



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

### **Calling on the Working Group to build a proactive and rights-based work programme**

Submission to the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises - December 2011

The International Federation for Human Rights (FIDH) is pleased to transmit this submission to the newly formed UN Working Group on Human Rights and Transnational Corporations and other Business Enterprises (hereinafter UNWG or Working Group) and appreciates the opportunity to share its views as the UNWG prepares for its first session.

Strong from its experience working with its member organisations and communities affected by the activities of business enterprises, FIDH's proposals stem from concrete cases and the challenges civil society and affected people still face today in trying to seek justice for corporate-related abuses.

Our proposals will focus both on the working methods of the Working Group as well as on the substantive issues FIDH believes should be addressed by the Working Group to “promote the effective and comprehensive dissemination and implementation of the UN Guiding Principles: Implementing the United Nations “Protect, Respect and Remedy” Framework.

#### **Procedural elements / Working methods**

##### **➤ Adoption of a rights-based approach**

FIDH recommends the UNWG to adopt a rights-based approach for the design of its work programme and its working methods.

Grounded in human rights standards, such approach has proven to bear the potential of contributing to the protection of and respect for human rights. FIDH believes such approach is essential to truly develop a “socially sustainable globalization”, as set forth as one of the objectives of the UN Guiding Principles.

Adopting a rights-based approach requires the Working Group to pay a particular attention to vulnerable and marginalized individuals and groups, as per §6(f) of resolution A/HRC/17.L.17/Rev.1 establishing the UN Working Group (see below on participation and consultation). It also requires the UNGW to assess the implementation of the UN Guiding Principles through the lens of international human rights law. In this regard, FIDH calls on the Working Group to refer to the pre-existing work of the UN treaty-bodies and Special Procedures on the benefits and the importance of a rights-based approach in working towards the protection of

human rights.

A rights-based approach also entails focusing on accountability and ensuring the identification of responsible actors and the promotion of monitoring mechanisms and effective remedies in cases of violations. In this regard, FIDH would like to recall paragraphs 5 and 6 of the preamble of the resolution creating the Working Group, which recognizes that proper regulation of transnational corporations and other business enterprises can contribute to promote, respect and fulfil human rights.

➤ **Participation and consultation with rights-holders**

As part of its mandate to “seek and receive information from all relevant sources, including [...] civil society and rights-holders” (§6.b) but recognizing the limited resources at the disposal of the UNWG members, FIDH calls on the UNWG to creatively use different existing means to ensure meaningful participation of rights-holders in its work. This could for instance include: conducting site visits emphasizing on the consultation of affected people; allowing rights-holders affected to participate in hearings during the Working Group' sessions, either physically or through video conference; ensuring close cooperation with and participation of civil society organisations especially those working directly with affected communities, etc. The UNWG's fundraising strategy should be orientated towards securing funds to ensure the participation of affected people and to gear capacity-building activities towards accompanying those who are currently suffering from corporate-related abuses and who are those most in need of human and financial resources.

➤ **Considering real situations through country and site visits**

As per § 6.(d) of the A/HRC/17/L.17/Rev.1 resolution, the Human Rights Council has requested the Working Group to “conduct country visits and to respond promptly to invitations from States”. FIDH would like to recall the importance of conducting such visits as a key to the fulfilment of all aspects of the group's mandate, from dissemination to the identification and promotion of good practices and lessons learned to providing support for efforts to promote capacity-building. Most importantly, **meetings with stakeholders and particularly with those affected** would allow the UNWG to **hear the views of those mostly concerned** and to **formulate practical recommendations to all duty-bearers and responsible actors including corporations and financial institutions** on the basis of concrete cases. FIDH believes recommendations formulated should be focused on “enhancing access to effective remedies available to those whose human rights are affected by corporate activities.” The conduct of country visits and the formulation of subsequent reports and recommendations will be of great importance to allow the Working Group to provide guidance to both home and host States on how to discharge their human rights obligations. Such recommendations will also serve companies in understanding the scope and meaning of their responsibility to respect all human rights and how to exercise due diligence.

➤ **Optimizing the usefulness of the Annual Forum**

FIDH welcomes the decision to establish an annual forum on business and human rights and wishes this opportunity can be a key moment for the participation of stakeholders, in particular representatives of those vulnerable and marginalised. In this regard, funding for the forums should, by priority, be allocated to ensure their participation. To ensure the forum is effective and can serve to feed into the work of the Working Group, FIDH recommends that specific objectives be set prior to the forums. FIDH suggests that the forum be an opportunity to address issues pertaining to specific sectors of business activities (land grabbing, extractive industries, IT companies, supply chain, ...) or to address in-depth cross-cutting issues, such as the role of public agencies.

## Substantive Issues

### ➤ **Focusing on access to justice and obstacles faced by victims**

One of the areas most neglected when it comes to business and human rights is the difficult and **complex yet fundamental question of access to justice for victims** of corporate-related abuses. As of today, there are still hundreds of cases illustrating the lack of effective remedies for victims of corporate-related abuses, particularly when these are located in weak governance zones.<sup>1</sup> While there exist certain legal avenues to seek reparation in home or host countries, the legal and practical obstacles for victims are such that, to date, most victims lack access to an effective remedy. Such obstacles range from the difficulty to address parent companies' liability, to the lack of access to information and the inequality of arms. By way of illustration, it is worth mentioning that no trial under the so-called Alien Tort Claim Act in the United States has ever come to completion, with well-known cases such as the cases of *Wiwa et al. Vs Royal Dutch Petroleum and Shell Transport and Trading Company* or *Aguinda vs. Chevron-Texaco* in Ecuador going on over a decade or ending up with out-of-court settlements. In Europe, while we witness timid signs of increased regulation of corporations through proposals of mandatory non-financial reporting, no ambitious reforms are under way to adequately address the issue of access to justice and adequate reparation for those negatively affected by business activities.<sup>2</sup>

