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Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises

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Dear ESCR-Net,

Thank you for your intervention to the UN Working Group on the issue of human rights and transnational corporations and other business enterprises at the consultation for civil society organizations in Medellín on 27 August 2013, ahead of the Regional Forum on Business and Human Rights. In your intervention, you expressed your views and observations on the mandate of the Working Group. The Working Group acknowledges the importance of our mandate for communities impacted by business operations, and we appreciate and admire the work of ESCR-Net in representing these communities. In the spirit of constructive engagement with which your intervention was made, the Working Group would like to offer some responses and clarifications to the points you raise.

In your first point, you maintain that the Working Group has not addressed aspects of its mandate related to strengthening regulation and enhancing the effectiveness of judicial access to remedy related to corporate human rights abuses.

You are correct to point out that the Working Group has thus far not developed and implemented fully fledged programs for every component of its mandate. The mandate, as laid out in Human Rights Council resolution 17/4, covers every right, in every country of the world, and has potential implications for nearly every political and economic actor across the globe, from vulnerable communities in developing countries to global corporations with operations spanning the world. The mandate of the Working Group is spelled out in ten specific points, indicating that the Working Group is required to conduct activities in the following action areas: dissemination of the UN Guiding Principles on Business and Human Rights striving for the integration of its three pillars; upon request, to provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights; to continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities; and to provide support for efforts to promote capacity-building and the use of the Guiding Principles.

Given the breadth of the mandate, and our limited time and resources to carry it out, the Working Group has put tremendous effort into developing a strategy that would allow it to have the greatest impact, both now and in the future, and establish a platform for collaboration with the many actors (including ESCR-Net) already conducting their own work in this incredibly dynamic field.

International Network for Economic
Social and Cultural Rights (ESCR-Net)
Corporate Accountability Working Group

The Working Group opened its mandate with a call for input from all stakeholders, and devoted its first open dialogue, in Geneva in January 2012, to the issue of strategic prioritisation. The Working Group's first report to the Human Rights Council (A/HRC/20/29) summarised the results of these consultations, and defined focus issues and activities to guide the work toward the areas where the Working Group believes it could have the greatest effect. The Working Group identified overarching strategic considerations, possible work streams and focus criteria, which together form an outline of the strategy that the Working Group brings to bear in its mandate. More specifically, the Working Group decided to pursue three work streams through which it will deliver its mandate: global dissemination, promoting implementation, and embedding in global governance frameworks. The Working Group envisages that, through this programme of global dissemination, the Guiding Principles will bring much needed clarity to the innumerable business-related human rights challenges around the world by providing a common language and approach shared by all stakeholders. The ultimate aim is to support and create demand for implementation. With regard to promoting implementation, the Working Group foresaw a variety of pathways towards implementation spanning a range of legal, institutional and business settings, and concentrating particularly on addressing the situation of groups vulnerable to impact of business activities, including indigenous peoples; encouraging implementation efforts; sharing good practices; and providing further clarification on the application of the Guiding Principles. Finally, and with regard to embedding in global governance frameworks, the Working Group proactively seeks to engage with institutions overseeing existing and emerging governance frameworks that are able to play a significant role in requiring, or otherwise encouraging, business enterprises and States to implement the Guiding Principles; and encourages the embedding of the Guiding Principles into such frameworks, especially those with accountability mechanisms. In the interactive dialogue with the Member States of the Human Rights Council which followed the presentation of this strategy, there was wide spread support expressed from across the regions and political divides.

In your message, you express concern that in your view the Working Group has not given sufficient attention to the issue of legal development. As you know, pillar one of the UN Guiding Principles is directed at the traditional authoritative law-making spaces and refers explicitly to regulation. The Working Group engages extensively with States, including through country visits, the State survey, reports and engagement with the Human Rights Council and the development of national action plans which include the development of laws when gaps are present. At the same time, the Working Group recognises that non-traditional regulation, namely binding rules that are not developed by States directly can also be powerful avenues to materialize change in corporate conduct and deliver prevention and mitigation. For example, contractual obligations among business partners bind companies to human rights processes and outcomes, with material and serious consequences when obligations are not fulfilled, such as losing the chance to operate or provide services in a given area.

The Working Group believes, based on our consultations and the work we have completed so far, that, indeed, one of our first priorities must be disseminating the Guiding Principles to new audiences and gathering practical experience of Guiding Principles implementation by all actors, as well as providing a platform for multi-stakeholder conversations on the way forward. This is not a strategy to turn the Guiding Principles into a ceiling that stops or discourages actors from focusing on legal developments, as this would be inconsistent with the Guiding Principles. We believe

that, at this crucial moment for the issue of human rights and business, dissemination and concrete experiences have the greatest immediate and long-term potential for human rights impact and can lay the groundwork for more targeted and effective legal developments as the field matures.

