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**AMNESTY
INTERNATIONAL**



Working Group on Human Rights and Transnational
Corporations and Other Business Enterprises
Office of the High Commissioner for Human Rights
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8 December 2011

Dear Michael Addo,

Dear Alexandra Guaqueta,

Dear Margaret Jungk,

Dear Puvan Selvanathan,

Dear Pavel Sulyandziga,

Amnesty International congratulates you on your appointment to the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises and looks forward to supporting your efforts to further ensure the protection of human rights for individuals and communities by businesses globally.

Key Thematic Priorities

In response to the Working Group's invitation for proposals, in this submission Amnesty International identifies five key thematic areas on which it is essential that the Working Group focus its work over the next three years, and provides suggestions for the methodology to take this work forward. These five areas are:

- Improved access to justice for victims of corporate abuse, particularly with respect to judicial and state based mechanisms in Home States;
- Need for greater State regulation of corporate actors, particularly with respect to operations conducted abroad;
- More effective enforcement of existing laws holding corporate actors to account for human rights abuses;
- Enhanced attention to protecting the rights of specific groups, particularly women, children, Indigenous Peoples and human rights defenders; and

- Enhancement of standards on business and human rights.

The identification of these areas is based on Amnesty International's own research and experience in working with business and human rights issues over the past decade. The rationale for identifying these five areas as essential priorities for the Working Group is provided in **Annex A**; additional information to illustrate this rationale is provided in the sample of Amnesty International's work on these issues, including a number of specific cases that are relevant to the five thematic areas, provided as **Annex B**.

The ultimate goal in relation to these issues must be the development of stronger standards developed and their enforcement at the national, regional and international levels. Evidence shows that major gaps in protection continue to leave individuals and communities vulnerable to business-related abuses, serious obstacles impede them when they seek redress and those responsible are only rarely, if ever held to account. The challenge for the Working Group is to assess whether or not States *in practice* fulfil their duty to protect against corporate abuse, companies meet their responsibility to respect human rights, and victims are able to exercise their right to an effective remedy.

To meet this challenge, it is critical that the Working Group not only works towards the implementation of existing standards on business and human rights, but continues to build on and elaborate these standards. Existing standards alone will not be sufficient to effectively bridge the "governance gap" identified by the former UN Special Representative on business and human rights Professor John Ruggie as the root cause of the current business and human rights predicament. As Professor Ruggie stated in his final report to the UN Human Rights Council, the Guiding Principles on business and human rights (Guiding Principles) "mark the end of the beginning" by providing "a common global platform for action, on which cumulative progress can be built".¹

Recommended methodology for the Working Group to best achieve its objectives

The effectiveness of the Framework and the Guiding Principles needs to be tested *in practice*. The Working Group must develop them in a meaningful way based on experience.

The Human Rights Council mandated the Working Group to assess the implementation of the Guiding Principles.² In order to carry out this role effectively, the Working Group must seek and receive information on actual situations and emblematic specific incidents relevant to its mandate – including allegations of corporate abuse, as well as examples of good practice.

The Working Group should use the country visits that it will carry out as part of its work as an opportunity to examine emblematic cases on the ground, and must ensure that it meets with a broad range of stakeholders including local civil society and rights-holders. It is essential that the mandate remains grounded in real-life situations.

¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, March 2011 (UN Doc: A/HRC/17/31).

² UN Doc. A/HRC/RES/17/4, operative paragraph 6 (b).

The Working Group should also broaden the focus of implementation efforts to all international standards that are relevant to business and human rights – in addition to the Guiding Principles, this includes the Framework and all relevant international human rights law. Prof. Ruggie’s final report states that the purpose of the Guiding Principles is to operationalize the Framework and to elaborate the “implications of existing standards and practices”; the Guiding Principles cannot be promoted effectively in isolation.

Amnesty International’s work with the UN Special Procedures

Amnesty International has worked closely with the Special Procedures for many years. This work includes regular submissions of individual cases or broader concerns, which are sent directly to the human rights officers at the Office of the High Commissioner for Human Rights. We also regularly share research and news information with mandate holders and their staff.

