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## Human Rights Council

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Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

### **Written statement\* submitted by the International Commission of Jurists, a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[4 June 2012]

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\* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

## Advancing human rights and business in the work of the Human Rights Council

The International Commission of Jurists (ICJ) welcomes the first report of the Working Group on human rights and transnational corporations and other business enterprises (the Working Group) and takes this opportunity to comment on the work and the priorities of the Working Group.

The ICJ recalls the three main issues proposed by a number of civil society organizations as priorities for the Working Group: (1) to explore the further development of international standards; (2) to improve access to remedies, and in particular access to justice for victims of human rights abuses; and (3) to address the impact of business on indigenous people and other vulnerable groups.<sup>1</sup>

According to the former Special Representative on business and human rights, in the area of gross human rights abuses, potentially amounting to crimes under international law, “greater consistency in legal protection is highly desirable, and... could best be advanced through a multilateral approach”.<sup>2</sup> The Working Group has observed that stakeholders and some States proposed as a priority for the Working Group: “that international legal options in the field of business and human rights should be explored”.<sup>3</sup> Investigating legal gaps in the protection of victims is clearly necessary for protection purposes. Developing further international standards in response to these gaps will provide a crucial component in the fight against impunity.

The preamble to Human Rights Council Resolution 17/4 specifically identifies the need for “*further efforts to bridge governance gaps*” at the national, regional and international level in the context of weak national legislation and implementation.<sup>4</sup> The Council has specifically mandated the Working Group: “*to explore options and make recommendations... for enhancing access to effective remedies*”.<sup>5</sup> The Working Group interprets this part of its mandate as including the need to identify opportunities to dismantle barriers to justice for victims of business-related human rights violations; identify success factors in establishing effective judicial as well as non-judicial grievance mechanisms; and discuss the consequences for States and businesses that fail to implement the Guiding Principles (GPs).<sup>6</sup> The ICJ agrees with this interpretation but suggests that a more complete approach would include an examination of the extent to which existing procedures and mechanisms have satisfied the obligation to provide an effective remedy consistent with international human rights standards and whether gaps and weaknesses in that respect might be addressed by the clarification or development of further international standards. The preamble of Resolution 17/4 also refers to the role of “*proper regulation, including national legislation*” in contributing to the promotion, protection and fulfillment of respect for human rights.<sup>7</sup> The use of the word “including” demonstrates the recognition by the Council that proper regulation at the regional and universal levels may also contribute to the protection of human rights and the provision of effective remedies.

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<sup>1</sup> UN Doc A/HRC/20/29 (2012), para 44.

<sup>2</sup> Special Representative, Recommendations on Follow-Up to the Mandate (February 2011) at Part 2, <<http://www.business-humanrights.org/SpecialRepPortal/Home/UNactionfollowingendofmandate>>.

<sup>3</sup> UN Doc A/HRC/20/29 (2012), paras 43 and 44.

<sup>4</sup> UN Doc A/HRC/Res/17/4, preamble.

<sup>5</sup> UN Doc A/HRC/17/L.17/Rev.1 (2011), para 6(e); and UN Doc A/HRC/20/29 (2012), para 2.

<sup>6</sup> *Ibid*, para 56.

<sup>7</sup> UN Doc A/HRC/Res/17/4, preamble.

It is notable that the Council has stated that the process of implementing the GPs should not foreclose other developments including the process of further enhancing standards.<sup>8</sup> The former Special Representative emphasized that the GPs are a common global platform on which “cumulative progress can be built, step-by-step”.<sup>9</sup> The ICJ would alert the Working Group to the possibility that some of the language in its Report may be read as foreclosing other long-term developments, including the further clarification or development of standards. In particular, the Working Group refers to the GPs as the “authoritative global standard” and asserts that the GPs “should remain the authoritative basis of understanding of the respective responsibilities and duties of business enterprises and States”.<sup>10</sup> The ICJ observes that the GPs do not themselves constitute a legally binding instrument, which necessarily limits their normative force.

