



**Date:** 23 June, 2023

**To:** Surya Deva, UN Special Rapporteur on the right to development

**From:** EarthRights International and Just Ground

**Re:** Information regarding two thematic reports and possible priorities for the work of the mandate during the next three years in the context of other relevant agendas

We welcome this opportunity to raise two related issues that need urgent attention in order to realize the right to development. First, as Just Ground urged the Working Group in our submission on corporate capture,<sup>1</sup> here we similarly highlight the importance and urgency of interrogating corporate power more deeply. Second, we emphasize the urgent need to address the historical legacy and current practices that cause epistemic injustice to rights holders, who have the capability, and should have the opportunity, to contribute to “reinvigorating the right to development.”

We share your concern about the need to address the corporate influence at UN institutions and their increasing control over the BHR narrative.<sup>2</sup> As we noted in our submission to the Working Group, interrogating discursive power in particular is useful for bringing to light the often under-addressed issues of corporate control over the narrative, which “creates an enabling environment for corporate capture, as corporate engagement on regulatory and political matters becomes less contested—even welcomed,” allowing corporate actors to influence institutions “in ways beneficial to them, and often harmful to rights holders and the environment.”<sup>3</sup>

We also share your focus on the absolute necessity to take rights holders seriously,<sup>4</sup> and to “[t]ransform[] the Current Model of Development”,<sup>5</sup> which we see as very much intertwined. “Centering rights holders”<sup>6</sup> is necessary and should inform how “development,” as well as remedy and accountability, is understood and practiced.

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<sup>1</sup> Just Ground, submission to the Working Group on Business and Human Rights for the Multi-stakeholder Consultation on “Corporate Influence in the Political and Regulatory Sphere” (2022) <https://www.ohchr.org/sites/default/files/2022-06/just-ground.pdf>.

<sup>2</sup> Surya Deva, ‘From “Business or Human Rights” to “Business and Human Rights”: What Next?’, in Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business* (Elgar 2020).

<sup>3</sup> Just Ground submission (n 1).

<sup>4</sup> Deva, 2020 at 10. *Also see*, Deva intervention at 2021 UN Forum, urging the BHR community to give a more central space to Global South actors at the Forum, and to get out of the “Geneva bubble” and look at other models of living and doing business.

<sup>5</sup> Deva, 2020 at 12.

<sup>6</sup> UN Working Group on the issue of human rights and transnational corporations and other business enterprises, ‘Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’ (July 2017) UN Doc A/72/162.

Communities, movements, and HRDs have long offered their expertise and lived experience to push for a more socially just form of development, and they need support in these efforts. This can also be aided by confronting and addressing the mutually reinforcing aspects of epistemic injustice- marginalization from knowledge-production practices and prejudicial credibility allocations.<sup>7</sup>

We hope that the mandate for the next three years focuses on reorienting the discourse in order to revitalize the right to development in a rights holder-centered way.

### **For the HRC Report (September 2023) – “Reinvigorating the right to development: A vision for the future”**

#### ***What are the key remaining challenges in the effective realization of the right to development at different levels?***

Some of the main challenges involve who are considered “development partners” and whose visions and interpretations of “development” dominate the discourse. This is closely tied to the corporate capture of various UN processes, which has led to a re-orienting of the discourse of development to prioritize corporate interests. The undue influence of corporate actors in policy-making, agenda setting, and knowledge production makes it more and more challenging for dissenting and alternative positions to be taken seriously. When market-driven models of development continue to dominate, and corporate actors continue to be treated with more legitimacy and authority than rights holders, the right to development simply cannot be realized.

These practices can be understood as exercises of corporate power. For example, exercises of discursive power used by corporate actors include efforts to “shap[e] identities”<sup>8</sup> and “frame actors.”<sup>9</sup> We increasingly see the private sector described as “partners in development” while HRDs and communities are often labelled as “anti-development” for questioning or challenging projects that will have negative impacts. Even if and when they are invited into deliberative spaces such as the UN Forum on Business and Human Rights or the World Bank meetings, their role is not that of a “partner.”

Discursive power also “refers to the ability by business and business associations to frame and define public interest issues in their favor.”<sup>10</sup> This is very clearly seen in how the framing of the issue of development has shifted more and more towards an emphasis on capitalistic economic development. The language around “sustainable

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<sup>7</sup> Katherine McDonnell, ‘Epistemic injustice and remedy: Can BHR ever really ‘centre’ rights holders?’ (2023) Australian Journal of Human Rights, DOI: 10.1080/1323238X.2023.2221175.