In relation to the UN’s work on business and human rights, Amnesty International engaged closely with the work of the former UN Special Representative for six years, and made a number of submissions relating to the Framework as well as the Guiding Principles. Earlier this year, Amnesty International contributed to the negotiations at the Human Rights Council regarding the establishment of the Working Group and highlighted key areas for the UN Working Group’s mandate.

We would like to extend an invitation to members of the Working Group to visit the International Secretariat of Amnesty International in London at times of your convenience to learn about our work on business and human rights and to discuss our up-coming reports and research. Visits of this sort are conducted regularly by new Special Procedures mandate-holders and have proved highly beneficial to both parties in the past.

I look forward to the opportunity to meeting each of you in person.

Yours sincerely,



Seema Joshi
Head of Business and Human Rights
Amnesty International

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ANNEX A – KEY THEMATIC PRIORITIES AND ACTIVITIES

The Working Group's work on these areas should be with a view to implementing and elaborating international standards on business and human rights, including through clear recommendations to States, business enterprises and other relevant actors such as multilateral institutions.

1. Improved access to justice for victims of corporate abuse, particularly with respect to judicial and state based mechanisms in home States

The UN Human Rights Council explicitly mandated the Working Group to make recommendations for "...enhancing access to effective remedies available to those whose human rights are affected by corporate activities."³ This is a welcome element of the mandate as access to justice should be a high priority for the Working Group.

In order to ensure that the human right to an effective remedy is properly respected in cases of corporate abuse, the Working Group's main focus must be on access to State-based judicial and non-judicial remedies. These can be supplemented, but not replaced by corporate-level grievance mechanisms. In particular, the Working Group should seek to improve the ability of rights-holders to access remedies in the home States where corporate actors are domiciled.

Individuals and communities currently face a number of hurdles when trying to seek redress for business-related human rights abuses. The problem is particularly acute for rights-holders who suffer abuses caused or contributed to by businesses incorporated abroad and attempt to seek justice in the companies' home States.

The focus of Amnesty International's research has been on four major obstacles to remedies which it recommends that the Working Group consider: 1) challenges presented by the complexity of corporate structures and how these are often used to evade accountability; 2) barriers to access to information for victims; 3) imbalances in power and influence between corporate actors and victims and the overall impact that this has on justice; and 4) legal procedural hurdles that can be used to defeat extraterritorial claims, such as the principle of *forum non conveniens*.

In 2012 Amnesty International will continue to work in detail on these issues. As part of this work, we will extrapolate recommendations based on the analysis of case studies. Additional materials relevant for understanding barriers to individuals and communities trying to access redress are listed in Annex B.

2. Need for greater State regulation of corporate actors, particularly with respect to operations conducted abroad

Amnesty International shares the concern expressed by the UN Human Rights Council that "that further efforts to bridge governance gaps at the national, regional and international levels are necessary."⁴

The Working Group should make clear to States the need to enact specific measures that strengthen the regulation of companies, particularly when operating abroad. This

³ UN Doc. A/HRC/RES/17/4, operative paragraph 6 (e).

⁴ UN Doc. A/HRC/RES/17/4, preamble

would reflect the emerging recognition of the need for States to ensure that their companies are not involved in human rights abuses in other countries.⁵ The ongoing failure by States to hold corporate actors domiciled in their territory accountable for human rights abuses committed abroad represents a key gap in protection which the Working Group must seek to address. Without measures to remedy this failure, the gap in human rights protection against abuses by business will never be closed. Corporate entities are currently able to operate across State borders with ease, while State borders simultaneously present institutional, political, practical and legal barriers to corporate accountability and redress for the victims of corporate human rights abuses.

In order to effectively address this gap, there is a need for States to enforce and adopt regulatory measures at the national and, where appropriate, regional levels that have extra-territorial effect. This requirement is in line with current trends and recommendations by UN bodies, for example, those of the Committee on Economic, Social and Cultural Rights.⁶ It is also reflected in the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* adopted by a group of experts in international law and human rights, including present and former Special Procedures mandate holders.

