmful corporate conduct, the responsibility to respect may furthermore serve as an additional point of reference, underpinning their grievances and adding legitimacy to their demands in public campaigning, litigation and similar efforts. Given the global endorsement of the UNGP, corporations may find it difficult to deflect indigenous peoples’ complaints if non-compliance with the standards set out in the UNGP can be clearly demonstrated.

### **Indigenous peoples and the responsibility to respect**

Principle 12 declares that the human rights responsibility of corporations relates to international human rights standards, namely to the International Bill of Human Rights, which is commonly understood as consisting of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as to “*the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work*”. The commentary is slightly more inclusive than the principle itself in that it also refers to “the principles concerning fundamental rights in the eight ILO core conventions” which, however, does not include Convention No. 169 on indigenous and tribal peoples.

The commentary furthermore clarifies that this list constitutes a bare minimum and that “depending on circumstances, business enterprises may need to consider additional standards.”

The UN Special Rapporteur on the rights of indigenous peoples notes “*that the Guiding Principles apply to advance the specific rights of indigenous peoples in the same way as they advance human rights more generally, when those rights are affected or potentially affected by business activities.*” Failing to do so “*would be contrary to the injunction, found among the Guiding Principles’ introductory paragraphs, that they should be applied ‘in a non-discriminatory manner’, with particular attention to the rights and needs of groups that are vulnerable or marginalized.*”<sup>47</sup>

There is thus little ambiguity that the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) contains an authoritative set of global standards which business enterprises must respect. Together with the Declaration, ILO Convention No. 169 and other ILO Conventions, it constitutes a normative framework of indigenous peoples’ human rights.

For companies, complying with their responsibility to respect may also significantly reduce the risk of disruption of their operations by violent or non-violent protest, conflict, legal disputes and oth-

er public responses to harmful corporate conduct.<sup>48</sup> In a recent position statement, the International Council on Mining and Metals (ICMM) acknowledged the UNDRIP on behalf of its members. Furthermore, the UN Global Compact has developed a Business Reference Guide to the UNDRIP, which can be seen as a sign of its growing acceptance by the business sector.<sup>49</sup> It must be recalled that the mining sector has, for decades, been the tar-

get of intense public pressure, including indigenous peoples' resistance to mining operations.

This vindicates one of the conclusions of the recently completed IMPACT study on CSR effectiveness, commissioned by the European Union, namely, that public pressure and state regulation are the most effective drivers for change in corporate conduct. At the same time, purely voluntary initiatives rarely effect any change in impact.<sup>50</sup>

### **IMPACT: Researching the effectiveness of Corporate Social Responsibility (CSR)**

In recent years, many policy-makers have viewed encouragement of voluntary Corporate Social Responsibility (CSR) measures by private business enterprises as a suitable method of ensuring business compliance with human rights standards and other social and environmental norms. In an attempt to ensure CSR effectiveness, in 2011 the European Commission adopted a new policy, which defined CSR as "the responsibility of enterprises for their impacts on society". To fully meet their responsibility, the Commission holds that enterprises "should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders". European Commission: A renewed EU strategy 2011-14 for Corporate Social Responsibility (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>). However, a broad study commissioned by the European Union, covering 12 countries and concluded in autumn 2013, indicates that CSR measures alone do little to change the social impact of business enterprises in a significant manner. It also found that state regulation, including substantial legislation, in no way inhibits or deters additional measures by business enterprises. What the report makes very clear is that, by and large, in the absence of strong state regulation, corporations fail to adequately measure and mitigate their impact on society.

This failure has multiple reasons. When there is no state-sponsored framework, there are no common standards for measuring corporate impacts on society, so each company develops its own ad-hoc methods. The common focus on "best practices" tends to divert attention towards particular flagship projects and away from the need to address widespread and systemic failures.

The need for corporate decision-makers to make a "business case" for socially responsible conduct also limits the effectiveness of CSR. If CSR measures are attractive because they will increase revenues, then the reverse is also true: if a given measure cannot be expected to yield a surplus, it will not be taken.

The publicly available results of the study do not specifically focus on human rights impacts. However, the main conclusion, i.e. the limited impact of CSR on the actual social impact of corporations, justifies the inference that protection of fundamental human rights from the adverse impacts of businesses requires strong regulatory action, which cannot be discharged by encouraging voluntary action by said corporations. The study ultimately does not reject CSR; however, it clearly indicates that CSR can never be a replacement for state regulation. This is even more true in the area of human rights which, due to their character, impose particularly firm obligations on states.

Indigenous peoples have also stated that businesses need to assume responsibility not only for present and future impacts but also for the legacy of past wrongs suffered.<sup>51</sup> For companies, engaging in sincere dialogue over this legacy and developing a deeper understanding of its continued impact is an important precondition for building a new type of relationship with indigenous communities. In its position paper, the ICMM indirectly hints at the need to address this legacy by stating that: “*Indigenous Peoples in many regions of the world have been historically disadvantaged and may often still experience discrimination, high levels of poverty and other forms of political and social disadvantage. Mining and metals projects can have significant impacts on local communities, both positive and negative.*”

The corporate responsibility to respect refers not only to impacts directly caused by a given enterprise but also to impacts which are “*directly linked to their operations, products or services by their business relationships*”. This means that the responsibility also extends to a company’s supply chain, such as its suppliers of mineral resources and subcontractors. Thus not only companies directly interacting with indigenous peoples but also those purchasing the resources extracted or energy generated in indigenous peoples’ territories, investors, banks providing loans and so on are subject to the standard of conduct defined by the responsibility to respect.

## **Policy Commitment (Principle 16)**

Principle 16 proposes that, as a basis for living up to their responsibility to respect human rights, enterprises should develop a human rights policy commitment. A policy commitment is a public statement, approved at the most senior level of a business enterprise, informed by relevant internal and/or external expertise, and “*which stipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services*”. It is distinct from operational policies and procedures throughout the business enterprise and should be reflected in them.

For business enterprises whose operations may affect indigenous peoples, a policy commitment concerning indigenous peoples, whether as a separate document or as part of a wider human rights policy commitment, should be grounded in and spell out the recognition of indigenous peoples’ specific rights as set out in the relevant international human rights treaties and resolutions as well as in the jurisprudence of human rights courts and monitoring bodies. Developing such a policy commitment on indigenous peoples is also an important forward-looking measure, especially for the extractive industries, as the share of operations affecting indigenous peoples is projected to increase notably in the future.<sup>52</sup>

Where enterprises are already interacting with indigenous peoples, such a policy commitment could be developed through a participatory process involving not only external human rights experts but, crucially, also indigenous representatives with first-hand experience, and be designed to ensure coherent conduct at all levels of a given enterprise, including subsidiary companies registered and operating in countries other than the enterprise’s home state.

Given the central significance of their relationship to their lands, the recognition of indigenous peoples’ collective rights to lands and resources in accordance with their own customary law should also be expressly stated and principles for engagement with indigenous communities laid out, including good faith consultations and when and how the company will seek their free, prior and informed consent.

The policy commitment should follow international standards, including the application of internationally accepted criteria for identifying “indigenous peoples”, which strongly rely on a group’s collective self-identification. Non-recognition of an indigenous group by the host state or its use of different terminology or classifications, avoiding the term “indigenous peoples” should not prejudice the application of the policy.

At present, indigenous peoples’ rights policy commitments or indigenous peoples’ policies still constitute a rare exception. A study published in October 2013 investigating investment risks stemming from indigenous rights issues found that, of 52

companies analysed, 47 did not have an indigenous rights policy in place. Of those who did, only one contained an explicit commitment to FPIC. The authors concluded that this state of affairs constituted a significant risk not only to the indigenous peoples affected but also to the assets of the business enterprises, which risk significant losses from disruptions in case of conflict induced by human rights abuses. If investing in countries with insufficient legal protection of indigenous rights, it is particularly important, also from a risk-management standpoint, that policy commitments and operational policies clearly commit to respecting indigenous peoples' rights, including the right to self-determination and FPIC.<sup>53</sup>

It is of key importance that the expectations set out in the policy commitment be properly communicated not only within the given corporation but also to its subsidiaries and subcontractors. This includes e.g. legally-independent national subsidiaries, private security firms, prospectors carrying out exploration work for the extractive industries or contractors constructing roads and other infrastructure. The policy commitment should also be made available to potentially affected indigenous groups taking into account language, literacy levels and cultural preferences.

## Human Rights Due Diligence (Principles 17-21)

The Guiding Principles operationalise the corporate responsibility to respect human rights through the concept of human rights due diligence. A central element of human rights due diligence is the conducting of Human Rights Impact Assessments (HRIA). More than other groups, indigenous peoples are likely to be affected not only by "violation by commission", the intended effect of which *per se* constitutes a human rights violation, such as extrajudicial killings or forced evictions, but also by unintended "violation by result", e.g. violation of indigenous peoples' land rights or decision-making methods due to a lack of knowledge. From the victim's perspective, it makes little difference whether or not a violation was intended, which is why human rights responsibilities equally extend to "violations by result". However, the risk of unintended

violations may be harder to identify in general impact assessments. Furthermore, due to their often highly specialised livelihood strategies, indigenous peoples tend to be more vulnerable than others to the impacts of business on land and resources. HRIAs concerning indigenous peoples must therefore be undertaken with their full and substantive informed participation, as set out in ILO Convention No. 169 (Art. 7), and they must be consulted in good faith and their consent obtained.

