

November 20, 2013

VIA EMAIL: forumbhr@ohchr.org

Working Group on Human Rights and Transnational Corporations and Other Business Enterprises

Office of the High Commissioner for Human Rights UNOG-OHCHR
CH-1211 Geneva 10 Switzerland

Dear Esteemed Members of the United Nations Working Group:

**Re: Written Submission – Justice and Corporate Accountability Project
Forum on Business and Human Rights - Second Session (3 and 4 December 2013)**

The Justice and Corporate Accountability Project (JCAP) is a Toronto based volunteer organization dedicated to providing legal services and advocacy support to communities adversely impacted by extractive industries in the Americas.

JCAP specializes in legal work and advocacy at the intersection of transnational corporate activities, resource extraction, and communities. Our approach to working with communities is guided by the following principles:

§ *Community self-determination* – We provide legal support to communities who are asserting their rights in the face of exploitative transnational resource extraction by assisting them in launching complaints using domestic, transnational, international and regional legal regimes and corporate social responsibility mechanisms.

§ *Corporate accountability* – We work collaboratively with a global network of civil society actors concerned by the negative impacts of transnational resource extraction. We support the corporate accountability movement by providing actors within this movement with high quality and relevant legal work and academic research.

§ *Transnational legal activism* – We ensure that law students gain the skills and experience needed to practice community-based lawyering in the global economy. Our law students are supervised by *pro bono* lawyers and are assigned legal work that is directly related to the concerns and needs expressed by specific communities and global civil society actors.

We look forward to continuing to support the efforts of the Working Group to promote the protection of human rights for individuals and communities and we are pleased to present the attached recommendation (Annex 1) for your consideration. JCAP would like to thank the Working Group for the opportunity to contribute to this session and we offer our encouragement and support for your future work.

Yours truly,

Justice and Corporate Accountability Project

Email: jmccormick@justice-project.org Webpage: <http://justice-project.org/>

Communities first!

Annex 1

Recommendations of the Justice and Corporate Accountability Project

The Working Group has invited stakeholders to contribute to the identification of additional steps that should be taken by States, business, civil society, national human rights institutions and other stakeholders to further the implementation of the Guiding Principles on Business and Human Rights (Guiding Principles). JCAP offers the following recommendation in relation to transnational corporate activity and indigenous peoples.

The Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership or structure. However, the mandates that preceded the development of the Guiding Principles were established with a specific focus on the impact of transnational economic activity on the protection and promotion of human rights [A/HRC/17/31]. The promotion and protection of the human rights and wellbeing of communities impacted by transnational corporate activity relating to extractive industries is the primary focus of the work of JCAP.

The failure to respect property rights, including communal property rights, is often a fundamental issue that underlies conflicts between communities and companies. The Working Group has noted that diminished access to land and security of land tenure are among the most concerning adverse impacts of the extractive sector on indigenous people [A/68/279 at para 1]. The impacts of corporate activity must be considered in relation to the property rights of communities and individuals. In order for an accountability mechanism to be effective it must be empowered to evaluate and address property rights violations.

JCAP has also observed that many of the barriers to the effective promotion and protection of human rights in relation to transnational corporate activity are practical. Affected communities are constrained in their ability to respond to human rights violations by financial cost, capacity and marginalization. These limitations are further exacerbated by the challenges associated with influencing corporate behavior within the context of complex transnational multi-party corporate structures. JCAP notes that these concerns disproportionately affect indigenous peoples and poor rural communities in areas of extractive development.

Various United Nations bodies have recognized that States have an obligation to take measures to encourage transnational corporate actors domiciled within their State to conduct their operations abroad in a manner that upholds the protection and promotion of human rights.

The Guiding Principles specifically note that home States have a role to play in assisting corporations and their host States to ensure that businesses are not involved with human rights abuses [Commentary to Guiding Principle 7 - A/HRC/17/31].

Similarly, the Committee on the Elimination of Racial Discrimination (CERD) has expressed that States need to take action to address the transnational activities of corporations domiciled within their borders. For example:

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- The Concluding Observations of the CERD to Canada in 2007 at its 70th Session [CERD/C/CAN/CO/18 25 May 2007] at paragraph 17:

...the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable.

- The Concluding Observations of the CERD to Canada in 2012 at its 80th Session [CERD/C/CAN/CO/19-20] at paragraph 14:

The Committee recommends that the State party take appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada, and hold them accountable.

- The Concluding Observations of the CERD to the United States of America in 2008 at its 72nd Session [CERD/C/USA/CO/6 May 8th 2008] at paragraph 30:

In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in the United States accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in the United States on indigenous peoples abroad and on any measures taken in this regard.

