

Mr. Craig Mokhiber  
Chief  
Development and Economic and Social Issues Branch  
UN Office of the High Commissioner for Human Rights (OHCHR)

April 12, 2013

Dear Mr Mokhiber,

We welcome the commitment of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (the 'Working Group') to listen to the views and suggestions it receives during their preparations for the second annual Forum on Business and Human Rights, to be held in Geneva on 3-4 December 2013. The Working Group is particularly interested to accept input on the following considerations:

- Specific topics/panels for the Forum, including names of potential speakers
- Regional dynamics in the implementation of the Guiding Principles, including the interaction between regional bodies and individual States and companies
- Examples of Guiding Principles implementation practice by States, business enterprises or other stakeholders on all or certain aspects of the Guiding Principles, for example, the issue of transparency measures such reporting requirements
- Specific examples of strategic incentives that can shape State and business uptake of the Guiding Principles
- Modalities that may be conducive to engaging key stakeholders and promoting multi-stakeholder dialogue
- How to enhance the geographical balance and participation by key stakeholders from all regions, including business enterprises and affected individuals and communities.

Below we provide specific input on these areas, as well as overarching and other additional considerations.

### **Overarching Considerations**

#### *1. Realizing the full mandate of the Working Group and the Forum*

The mandate of the UN Forum, as established by resolution 17/4 of the Human Rights Council, calls for this event to "promote dialogue and cooperation on issues linked to business and human rights", as well as further thinking on how best to implement the Guiding Principles. The first Forum focused on 'taking stock of implementation of the Guiding Principles on Business and Human rights to date, highlighting challenges to implementation for States, business and civil society, and identifying and discussing good practices', as outlined in the invitation to contribute to the planning of the 2013 Forum.

While it remains important to consider further how to better implement the Guiding Principles, the '*issues linked to business and human rights*' cannot be reduced only to optimum implementation of the

Guiding Principles, and sharing best practices. There are ‘issues’ with very broad parameters that are ideal for consideration by all stakeholders at the Forum.

We recall two key elements of the mandate of the Working Group, firstly to “continue to explore options and make recommendations...for enhancing access to effective remedies”, and secondly “to provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights”. The Forum is the ideal platform for making concrete progress on these two elements of the Working Group’s mandate. For example, the Working Group could take advantage of this gathering to learn from stakeholders about proposals and interactive dialogue about new and innovative instruments and mechanisms, particularly those with extra-territorial character, which could provide greater incentives, certainty and instruction for corporations and states.

Therefore we propose that this Forum publicly identify some clear and concrete objectives that go beyond what was required of the first Forum. In addition, the Working Group should commit to producing a report of the progress that countries have made on implementing the Guiding Principles as well as other lessons it has learned from the Forum, and how it intends to build on these in the following year.

Furthermore, we recommend that, taking into consideration the highlighted elements of the Working Group’s mandate above, the following be the five key objectives of the Forum this year.

*Identify concrete proposals and suggestions for specific ways to advance:*

- ❖ States’ extra-territorial means of protecting human rights;
- ❖ States’ application of their duty to protect (including human rights due diligence requirements) into the their procurement practices, the operations of their export credit agencies, and their development financing;
- ❖ Protection of human rights defenders (in particular of land and environmental rights) as part of the State duty to protect the legitimate and peaceful activities of human rights defenders, and of the responsibility of business enterprises to engage in meaningful consultation;
- ❖ Corporate operationalization of the responsibility to embed human rights due diligence procedures into their operations, especially in conflict zones;
- ❖ Access to effective judicial and non-judicial remedy;

## *2. Constructive and meaningful multi-stakeholder interaction*

For the first Forum the Working Group was successful in assembling over one thousand participants – the largest ever multi-stakeholder business and human rights gathering. While having a significant

number of participants is an indicator of a broad willingness to engage, the Forum for 2013 could improve on the first year in a number of ways:

- ❖ Encourage broader and more active participation of States as being the primary duty bearer under international law, and which have a key role in protecting against human rights abuses involving business and in implementation of the right of victims to access an effective remedy;
- ❖ The working group should formulate sessions so that they are outcome-orientated, hence each session should have a section at the end aimed at eliciting concrete actions that duty-bearers, including corporations, should follow-up on (see panel suggestions below).
- ❖ The working group should formulate panels that facilitate robust dialogue between high-level Government representatives (with senior Government decision-making authority), affected people and civil society groups. Corporations, including investors and financiers, should also be active participants in this form of dialogue, where relevant, particularly on pillar two.
- ❖ Increase the level of knowledge in session dialogue of the application of human rights law by ensuring that thematic UN Special Procedure mandate-holders – additional to the UN Working Group members – including those Special Rapporteurs and members of the UN treaty bodies with recognized expertise in business and human rights, are involved in the panels of each session.

