

# INDIAN LAW RESOURCE CENTER

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### **Submission to the 2nd Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights**

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#### Introduction

The Indian Law Resource Center welcomes the opportunity to offer this submission to inform the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Working Group) in their “deliberations on the content, scope, nature and form of the future [legally binding] international instrument.”<sup>1</sup>

This submission discusses different models to ensure responsibility or accountability for human rights violations. Special attention is given to violations committed by business enterprises during “development” projects financed by public sector financial institutions. In determining the scope of the new instrument, the Working Group must give serious attention to rights violations arising out of this bank-business nexus and address the responsibility of public sector financial institutions. Because publically-financed projects are frequently undertaken by transnational corporations, addressing the human rights responsibility of the lenders will also help protect against human rights abuses by transnational corporations.

#### Content and Scope of the Instrument

As detailed in our submission for the Working Group’s first session,<sup>2</sup> we recommend that the instrument directly address indigenous peoples’ collective rights and include public sector financial institutions within its scope.

Indigenous peoples face unique risks from business-related human rights abuses. For example, during the first session, indigenous communities from Ecuador stated that two indigenous nations have gone extinct as a result of systematic corporate-related human rights abuses in the Ecuadorian Amazon.<sup>3</sup> In response to these risks, many

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<sup>1</sup> Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, H.R. Council Res. 26/9, HRC/26/L.22/Rev.1 (June 2014).

<sup>2</sup> Available at <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/WrittenContributions.aspx>.

<sup>3</sup> Oral Statement by Union de Afectados y Afectadas por las Operaciones de la Petrolera Texaco-Chevron (July 7, 2015),

participants in the Working Group's first session supported inclusion of indigenous rights in the instrument. States, including Bolivia,<sup>4</sup> Ecuador<sup>5</sup> and Cuba,<sup>6</sup> explicitly recommended that the Working Group address indigenous peoples' rights. The UN Special Rapporteur on the rights of indigenous peoples<sup>7</sup> and various NGOs,<sup>8</sup> including indigenous organizations,<sup>9</sup> also supported this position.

Indigenous peoples' human rights include collective rights held by indigenous communities or nations, such as rights of self-determination and self-governance,<sup>10</sup> and rights over lands and resources.<sup>11</sup> These rights are sufficiently distinct from other human rights that specific language in the instrument is needed to ensure that they are properly recognized and fully protected.

The instrument must be broad enough in scope to address the activities of public sector financial institutions. This position was also well supported by NGOs and panelists during the first session. For example, the Asociación por una Tasa a las Transacciones Financieras Especulativas para Ayuda a los Ciudadanos (ATTAC-Argentina), called for the instrument to specify public sector financial institutions' human rights obligations and responsibility,<sup>12</sup> while panelist Robert McCorquodale stated "[t]here should also be consideration to include international financial institutions . . . They should have specific legal obligations to protect human rights in this area."<sup>13</sup> Panelist Carlos Lopez urged the Working Group to hold further discussions about when international financial institutions may become complicit in human rights abuses committed by the businesses they fund.<sup>14</sup>

Public sector financial institutions like the International Finance Corporation consistently fund private sector projects, including large-scale infrastructure and extractive industry projects, that disproportionately affect indigenous peoples. Yet gaps in international human rights law exempt these financial institutions from international responsibility. Instead of following international law, they develop their own safeguard standards, as Professor Ruggie has observed.<sup>15</sup> These standards vary, enforcement is difficult due to inherent institutional conflicts of

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<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/Others/CentreEuropeTiersMonde.pdf>.

<sup>4</sup> Oral Statement by Bolivia (July 7, 2015),

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/States/Bolivia\\_Plurination\\_al\\_State\\_of.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/States/Bolivia_Plurination_al_State_of.pdf).

<sup>5</sup> Oral Statement by Ecuador (July 7, 2015),

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/States/Ecuador.pdf>.

<sup>6</sup> Oral Statement by Cuba (July 7, 2015),

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/States/Cuba.pdf>.

