

June, 2014

Open letter regarding:

The Draft Resolution on Human Rights and Transnational Corporations and Other Business Enterprises to be Adopted During the 26th Session of the UN Human Rights Council for the Renovation of the Mandate of the Working Group

Dear Excellencies,

The undersigned nongovernmental organizations (NGOs) have the honor to address you with respect to the draft resolution on the **renewal of the mandate of the Working Group on the issue of Human Rights and Transnational Corporations and other Business Enterprises (the WG)**, that is to be adopted during the current 26th session of the UN Human Rights Council.

Considering the importance of the establishment and the continuation of a special procedure that deals with the role of private actors in human rights abuses at the UN human rights system, as well as the complexity of the Working Group mission, which brings together many different types of violations and victims, **we would like to call your delegation's attention to some aspects that could improve this important mechanism.**

In our opinion, in its first three years of its existence, the WG has given high priority to some of its functions to the detriment of others. We believe that these other functions would make the work of the WG more meaningful in the prevention and remediation of human rights abuses by corporations¹. These include:

- (1) **enhancing access to effective remedies;**
- (2) **contributing to a progressive application of international human rights law;**
- (3) **clarifying the applicability of the GPs to public financial institutions.**

In addition to these substantive issues, we are concerned about the **methodology of the WG's work**. In our view, the WG has fallen short in designing a predictable plan of work, lacks a clear procedure to address alleged violations and has not done enough to secure strong victim participation in all its activities. We also would like to express our concern vis-à-vis the lack of transparency regarding the WG funding, especially regarding funding from business actors.

Considering the aforementioned issues, the new resolution represents a valuable opportunity to improve and clarify these aspects of the Working Group mandate.

¹ See Dejusticia, Conectas and Justiça Global, "Working Group on the issue of human rights and transnational corporations and other business enterprises: A review of the first two-and-a-half years of work," November 2013. Available at http://conectas.org/arquivos/editor/files/6_Dej_Con_JG_WG2years_Nov2013.pdf

We believe that with the changes we are proposing (see below), the international community will be taking an important step in building an international framework to end corporate human rights violations. Some of the proposals set forth herein build on the first draft of the resolution on the renewal of the mandate of the WG, presented by the sponsors and co-sponsors of the WG mandate.

1. Access to effective judicial remedies

Access to effective judicial remedies is one of the central pieces of international human rights law. “To be effective, remedies must be capable of leading to a prompt, thorough and impartial investigation; cessation of the violation, if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition”². Despite the fact that access to effective judicial and non-judicial remedies has been recognized as the third pillar of the Guiding Principles (GPs), it was not established as a proper “right” and has received limited attention from the WG³.

The resolution that established the Working Group mandate specifically vests it with the power to make recommendations aimed at strengthening access to justice for those whose rights companies violate. Nonetheless, in the last three years, the WG has prioritized the identification of best practices and the dissemination of the Guiding Principles, to the detriment of filling the gaps regarding access to effective judicial remedies. We believe that the new resolution should stress that the WG should make substantive progress in this regard in the next period of the mandate.

Regarding this specific issue, we welcome the text proposed in the draft resolution circulated by the sponsors and co-sponsors of the WG mandate (OP – Paragraph 7), yet with the reservation that **access to effective remedies shall not be secured only for victims of gross human rights abuses, but to all those individuals and communities whose rights have been harmed by business enterprises.** Our concrete recommendation in this regard is for the elimination of the expression “gross” in Paragraph 7 (OP) of the draft resolution.

Concrete recommendation:

> Inclusion of an OP:

Requests the Working Group to undertake studies and other initiatives aimed at identifying concrete institutional and legal solutions to overcome the obstacles to access to judicial remedies in the context of human rights abuses committed by corporations as identified in the Principle 26 of the Guiding Principles;

2. Progressive Application of the International Human Rights Law

The majority of the WG’s reports address mainly procedural issues. However, in the reports with substantive content, we identified a regressive application of international human rights law, most disconcerting was the WG report to the General Assembly on indigenous peoples’ rights. This report

² See Icar, Core and ECCJ, “The Third Pillar”, December 2013.

Available at <http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>

³ See “Panel on Access to Judicial Remedy” organized by Conectas and FIDH during the first UN Forum.

Webcast available at: <http://www.conectas.org/en/actions/business-and-human-rights/news/un-forum-on-business-and-human-rights>

neglects the fact that in certain circumstances, international human rights law requires that free, prior informed consent (FPIC) must be obtained from indigenous peoples, and also confuses the concepts of consultation and consent⁴. Based on this observation, we consider that it is of paramount importance that the resolution recognizes the responsibility of the WG in abiding by highest available standards especially regarding vulnerable groups.

Concrete recommendations:

>Inclusion of a PP:

Stressing the importance of the jurisprudence of treaty bodies on the issue. Calling the attention to the United Nations Declaration on the Rights of Indigenous Peoples and recalling recent jurisprudence of Inter-American Court on the issue;

>Inclusion of an OP:

Requests the Working Group to make extensive use of specialized sources of international human rights law, especially the jurisprudence, guidelines and recommendations of the treaties' bodies, the regional courts and the thematic reports of the UN special rapporteurs.