The UNDRIP defines a set of specific rights for indigenous peoples which warrant the conducting of special participatory impact assessments, exceeding the scope of generic HRIAs. As stated by UN Rapporteur Anaya: "*Due diligence is not limited to respect for the national regulations of States in which companies operate, which are inadequate in many cases, but should be governed by the international standards that are binding on those States and on the international community as a whole.[...] Due diligence also means that companies must not contribute to States' failure to meet their international obligations in relation to indigenous rights, nor should they endeavour to replace the role of States in the fulfilment of those obligations.*"<sup>54</sup>

### Identification of risks, consultation (Principle 18)

Principle 18 stipulates that "*in order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impact with which they may be involved*" and to this end "*involve meaningful consultation with potentially affected groups and other relevant stakeholder*".

A foundational element of human rights due diligence for indigenous peoples is therefore the proper identification, at the earliest possible stage, of all indigenous groups who might be affected by a project. This includes identifying their rights with regard to the affected area and the way in which these rights are likely to be affected.<sup>55</sup> Indigenous peoples often do not hold formal title to lands and territories that they have been using for many generations. At the same time, their land-use methods are complex and multi-layered, comprising a host of economic, cultural and spiritual uses. Human rights due diligence therefore needs to give full

consideration to indigenous peoples' customary rights, customary legal systems, methods of ownership and land management and decision-making methods. These rules are usually dynamic and flexible. Their descriptions are rarely readily available in written form. In addition to complying with internationally recognised standards for indigenous peoples' rights, the due diligence process thus has to be highly adapted to the respective local situation, based on the understanding that respecting indigenous peoples' customary law and decision-making methods in this way constitutes an obligation under international law.

From a business standpoint, neglect of human rights due diligence constitutes a major investment risk as it exposes a company's operations to an increased risk of future disruptions. This is especially relevant in high-risk countries, i.e. those with no or insufficient safeguards of indigenous peoples' rights in their legal systems, and where the preconditions for a peaceful reconciliation of group interests are therefore lacking.

For indigenous peoples, the norm relating to good faith consultations, as specified in the UNDRIP, stipulates that such consultation does indeed constitute a right of indigenous peoples. In a number of cases, including those concerning resources and territories, mere consultation is insufficient and the Free, Prior and Informed Consent (FPIC) of the indigenous peoples concerned must be obtained. If states fail to discharge this responsibility, the responsibility to protect means that corporations should ensure that FPIC is properly obtained.

Frequently raised reservations regarding the practice of FPIC include the alleged difficulty of identifying the legitimate representatives of indigenous communities as well as the definition of "consent" in the context of indigenous customary institutions, sometimes expressed in the expectation that FPIC gives individuals the power to veto a decision. Both reservations pose challenges which need to be explored further. However, in both cases, international human rights standards and practice do provide useful guidance. It is generally advisable for states and corporations to seek an open and inclusive dialogue including, where applicable, national federations and umbrella organisations as well as regional and local organisations of indig-

enous peoples. When such an approach is taken, indigenous peoples themselves will, in most cases, identify their legitimate representatives themselves. Likewise, the indigenous people affected should be the party to determine autonomously how consent is defined and established. In their own interest, corporations should seek to avoid to influence, or to be perceived as influencing, the FPIC process. If, in a given situation, no broad agreement can be reached within the given community on whether or not to give consent, a project should not go ahead.<sup>56</sup>

### **Tracking (Principle 20)**

Principle 20 stipulates that *"In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should: (a) be based on appropriate qualitative and quantitative indicators;(b) draw on feedback from both internal and external sources, including affected stakeholders."*

The requirement to track the effectiveness of mitigation measures is often complicated by the lack of disaggregated, specific data regarding the indigenous peoples. For various reasons – administrative or political – many states do not gather or compile the necessary quantitative data, disaggregated by ethnicity. In such cases, it is essential that corporations undertake the necessary efforts to compile robust data, allowing them to track the effectiveness of their response. Tracking mechanisms should be diligently designed to ensure that the views of all affected parties are duly registered, including the critical views of indigenous peoples. Criticism should be invited as a genuine learning opportunity. If surveys are undertaken, a robust mechanism should be in place to ensure that there is no bias-driven pre-selection of informants.

### **Remediation (Principle 22)**

Principle 22 specifies that *"where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes."* While the details of remediation will be examined in the following chapter, within the context

of the corporate responsibility to respect this it can be noted that participation, consultation and consent are essential pillars for an effective remedial mechanism. The prior identification of adequate and culturally appropriate remedial mechanisms should be an integral part of any contractual relationship between indigenous peoples and industrial companies. Furthermore, whenever companies and states enter into a contractual relationship over concessions affecting indigenous peoples' resources and territories, it should be ensured that these communities are included as a party to the contract and that remedial mechanisms have been agreed.

### **Issues of Context (Principles 23-24)**

Principle 23 stipulates that: *"In all contexts, business enterprises should (...) respect internationally recognized human rights, wherever they operate"* and

*"seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements"*. Given the insufficient or lacking recognition of indigenous peoples and their collective rights over territories and resources in many parts of the world, this stipulation is of central importance in terms of minimising the risk of gross human rights violations and, in particular, ensuring that corporations are not complicit in such abuse. This means that corporations must also respect the provisions of the UNDRIP and ILO Convention No. 169 in such contexts where the host state withholds recognition of a given community as indigenous although they self-identify as such and meet other international criteria of identification, such as marginalisation or cultural distinctiveness. As stated above, this implies that corporations are obliged to obtain FPIC even if not required to do so by the national legislation of the host state.

Corporations should under no circumstances become complicit in the violent oppression of indigenous peoples and their social and political movements.

## **PILLAR 3: Access to Remedy**

The third pillar is the shortest part of the UNGP, comprising Principles 25-31. Principle 25 establishes the foundations of the obligation to provide access to remedy, while Principle 26 sets out some elements of effective remedy through the judicial system. The remainder of the third pillar (Principles -31) deals with non-judicial remedy mechanisms.

### **Foundational principle (Principle 25)**

Principle 25 develops the obligation of states to *"take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."* Notably, Principle 25 frames access to remedy in terms of state obligations. It does not explicitly ground this obligation in a *right to remedy*. For indigenous peoples who, in

many parts of the world, are still grappling with insufficient recognition of fundamental rights, invoking a right to remedy may, however, be an issue of both procedural and substantive importance: which remedial procedures are adequate to address indigenous peoples' grievances as well as which substantive issues require access to remedies (and which remedial outcomes are acceptable) is ultimately to be decided by determining their effect in terms of protecting human rights. The following section therefore seeks to provide the foundational elements of a right of indigenous peoples to access remedy.

### **Right to remedy**

The principle that every right must be accompanied by an effective remedy is a general principle of law that exists across all legal systems and is enshrined in Article 8 of the Universal Declaration of Human Rights.<sup>57</sup> As set out in the Declaration,

any person or group affected by a violation of a right enshrined in the Declaration is entitled to an appropriate remedy at the national or international level. The basic right to remedy for victims of human rights violations was confirmed by resolution 60/147 of the UN General Assembly, adopted on 21 March 2006. The right to effective remedy is also an integral principle of all major international and regional human rights instruments.

While the scope of grievances for which remedies should be available is not limited to any particular set of issues, submissions from indigenous communities indicate a strong prevalence of issues associated with a number of sectors, including the extractive sector, the energy sector and, increasingly, the agro-industrial sector. This correlation does not necessarily mean that human rights abuse is a necessary by-product of any of these sectors. It may, to some extent, simply reflect the fact that indigenous peoples are confronted with these sectors more often than others. However, in effect, the types of grievances associated with these sectors produce a specific pattern of human rights risks which policy-makers and corporations should seek to address. As observed by the UN Special Rapporteur on the rights of indigenous peoples, affected rights include: “rights to property, culture, religion, and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue their own priorities for development, including development of natural resources, as part of their fundamental right to self-determination.”<sup>58</sup>

Several international treaties and declarations provide important elements of a remedial framework for indigenous peoples affected by business-related human rights risks. Article 12 of ILO Convention No. 169 states that: “The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights.”

Additionally, other ILO Conventions prohibit certain types of violations to which indigenous peoples are highly exposed in the sphere of work,

notably Conventions No. 29 and 105 on forced labour and Convention No. 111 on discrimination. Convention No. 111 has a strong remedial dimension in that it requires governments to adopt and implement a national policy to promote equality of opportunity and treatment, including proactive measures to achieve equality in practice.

The obligation of states to ensure that indigenous peoples have access to effective administrative and judicial procedures to ensure remedy whenever their human rights are violated, including those violations resulting from large developments or investments that take place in their lands and territories, has been stressed by the Inter-American Court of Human Rights.