Effective regulatory measures put in place by States can take a number of forms. One concrete measure is for States to legally require their businesses to undertake human rights due diligence throughout their global operations. If, as Professor Ruggie has stated, “the responsibility to respect is the baseline expectation for all companies in all situations”⁷ and “to discharge the responsibility to respect requires due diligence”⁸, then it follows that all companies should carry out human rights due diligence particularly where there is a high-risk of human rights abuses arising.⁹

An immediate and important step towards mandatory due diligence for all companies would be for States to require that state-owned-enterprises and businesses receiving any form of public support conduct human rights due diligence. States should not provide support if this is not done. Amnesty International has been among those calling on national export credit agencies (ECAs) to require that businesses conduct human rights due diligence as a condition for receiving support¹⁰. States must ensure that they are not complicit in the commission of human rights abuses by corporations. Although this principle is referenced in the Guiding Principles, in practice little is

⁵ One example is the passage of legislation on conflict minerals and transparency in the United States and calls by Members of Parliament and NGOs for similar laws at the EU level.

⁶ “States Parties should take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction” - Committee on Economic, Social and Cultural Rights, “Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights” (UN Doc. E/C.12/2011/1).

⁷ UN Doc. A/HRC/8/5, paragraph 24.

⁸ UN Doc. A/HRC/8/5, paragraph 56.

⁹ The Committee on Economic, Social and Cultural Rights recommended that “States Parties shall ensure that companies demonstrate due diligence to make certain that they do not impede the enjoyment of the Covenant rights by those who depend on or are negatively affected by their activities” (UN Doc. E/C.12/2011/1).

¹⁰ Export credit agencies (ECAs) are public entities that provide corporations with government-backed loans, guarantees, credits and insurance to support exports and foreign investments. ECAs are largely focused on facilitating domestic commerce in lesser developed countries and emerging economies, under conditions of significant political and financial risk.

currently being done by States to give effect to it. The Working Group should promote progress in this area.

Similarly, States should require mandatory disclosure by corporations of information relevant for determining potential or actual negative human rights impacts as a result of their operations. The Working Group could start by assessing how legislation which is evolving in this area can be developed across jurisdictions.¹¹

3. More effective enforcement of existing laws holding corporate actors to account for human rights abuses

Within the scope of State regulation, there is an urgent need to address the legal enforcement gap that exists when it comes to holding companies to account for illegal conduct under existing laws. Even where laws exist, corporate actors are not being held to account for committing illegal or criminal acts that lead to human rights abuses abroad.

The Working Group should urge States to ensure that existing laws that hold companies accountable for illegal acts are properly enforced. The Working Group could also explore gaps in criminal accountability that exist between different domestic legal regimes in relation to corporations.

States fail to apply sanctions against corporate actors for illegal acts that lead to human rights abuses, even where this is permitted by existing penal, administrative or criminal laws. One illustration is provided by the findings of the UN Special Rapporteur on the human rights implications of environmentally sound management and disposal of hazardous substances and wastes.¹²

Criminal prosecutions following the 1984 chemical disaster in Bhopal, India, have been neither timely nor effective and expose the failure to hold corporate actors criminally accountable when their operations lead to serious human rights abuses. The disaster killed thousands and continues to severely impact affected persons' health, and their enjoyment of their rights to safe water and to a healthy environment. Charges were filed against Union Carbide Corporation and its Indian-based subsidiary. However, a verdict in the case was not given until more than 25 years after the disaster, and concerned only former employees of the Indian-based company – US-based Union Carbide Corporation and its former Chairman have still not been prosecuted.

Amnesty International will continue to focus on this area of work during the term of the Working Group.

4. Enhanced attention to protecting the rights of specific groups, particularly women, children, Indigenous Peoples and human rights defenders

The Working Group must provide clear and specific guidance in relation to protecting and respecting the rights of members of specific groups. Such guidance should draw

¹¹ For example, relevant provisions of the US Dodd-Frank Act and proposals for similar legislation in the EU.

¹² Addendum to report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, 3 Sep 2009 (UN Doc. A/HRC/12/26/Add.2).

upon the recommendations made by other relevant UN Special Procedures, such as the Special Rapporteur on the rights of indigenous peoples.¹³ We encourage the Working Group to seek inputs from other Special Procedures and the UN treaty bodies.