3. Public Sector Financial institutions

The WG should pay particular attention to the need to fully address the human rights performance of business enterprises financially supported by public sector financial institutions and of these institutions themselves. This is a critical element of the State-business nexus because these institutions are either owned or controlled by States. State-owned and international financial institutions provide financial support to business enterprises' proposed development projects taking place in different parts of the world. Unfortunately, in many cases these projects lead to human rights violations against those individuals and communities, indigenous and non-indigenous, that are located within or near the project area. While these institutions are well positioned to raise awareness about the Guiding Principles and to secure their implementation, most of them either lack of robust due diligence processes to identify potential human rights impacts or address them. Their policy, transparency and accountability standards must be improved to meet applicable international human rights law standards.

Concrete recommendations:

>Inclusion of a PP:

Recognizing the need to address the role of public sector financial institutions, including State-owned and international financial institutions, in advancing the implementation of the Guiding Principles.

⁴ See DeJusticia, Conectas and Justiça Global, "Comment On The Second Report Of The Un Working Group On The Issue Of Human Rights And Transnational Corporations And Other Business Enterprises (A/68/279) Submitted To The Un General Assembly In August 2013. Analysis by DeJusticia, October 2013. Available at:

http://www.conectas.org/arquivos/editor/files/5_Comment2ReportWG_GA_IndPeoples_Dejusticia.pdf

>Inclusion of an OP:

Requests the Working Group to address public finance throughout its work and to develop a regular dialogue with public sector financial institutions, including national and multilateral development banks, to discuss their role in advancing the implementation of the Guiding Principles.

4. Enhancing WG Methods of Work

The WG's mandate is fairly broad. However, the Group has prioritized some of its functions to the detriment of others. More importantly, the WG has not adopted a positive and clear attitude toward the victims of human rights abuses as one would reasonably expect it to do, given its status as a special mechanism of the UN's main human rights body. **We would like to express our deep concern with the level of sensibility of the WG has to the needs of victims of corporate human rights abuses.**

The **lack of clarity regarding its role with respect to allegations of human rights violations** was evident in the first WG report⁵. In its short note of March 2014⁶, the WG informed that it has made 16 public communications of alleged abuses and violations. Considering the situation on the ground, this is a very limited number of communications, and is not clear from the document how many of those communications were originally developed by the WG (or rather by other special mechanism). The limited number of cases can be the result of the lack of dissemination of the possibility to send those allegations to the WG, reflected in the fact that on the OHCHR's website, there is no "individual complaints" option on the WG's page as there is on the pages of the other special mechanisms.

The **transparency in the funding** of the WG also raises questions of trust and credibility. One can legitimately question if it is acceptable that the private sector finances WG activities, considering all the many conflicts of interest involved. The information on this source of funding should, at the very least, be made public in order to allow for public scrutiny. However, the WG has been slow and ambiguous in answering those questions, leading to the emergence of another element of distrust regarding its impartiality and independence from the corporate sector. We believe that the new resolution can contribute to alleviate this problem, by building concrete criteria and principles of transparency.

Finally, another shortcoming of the first three years of activities of the WG was the absence of a **clear and public work plan**. As a UN Special Procedure, there is an expectation that the WG announces the list of themes and issues it intends to focus on in each of the coming reports, so as to give civil society groups and organizations the opportunity to prepare their contributions to the review process.

Concrete recommendations:

>Inclusion of OPs:

⁵ See Amnesty International and Conectas Letter to the Working Group dated July 13, 2012.

Available at: <http://www.business-humanrights.org/media/documents/un-working-group/conectas-and-amnesty-intl-ltr-to-un-working-group-13-jul-2012.pdf>

⁶ "The UN Working Group on Business and Human Right's work on individual cases of alleged human rights violations and abuses," March 2014.

Available at:

http://www.ohchr.org/Documents/Issues/Business/WGBrief_Communications_with_States_and_non-State_actors_12.03.2014.pdf

Requests the Working Group:

- 1. To mainstream the participation of the victims of human rights abuses by corporations, human rights defenders and organizations or groups working on corporate abuses in all activities developed by the WG;*
- 2. To receive and process communications of alleged human rights abuses committed by corporations under clear procedures, reporting them to the Human Rights Council;*
- 3. Taking into consideration the risk of conflicts of interest, the Working Group should refrain from funding its activities with resources coming from the private sector;*
- 4. To ensure the transparency and the right to information related to all its projects, including sources of funding and proposed activities;*
- 5. To adopt a clear and public Work Plan in order to facilitate the contribution of all stakeholders in a timely fashion.*

Cairo Institute for Human Rights Studies (Egypt)

Center for Applied Legal Studies (South Africa)

Centro de Estudios Legales y Sociales (Argentina)

Conectas Direitos Humanos (Brazil)

Dejustica (Colombia)

FORUM-ASIA

Indian Law Resource Center (USA)

Justiça Global (Brazil)