Without integrating these throughout the agenda for this year, the Forum could be a lost opportunity to establish real steps towards making progress.

### 3. *Primacy of involvement by affected people*

Some representatives of people affected by corporate human rights violations were present and participated in the first Forum. The Working Group should continue to ensure that the participation of this vital stakeholder group is prioritized for support in attending the event. Furthermore, all efforts should be made to ensure the Working Group designs the Forum to meet the expressed expectations of affected people, in so far as is possible. This is reflective of their situation as the only stakeholder group at the Forum that experiences human rights violations as a result of business conduct, and therefore they have the most to gain by effective outcomes from the event. Therefore, we recommend that:

- ❖ Representatives of people affected by corporate violations of human rights should be expressly invited, and supported financially, to be present and contribute to all the panels of the each session. Procedural requirements should be eased as much as possible to facilitate their meaningful participation.

## **Modalities that may be conducive to engaging key stakeholders and promoting multi-stakeholder dialogue**

### 1. *Learning from real experience*

The panels of the first Forum covered a wide array of issues and challenges, without concretely examining how the obstacles for Guiding Principles arise in real-world examples. Without this feature to the discussions, the analysis and dialogue was predominantly vague, thereby failing to provide concrete opportunities for learning.

While, it is certainly not the role of the Working Group or its members to adjudicate, or attempt to pass authoritative judgment on elements of certain cases, great value could come from using the Forum to steward multi-stakeholder discussions on cases, providing space for all stakeholders to listen to one another and collaboratively develop analysis on how to overcome obstacles to resolving common challenges. Relying on actual case examples would provide opportunities for all participants to constructively examine the application of the Guiding Principles in practice, thereby giving the best opportunity to identify ways to strengthen how they are operationalised, based on real experiences. Furthermore, this approach would assist stakeholders that are directly involved to encounter ‘break-throughs’ in their analysis and mutual understanding of pathways to resolving the situations.

- ❖ We strongly recommend that the Working Group includes into the agenda of the Forum this year sessions that facilitate dialogue which explore real examples of where human rights have been violated by business activities, inviting involved stakeholders to engage in a constructive and interactive dialogue about their experiences and expectations.

## 2. *Facilitating greater dialogue from all participants*

The predominant design of panel sessions in the first Forum was for panelists to present on general issues and then a very short time was made for participants to ask questions. The Forum session would benefit from having the sessions structured in such a way that more time is made for fostering genuine interaction between participants and panelists.

- ❖ We recommend that there are fewer sessions overall this year to ensure greater time to consider issues in greater depth, and;
- ❖ We recommend that more time is made available for the question-and-answer portion of each session.

## **Specific topics/panels for the Forum**

With regard to the discussions above, concerning consideration of concrete examples and realization of the full mandate of the Working Group, we recommend the agenda of the Forum include the following sessions, in ways that address concrete business and human rights issues, with a view to delivering outputs to be further developed after the Forum:

- ❖ **State Duty to Protect: *Advances in extra-territorial oversight***

*Interactive dialogue on regulatory advances, the effectiveness of new approaches, outstanding gaps and proposals to address them*

Presentation and discussion on:

1. Presentation and discussion by relevant UN Special Rapporteurs and expert members of UN Treaty Bodies on advances in extra-territorial requirements at UN level, including application of the new CRC general comment 16 and the recent ETO themes arising across recent concluding observations.
2. The [Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights](#)
3. Recent Developments regarding national legislation with extra-territorial reach
4. International crimes involving businesses considering options for further normative developments following up on Professor Ruggies's referral at the 2012 Forum to “the further development of international law and the issue of extra-territorial jurisdiction”.
  - Question and answers – Particularly seeking from participants suggested proposals for follow up actions for States & UN WG
  - Initial response of panelists from State and UN WG member(s)

❖ **State Duty to Protect: *When States conduct business***

*Interactive dialogue on opportunities for advancing the operationalization of human rights due diligence in State business policies, identifying gaps and proposals for address them*