<sup>7</sup> Opening Remarks by the U.N. Special Rapporteur on the Rights of Indigenous Peoples, Ms. Victoria Tauli-Corpuz (July 6, 2015),

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/SR\\_STATEMENT\\_IWG.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/SR_STATEMENT_IWG.pdf).

<sup>8</sup> See, Oral Statement by Friends of the Earth International (July 7, 2015),

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/Others/Friends\\_of\\_the\\_Earth\\_International.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/Others/Friends_of_the_Earth_International.pdf). See also, Written Contribution by Legal Resource Center (July 2015),

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/LegalResourceCenter.pdf>.

<sup>9</sup> Joint Written Contribution by Coordinadora Andina de Organizaciones Indigenas, Grupo Intercultural Almaciga and International Working Group for Indigenous Affairs (June 24, 2015), available at

<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/WrittenContributions.aspx>.

<sup>10</sup> UN Declaration on the Rights of Indigenous Peoples, art. 3 and 4.

<sup>11</sup> *Id.*, art. 26.

<sup>12</sup> Statement by ATTAC-Argentina (July 2015),

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel5/Others/Friends\\_of\\_the\\_Earth\\_International.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel5/Others/Friends_of_the_Earth_International.pdf).

<sup>13</sup> Presentation by Robert McCorquodale (July 2015),

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/McCorquodaleIGWGPPanel060715.pdf>.

<sup>14</sup> Presentation by Carlos Lopez (July 8, 2015).

<sup>15</sup> U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Interim Report on the Promotion and Protection of Human Rights*, ¶ 53, U.N. Doc. E/CN.4/2006/97 (2006) (prepared by John Ruggie) [hereinafter U.N. H.R. & Transnat'l Corp. Rep.].

interest, and accountability is lacking.<sup>16</sup> For example, a report adopted this month by the Inter-American Development Bank concludes that the Bank's failure to ensure compliance with the Bank's own policies, including those relating to environmental standards, access to information, and indigenous peoples, resulted in the violations of the rights of seven indigenous communities.<sup>17</sup> Whether this internal report will lead to meaningful remedy or prevent future harms is still uncertain. Ruggie has also noted that financial institutions' internal accountability mechanisms are generally not effective at addressing human rights violations that result from the projects they fund.<sup>18</sup>

The need to address the international responsibility of public sector financial institutions is evident, and technical questions about whether these institutions have international legal personality have been largely settled in the affirmative.<sup>19</sup> Intergovernmental organizations and public sector financial institutions are subject to the legal obligations to respect, protect, and promote human rights that apply to states generally. Yet, the current international law framework generally offers victims of human rights violations no recourse against these entities.<sup>20</sup> This instrument must fill this gap.

#### Existing Models of Responsibility and Accountability

The following section discusses different approaches to responsibility and accountability that could be incorporated into this new instrument to provide victims of human rights violations with an effective remedy.

#### Setting Open Standards for Domestic Law

One approach is to utilize domestic legal systems to enforce international law obligations. International law can be used as a background framework to inform and give content to existing domestic laws. Alternatively, international law can be brought directly into the domestic law of a state, either as a matter of basic legal principle, or through specific legislation or court decisions relating to specific treaty obligations.<sup>21</sup> For example, aviation treaties have set up self-executing rules determining the direct responsibility of airline carriers<sup>22</sup> that domestic courts must consider. Human rights treaties have largely relied on this approach, creating general international law obligations and leaving wide latitude regarding domestic implementation.<sup>23</sup>

#### Setting Specific Domestic Law Obligations

Treaties can also establish international law obligations for states to create specific domestic laws, or for

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<sup>16</sup> For a general discussion of the limitations of internal accountability mechanisms at the World Bank and IMF, *see, e.g.,* Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. Davis J. Int'l L. & Policy 350-61 (2006).

<sup>17</sup> Independent Consultation and Investigation Mechanism, Compliance Review Report: *Mareña Renovables Wind Power Project*, Sept. 14, 2016, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=40671375>

<sup>18</sup> *See* U.N. H.R. & Transnat'l Corp. Rep., *supra* note 10, ¶ 53.