The UN Human Rights Council mandated the Working Group to “integrate a gender perspective throughout the work of the mandate and to give special attention to persons living in vulnerable situations, in particular children”.¹⁴

Given the significant and increasing risks faced by Indigenous peoples and human rights defenders in the context of many corporate activities, the Working Group must ensure that members of these groups are also included in efforts relating to persons in vulnerable situations. As noted in the Guiding Principles, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. For indigenous peoples affected by corporate activity, particular regard must be had to the UN Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly in 2007¹⁵.

Amnesty International will continue to devote particular attention to the rights of indigenous peoples under the Declaration in relation to extractive industry activities in the Americas and Asia.

5. Further enhancement of standards on business and human rights

In the longer-term, the Working Group should seek to build on and elaborate existing standards through clear guidance and recommendations and through the development of additional standards or an international legal instrument on business and human rights, or both. The UN Human Rights Council has recognized the need for other longer term developments, including the “further enhancement of standards”.¹⁶

Professor Ruggie has acknowledged that supplementary measures such as a multilateral legal instrument on business and human rights may be required to provide greater clarity and increase legal protections.¹⁷ With a view to contributing to the groundwork that would be necessary for the eventual development of such an instrument, the Working Group should analyze the options for addressing weaknesses and gaps in the legal protection of human rights including, but not limited to, those related to gross human rights abuses, and it should make recommendations for action.

The Working Group must also reinforce and build on efforts to ensure that the UN standards on business and human rights are effectively integrated into concurrent multilateral processes. Amnesty International has engaged in intensive efforts to further propagate international standards relevant for business and human rights, including through the revision of the International Finance Corporation's (IFC) Performance Standards. Although some gains were made as a result of the revision

¹³ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples, UN Doc. A/HRC/15/37, 19 July 2010; also see A/HRC/18/35, 11 July 2011.

¹⁴ UN Doc. A/HRC/RES/17/4, operative paragraph 6 (f).

¹⁵ UN Doc. A/RES/61/295.

¹⁶ UN Doc. A/HRC/RES/17/4, operative paragraph 4.

¹⁷ UN Special Representative on business & human rights, “Recommendations on follow-up to the mandate”, 11 February 2011, <http://www.business-humanrights.org/Links/Repository/1004398>

process, these were minimal. Overall, there was a failure to reflect international standards such as those relating to forced evictions and resettlement. Moreover, the IFC failed to include the requirement for its clients to conduct human rights due diligence as a condition of receiving support.

Similarly, throughout the revision process for the OECD Common Approaches, we have been calling for language requiring adherence by clients (i.e. private entities receiving support from ECAs) to international human rights standards. This is consistent with the Guiding Principles. However, thus far this requirement has not been established. The Working Group should promote the inclusion of the UN Framework and Guiding Principles in other multilateral processes relevant for business and human rights.

The development of stronger standards must also take into account relevant commentary and recommendations made by other UN bodies that serve to elaborate further on the duties and responsibilities of States and business respectively.¹⁸

Amnesty International would welcome an opportunity to discuss with the Working Group our past and current in-country research into specific cases of human rights abuses caused or contributed to by businesses (see Annex “B”).

¹⁸ For example, recent commentary emerging around the Convention on Economic, Social and Cultural Rights (CESCR), the Convention on the Elimination of Racial Discrimination (CERD), and the Convention on the Rights of the Child (CRC) as well as recent reports by the UN Special Rapporteur on Indigenous Peoples.

ANNEX B - EXAMPLES OF RECENT AMNESTY INTERNATIONAL PUBLICATIONS ON THE ISSUE OF BUSINESS AND HUMAN RIGHTS

GENERAL FOCUS:

Demand Dignity: Close the accountability gap: Corporations, human rights and poverty, ACT 35/006/2009, May 2009,
<http://www.amnesty.org/en/library/info/ACT35/006/2009/en>

UN

United Nations: A call for action to better protect the rights of those affected by business-related human rights abuses, IOR 40/009/2011, June 2011,
<http://www.amnesty.org/en/library/info/IOR40/009/2011/en>

Comments on the United Nations Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises' Draft Guiding Principles and on post-mandate arrangements, IOR 50/002/2010, December 2010,
<http://www.amnesty.org/en/library/info/IOR50/002/2010/en>