The IAHR Court has affirmed that these peoples have the right to effective and prompt administrative mechanisms to protect, guarantee and promote their rights to their ancestral territories. In cases concerning indigenous peoples’ right to land, the IAHR Court has affirmed that states must establish administrative procedures to resolve those claims in such a way that these peoples *have a real opportunity to recover their lands*. Such procedures are to be *accessible and simple* and the bodies in charge of them must have the necessary technical and material conditions *to provide a timely response* to the requests made within the framework of said procedures.<sup>59</sup>

Moreover, in the *Saramaka v. Suriname* decision (2007), the IAHR Court recognised the need of states to ensure indigenous peoples’ access to justice in a *collective* manner, *in accordance with their culture*, by highlighting that judicial remedies which are only available to persons who claim violation of their individual rights to private property are not adequate or effective to repair alleged violations of the right to communal property of indigenous and tribal peoples.<sup>60</sup>

Increasingly, international human rights practice and jurisprudence recognise the importance of *indigenous peoples’ customary law* as a remedial instrument. Globally, according to a survey, 112 national constitutions contain provisions relevant to recognition of customary law.<sup>61</sup> While the recognition of indigenous peoples’ customary dispute resolution mechanisms is consistent with their status as subjects of international law,

endowed with the right to self-determination, their use has also been demonstrated to be more efficient in addressing indigenous peoples' grievances than sole reliance on national legal systems or other non-judicial remedy mechanisms.<sup>62</sup>

An example of the growing relevance of indigenous customary law within international human rights law can be found in the Inter-American Human Rights system. The Inter-American Court of Human Rights has in recent years acknowledged indigenous peoples' *rights to communal property over lands ancestrally owned and/or used by them on the basis of customary law*. In its ruling in the *Awasi Tingni v. Nicaragua* case (2001), the Court explained that "*as a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.*"<sup>63</sup> In other decisions (*Yakye Axa v. Paraguay*, 2005; *Sawoyamaka v. Paraguay*, 2006; and *Saramaka people v. Suriname*, 2007), the Court has affirmed, on the basis of customary law, that possession is not a requisite for establishing the existence of indigenous property rights, and that indigenous peoples who have been deprived of the territory they have traditionally occupied preserve their property rights and have the right to restitution of their lands.

### Right to redress

The third pillar of the UNGP is largely process-oriented. It concerns itself more with what constitutes a fair, effective, transparent and equitable *procedure* and less with what are elements of a fair and equitable remedy *outcome*. Conversely, the UNDRIP and other sources of indigenous peoples' rights stipulate that indigenous peoples also have a right to redress. In other words, a remediation process also needs to have an adequate outcome, leading to restitution, compensation, rehabilitation, etc.

Article 28 of the UNDRIP states that: "*Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they*

*have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent*", underlining the priority of restitution over compensation as well as the close interrelation between access to justice and the concept of Free, Prior and Informed Consent.

Similarly, in its General Comment 23 of 1995, the UN Committee on the Elimination of Racial Discrimination calls upon states to ensure indigenous peoples' access to restitution and, where this is not available, adequate compensation. Both documents agree that restitution is to be preferred over compensation and that, if restitution is not possible, compensation for land should be in the form of alternative land.

ILO Convention No. 169 emphasises the right of indigenous peoples to legal redress and compensation, with particular focus on violations of labour rights, extractive industries' activities and involuntary relocation (Art. 15, 16, 20). These provisions are not only born of the experience that indigenous peoples are under increased risk of human rights violations but they also take account of the collective nature of indigenous peoples' special relation to their territories and are a recognition of their status as collective rights-holders under international law.

The Inter-American Court of Human Rights acknowledges the right of indigenous peoples to reparation in cases of impacts upon their natural resources in their ancestral lands. The Court has identified participation in the benefits as a specific form of fair compensation stemming from the limitation or deprivation of the right to indigenous communal property. The Court affirmed: "*In the present context, the right to obtain 'just compensation' pursuant to Article 21(2) of the Convention translates into a right of the members of the Saramaka people to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.*"<sup>64</sup>

Given the historical experience of dispossession, marginalisation and expropriation, the right to redress must be regarded a necessary complement to the right to remedy, the fulfilment of which is no less mandatory than that of the former.

### **Extraterritorial access to remedies (judicial and non-judicial)**

The third pillar makes no specific provisions or recommendations regarding access for victims of human rights abuse in the home states of these companies. Foundational Principle 25 specifies that states need to provide remedies for abuses occurring “within their territory and/or jurisdiction”. While the distinction between “within their territory” and “under their jurisdiction” would suggest that there could be cases of abuse occurring outside their territory but still falling within their jurisdiction, Principle 25 does not explicitly recommend that states extend the reach of their jurisdiction to enable corporate liability for human rights abuses occurring beyond their boundaries. It could be argued that the commentary to Principle 2 alludes to this possibility by stating that states are not prohibited from taking measures to regulate the extraterritorial operations of businesses domiciled in their territories; however, the remedy section provides no guidance to this effect.

The need for extraterritorial access to remedy arises whenever an action or omission of one state adversely affects the human rights of individuals or groups living on the territory of another state and where the latter is either unable or unwilling to provide for effective remedy sufficient to ensure an impartial investigation, prompt cessation of the violation and due reparation, including restitution and compensation. A frequent case is that of home states of transnational corporations whose operations take place in states with weak regulatory regimes, providing no effective remedy for victims of human rights abuses.

In the past, the UN Committee on the Elimination of Racial Discrimination has issued recommendations to the governments of several industrialised countries, including Canada (CERD/C/CAN/CO/19-20), Norway (CERD/C/NOR/CO/19-20), the United Kingdom (CERD/C/GBR/CO/18-20) and Australia (CERD/C/AUS/CO/15-17) aimed at ensuring access to effective remedy for indigenous peoples. In order to ensure that legal remedies are available for human rights violations committed by business enterprises domiciled in these states, CERD recommended that Norway, for example: “take appropriate legislative or administrative mea-

*asures to ensure that the activities of transnational corporations domiciled in the territory and/or under the jurisdiction of Norway do not have a negative impact on the enjoyment of rights of indigenous peoples and other ethnic groups, in territories outside Norway.”*

It further recommended that: “*In particular, the State party should explore ways to hold transnational corporations domiciled in the territory and/or under the jurisdiction of Norway accountable for any adverse impacts on the rights of indigenous peoples and other ethnic groups, in conformity with the principles of social responsibility and the ethics code of corporations.*” (CERD/C/NOR/CO/19-20)

On the question of which types of remedy should be available to indigenous peoples, the UN treaty bodies broadly agree that effective remedy can take a variety of forms but that the possibility of judicial recourse is a necessary component of a regime of effective remedies. In most states, legal requirements allowing for such a course of action still need to be created, including not only the possibility of holding a parent company accountable for the actions of its subsidiary in the host country as do the legal preconditions for the adjudication of violations of indigenous peoples’ rights, such as the rights to food, development, culture and subsistence. If such preconditions are in place, the associated financial burden may still, in effect, prevent indigenous communities from making use of them. The necessary logistical and financial assistance should therefore be part of a legal framework enabling extraterritorial access to justice.

More generally, states should work together to enable access to justice in cases relating to more than one state. This has been expressed in the context of the “State duty to cooperate”.<sup>65</sup>

To date, examples of domestic legislation with extraterritorial scope allowing multinational corporations to be sued for harm committed abroad remain few and far between. One of the best-known legislative measures is the Alien Tort Claims Act (ATCA) in the United States. Currently, it is being challenged as regards whether ATCA can be used against companies and whether it can be used to hear lawsuits alleging violations of international law occurring outside the USA.<sup>66</sup>

## State-based judicial mechanisms (Principle 26)

Principle 26 notes that: “States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”

The commentary begins by stating, that „effective judicial mechanisms are at the core of ensuring access to remedy”. This underlines the fact that ensuring access to justice through the domestic judicial system for all citizens and residents is a core duty and function of states. Like any other citizens, indigenous peoples depend on a functioning judicial system for the protection of their rights.

### Barriers to indigenous peoples’ equal access to the judiciary

The commentary primarily concerns itself with the issue of barrier-free access to judicial mechanisms, thereby invoking indigenous peoples as one of the groups at risk of exclusion: “Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example [...] certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population.”

It should be noted that “protection of their human rights” must be understood as including those human rights norms which are specific to indigenous peoples and which do not apply equally to the wider population, such as land rights or the right to practise and preserve their endangered language. A comment from EMRIP underlines this point by demanding that “particular attention [...] be given to the rights and specific needs of Indigenous peoples at each stage of the remedial process – access, procedures and outcome.”<sup>67</sup>

It is widely understood that a lack of interpretation from and into indigenous languages, transport for indigenous communities residing in remote parts of the country and the costs associated with litigation can constitute serious obstacles to obtaining equal access to judicial remedy.

However, a particular barrier that is not as immediately apparent is the lack of access to justice for their grievances due to factors such as a lack of official land titles and a lack of legal recognition of their intellectual property and their customary law, as well as a lack of understanding of indigenous peoples’ value systems, including the complex value of resources and ecosystems, extending far beyond their market value.

The doctrines of discovery and *terra nullius* remain embedded in some post-colonial legal systems. This doctrine holds that land “discovered” by the colonial powers was previously *terra nullius* (no man’s land) and hence vested in the discovering sovereign (in most cases, the British Crown), with the indigenous inhabitants merely retaining use or occupancy rights granted by the sovereign.

This stands directly at odds with the need to recognise indigenous peoples’ customary rights as set out in the UNDRIP, and its invocation by courts to prove that land ownership on the part of the indigenous population has been extinguished obstructs the right to effective remedy.

In order to ensure indigenous peoples’ equal access to the judiciary, the judicial process needs to accommodate the fact that indigenous peoples are collective rights-holders under international law and that this is reflected in their social realities. In particular, this relates to the recognition of indigenous peoples’ customary law and customary ownership of their lands and natural resources.