The Working Groups recognizes that the law, whether related to criminal investigations and potential consequences that derive from them --including opportunities for effective remedy-- or related to the regulation of market transactions, is an indispensable vehicle to encourage the greatest amount of companies in the greatest amount of countries to follow certain rules. Effectively enforced regulation and upholding of the rule of law can quickly serve to level the playing field and force those that have so far been unwilling to even consider the implementation of the Guiding Principles, to start a process of transformation even if it takes some time. Any legal developments, either at national and international level, must take into account the differentiated roles that corporations and States have, and the obligations of States to provide a secure environment for those under its jurisdiction. With this in mind, the Working Group would like to draw your attention to a few actions it has taken in this area (more information is available in the Working Group reports to the Human Rights Council and General Assembly at

<http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx>):

- The Working Group is supporting an initiative by OHCHR to explore how to achieve a more coherent global response to corporate liability for the most serious human rights abuses.
- The Working Group has made recommendations for strengthening regulation in each of its official country missions.
- The Working Group has initiated dialogues with States and other stakeholders to inform and make recommendations on national legislation.

In your second point, you maintain that the Working Group addresses the challenges faced by companies more than those human rights abuses experienced by victims.

The Working Group invites you to examine our country reports, reports to the Human Rights Council and UN General Assembly and other public statements (available at <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx>). The Working Group devotes more attention to the victims of human rights abuses by companies, including their challenges related to accessing effective remedy, than the challenges faced by companies. Indeed, the Working Group's upcoming report to the General Assembly is exclusively devoted to the subject of adverse impacts of business activities on indigenous peoples and recommendations for strengthening remedy (A/68/279 (Advance unedited version)).

That being said, the Working Group will continue to stress the importance of building capacity and know-how for good due diligence practices by companies. Ensuring that these practices are both robust and widespread is a crucial step toward preventing future abuses, and a core component of the Working Group's mandate. The Working Group wishes to stress that engaging companies and States is part of its mandate. If the Working Group were to cut engagement efforts with businesses, it would be proceeding in a manner contrary to the multi-stakeholder approach required by this subject. One of the Working Group's key roles is to provide platforms for

constructive engagement between stakeholders, and in order to do so, that the Working Group must have enough knowledge and technical skills related to corporate management practices, and crucial political space to engage victims, civil society, academics, businesses, unions, States, international organizations and innovative multi-stakeholder initiatives. This approach is undertaken by the Working Group in the full knowledge of the existing power imbalances between victims and large corporations. We believe that this approach does not undermine victims. Instead it helps build a framework that can help them.

In your third point, you argue that the Working Group has not addressed the root causes of corporate human rights violations, such as the close relationship between companies and regulators.

You highlight a crucial issue for the field of business and human rights, namely one that challenges the assumptions of outside actors, including the idea that corporate human rights abuses are only relevant in developing countries. State capture has devastating consequences wherever it takes place.

The Working Group has raised this issue in its public country report and speeches, and will examine the implementation of the Guiding Principles in corporate lobbying during its upcoming session. Corporate lobbying can be a root cause of a number of violations, ranging from lobbying to lower minimum wage or health and safety standards, to pressuring the government to weaken environmental protections and anti-corruption measures.

As you have indicated, the Working Group has not commissioned specific research on this topic so far, as a result of the lack of core funding for research and not because of an ideological stance. The Working Group welcomes any research which ESCR-Net and its members would undertake, and invites ESCR-Net to communicate your findings to the Working Group. The Working Group considers groups such as ESCR-Net as partners in producing information related to corporate human rights abuses, and the Working Group always aims to collaborate and disseminate the work of actors who have resources and insights that complements its own strategy. In keeping with its mandate, the Working Group does not seek to duplicate the work of existing organisations, but rather build partnerships, fill gaps and generate discussion related to ongoing efforts and projects.

In short, the root causes of corporate human rights violations are of extreme interest to the Working Group and of utmost relevance to its work. The Working Group invites you and your members to contribute your expertise and work with us toward identifying and alleviating these causes.

In your fourth and fifth points, you voice concerns regarding the independence of the members of the Working Group from corporate entities.

All members of the Working Group are independent experts and do not receive any funding from corporate entities. The Human Rights Council's process of selecting members for the Working Group involved an examination of independence and impartiality, financial and otherwise.

It is true that some members of the Working Group have worked with or within corporations in the past. It is also true that members of the Working Group have also worked with or within organisations representing governments, civil society, National Human Rights Institutions, international organizations, academia and communities impacted by corporate human rights abuses. The Working Group considers that the diverse backgrounds of its members are a great asset, not a liability.

In closing, the Working Group reiterates its appreciation for your concerns, and your willingness to engage in dialogue to address them. The Working Group recognises the wide range of actors working toward its shared goal of a world free of corporate human rights abuses, and the different paths each actor has chosen in getting there. Indeed, this diversity of viewpoints and approaches is the very reason the Working Group believes the Annual Forum and regional forums to be such a vital component of its mandate and strategy. The Working Group sincerely hopes you and your members will participate in these forums in the future, and will continue to work with us toward our shared vision.

Yours sincerely,



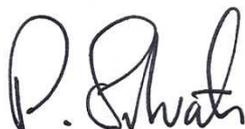
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