<sup>8</sup> John Ruggie, ‘Multinationals as Global Institution: Power, Authority and Relative Autonomy’ (2018) 12 Regulation & Governance 317, 325.

<sup>9</sup> Doris Fuchs and Markus Lederer, ‘The Power of Business’ (2007) 9,3 Business and Politics 1, 10-11.

<sup>10</sup> Ruggie, 2018 at 321.

development” in particular is being used by corporate actors to push forward their agenda.<sup>11</sup>

These practices can also be understood through the lens of epistemic injustice, by excluding rights holders from contributing to the shared epistemic resources, and by producing and reproducing imbalanced perceptions of credibility and trustworthiness of the different actors involved.<sup>12</sup>

Despite having critical knowledge and expertise to contribute to how we can understand development, there is a “willful ignorance”<sup>13</sup> that deems visions of development that do not align with the market-friendly narrative either unintelligible or counter-productive. In many cases rights holders are even put at risk for sharing their visions or questioning the dominant interpretations of development that primarily serve corporate interests. Community leaders regularly share experiences of being labelled “anti-development” and attacked.<sup>14</sup>

### ***How could the right to development be mainstreamed and integrated into other relevant agendas (including the 2030 Agenda) at the national, regional and international levels?***

The right to development should be (re)integrated into the Business and Human Rights agenda given their obvious overlap. In the evolution of the texts on corporate accountability from the Code to the UNGPs, reference to development has been erased,<sup>15</sup> and you have noted the negative effects of “lack of coherence between the UNGPs and the SDGs.”<sup>16</sup> This integration could be an opportunity to fill some of the gaps in the BHR agenda. By centering rights holders as full participants in realizing the right to development, rather than simply treating them as recipient of “benefits” and/or sources of information, these practices could be leveraged to help contribute to a more rights-focused version of “polycentric governance” than what the UNGPs provide.

If rights holders’ visions of development were mainstreamed into the BHR agenda, it could help move away from the assumption that due diligence and remedy are only intended to ensure that a project goes forward with less harm or less resistance, towards one where it must question whether the project can and should go forward at all. And when harms occur, it can help ensure that remedy is actually adequate, appropriate and prompt.

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<sup>11</sup> Nina Kolleck, ‘How Global Companies Wield Their Power: The Discursive Shaping of Sustainable Development’ in John Mikler (ed), *Handbook of Global Companies* (Wiley-Blackwell 2013).

<sup>12</sup> See, e.g., McDonnell, 2023.

<sup>13</sup> See, e.g., Charles Mills, ‘White Ignorance’ in Shannon Sullivan and Nancy Tuana (eds) *Race and Epistemologies of Ignorance* (State University of New York Press 2007) 13-38; Gaile Pohlhaus, Jr., ‘Relational Knowing and Epistemic Injustice: Toward a Theory of “Willful Hermeneutical Ignorance”’ (2012) 27 *Hypatia* 715.

<sup>14</sup> See, e.g., Ikal Ang’elei, presentation at the 2021 UN Forum on Business and Human Rights <https://media.un.org/en/asset/k1d/k1dw70ihdb>.

<sup>15</sup> Jennifer Bair, ‘Corporations at the United Nations: Echoes of the New International Economic Order?’ (2015) 6,1 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*.

<sup>16</sup> Deva, 2020 at 9.

## **For the UNGA report (October 2023) – “Role of businesses in realizing the right to development”**

### ***How do businesses ensure that development projects do not result in environmental pollution and/or forced displacement of communities, including indigenous peoples***

Businesses largely do not ensure that projects do not result in harm. Companies may take certain actions in the name of due diligence, but rarely does this result in taking measures strong enough to avoid those harms, or even to lessen them. They may conduct consultations, but do not seek *meaningful* participation of rights holders. And the option of not going forward with a project at all does not appear to even be an option.

What’s more concerning is that corporate actors often use language to imply that the project will bring benefits to the community, but those “benefits” are often seen as such by the business rather than the rights holder. When companies enter communities, instead of true participation, they pay lip service to benefits and use CSR language in order to make the project look good. Because this engagement is not based on accurate information-sharing, the community may not fully understand or they may be misled, and thus can’t participate in a meaningful way.

