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*Submission to the consultation on operationalizing the framework for business and human rights organized by the Office of the High Commissioner for Human Rights*

8 December 2011

The Corporate Accountability Working Group<sup>1</sup> of the International Network for Economic, Social and Cultural Rights (ESCR-Net) submits this proposal regarding the work programme of the UN Working Group on Human Rights and Transnational Corporations. In keeping with ESCR-Net's ongoing engagement with the UN's business and human rights mandates, we would like to draw attention to several issues of relevance to our members in this context.

**I. Ensuring participation of victims and affected communities in the implementation of the Guiding Principles and in the Forum on Business and Human Rights**

The mandate of the Working Group includes the directive to “seek and receive information” from “rights-holders,” in addition to governments, civil society groups, and businesses. A critical element in the work programme of the Working Group, as well as the Forum on Business and Human Rights is to ensure that affected communities and victims of corporate human rights abuses have access to the mechanisms.

Throughout the work of the UN's business and human rights mandates over the past six years, lack of resources to enable full participation by a range of affected communities has been a consistent problem. While governments, businesses, and international civil society groups have little problem traveling to consultations and forums, affected communities and local civil society organizations frequently lack the resources to do so. The Special Representative of the Secretary-General attempted to remedy this problem in part by conducting a series of regional consultations, which helped broaden access but did not constitute a complete solution.

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<sup>1</sup> The Steering Committee of the ESCR-Net Corporate Accountability Working Group includes: Tricia Feeney, Rights and Accountability in Development (RAID) UK; Joji Carino (Tebtebba Foundation) UK/Philippines; Julie Cavanaugh-Bill (Western Shoshone Defense Project) Newe Sogobia/USA; Maria Silvia Emanuelli (Habitat International Coalition – Latin America) Mexico; Bhanu Kalluri (Dhaatri Resource Centre for Women) India; Carlos Lopez (International Commission of Jurists) Switzerland; Legborsi Saro Pyagbara (Movement for the Survival of the Ogoni People –MOSOP) Nigeria; Marco Simmons (EarthRights International) US/Thailand; and Dora Lucy Arias/Alirio Uribe (Colectivo de Abogados Jose Alvear Restrepo) Colombia.

In addition to such regional consultations, we urge OHCHR and the Working Group to ensure that adequate funding is available to allow affected communities to travel, to conduct consultations that are specifically directed at hearing from such communities, ensure that affected communities are well-represented at the Forum on Business and Human Rights, and that the Forum highlights direct testimony from victims. To do this, the OHCHR should establish a Voluntary Fund to facilitate the participation of rights-holders and victims of abuse in the activities of the Forum on Business and Human Rights. The Working Group should also adopt the criteria for participation in the annual Forum to ensure diversity of voices and representation. The Working Group could look to those used by the UN Permanent Forum and the Forum on Minorities for guidance.

Victims and affected communities have a fundamental right to participate in decisions that affect them. Direct contact with affected communities is also necessary for an accurate picture of the implementation of the Guiding Principles, and for an understanding of the problems the Guiding Principles are designed to address. Although international civil society groups often work closely with communities, they cannot claim to serve as representatives of a wide spectrum of communities and must work within the limitations of their own mandates; they are not, therefore a replacement for direct community participation. A discussion of “best practices” in a vacuum, without regard to the experience of the communities who experience those practices, will not be a useful contribution to human rights protection.

## **II. Moving toward international standards and remedies**

Implementation of the Guiding Principles is an important step toward realizing the UN “Protect, Respect, and Remedy” Framework for business and human rights, but the Working Group is also charged with continuing to explore options to enhance access to remedies for corporate abuses at the national, regional and international levels. Although the UN Framework emphasizes the importance of access to remedies, the SRSG’s work repeatedly highlighted the failures of domestic remedial mechanisms and the limits of existing international mechanisms.

The Working Group should continue this work of identifying gaps in the remedial options available for business-related abuses and exploring new options for remedies at the international level. Such remedies we believe require the further development of the international legal regime applicable to businesses and governments. In particular, the Working Group should explore the option of a rule-based international remedial scheme that is backed by agreed-upon global standards.