The GPs are an extension of and may assist with the implementation of the UN Framework “Protect, Respect, Remedy”, and should be considered against the backdrop of the UN Framework and relevant human rights law and other international standards. It is, however, important to note that the GPs lack sufficient elaboration of or guidance on the role of judicial remedies. Such remedies must always be available to victims of human rights violations, even if as a last resort and complementary to other non-judicial mechanisms.<sup>11</sup>

The ICJ supports the strategic focus by the Working Group on the need for greater access by victims of business-related human rights abuses to effective remedies.<sup>12</sup> The ICJ supports the intention of the Working Group to address, in particular, the rights of marginalised individuals and groups such as indigenous people and children who are often excluded from decision making processes, rights protection and reparations.<sup>13</sup> In this regard, it is essential that the Working Group collects information first-hand from local communities affected by business enterprises, as per its mandate.

The Working Group considers that a broad range of “governance gaps” lie at the core of the human rights and business challenge and has indicated its intention to survey existing accountability mechanisms and identify gaps.<sup>14</sup> These governance gaps were also outlined by the former Special Representative and recognised by the Council in its Resolution endorsing the GPs.<sup>15</sup> To fulfil its mandate and continue work to fill these “governance gaps” the Working Group should draw on first-hand information from country visits and consultations and identify best practices and lessons learnt from various jurisdictions.

It is essential to further elaborate upon the extent of State responsibility for corporate actors and of States’ duty to ensure access to effective remedies for victims of gross human rights abuses involving corporations committed in conflict situations. Guiding Principle 7 specifically refers to the special situation of businesses operating in conflict-affected areas. The commentary to this principle envisages a role for ‘home’ States and neighbouring States in helping to ensure that transnational corporations are not involved in human rights abuse in conflict-affected areas.<sup>16</sup> This commentary also says that States should consider multilateral approaches to prevent and address gross human rights abuses.<sup>17</sup>

<sup>8</sup> UN Doc A/HRC/17/4 (2011), para 4.

<sup>9</sup> UN Doc A/HRC/17/31 (2011), art 13.

<sup>10</sup> UN Doc A/HRC/20/29 (2012), paras 1, 10, and 50.

<sup>11</sup> UN Doc A/RES/60/251 (2006), paras 2 and 3.

<sup>12</sup> *Ibid*, para 48(b).

<sup>13</sup> *Ibid*, para 67.

<sup>14</sup> *Ibid*, paras 13 and 20.

<sup>15</sup> UN Doc A/HRC/17/31 (2011).

<sup>16</sup> UN Doc A/HRC/17/31 (2011), Article 7.

<sup>17</sup> *Ibid*.

Inherent to the delivery of effective remedies is the holding to account of corporations and other business enterprises that are responsible for the impairment of human rights. The GPs clearly consider enhanced accountability and identifies the challenges of investigation and prosecution in this context, including the problem of extraterritoriality. This warrants further consideration and elaboration by the Working Group. In this task, the Working Group should consider proposals made by the former Special Representative, as well as other proposals made by inter-governmental and non-governmental organisations. A high-level discussion on this issue will be convened in a parallel event during the 20<sup>th</sup> session of the Human Rights Council, on 21 June 2012 at 13h.

A further matter of importance concerns the extraterritorial application of human rights law. In this regard, the ICJ draws attention to the recently elaborated Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.<sup>18</sup> The Maastricht Principles were developed over a two-year period and adopted by a group of human rights experts that include current and former members of the treaty bodies, former and current Special Procedure mandate-holders, along with scholars and legal advisers of leading NGOs. The Maastricht Principles are built upon two main conceptual foundations. First, that international human rights law requires that States, when conducting themselves in a way that has real and foreseeable effects on human rights beyond borders, must ensure that they respect and protect rights, as well as in some circumstances fulfil those rights. Second, international law, most pointedly in the area of economic, social and cultural rights, demands that States act to realize rights extraterritorially, through ‘international assistance and cooperation’. The Principles regarding “obligation to protect” are most pertinent to the area of business and human rights. This obligation entails protection of human rights against nullification or impairment by third parties, such as business enterprises or other non-State actors, for example in relation to the impact on human rights of extractive or agricultural industries. A Commentary to the Maastricht Principles will be published later this year.<sup>19</sup>

### **Call for action**

The ICJ urges the Human Rights Council and the Working Group to:

- pay special attention to the need for State regulation of corporations and other business enterprises;
- pay special attention to the need to ensure access to justice and effective remedies and reparations to victims;
- ensure its activities do not foreclose the elaboration of further international standards and;
- take fully into account the Maastricht Principles in their work.

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<sup>18</sup> Available at <<http://www.maastrichtuniversity.nl/web/show/id=596286/langid=42>>.

<sup>19</sup> Forthcoming in (2012) 34(4) Human Rights Quarterly.