Amnesty International submission to the UN Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, IOR 40/018/2008, July 2008,
<http://www.amnesty.org/en/library/info/IOR40/018/2008/en>

World Bank – International Finance Corporation (IFC)

The Revised Sustainability Framework of the International Finance Corporation: a missed opportunity to better protect the rights of those affected by business related human rights abuses, IOR 80/006/2011, October 2011,
<http://www.amnesty.org/en/library/info/IOR80/006/2011/en>

Time to invest in human rights: a summary of concerns for the International Finance Corporation, IOR 80/005/2010, October 2010,
<http://www.amnesty.org/en/library/info/IOR80/005/2010/en>

Time to Invest in Human Rights: A human rights due diligence framework for the International Finance Corporation, IOR 80/004/2010, September 2010,
<http://www.amnesty.org/en/library/info/IOR80/004/2010/en>

OECD

The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has come to an end: the OECD must now turn into effective implementation, IOR 30/001/2011, May 2011, <http://www.amnesty.org/en/library/info/IOR30/001/2011/en>

2010 Update of the OECD Guidelines for Multinational Enterprises: Amnesty International key demands on human rights standards for the revised OECD Guidelines, IOR 30/003/2010, October 2010,
<http://www.amnesty.org/en/library/info/IOR30/003/2010/en>

Open letter to Mr Angel Gurría, Secretary-General of the OECD, IOR 30/002/2011, June 2011, <http://www.amnesty.org/en/library/info/IOR30/002/2011/en>

Amnesty International submission to the review of the Revised Recommendation on Common Approaches on the Environment and Officially Supported Export Credits, POL 30/002/2010, March 2010,
<http://www.amnesty.org/en/library/info/POL30/002/2010/en>

CASE SPECIFIC:

India

India rejection of Vedanta mine a landmark victory for Indigenous rights, August 2010, <http://www.amnesty.org/en/news-and-updates/indian-government-rejection-vedanta-bauxite-mine-landmark-victory-indigenous-rights>

Don't Mine us out of Existence: Bauxite Mine and Refinery devastate lives in India, ASA 20/001/2010, February 2010,
<http://www.amnesty.org/en/library/info/ASA20/001/2010/en>

India: Dodging responsibility: Corporations, governments and the Bhopal disaster, ASA 20/002/2009, May 2009,
<http://www.amnesty.org/en/library/info/ASA20/002/2009/en>

First convictions for 1984 Union Carbide disaster in Bhopal too little, too late, June 2010, <http://www.amnesty.org/en/news-and-updates/first-convictions-1984-union-carbide-disaster-bhopal-too-little-too-late-2010-06-07>

Clouds of injustice: the Bhopal disaster 20 years on, ASA 20/015/2004, November 2004, <http://www.amnesty.org/en/library/info/ASA20/015/2004/en>

Papua New Guinea

Undermining Rights: Forced Evictions and Police Brutality around the Porgera Gold Mine, Papua New Guinea, ASA 34/001/2010, February 2010,
<http://www.amnesty.org/en/library/info/ASA34/001/2010/en>

Nigeria

Nigeria: The true 'tragedy': Delays and failures in tackling oil spills in the Niger Delta, AFR 44/018/2011, November 2011,
<http://www.amnesty.org/en/library/info/AFR44/018/2011/en>

Nigeria: Petroleum, Pollution and Poverty in the Niger Delta - Campaign Digest, AFR 44/018/2009, July 2009, <http://www.amnesty.org/en/library/info/AFR44/018/2009/en>

Nigeria: Petroleum, Pollution and Poverty in the Niger Delta, AFR 44/017/2009, June 2009, <http://www.amnesty.org/en/library/info/AFR44/017/2009/en>

Côte d'Ivoire

Côte d'Ivoire: Missing millions must reach Trafigura toxic waste victims, August 2011, <http://www.amnesty.org/en/news-and-updates/c%C3%B4te-d%E2%80%99ivoire-missing-millions-must-reach-trafigura-toxic-waste-victims-2011-08-18>

Trafigura found guilty in toxic waste dumping tragedy, July 2010, <http://www.amnesty.org/en/news-and-updates/trafigura-found-guilty-toxic-waste-dumping-tragedy-2010-07-23>