In addition, the promises made often fail to materialize in practice. For example, one of the authors worked with communities forcibly displaced to make way for a Special Economic Zone. They were forced to abandon their land-based livelihoods after being relocated to a cramped resettlement site where they had no access to land, and were not provided with either replacement land or enough compensation to purchase new land. The project made promises of providing jobs, yet these were in short supply, under precarious contracts, and grossly underpaid. After almost a decade, the communities continue to face significant hardships related to their livelihoods.

In locations where regulations are non-existent, weak, or unenforced, the business sector will often cite adherence to weak local standards rather than apply stricter regulations from their own countries. States play a role in this poor enforcement as well. For example, Thailand is the first country in Asia to have a National Action Plan on Business and Human Rights (NAP), but it does not have an enforcement or monitoring system to ensure this is implemented. While it looks good on paper, there is no implementation on the ground. As other countries develop NAPs, we want to see these as something that communities can effectively apply, rather than more paper tigers.

### ***How can States and other actors (e.g., national human rights institutions, development finance institutions and businesses) provide effective remedies to individuals and communities alleging breach of the right to development?***

Right to remedy is a fundamental human right, it gives all other rights meaning. As you have noted, rights have little meaning if there is no remedy available.<sup>17</sup> It needs to be taken seriously by all actors. And it needs to be understood for what it is—actions to make good for damage caused. The alarming shift in the discourse on remedy towards language like ‘[r]emedy should not be seen as a “blame game” but rather an ordinary project contingency and a central part of a collective effort to make a positive difference in people’s lives’<sup>18</sup> significantly weakens the overall approach to remedy, limits what is available, and denies rights holders the language to share their experiences.

Remedy for development-related harms must match the extent and type of harms suffered. If a client does not have the resources available to provide adequate remedy, then they should not be going forward with the project. Similarly, when potential irremediable harms are identified, for example during due diligence activities, then the project should not go forward.

All actors must take responsibility for their part in contributing to remedy. Companies, especially clients of financial institutions, should be required to have a rights-compatible grievance mechanism in place. Financial institutions and investors can and should include this requirement as a loan condition, and should be responsible for conducting oversight to ensure that the mechanism exists and is running properly. Financial institutions must also take responsibility for their role, including providing remedy, not just “facilitating access to remedy.” The position that the IFC is currently taking on their (lack of) responsibility to provide remedy is alarming and harmful to those impacts by development projects.<sup>19</sup> International financial institutions should agree to the growing calls for a “remedy fund”<sup>20</sup> to help ensure that there are resources to provide remedy.

Rights holders should have significantly more input into remedial processes, including prevention. The community should have a role in the design of the remedial mechanism if they choose, including a leading role. And the adequacy of the remedy must be decided by the community impacted by the project. This can be facilitated by:

- **Supporting and taking seriously risks identified by communities through community-led impact assessments, and following their requests and demands on how to address those risks.** Communities are more than capable of conducting risk mapping and impact assessments. In fact, they are much better positioned to do so than companies or external consultants.<sup>21</sup>

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<sup>17</sup> Deva, 2020 at 11.

<sup>18</sup> UN Off. High Comm’r Hum. Rts., *Remedy In Development Finance: Guidance And Practice*, 5, 6 (2022).

<sup>19</sup> Joint CSO Statement Calls on IFC and MIGA to Strengthen its New Approach to Remedial Action Policy (2023), <<https://accountabilitycounsel.org/2023/02/joint-cso-statement-calls-on-ifc-and-miga-to-strengthen-its-new-approach-to-remedial-action-policy/>>.

<sup>20</sup> See, e.g., Accountability Counsel ‘Remedy Requires Real Resources’ <<https://www.accountabilitycounsel.org/institution/inadequate-remedy-for-environmental-and-social-harms/>>

<sup>21</sup> See, e.g., The Light in the Middle of the Valley KABOEDIN The Land of Wonder, Kaboedin community impact assessment report <https://www.greenpeace.org/static/planet4-thailand-stateless/2022/04/b29c2b22-kaboedin-community-report-full-english.pdf>.