Presentation and discussions on:

1. Application of the guiding principles into the operations of states' Export Credit Agencies
  2. Application of the guiding principles into states' procurement practices
  3. Application of the guiding principles into trade negotiations
  4. Application of the guiding principles into stock market regulation, the associated sanctions regime and their relevance for the protection of human rights
  5. Application of the guiding principles to the conduct of the majority state owned companies
- Question and answers – Particularly seeking from participants suggested proposals for follow up actions for States & UN WG
  - Initial response of panelists from State and UN WG member(s)

❖ **Corporate Responsibility to Respect: *Operating in Conflict Zones***

*Interactive dialogue on exploring the advances in operationalising human rights due diligence in conflict zones, identifying gaps and proposals for address them*

Presentations and discussion on:

1. Examples of effective ways business supply chains can operationalize due diligence requirements when engaged in conflict zones
  2. Examples of robust disclosure practices when operating in conflict zones
  3. Application of international humanitarian and human rights law to corporations (esp. private security companies) in conflict zones such as Occupied Palestinian Territories and elsewhere.
  4. Examples of safeguards to ensure access to grievance mechanism in conflict zones
- Question and answers – Particularly seeking from participants suggested proposals for follow up actions for Corporations, States & UN WG
  - Initial response of panelists from Corporations, State and UN WG member(s)

❖ **Access to Effective Judicial Remedy: *What the Guiding Principles Provide***

*Collaborative learning from the field including State, affected people and civil society – Case one*

Presentation and discussions on experience sharing from [Case name]:

1. Adequacy of the opportunities for judicial remedy in host state
  2. Adequacy of the opportunities for judicial remedy in home state
  3. Challenges applying legal standards to non-state duty-bearers in home or host state (including both corporations and their investors)
- Question and answers – Particularly seeking from participants suggested proposals for follow up actions for Corporations, States, civil society, affected peoples' and UN WG member(s)
  - Initial response of panelists from Corporations, States, civil society, affected peoples' and UN WG member(s)

❖ **Access to Effective Non-Judicial Remedy**

*Collaborative multi-stakeholder learning from the stakeholders, especially affected people, in the field*

Presentation and discussions based on sharing experience from real cases:

1. Opportunities and constraints seeking effective remedy using the OECD National Contact Point
  2. Opportunities and constraints seeking effective remedy using the Development Bank grievance mechanisms (and possibly other mechanisms)
  3. Discussion of which mechanisms are best suited to resolve certain grievances
  4. Discussion of how gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms
- Question and answers – Particularly seeking from participants suggested proposals for follow up actions for Corporations, States, civil society, affected peoples' and UN WG member(s)
  - Initial response of panelists from Corporations, States, civil society, affected peoples' and UN WG member(s)

❖ **Protection of Human Rights Defenders**

*Interactive dialogue exploring the risks States and corporations pose to human rights defenders*

1. Repression of land and environmental rights defenders opposing investment projects
  2. Exploring content and modalities of *meaningful* consultation
  3. Perspectives of relevant special procedures
- Question and answers – Particularly seeking from participants suggested proposals for follow up actions for Corporations, States, civil society, affected peoples' and UN WG member(s)
  - Initial response of panelists from Corporations, States, civil society, affected peoples' and UN WG member(s)

**Additional considerations**

*Regional Fora*

- ❖ Acknowledging the desire of the Working Group to hold regional forums or consultations on business and human rights, we urge the Working Group to provide ample opportunity for groups in specific regions to contribute to the design of these events.

*President of the Forum*

- ❖ In the interests of ensuring the President of the Forum represents the interests of all stakeholder groups, we urge the Working Group to ensure the selection of the President is the product of a genuinely consultative selection process.

We, the following undersigned groups, hope these suggestions for the format and content of this year's UN Forum will prove useful for the Working Group in their preparations, as well as the attending participants for their work.

Sincerely,

***Asian Forum for Human Rights and Development (FORUM-ASIA)***

***Centre for Human Rights and Environment (CEDHA)***

***Citizens for Justice***

***CIVIDEP India***

***Conectas Direitos Humanos***

***DeJusticia***

***International Network for Economic, Social and Cultural Rights (ESCR-Net):***

***Corporate Accountability Working Group***

***International Federation for Human Rights (FIDH)***

***Mining Watch Canada***

***Rights and Accountability in Development***

***SOMO***

***Terra de Direitos***