As part of our work, FIDH has documented, through numerous cases, obstacles faced by victims. In collaboration with various experts and civil society organisations, FIDH's documentation work has served to demonstrate the urgent need to address the issue of access to justice and to address the hugely disproportionate inequality of arms between victims of corporate-related abuses and means at the disposal of corporations, in particular multinational corporations.<sup>3</sup>

FIDH strongly believes that working on access to justice should not only be central to a human rights body such as the UNWG, but also remains convinced that it can feed into all aspects of the mandate and can ultimately lead to the prevention of human rights abuses. Concretely, the Working Group should explore and recommend how States **in particular home States**, as part of their obligation to protect, could facilitate access to justice for victims of human rights abuses in third countries for abuses involving corporations based in their territories or under their jurisdiction. Such recommendations should also tackle corporate law and the complex legal structures of multinational companies to ensure these do not prevent victims from accessing justice.

### ➤ **Addressing current and emerging issues**

FIDH's long standing experience in protecting human rights defenders serves to show the increasing tendency to **criminalize human rights defenders and social protest** in the context of investment projects.<sup>4</sup> Repression has taken the form of attacks, harassment, intimidation acts, statutory offences and other judicial proceedings. Qualified as “one of the most prominent features of the attempt to control civil society”, the interferences and attempts to criminalise and repress

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1 Such obstacles have been recognized by former UN Special Representative on business and human rights John Ruggie. See for instance reports A/HCR/11/13 and A/HRC/14/27.

2 For legal opportunities to improve Europe's corporate accountability framework, please see “Principles and Pathways” published in 2010 by the European Coalition for Corporate Justice, of which FIDH is a steering group member : [www.corporatejustice.org](http://www.corporatejustice.org)

3 See for instance a 600-p guide on available recourse mechanisms for victims and NGOs published in 2010 and updated in the 2011 Spanish version : FIDH, “Corporate Accountability and Human Rights Abuses : A Guide for Victims and NGOs on Recourse Mechanisms”, [www.fidh.org](http://www.fidh.org)

4 See for instance the last annual report of the Observatory for the Protection of Human Rights Defenders (joint programme between FIDH and OMCT), “Steadfast in Protest”, 2011 Annual Report, [www.fidh.org/Steadfast-in-Protest-2011-Report](http://www.fidh.org/Steadfast-in-Protest-2011-Report)

human rights defenders and social protest has particularly affected those who defend vulnerable or marginalised communities, such as indigenous peoples in their defence of land rights or natural resources.<sup>5</sup> Such situation adds on the already heavy obstacles faced by affected individuals and communities in claiming the protection of their rights. FIDH remains deeply preoccupied by such tendency and calls on the UNGW to treat this issue as one of their priorities.

Closely linked with this issue is the question of the **consultation of affected stakeholders**. While FIDH strongly supports an inclusive approach and the involvement of all stakeholders, it calls on the UNWG to keep in mind obstacles faced by affected individuals or their representatives when mobilised to claim their rights. When addressing the issue of meaningful participation and consultation, international standards such as indigenous peoples' right to free, prior and informed consent protected by ILO Convention 169 and the right to participation, as evoked in the International Covenant on Civil and Political Rights, should be taken into consideration. An improper or biased reading of a multi-stakeholder and constructive approach should not overlook the current criminalisation of human rights defenders and social protest and should by no means result in further undermining affected individuals' right to be consulted over matters that can negatively affect them.

In light of the current global political and economic dynamics, FIDH recommends the UNGW – when carrying out its capacity-building activities directed at States and companies – to particularly target States or companies based in emerging economies (such as the BRICs).

The UNWG should also seek to provide guidance on current and emerging issues such as land grabbing, due diligence in supply chains, mega industrial projects, freedom of expression and of assembly and the protection of the right to privacy and the role of information technologies companies. In the same vein, attention should be given to provide further guidance, including through recommendations regarding the development of domestic legislation and policies relating to business and human rights, as per §6(c) of resolution A/HRC/17/L.17/Rev.1, on how States can discharge the obligation to protect, in particular to ensure domestic coherence. Areas of work could focus on needed reforms to ensure coherence between trade and investment contracts and **extraterritorial human rights obligations**.

When addressing substantive issues, the Working Group should collaborate with and build on the work of the UN treaty-bodies and Special Procedures, many of which have already worked on issues related to corporate accountability issues such as land grabbing, information technologies, the use of private security forces, etc.

### **Leading the way forward**

Finally, FIDH hopes that the Working Group will show a proactive leadership in exploring “**further enhancement of standards**” (as per §4 of resolution A/HRC/17/L.17/Rev.1), particularly in cases of international crimes and conflict areas.

In light of the current and continuous impunity enjoyed by those responsible, directly or indirectly, for the commission of corporate-related human rights violations, FIDH believes such role to be in line with the UN Human Rights Council's mandate to promote universal protection of all human rights and to address situations of violations of human rights and to make recommendations thereon.<sup>6</sup>

FIDH remains available to meet with you, individually or when all members are reunited, and would be happy to share its experience with the members and to assist the UNGW in its work.

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<sup>5</sup> Ibid.

<sup>6</sup> UN General Assembly Resolution A/RES/60/251, 15 March 2006, §§2,3.