### Recognition of indigenous peoples’ customary law as a human rights obligation

As pointed out above, lack of access to justice for their grievances is a principle barrier to indigenous peoples’ equal protection through the judicial system. Recognition and integration into the judicial system of indigenous peoples’ customary law must therefore be regarded a human rights obligation of states.

In the Americas, both the Inter-American Court of Human Rights and some domestic courts have acknowledged indigenous title to land on the basis of customary occupancy. In the case of Canada, for example, aboriginal title to lands traditionally owned has been acknowledged by several decisions of the Supreme Court since the Calder case

(*Calder v. Attorney General of British Columbia*, 1973). In the *Delgamuukw* case (*Delgamuukw v. British Columbia*, 2007), a claim by the Gitskan and Wet'suwet'en hereditary chiefs for aboriginal title to land, the same Court acknowledged that when an aboriginal people can establish that, at the time of sovereignty, it exclusively occupied a territory to which a substantial connection has been maintained, then it has the communal right to exclusive use and occupation of such lands. Moreover, the Court also established the Crown's duty to consult - in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples - and to accommodate in the context of infringement of aboriginal rights. In the *Taku River Tlingit v. British Columbia* (2004) case, the Supreme Court of Canada stated that accommodation by the Crown includes implementing or requiring implementation by others of measures to avoid impact, minimise or mitigate that impact or, as a last resort, compensate for an impact.

For Africa, the 2003 ruling of the Constitutional Court of South Africa in the case of *Alexkor Limited vs. the Richtersveld Community and Others*, under the provisions of the Restitution of Land Rights Act, was a landmark case demonstrating the possibility and importance of adjudicating claims based on customary law. In its ruling, which resulted in restitution and compensation for past mining activities, the Supreme Court of South Africa found the customary land rights of the Richtersveld Community in the subject land as being "akin to that held under common-law ownership". The Constitutional Court later amended the ruling, declaring that "*the Richtersveld Community held ownership of the subject land under indigenous law, which included the rights to minerals and precious stones*", on which basis it was determined that the Richtersveld Community "*is entitled in terms of section 2(1) of the Restitution of Land Rights Act 22 of 1994 to restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof.*"<sup>68</sup>

Similarly, indigenous customary law has recently (May 2013) been acknowledged by Indonesia's Constitutional Court when it ruled that customary forests should not be classified as State Forest Areas, potentially giving indigenous and local

communities the right to manage their customary forests.<sup>69</sup>

These cases demonstrate that there are no principal obstacles to judicial systems recognising and upholding indigenous peoples' customary ownership of land and resources. In fact, it is an imperative under international law that such practice be expanded. As noted by EMRIP in their comment on the Guiding Principles, states should also go a step further: "*Where formal Indigenous legal systems exist, states can work in partnership to ensure that business-related human rights abuses are governed under the jurisdiction of Indigenous peoples' legal systems.*"<sup>70</sup>

### **State-based non-judicial mechanisms (Principle 27)**

Principle 27 and its commentary note the need for states to provide access to non-judicial remedy mechanisms in addition to the judicial system, in order to ease the burden on the judicial system and because some claimants allegedly prefer a non-judicial avenue over a judicial one. The commentary specifically underlines the importance of National Human Rights Institutions (NHRIs).

State-based non-judicial mechanisms may be effective in protecting indigenous peoples' human rights as they are generally more accessible, imply significantly lower costs and generally pursue a dialogue-oriented approach, potentially allowing for a speedier resolution of a dispute than litigation procedures.

The Paris Principles provide an authoritative set of requirements ensuring the impartiality, effectiveness and independence of NHRIs.<sup>71</sup> National Human Rights Institutions or Ombudsman offices have provided an important channel for indigenous peoples' grievances regarding the human rights impacts of business activities, in particular those referring to natural resource exploitation. The role that NHRI have played in investigating such violations and in ensuring through different means, including reporting to state organs in charge of supervising these activities, and prosecution at the domestic or international level, should be highlighted. The same institutions have played a significant role, for

instance in the context of Latin America, in preventing these human rights violations, by promoting the need for adequate consultation processes with indigenous peoples prior to an investment which affects their rights or by promoting forms of reparation for damages caused by investors as a consequence of such activities.<sup>72</sup>

When dealing with indigenous peoples' human rights grievances related to business enterprises, non-judicial mechanisms must address the inherent power imbalance arising when an indigenous community confronts a typically well-resourced business enterprise. This power imbalance is also noted in the commentary to Principle 27.

With regard to addressing indigenous peoples' grievances, it is essential that any human rights mechanism is designed to be victim-centric. Dialogue and mediation have an important role to play in non-judicial state-based mechanisms but, throughout the process, human rights norms themselves must remain strictly non-negotiable. No negotiated settlement can tolerate continued violation of indigenous peoples' rights.

Criticism has been aimed at state-based non-judicial mechanisms developed to mediate in the area of business and human rights, regarding insufficient authority and powers, for example in the case of the CSR Counsellor of the Canadian government. From the criticism, it can be inferred that in order to meaningfully contribute to indigenous rights protection, these mechanisms must

have the authority and resources to undertake their own investigation of complaints rather than having to rely fully on the accuracy and completeness of submissions from the parties to the dispute, including, where necessary, site visits. They must be authorised to determine whether a breach of a given standard or right has occurred and to make this determination public. They should be mandated to follow up on cases and monitor whether their decisions have been complied with. A victim-centric design also stipulates that conflict of interest needs to be avoided, e.g. is it not advisable for a grievance mechanism to be housed in a branch of government that primarily serves foreign investment.<sup>73</sup>

For corporations, engagement with indigenous peoples through such mechanisms may offer significant benefit with regard to reputation, risk management and their social licence to operate. However, since situations can occur whereby compliance with their human rights entails significant cost not outweighed by such benefit, non-judicial state-based mechanisms should be equipped with sufficient leverage to compel corporations into cooperation, even in the absence of sufficient cost-related or reputational incentives. Such leverage could involve the possibility of withdrawing access to export insurance and other forms of public support as well as exclusion from government contracts and public procurement in case of non-cooperation.

## The OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises establish a state-based non-judicial remedy mechanism which, in recent years, has been repeatedly used by indigenous peoples and which, in a number of cases, has contributed to alleviating ongoing human rights violations. The OECD Guidelines have no immediate binding force on business enterprises; they are binding only on the OECD member states, who then have to establish their own procedures in accordance with the Guidelines. Complaints submitted under the OECD Guidelines are dealt with by National Contact Points (NCP) which are to be set up by the governments of the home states of the respective enterprises. The details, including their level of independence, depend to a large extent on the host government.

In December 2008, the NGO Survival International filed a complaint with the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises against British mining corporation

Vedanta Resources, alleging that the company's planned bauxite mine on Niyam Dongar Mountain in Orissa, India, would violate the rights of the Dongria Kondh indigenous people. Anticipated impacts included the mine's effect on the mountain itself, which is of central significance to the tribe's spirituality and identity, as well as damage to their livelihood and environment.

In two successive decisions in 2009 and 2010, the NCP confirmed the substance of the allegations and established that Vedanta had acted in breach of the OECD Guidelines, recommending that the company work with the Dongria Kondh people to explore alternatives to resettlement and to include a human rights impact assessment in its project management process.

This demonstrates the importance of upholding international human rights standards in cases where the protection afforded to an indigenous community by national statutory law is insufficient to prevent an adverse impact on their human rights. Furthermore, it is very important that the NCP placed high emphasis on the importance of consultation with the affected community. Without due consultation, no effective remedy is possible.

Ultimately, however, the company declined to comply with the recommendations, which it regarded as unnecessary, as it had already complied with Indian national legislation. The NCP has no powers to compel the company to comply with its recommendations. Despite the best efforts of the NCP, this remedy has therefore not been immediately effective. In April 2013, however, the Supreme Court of India issued a ruling effectively banning Vedanta from constructing the mine without the Dongria Kondh's consent. In its ruling, the court cited the NCP decision, indicating that even though the company had refused to cooperate, the NCP proceedings may have indirectly contributed significantly to the positive development the case had taken.

Owing to the insufficient effectiveness of outcomes, civil society's appraisal of the OECD Guidelines' performance has been largely critical. It has been pointed out that the rules and performance of NCPs vary immensely and that many NCPs neither receive human rights training nor are equipped to undertake their own investigations. Some NCPs do not publish an initial assessment of the case nor do they make a public determination of whether a breach of the guidelines has occurred. In addition, some impose strict confidentiality rules on the complainants, thereby limiting the possibility of parallel public campaigning. Provisions for following up on concluded cases are usually weak or missing.<sup>74</sup>

The OECD Guidelines were updated in 2011, and a full human rights chapter was included in the document, responding to the fact that almost half of the cases filed by NGOs since 2000 referred to the single paragraph on human rights contained in the 2000 version. The update is substantially informed by the UN Guiding Principles in that it calls upon companies to respect all human rights, including the documents comprising the International Bill of Rights, introduces the concept of human rights due diligence, along with the need for corporations to develop a policy commitment on human rights and to enable remediation.<sup>75</sup>

Still, the revised guidelines fail to include *"adequate standards on disclosure and consultation with affected or potentially affected communities, including specific requirements for consultation with indigenous communities and free, prior and informed consent."*<sup>76</sup>

Furthermore, strengthened and unified procedural standards for the NCPs have yet to be added. Essentially, the 2011 update fails to incorporate lessons learnt from 10 years of NCP practice. Neither mandatory oversight nor peer review have been introduced for NCPs, let alone any compulsory force added to their mandate. Ultimately, non-compliance by corporations carries no consequences. It has been suggested that the possibility of sanctions needs to be included in non-judicial state-based remedy mechanisms such as the NCPs under the OECD Guidelines. Possible sanctions could affect a company's eligibility for public procurement as well as for investment insurance or export credits from Export Credit Agencies (ECA) and other public donors.