In order for the Guiding Principles to effectively enhance the protection of human rights for communities affected by transnational corporate activities, legal mechanisms must be developed to ensure that all corporate activity, regardless of its physical location, is governed by accessible laws that effectively protect the internationally recognized human rights of affected groups and individuals.

JCAP has observed that victims of corporate human rights abuses perpetrated by transnational corporations need to be able to access both the courts of the host State and the courts of the State of corporate domicile in order to obtain justice. When corporate authority and decision-making power is sourced outside of the country where the human rights violations are taking place access to courts within the home State of the corporation is a critical component of effective transnational corporate accountability. JCAP invites the Working Group to consider recent litigation efforts by Mayan Q'eqchi' communities to pursue corporate accountability for actions taken by a Guatemala-based subsidiary of a corporation domiciled in Canada in the Canadian courts in *Choc v. Hudbay Minerals Inc.*¹

¹ <http://www.chocversushudbay.com/wp-content/uploads/2010/10/judgment-july-22-2013-Hudbays-motion-to-strike.pdf>

The Working Group has the opportunity to aid in the shaping and application of mechanisms to further transnational corporate accountability as part of its mandate to promote the effective and comprehensive dissemination and implementation of the Guiding Principles.

In its report to the 68th session of the General Assembly, the Working Group called upon States to state their expectation that transnational corporations domiciled within their borders will respect human rights throughout their operations and requested that States consider ways to ensure that indigenous peoples affected by foreign operations have access to effective remedies [A/68/279]. JCAP applauds the Working Group's commitment to promoting the implementation of effective measures within home States to ensure transnational accountability for transnational operations.

JCAP respectfully submits that transnational corporate accountability should continue to form a key component of the Working Group's efforts to promote the effective and comprehensive dissemination and implementation of the Guiding Principles. As a practical measure to further the steps already taken by the Working Group in this regard, JCAP recommends that the Working Group prepare a questionnaire for distribution to States that requests them to report on the legislative or administrative measures that they have taken to prevent or sanction acts of transnational corporations registered within the State which negatively impact the enjoyment of human rights by indigenous peoples in territories outside of the State. The results of this questionnaire should be posted on-line to ensure that they are accessible to civil society actors. JCAP further recommends that the questionnaire should include the following questions to facilitate critical evaluation of the effectiveness of the measures:

- Has the State mandated individuals or institutions to prevent or sanction acts of transnational corporations registered within the State that negatively impact the enjoyment of rights of indigenous peoples in territories outside the State? If so:
 - What budget has been allocated to support the mechanism?
 - Has the mechanism been empowered to address complaints made by individuals, communities or States concerning alleged violations of the rights of indigenous peoples?
 - Has the mechanism been empowered to impose enforceable sanctions?
 - Has the mechanism been empowered to address violations of property rights, including the communal property rights of indigenous peoples?
 - Does access to the mechanism require the corporate entity to submit voluntarily to the jurisdiction of the mechanism?
 - What measures has the State taken to ensure the independence of the mechanism?
 - Has a process of review or consultation been implemented to monitor the work of the mechanism to ensure that it is working effectively?

The Expert Mechanism on the Rights of Indigenous Peoples has used questionnaires effectively to solicit valuable information on challenges and best practices relating to access to justice for indigenous peoples and strategies to implement the Declaration on the Rights of Indigenous Peoples (A/HRC/24/51). The dissemination of a questionnaire to States would facilitate State engagement on matters of importance to the Working Group and would contribute new and valuable information to the Working Group concerning present practices aimed at facilitating transnational corporate accountability.

Recommendation - JCAP recommends that the Working Group prepare a questionnaire for distribution to States that requests them to report on the legislative or administrative measures that they have taken to prevent or sanction acts of transnational corporations registered within the State which negatively impact the enjoyment of human rights by indigenous peoples in territories outside of the State. The results of this questionnaire should be posted on-line to ensure that they are accessible to civil society actors. JCAP further recommends that the questionnaire should include the following questions to facilitate critical evaluation of the effectiveness of the measures:

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- **Has the mechanism been empowered to address violations of property rights, including the communal property rights of indigenous peoples?**
- **Does access to the mechanism require the corporate entity to submit voluntarily to the jurisdiction of the mechanism?**
- **What measures has the State taken to ensure the independence of the mechanism?**
- **Has a process of review or consultation been implemented to monitor the work of the mechanism to ensure that it is working effectively?**