## **III. Furthering access to domestic and regional remedies, and multi-stakeholder grievance mechanisms**

Access to remedy is a key part of the U.N. Framework, and was identified as a major problem in the work of the SRSG. The Guiding Principles incorporate some recommendations for remedial mechanisms, including reducing barriers to access to

judicial mechanisms, and series of criteria for assessing the effectiveness of non-judicial mechanisms.

Continuing the work of strengthening remedial mechanisms is a critical role for the Working Group, and can be advanced in several ways. First, the Working Group should undertake to assess the use of the Guiding Principles in the area of remedies by each State, and include in its reports information about States' steps to enhance access to remedies, especially legal remedies. Second, the Working Group should make State-specific recommendations on reducing barriers to access to remedies, especially judicial mechanisms, and including mechanisms to address obligations of businesses in relation to their business relationships abroad. Third, the Working Group should employ the criteria of the Guiding Principles, as well as the conclusions of UN treaty bodies in General Comments and Statement, to assess major grievance mechanisms and to recommend the creation of such mechanisms in conjunction with multi-stakeholder initiatives that currently lack any grievance mechanism. Fourth, the Working Group should examine the appropriateness and effectiveness of any remedial actions.

#### **IV. Identifying countries, industries, and issues for in-depth study**

The Working Group's mandate includes country visits, and we believe that such visits should be planned in conjunction with civil society groups and with an eye toward hearing from victims and affected communities. Because the Working Group's mandate includes identifying "lessons learned" as well as "good practices," its country visits should be designed to examine both problematic situations of corporate abuse of human rights as well as more exemplary case studies. If necessary, the Working Group should avail itself of standing invitations by States for country visits.

It is important that the Working Group balances its country visits in such a way that victims of corporate abuses, businesses and government are given equal treatment in terms of organisation and participation in the visits. Further, considering the diverse location of the victims of corporate abuse, the Forum on Business and Human Rights should take a dual approach in its operation with hearings held both in Geneva and in rotating locations in the various regions.

Furthermore, to the extent that it is useful for the Working Group to focus on particular industries or businesses in its investigation of best practices, lessons learned, and recommendations for implementation of the Guiding Principles, a focus on the extractive industries is particularly important. Due to the nature of their business, extractive industries often have to operate also in conflict zones where particular issues of gross human rights violations, including of women, are likely to occur, and also frequently present issues of entanglement with public or private security forces, impinging on traditional farmers' land use, and issues of unfair resource distribution and benefits sharing.

Finally, building on Special Rapporteur James Anaya's recent report to the General Assembly, a particular focus on the rights of indigenous peoples is appropriate. Professor

Anaya has identified a number of specific features of indigenous rights in the business context that should be adopted by the Working Group and incorporated into its efforts to implement the Guiding Principles and the U.N. Framework, including recognition of indigenous peoples, indigenous rights to lands, territories and resources, and duties to consult with and obtain the consent of indigenous peoples before undertaking measures that may affect them and their traditional territories.

## **V. Investigation of specific situations**

The Working Group's mandate includes seeking and receiving information from all relevant sources, including rights-holders, civil society, Governments, and businesses, in order to assess the implementation of the Guiding Principles and to make recommendations on good practices. In this context, it is important for the Working Group to accept information about specific situations of alleged rights violations, to seek out and receive information from the relevant parties, including women, and to make assessments of whether the Guiding Principles have been appropriately used in that circumstance. Simply identifying good practices at a broad level of generality will not suffice; civil society and businesses alike have consistently requested detailed guidance that can be clearly applied in specific circumstances. Full implementation of the Guiding Principles and the U.N. Framework will thus require guidance drawn from detailed examples of specific situations of alleged rights abuses, in which the Working Group can make concrete recommendations about the appropriate steps to take.

We appreciate the Working Group's willingness to accept feedback on its upcoming work programme and wish to express our willingness to work with the Working Group to accomplish its mandate over the coming years.