Additionally, in order to strengthen the ability of NCPs to address indigenous peoples' grievances, a specific chapter on indigenous peoples should be added to the OECD Guidelines and respective guidance for NCPs developed. More generally, the institutional setup of the NCPs should be re-examined to ensure their independence. Many NCPs are currently housed within government structures that are in charge of facilitating foreign investment and trade, and which are thus less likely to take steps potentially inhibiting said investment or trade in some cases. Instead, as a non-judicial remedy mechanism, they would be better placed under, e.g. a state's Ministry of Justice.

## **Non-state-based mechanisms (Principles 28-30)**

### **Company-based grievance mechanisms**

While the use of company-based grievance mechanisms predates the development of the Guiding Principles, their publication has worked as a powerful stimulus, contributing to their considerably increased use in recent years. Surveys into the effectiveness of corporate-based grievance mechanisms suggest that the establishment of a well-functioning mechanism is, in most cases, a response to a strong external incentive such as protests by the local indigenous communities or the requirement of donors, governments or certification authorities. Given the considerable cost and effort involved in establishing and operating a sophisticated grievance mechanism, clear and strong requirements by home states, hosts states and international financial institutions are needed to ensure that grievance mechanisms are viable and effective in preventing and mitigating business-related human rights violations.

One example often portrayed as a success story are the grievance mechanisms instituted in connection with the Sakhalin 2 oil and gas development project, operated by Sakhalin Energy Investment Company Ltd. on the Russian island of Sakhalin, located off the country's Pacific coast. Following widespread protests against the operations of oil and gas corporations by indigenous communities and environmentalists, the parties negotiated the creation of a development plan for the indigenous peoples of Sakhalin (Sakhalin Minorities Development Plan – SIMDP), including a community grievance mechanism.<sup>77</sup> Sakhalin En-

ergy set up a Community Liaison network of twelve Community Liaison Officers (CLO), including one IP CLO, tasked with ensuring communication on a day-to-day basis with indigenous peoples' communities, including on grievances.

The establishment of a distinct grievance mechanism for the indigenous communities was a response to the consultations with the community that followed the protests. These showed the need for such a mechanism. Observers noted the different nature of complaints lodged by indigenous and non-indigenous users, notably that, at least during construction, indigenous peoples' grievances were more often related to environmental harm and violations of their traditional livelihood,<sup>78</sup> meaning that they related to violations of rights set out in the UNDRIP. This indicates that the development of grievance mechanisms cannot be separated from the broader dialogue and engagement with indigenous communities. Such engagement should be based on an acknowledgement of the status of indigenous peoples as collective rights-holders and, where required by the UNDRIP, be framed in an FPIC process.

Challenges facing such mechanisms may arise when the political culture is not conducive to democratic and participatory processes or when local authorities interfere with processes with the intent of minimising public expressions of discontent. Indigenous peoples are typically affected by a severe imbalance of power, which may be deeply internalised by members of the community and may continue to affect their interaction with businesses, even if a process establishing formal equality is established. The authors of this analysis learnt, through personal communication, that corporate representatives tend to view some complaints submitted as disingenuous and motivated by the de-

sire to extract money from their corporations, while they rarely regard complaints as having a genuine human rights dimension. At the same time, the indigenous representatives interviewed expressed doubts as to the impartiality of operational-level grievance mechanisms. This includes the notion that monitoring by external consultants suffers from confirmation bias. Hired consultants tend to hand-pick informants who will deliver a positive appraisal in order to please their client. Whether and under what conditions it is possible to establish a fully impartial operational-level grievance mechanism and maintain its impartiality in the long run, when it is funded and operated by the party against whom the complaints are directed, needs to be explored through systematic research.

### **Customary institutions in relation to their role in remedy mechanisms**

Elements of the customary law of indigenous peoples often play a central role in both judicial and non-judicial dispute resolution. At the same time, indigenous peoples have developed a wealth of dispute resolution mechanisms and judicial systems, based on their respective customary law and their traditional values. These mechanisms address a wide variety of grievances, from resolving disputes over and management of land and resources to determining the penalty for murder.

Their approach has often been described as participatory and dialogue-oriented. In Tanzania, for instance, *“Customary laws are widely used and accepted in most rural areas in solving local water conflicts. Respondents reported that most disputes are settled by water user groups and customary institutions.”*<sup>79</sup> Compared to the state-based judicial system, customary grievance mechanisms are not only more participatory, they are significantly easier to access, are free from the costs associated with the use of the judicial system and are more likely to lead to a settlement able to restore harmonious relations.

While the primary use of indigenous dispute resolution mechanisms is for the resolution of disputes and grievances between members of the same community, as will be shown below, such mechanisms have already been successfully ap-

plied with the aim of remedying violations of indigenous peoples' rights by business enterprises.

One case that gained prominence was the dispute between the Subanon people of Mindanao, Philippines, and the Canadian-owned mining company TVI which, in 1996, was granted mining permits for Mount Canatuan without any prior consent by the Subanon, even though it is required to do so under the Philippine Indigenous Peoples Rights Act (IPRA). In 2002, a body calling itself the “Siocon Council of Elders” was created and gave its consent to the mining operations. The local Subanon community rejected this body's authority and, failing to get an adequate response from the judiciary, brought the case to their own highest traditional judicial authority, the “Gukom of the Seven Rivers Region”. The Gukom established that the “Siocon Council of Elders” was illegitimate and illegal and declared it be abolished and all acts entered into by it deemed null and void. In 2007, Timuay (traditional leader) Jose Anoy complained to the Gukom that TVIRD, a subsidiary of TVI, had failed to respect customary law within the affected area. The Gukom ruled in his favour and declared a fine for the company. Unsurprisingly, the company initially refused to obey the ruling. However, after two years of discussions with the traditional leader, starting in 2009, public pressure and an intervention by the UN Committee on Elimination of Racial Discrimination (CERD), the company eventually agreed to pay a negotiated fine after admitting its guilt. In May 2011, it took part in a cleansing ceremony in which it recognised Mount Canatuan as a sacred site and reportedly acknowledged its wrongdoing in desecrating the mountain.<sup>80</sup>

This case demonstrates that indigenous peoples' customary authorities have the capacity to serve as remedy mechanisms in cases involving third parties, including business enterprises. Like other non-judicial mechanisms, they lack the formal power to enforce their decisions. They can, however, be effectively reinforced by other mechanisms such as Ombudsman institutions and human rights mechanisms.

It is possible that TNCs regard the prospect of voluntarily submitting to the authority of such mechanisms as risky, given that indigenous peoples' customary law typically does not exist in a fixed

and codified written format, such that outcomes may seem difficult to predict. However, a requirement to consider and respect indigenous peoples' customary law may often already be implied by the requirement to obtain indigenous peoples' free, prior and informed consent, which means that authorities and corporations have to explore and familiarise themselves with customary law, allowing for predictable outcomes.

By their nature, many indigenous dispute resolution mechanisms will fulfil several of the process-oriented effectiveness criteria set out in Principle 31: they are legitimate, as they are based on standards and values shared by the community; they are certainly more accessible to indigenous peoples than any other mechanisms; and predictability for all sides can be ensured through sufficient study and relationship building, framed in an FPIC process. They are equitable, as knowledge about their procedures can be expected to be common in the community. Similarly, the way in which they are embedded in the community should also help to ensure their transparency. They are certainly compatible with the rights of indigenous peoples, while extra study may be needed to verify their compliance with the entire spectrum of human rights.

For businesses, one decisive strength of indigenous dispute resolution mechanisms lies in the importance they place on restoring peace and harmonious relations. A settlement based on customary law has the potential for ensuring sustainable, longer-lasting results acceptable to all parties involved, which may be less likely to emerge from a judicial process.

For indigenous peoples, using customary law as a remedial instrument in relation to businesses operating on their territories offers the potential of re-asserting control over their resources and territories and, more broadly, over their destiny. At the same time, such an approach puts a very substantial responsibility on indigenous communities, including *“the responsibility to prepare themselves to make decisions, to agree upon modalities for considering matters requiring their consent and establish, where not already existing, the necessary internal procedures for dealing with complex consent related decision-making in areas not historically covered by customary law.”*<sup>81</sup>

### **Equitable and fair benefit-sharing**

Impact Benefit Agreements (IBA) as practised in Canada *inter alia* fulfil functions related to remedy and redress. Although IBAs are not considered legally binding, the jurisprudence of the Supreme Court of this country regarding the duty to consult with and to accommodate indigenous peoples whenever their aboriginal rights and title are affected has led business to undertake negotiations on the impacts and benefits of the activities they undertake on indigenous peoples' land and territories. IBAs can be considered both a mechanism to prevent human rights violations as a consequence of large development or investment and a form of just compensation for the restriction or deprivation of indigenous peoples' right to enjoy their traditional lands and the resources needed for their survival. In accordance with the UNDRIP, however, they should be guided by the FPIC of the affected peoples, which is an expression of their right to self-determination. Some examples of this are now standard practice in Canada, such as the IBA signed by the Inuit of Nunavik and the Raglan mining company before the development of the Raglan mine in 1995<sup>82</sup> and the IBA signed by the Innu and Inuit of Labrador with International Nickel Company (INCO) in the context of the implementation of Voisey's Bay mine in the 1990s.<sup>83</sup>

### **International mechanisms**

#### **UN treaty bodies**

Principle 28 places international human rights mechanisms such as UN treaty monitoring bodies in the category of non-state-based non-judicial mechanisms. This classification is debatable, given that inter-governmental organisations such as the United Nations are legally distinct from non-state actors, in that they are established by agreements between states.