<sup>19</sup> Sources supporting this view include the jurisprudence of the International Court of Justice (I.C.J.), the Vienna Conventions, and the International Law Commission's draft treaty provisions on the responsibility of international organizations. For detailed discussion and citations, see Footnote 24 of the Center's July 2015 Submission to this Working Group.

<sup>20</sup> For instance, Article 43 of the *Draft articles on the responsibility of international organizations* holds that only states or other international organizations, not affected individuals, are able to invoke responsibility for internationally wrongful acts committed by their agents (Article 6) or by states under their direction.

<sup>21</sup> For discussion of incorporation of international law obligations in domestic law, *see* Ralph Steinhardt, *The Role of Domestic Courts in Enforcing International Law*, in Hurst Hannum, *Guide to International Human Rights Practice*, (4<sup>th</sup> ed., 2004).

<sup>22</sup> International Civil Aviation Organization, *Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal Convention), May 28, 1999, 2242 U.N.T.S. 309 at article 17(1) and 21(1); *Convention for the Unification of Certain Rules Relating to International Transportation by Air* (Warsaw Convention), Oct. 12, 1929, 137 L.N.T.S. 11 at article 17).

<sup>23</sup> *See generally*, Jack Donnelly, *Universal Human Rights In Theory and Practice*, 32-39 (3<sup>rd</sup> ed., 2013).

public sector financial institutions to create law-like policies. For example, the Convention on the Rights of the Child's Optional Protocol on the sale of children and child pornography creates international law obligations for states to develop clearly specified domestic laws.<sup>24</sup> This approach allows international monitoring to focus on review of domestic laws to ensure compliance with principles established in the treaty, while avoiding the difficult and fact-specific task of adjudicating individual cases. This approach can also be applied, *mutatis mutandi*, to public sector financial institutions, to ensure that their internal policies comply with relevant international legal standards.

Of course, these first two approaches exist on a continuum. All human rights treaties create obligations for states to ensure their domestic laws to comply with the treaty's terms. The relevant difference is simply the degree of specificity the treaty requires, and the level of detail in the treaty's provisions.

#### Establishing Direct International Responsibility

A third approach is to establish direct responsibility for human rights law violations through international courts. This could be accomplished through a new court or treaty body with judicial authority, through an expansion of the International Criminal Court's jurisdiction, or perhaps by utilizing existing regional human rights courts.

This approach has many advantages. It would establish direct responsibility for human rights violations within a unified and coherent legal system. Because many countries lack the capacity or political will to handle certain human rights cases, this approach would improve access to justice and meaningful remedy for victims. It would also result in authoritative statements of the law as it applies to specific facts, the sort of precedents that are essential for the development of the law and the creation of legal norms by which future actions can be judged.

#### Recommendations

In drafting this instrument, the Working Group has an opportunity to develop creative solutions to well-known problems, and the Working Group should seize this chance to propose a set of solutions that will build on the existing mechanisms of the UN and international human rights law. To this end we offer, the following recommendations for further discussion:

- The instrument should create clear legal rules regarding jurisdiction and responsibility for states, public sector financial institutions, and business enterprises.
- The instrument should establish procedures for the submission of complaints of human rights violations arising from projects funded by public sector financial institutions. The instrument should specify how such complaints will be considered and establish that where a violation is found, a written report with recommendations for corrective actions will be issued.
- The treaty body created by the instrument should assess compliance with these rules through periodic reports. The body should monitor compliance with any recommendations it might issue by investigating facts, gathering evidence, and examining the law, in order to ensure that the violation at issue does not recur.
- The treaty body should work closely with existing UN mechanisms, including the Forum on Business and Human Rights, to assist states, public sector financial institutions, and business enterprises to address human rights issues by offering technical assistance, disseminating best practices, and providing opportunities for dialogue and discussion.
- Finally, the Working Group should discuss establishment of an international court-like body to provide a forum for victims of human rights violations to pursue their claims when they have been denied access to domestic remedies, or have struggled with unwarranted delay in obtaining a final decision, or have exhausted domestic remedies, but have not been afforded due process of law or effective remedy.

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<sup>24</sup>Text of Optional Protocol available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>.