While the UN treaty bodies provide no distinct complaints mechanism for indigenous peoples, some treaty bodies have successfully addressed business-related violations of indigenous peoples' rights. Between 2009 and 2010, CERD issued concluding observations on seven Latin Ameri-

can countries, acknowledging racial discrimination against indigenous peoples as a consequence of land policies and extractive industries activities, and urging states to adopt policies and legislation to end such discrimination. Of particular relevance is the CERD's insistence on the need for states to develop consultation and obtain the free, prior and informed consent of indigenous peoples in the case of natural resource exploitation on their lands and territories.<sup>84</sup> Furthermore, CERD has, through its early warning and urgent action procedures, effectively addressed indigenous peoples' business-related grievances, including in the case of the Subanon, Philippines, referenced above, where the committee chose to take action in August 2008 with a follow-up in August 2010, determining a violation of the Subanon's right to FPIC. While the treaty bodies by themselves lack any means of enforcing compliance with their recommendations, these interventions did nevertheless contribute to the achievement of a satisfactory rights-based settlement.

The complaints procedure considered by the ILO's Constitution (Art.24) has been frequently used by indigenous peoples in cases of state infringement of their rights under Convention No. 169. On many occasions these complaints have dealt with infringements of their rights to land and resources (Art. 14), as well as the right to be consulted in order to obtain agreement or consent (Art. 6 and 15) in the context of business activities. Observations by the Committee of Experts on the Application of Conventions and Recommendations and the ILO Conference have regularly supported indigenous claims and requested states parties to legally recognise lands on the basis of traditional occupation. They have also requested that states implement consultation processes in order to obtain agreement or consent that will enable indigenous peoples to effectively participate in decisions concerning activities directly affecting them. As with the UN treaty bodies, the ILO lacks enforceable mechanisms for ensuring state compliance with its decisions, so many of these decisions remain unimplemented.

### **Regional mechanisms: the Inter-American Human Rights Court**

As previously noted, the Inter-American Human Rights system has provided protection of the lands and resources as well as the right to life of indigenous peoples affected by business activities. In the *Saramaka v. Suriname* (2007) case referred to above, the Court adhered to the UNDRIP standard of FPIC in the context of large-scale developments that have a significant impact on indigenous property rights and on the use and enjoyment of such territories. More recently, in the *Sarayaku v. Ecuador* decision (2012), a case concerning an indigenous community in the Amazon affected by the activities of an oil company, the same Court stated the need for states to ensure indigenous peoples' right to free, prior and informed consultation in accordance with international standards. It highlighted the fact that the right to consultation was closely related to indigenous peoples' rights to communal property and cultural identity, as well as to the right to life and physical integrity.

Implementation of the IAHR Court decisions by states, notwithstanding the efforts made in this regard in recent years, continues to be fragile due to the lack of a mechanism to ensure their enforceability by states.

### **Multilateral Development Banks' accountability mechanisms**

Multilateral development banks (MDBs)<sup>85</sup> provide indigenous peoples with the possibility of accessing their accountability mechanisms in order to raise concerns regarding projects affecting them or their environment, by lodging a related complaint. These mechanisms have proved to be a means of holding MDBs to account for actions that cause or risk causing harm to affected complainants or the environment as well as for actions that are inconsistent with MDBs' own operational policies and procedures,<sup>86</sup> including safeguard policies created for the purpose of preventing harm to indigenous peoples. Unfortunately, as will be explained below, certain MDBs have started to limit the access of project-affected communities to these mechanisms.

MDBs that are funding projects with both developing countries and private sector companies

operating in the developing world have made these mechanisms available for the purposes of accountability.

The International Finance Corporation, the private sector arm of the World Bank Group, has created the Compliance Advisory Ombudsman (CAO) with both a compliance, advisory and dispute resolution mandate<sup>87</sup> in relation to its Performance Standards, including **Performance Standard 7 Indigenous Peoples**.<sup>88</sup>

IFC Performance Standard 7 on indigenous peoples applies to all private enterprises seeking funding from the IFC. It makes several requirements intended to protect indigenous peoples from human rights abuse, to mitigate adverse project impacts, to promote sustainable development, to ensure “informed consultation and participation” and to “respect and preserve the culture, knowledge and practices of indigenous peoples”. Since 2012, PF7 has stipulated that, in certain cases, the Free, Prior and Informed Consent of indigenous peoples must be obtained. These cases include:

- projects which impact on lands and natural resources subject to traditional ownership or under customary use;
- projects involving relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use; and
- projects which significantly impact on critical cultural heritage.

PF 7 stipulates that while there is no universally agreed standard of FPIC, the principal form of engagement is through “Good Faith Consultation” with the affected communities, which needs to reach a successful conclusion before a project can be approved.

In case of violations, indigenous peoples can file complaints with the IFC’s Compliance Advisor Ombudsman. The CAO has a threefold role – as an Ombudsman office facilitating negotiation and mediation; as a compliance mechanism investigating the IFC’s compliance with its own standards; and, lastly, as an advisory body to the IFC’s management. The CAO’s Ombudsman role is strictly non-coercive. It cannot force any party to enter into

negotiations against their will; it is also fully confidential and does not make public determinations of whether or not a breach of PF 7 or any other standard has occurred.

If the parties cannot agree to enter into negotiations, cases can be escalated to the level of CAO Compliance, which undertakes an investigation and, if necessary a full audit of the Bank’s compliance with its own standards in the given case. It can also issue observations and recommendations when it finds that existing standards are insufficient. In neither case can the CAO authorise direct sanctions against a company.

The Inter-American Development Bank (IDB), a regional MDB that funds both developing countries and corporations, has created the Independent Consultation and Investigation Mechanism (ICIM)<sup>89</sup> with similar mandate to that of the CAO. The IDB is among those MDBs which have recently started to limit access to these mechanisms. Unfortunately, the IDB has added a new exclusion criterion that prevents project-affected communities from accessing its accountability mechanisms if the complaint “*raise[s] issues under arbitral or judicial review by national, supranational or similar bodies.*”<sup>90</sup> This unprecedented exclusion criterion is known as the “judicial clause”, and was added under the last review of the IDB policy establishing the new ICIM that was concluded in early 2010.<sup>91</sup> Not surprisingly, no other MDB has adopted a similar exclusion criterion.

As presented, the “judicial clause” is general, deserves more precision, and should be interpreted in a restricted fashion by the organs that make up the ICIM. Project proponents can easily influence the determination of eligibility of complaints filed by project-affected communities by filing any lawsuits before the domestic courts. This will literally force the organs of the ICIM in charge of making such decisions to declare the complaint in question ineligible for investigation. Because the clause is drafted in such a general fashion, these organs are provided with unlimited discretion to determine the eligibility of the complaints without much-needed guidance.

Further guidance is required, specifying criteria in the light of which the linkage between a complaint and the judicial process in question should be determined. Criteria focusing on the potential

elements of such linkage, such as the parties to the process, the issues at stake and legal arguments, among others, should be clearly laid out. Otherwise, the chances of project-affected communities achieving an investigation of a project that is adversely affecting them are greatly reduced. This is particularly relevant for indigenous communities because their lands and natural resources are usually targeted for projects of a diverse nature, and will naturally resort to domestic legal remedies to achieve judicial protection of their collective ownership rights. As the “judicial clause” is presented, almost any legal remedy filed by a project-affected indigenous community will automatically prevent the progress of an eventual complaint filed with the ICIM. Needless to say, this criterion undermines not only indigenous peoples’ access to justice but also the purpose for which MDBs created their internal accountability mechanisms in the first place.

#### **Impact of remedy and dispute resolution mechanisms attached to trade and investment agreements on indigenous peoples**

Arbitration mechanisms considered in Free Trade Agreements (FTA) and Bilateral Investment Treaties (BIT) have not proved effective for the protection of indigenous peoples’ rights in different contexts. One recent example is that of the indigenous communities in the area of Chimanimani, in south-eastern Zimbabwe, who submitted a petition as *amicus curiae* before the International Centre for the Settlement of Investment Disputes (ICSID) on the basis of German and Swiss Bilateral Investment Protection Agreements with the Republic of Zimbabwe. The arbitration concerns properties in Zimbabwe on which the claimants, European investors, are currently operating timber plantations that had been compulsorily acquired by the Zimbabwean state as part of its land reform programme. The plantations are located on the ancestral territories of indigenous peoples, violating their rights to lands and to consultation under international law. In June 2012, the tribunal rejected the petition, despite acknowledging that the proceedings could well impact on the rights of the affected indigenous communities. In its decision, the tribunal

asserts that international human rights law is of no relevance to the dispute.<sup>92</sup>

### **Effectiveness criteria for non-judicial grievance mechanisms (Principle 31)**

Principle 31 formulates a set of effectiveness criteria for non-judicial remedy mechanisms, namely that they should be

- a) legitimate;
- b) accessible;
- c) predictable;
- d) equitable;
- e) transparent;
- f) rights-compatible; and
- g) a source of continuous learning and, for operational-level mechanisms, that they should be based on engagement and dialogue.

These criteria are process-oriented; they do not define, what constitutes an adequate remedy outcome and, while they do provide meaningful guidance, they are not exhaustive with regard to the specific challenges facing indigenous peoples.

While judicial and non-judicial mechanisms serve different roles and purposes, information provided in the preceding chapters indicates that certain aspects need to be addressed in the design and operation of both judicial and non-judicial mechanisms:

- Remedy mechanisms need to fully acknowledge the status of indigenous peoples as collective rights-holders under international law and take into account the rights and standards associated with this status.
- Remedy mechanisms should afford due recognition to the role of indigenous peoples’ customary law and the authority of their governance institutions, both for substantive as well as for procedural reasons.
- Such recognition implies that existing indigenous peoples’ internal grievance mecha-

nisms may assert authority when dealing with violations occurring within territories under their traditional jurisdiction. Such practice has been increasingly recommended by CERD and has shown to be more efficient in achieving permanent, mutually-acceptable solutions than mechanisms over which indigenous peoples have no control.

- Remedy mechanisms must apply to all persons whose rights are affected, including e.g. actual users of a territory whose traditional ownership is not formally recognised by the host country.
- Remedy mechanisms should be accessible to indigenous peoples. Accessibility includes their physical access, i.e. the place and timing of proceedings should be chosen in such a manner as to allow indigenous representatives to be physically present. As indigenous peoples often settle in remote, peripheral regions of their respective states, ensuring physical access to remedy mechanisms often requires special measures. It also includes linguistic and cultural accessibility.
- Non-judicial mechanisms should, where possible, be equipped with the ability to impose meaningful sanctions in case of non-compliance or failure to cooperate.
- Remedy mechanisms should be accompanied by the provision of adequate means of technical and legal assistance to indigenous communities seeking legal redress. This may include i.a. legal counselling, translation and communication.
- Remedy mechanisms should be transparent and subject to continuous independent monitoring.

#### **Criteria and requirements for adequate remedy outcomes**

The Guiding Principles do not concern themselves with the possible content of remedy outcomes.

From a human rights perspective, the overall objective of any remedy mechanism must be to ensure that human rights are respected, protected and fulfilled. The human rights-compliant *outcome* is thus the ultimate criterion of its effectiveness. Below, we present a non-exhaustive list of aspects of remedy outcomes that are compliant with the rights of indigenous peoples:

- Remedy mechanisms must be endowed with the necessary authority and resources to enforce a prompt cessation of the violation in question and guarantee its non-repetition. Where necessary to prevent irreparable harm, they must offer interim measures.
- Full restitution is preferable to mere compensation, as enshrined in the UNDRIP and ILO Convention 169 and acknowledged by CERD in General Recommendation 23, in which the Committee especially calls upon states in cases where indigenous peoples have been “*deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.*”
- Where such restitution is not possible, “*the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.*” (CERD, General Recommendation 23)
- Compensation has both monetary and non-monetary aspects, and it should benefit entire communities rather than individual members.
- Provision of basic social services is the responsibility of the state, and as such provision of such services should not be granted in return for resource extraction rights.

## CONCLUSIONS AND RECOMMENDATIONS

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Globally, indigenous peoples are one of the groups most affected by the adverse human rights impacts of business activities. In the context of the UN Guiding Principles, they are usually viewed as one of many business-affected vulnerable groups. While this vulnerability is an undeniable fact, indigenous peoples are also distinct from other groups in that they are collective rights-holders under international law, endowed with the right of self-determination. As such, they are entitled to protection from the adverse impact of business activities and to reparation for past and present injuries.

Due to their universal acceptance, the Guiding Principles have the potential to contribute substantially to ensuring respect and protection of the human rights of business-affected indigenous peoples throughout the world. For this potential to be realised, the interpretation and operationalisation of the Guiding Principles must be firmly grounded in full recognition of the human rights of indigenous peoples in their most comprehensive and up-to-date form. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), in conjunction with the ILO Convention 169, currently provides this authoritative frame of reference. However, it should also remain open for new developments and thus take into consideration the jurisprudence of relevant UN and regional human rights mechanisms, such as the recent recommendations by the UN CERD to various home states of transnational corporations.

### **The right to self-determination**

It has been observed that there is a danger of indigenous peoples' procedural rights being understood as "a trade-off for or exchangeable with indigenous peoples' substantive rights to their lands, territories and resources." 93 Mechanisms which allow indigenous peoples to participate in the drafting of policy commitments, to submit complaints or to have access to information are meaningless unless they actually ensure that their substantive rights, such as rights relating to lands, territories and resources, are

respected, protected and fulfilled. The most basic substantive right of indigenous peoples is the right to self-determination, as affirmed by the UNDRIP as well as the two international human rights covenants.

### **Participation, Consultation and Consent**

The principle of Free, Prior and Informed Consent (FPIC) has gained prominence in recent years, including by adaptation into national legislation of some states and recognition by some business associations and enterprises. FPIC is indeed an indispensable aspect of the full operationalisation of the Guiding Principles in the indigenous rights context and states are duty-bound under the UNDRIP to obtain the FPIC of indigenous peoples in a number of instances, including all measures affecting their territories and livelihood. However, there is strong evidence that FPIC, if understood as a mere compliance mechanism, may easily mutate into a simple box-ticking exercise, failing to prevent human rights harm from occurring.

FPIC must therefore be understood and practised as just one expression of a rights-based relationship between indigenous peoples, states and businesses, predicated on the full recognition of the whole set of rights laid out in the UNDRIP, with emphasis on the rights to participation, consultation and consent. Furthermore, FPIC must be regarded as a process of sincere long-term trust and relationship building, leading to a real mutual commitment, which may need renewal at various stages of a project and which implies that enterprises take responsibility for the impact of their operations on future generations of the affected indigenous communities.

### **Ensuring accountability, closing the remedy gap**

Indigenous peoples whose human rights are harmed due to business operations have the right

to effective remedy and redress. This includes the right to judicial recourse, to a prompt cessation of violations, and a guarantee of non-repetition, restitution and compensation. This right is universal, it cannot be extinguished by national legislation, and the absence of respective provisions in national legislation does not diminish the responsibility of transnational corporations to ensure that indigenous peoples affected by their operations have access to effective remedy. Many gaps need to be closed for effective remedy and adequate redress to become a reality for indigenous victims of human rights harm and for impunity to become history.

There is a wealth of judicial and non-judicial remedy mechanisms available at many different levels, from international human rights mechanisms through the national judiciary, the compliance mechanisms of development banks to operational-level grievance mechanisms. Each of these mechanisms has its distinct challenges as regards the degree to which it recognises and incorporates indigenous peoples' rights, its preparedness to adjudicate their grievances, its accessibility on the part of indigenous peoples, its impartiality and, crucially, its ability to enforce compliance and its effectiveness in restoring the victims to justice.

A key task in ensuring that indigenous victims of human rights violations have full access to justice is the closing of existing gaps so that, e.g., victims who are barred from seeking judicial redress in their home countries have other avenues to hold those responsible to account, either through the judicial system (or effective non-judicial mechanisms) of the perpetrator's home country or, should the home country fail to discharge its extraterritorial obligations, via effective international mechanisms.

Indigenous peoples themselves have much to bring to the table. They have flexible and restorative systems of customary law which seek not only to determine and redress material damage but to restore peace and harmonious relationships. Increased use of such mechanisms offers great potential benefit to all parties involved; however, these systems cannot be isolated from the broader indigenous rights context and utilised as a mere instrument to increase the efficiency of grievance mitigation.

### **A matter of urgency**

Projections suggest that, for the foreseeable future, the impact of business enterprises, including the extractive industries, the agro-industrial sector and the energy sector, are going to increase substantially, as is the risk of more gross human rights abuses in connection with these operations. The provision of adequate mechanisms to prevent and remedy business-related human rights violations should therefore be treated by all parties concerned as a matter of the utmost urgency. In the light of these developments, we would like to make the following recommendations to states, business enterprises, international organisations and financial institutions, taking into consideration the binding human rights obligations incumbent upon these parties. We would also like to propose a number of recommendations to business-affected indigenous peoples which, in the light of the evidence, would appear to offer promising avenues for better protection and restoration of their rights.

### **Recommendations to States**

- States should review their legislation to ensure compliance with indigenous peoples' rights as set out in the UNDRIP and ILO Convention No. 169, including their customary rights of disposal over land and resources. Wherever remnants of the doctrines of discovery and *terra nullius* persist in the legal system or judicial practice, they should be eradicated as they violate indigenous peoples' rights and obstruct access to effective judicial remedy.
- All states should include the creation of remedial instruments for indigenous peoples in the development of national implementation plans for the UNGP.
- As part of such plans, all home states of transnational corporations operating in territories used or inhabited by indigenous peoples should consider fully implementing the provisions of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ratifying ILO Convention No. 169, whether

or not indigenous people reside within their territories. These measures will ensure that, even if the host state is unable or unwilling to provide them, remedies will be accessible to communities affected by the activities of foreign businesses and that states will exercise adequate oversight.

- OECD Member States should ensure that National Contact Points (NCP) are independent, impartial and fully-equipped and trained to address indigenous peoples' complaints. This includes knowledge of indigenous peoples' rights, including FPIC and familiarity with indigenous methods of decision-making and customary law. They should be equipped with the necessary authority to undertake fact-finding and investigation, make a public determination of whether or not a breach of the OECD Guidelines has occurred and have the authority to follow up on cases. OECD states should introduce sanctions for non-compliance with decisions taken by NCPs, such as exclusion of the company in question from public procurement and from the investment guarantees of Export Credit Agencies.
- All home states of multinational enterprises potentially affecting indigenous communities in other states should create frameworks for indigenous peoples' extraterritorial access to justice, including legal preconditions and logistical and technical assistance.
- States should address issues of legacy such as violence, dispossession, forced eviction and oppression suffered by indigenous peoples as a direct or indirect consequence of business activities through appropriate processes, such as truth and reconciliation commissions.
- Host countries should include the requirement for FPIC as a condition in all agreements with multinational enterprises whose operations will potentially have an impact on indigenous communities. It is recommended that the responsibility of the given enterprise to cover the financial burden associated with the full protection of the rights of indigenous peoples is clearly regulated in the terms of such agreements.

- To ensure policy coherence, states need to systematically assess free trade or bilateral investment agreements in order to ensure that their provisions do not contradict the human rights obligations of states, including those towards indigenous peoples. If they are not in conformity with these human rights obligations, they should be amended or rejected by states to ensure that human rights are not harmed by them. Arbitral tribunals set up under such agreements should be accessible to indigenous peoples and bound in their decisions by the relevant international human rights standards, including the UNDRIP and ILO Convention 169.
- States should ensure that indigenous peoples' organisations have sufficient access to technical and financial assistance, as required by Art. 39 of the UNDRIP, for the purpose of expanding their knowledge and building their capacity regarding the efficient use of relevant national, regional and international human rights standards, instruments and judicial as well as non-judicial mechanisms.
- All states should take decisive measures to combat serfdom, debt bondage and other forms of forced labour prohibited by ILO Convention Nos. 29 and 105 and discrimination in employment and against indigenous peoples' traditional occupations as prohibited by ILO Convention No. 111.

## Recommendations to international organisations

- The UN and other international organisations should ensure that indigenous peoples' organisations have sufficient access to technical and financial assistance, as required by Art. 39 of the UNDRIP, for the purpose of expanding their knowledge and building their capacity regarding the efficient use of relevant national, regional and international human rights standards, instruments and judicial as well as non-judicial mechanisms.
- The UN Human Rights Council should commission a working group to develop a liabil-

- ity mechanism within the UN human rights system, dealing with human rights abuses by Transnational Corporations. Such a mechanism should be fully prepared to work with and be accessible to indigenous peoples.
- The UN Human Rights Council should ensure that implementation of the Guiding Principles on business and human rights is adequately monitored at national and regional levels. Monitoring guidelines regarding indigenous peoples should be based on the provisions of the UNDRIP and ILO Convention 169. They should include the identification of capacity building needs among indigenous peoples, states and business enterprises. The UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises should provide advice and recommendations on legislation and policies suitable for this purpose.
  - With the involvement of the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), the UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises should undertake a broad empirical study looking into the efficacy of existing remedy mechanisms available to indigenous peoples, including judicial and non-judicial mechanisms, extra-territorial remedies as well as indigenous dispute resolution methods with the goal of developing fact-based comprehensive guidance for states, international institutions, business enterprises and indigenous peoples. Such a study should consider both process and outcome effectiveness.
  - The UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises should continue its engagement and dialogue with indigenous peoples, including at the high-level plenary meeting of the UN General Assembly, to be known as the World Conference on Indigenous Peoples, in September 2014 and in the context of the post-2015 development agenda.
  - The OECD should amend its Guidelines for Multinational Corporations with specific provisions regarding indigenous peoples and set out clear guidelines, including for process and outcome effectiveness of National Contact Points.
  - International development banks should refrain from any measures, limiting indigenous peoples' access to their compliance mechanisms, such as the introduction of 'judicial clauses'.
  - Recommendations to business enterprises
  - Corporations whose operations affect indigenous communities, their territories, lands and resources should, apart from complying with the rules and regulations of the host country, develop a full understanding of the rights of these peoples as set out in the UNDRIP and ILO Convention 169. They should formally commit, at the most senior level, to ensuring full respect of these rights at all levels and throughout their value and supply chains. Such policy commitments should be informed by views of indigenous human rights experts and communities and be independent of the host country's legislation and administrative rules.
  - Corporations should address issues of legacy such as violence, dispossession, forced eviction and oppression suffered by indigenous peoples as a direct or indirect consequence of business activities.
  - Corporations should also develop a clear understanding of their potential impact on and responsibility towards future generations of the indigenous peoples affected and, through good faith consultations with indigenous peoples, identify ways of addressing these.
  - Business enterprises should formally commit to respecting indigenous peoples' right to Free, Prior and Informed Consent (FPIC), including their right to define the process by which FPIC is achieved and to withhold consent. Corporations should embrace a holistic understanding of consultation, participation and consent as a process of building a long-term good-faith relationship with indigenous peoples, which may require renewal at various stages of a given project, rather than a mere compliance mechanism to be fulfilled through one-off box-ticking.

- Human rights due diligence requires that business enterprises employ participatory human rights impact assessments to ensure respect for indigenous peoples' rights, in particular for projects aimed at the development, exploration or extraction of natural resources.
- Human rights due diligence procedures should identify, at the earliest possible stage, the indigenous peoples potentially affected by their activities, determine how they will be affected and assess the land and resource rights to which indigenous peoples may lay claim.
- Corporations should develop a sufficient understanding of indigenous peoples' customary law, including customary approaches to dispute resolution. Such learning processes should be guided by the realisation that indigenous peoples' customary laws and decision-making processes are flexible and dynamic and closely related to those specific environmental and social contexts in which they have evolved. Such learning processes hence need to take place in each individual case.
- Business enterprises should ensure that indigenous peoples share the benefits generated by business activities. Such benefits should be regarded as a means of complying with a right, not as a charitable award or favour granted by the company in order to secure social support for the project.<sup>94</sup>
- Business enterprises should refrain from asking indigenous peoples' consent in exchange for the provision of basic social services to which they are entitled as humans and citizens of their country.
- Corporations should ensure that effective and equitable dispute resolution mechanisms are set up by mutual agreement prior to any project activities in order to enable mitigation and prevention of conflict. Such mechanisms should be predicated on the acknowledgement of the traditional owners of a given territory and thus respect and embrace their customary laws to the fullest extent possible.
- With regard to redress and compensation, business entities should abide by any ruling, decisions or recommendations of any judicial

and/or non-judicial mechanism proceeding and also consider providing additional redress/compensation, where appropriate, for the purposes of acknowledging special losses or harm such as with respect to indigenous sacred sites.

## Recommendations to indigenous peoples

- If indigenous peoples wish to apply their customary law as remedy mechanisms in relation to business enterprises, they should ensure that such laws are described, restated or revised in order to assist in their application, and that such laws are understandable and accessible to business entities or states, while retaining their underlying characteristics.
- Indigenous peoples may consider reviewing their own institutions in order to identify a possible need to set up representative structures, through their own decision-making procedures, in order to facilitate their relationship with business activities, in particular in relation to processes of consultation and of FPIC, when these activities directly affect them or their lands and resources, as well as those dealing with their right to redress or compensation and/or benefit-sharing from the same activities.
- Indigenous peoples might consider seeking assistance to expand their knowledge and build their capacity with regard to the efficient use of relevant national, regional and international human rights standards, instruments and judicial as well as non-judicial mechanisms.
- Indigenous peoples might consider strengthening their networks with other indigenous peoples and civil society organisations in order to share experience, knowledge and skills regarding the defence of their human rights in a business context and to explore opportunities for mutual support in concrete cases.

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In June 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs). These principles form the first globally-agreed framework for preventing and addressing adverse human rights impacts linked to business activities. While the UNGPs do not introduce new human rights obligations, they do specify how human rights standards and state obligations that are set out in existing human rights agreements translate into the business context.

Indigenous peoples are among the most severely affected by business operations: oil and gas extraction, the construction of large dams or agricultural expansion for cash crop cultivation, among others, all result in a wide variety of human rights abuses such as the devastation of indigenous ancestral lands, forced evictions or extrajudicial killings by private security forces.

This document explores the potential of the UNGPs to ensure that the rights of business-affected indigenous peoples are respected, protected and fulfilled. It examines the relationship between the UNGPs and indigenous peoples' substantive rights, in particular the rights to self-determination, land and resources, from which *inter alia* ensues the right to Free, Prior and Informed Consent.

Since the UNGPs emphasise the need to ensure access to effective remedies, this report looks at existing remedy mechanisms at all levels and examines their effectiveness for indigenous peoples.

Finally, the report makes specific recommendations to states, business enterprises, international institutions and indigenous peoples to ensure that the UNGPs can become an effective tool for preventing and mitigating the human rights violations suffered by indigenous peoples.



INTERNATIONAL WORK GROUP  
FOR INDIGENOUS AFFAIRS



EUROPEAN NETWORK ON  
INDIGENOUS PEOPLES