- **Co-designing a grievance mechanism or agreeing to participate in a community-driven OGM (CD-OGM) if it is proposed.**<sup>22</sup> There are increased calls for community involvement in the design and operation of operational level grievance mechanisms. This has proved successful in the supply chain context, with the worker-driven social responsibility model,<sup>23</sup> and has been attempted in the context of communities impacted by development projects.<sup>24</sup> While the CD-OGM is a promising model,<sup>25</sup> given the ongoing power dynamics between companies and communities, it needs more support from outside actors.
- **Ensuring adequate resources are available to provide remedy when needed.** It is simply not acceptable for a company to financially benefit from an operation, yet not have funds to provide adequate remedy. If they cannot prevent or remedy harms that they cause, they should not be conducting the business activity.

## **For the Thematic priorities for 2023-26**

### ***What issues should the Special Rapporteur focus on during the next three years of his mandate for the effective realization of the right to development at the local, national, regional and international levels?***

The mandate should draw from the Special Rapporteur's work as part of the Working Group in prioritizing the "centrality of the rights holder" in the context of the right to development. Two key areas that demand attention are:

- Including rights holders' definitions and visions of development into legal and policy practices. This can include amplifying and supporting rights holder-led processes such as community-led natural resource mapping, impact assessments, and grievance mechanisms. Mainstreaming these activities has the added bonus of challenging corporate capture of both the narrative and institutions.
- Protecting rights holders and proactively creating safe spaces for rights holders to speak out without fear or risk of retaliation. For example, when communities seek to conduct an impact assessment or design a CD-OGM, this could be aided by the Special Rapporteur or others serving as a witness to that process and supporting it publicly. This safe space should also be for rights holders who challenge or oppose harmful development approaches.

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<sup>22</sup> See, e.g., International Commission of Jurists (ICJ), 'Effective Operational-Level Grievance Mechanisms' (ICJ 2019); United Nations Office of the High Commissioner for Human Rights, 'Accountability and Remedy Project III: Enhancing effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse' (2020) UN Doc A/HRC/44/32.

<sup>23</sup> The Fair Food Program <https://fairfoodprogram.org/about/>.

<sup>24</sup> Thilawa Community-Driven OGM (CD-OGM) proposed draft < <https://www.business-humanrights.org/en/latest-news/thilawa-community-driven-operational-grievance-mechanism-draft/>>.

<sup>25</sup> EarthRights International and Just Ground, Community-Driven Operational Grievance Mechanism Discussion Paper [https://earthrights.org/wp-content/uploads/2022/12/20221124\\_CD-OGM-Discussion-PaperFull-Name-v2-1.pdf](https://earthrights.org/wp-content/uploads/2022/12/20221124_CD-OGM-Discussion-PaperFull-Name-v2-1.pdf).



***What are the main challenges faced in realizing the right to development? Are there any good practices and effective strategies in overcoming these challenges?***

As discussed above, the central challenge is that the operating interpretation of “development” continues to be dominated by corporate voices at the expense of rights holders. Corporate capture marginalizes local knowledge. There needs to be space for alternative concepts of development to be not only given an opportunity to be heard, but for them to be amplified and put into action.

The role of the private sector as a development partner needs to be critically evaluated. Their powerful role in institutions such as the UN Global Compact, the SDGs, and the UNGPs is a source of concern for many.<sup>26</sup>

The emerging good practices are coming from the communities themselves, with support from civil society allies. Existing work on community-led development amplifies community efforts to identify, articulate and demand their development plans. Activities include:

- Community-led mapping and natural resource management plans. Communities take the lead in documenting their natural, social, and cultural environment. This information may be used for internal natural resource management, or as a starting point for impact assessments.
- Community-led impact assessments.<sup>27</sup> These have taken different forms and go by different names, but all center on those from the potentially impacted area identifying the potential environmental, livelihood, health, social, and human rights impacts of a potential project.
- Community-driven grievance mechanisms.<sup>28</sup> In this emerging model, the impacted rights holders articulate what they want the local remedial mechanism to look like and propose it to the company.
- Community development plans. The International Accountability Project's Global Advocacy Team (GAT) recently undertook important work in developing local community development plans.<sup>29</sup>

These efforts must be amplified and supported.

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<sup>26</sup> Jens Martens, ‘Corporate Influence on the Business and Human Rights Agenda of the United Nations’ (Working Paper, Global Policy Forum 2014); Deva, 2020 at 9.

<sup>27</sup> See note 23.

<sup>28</sup> See notes 26-27.

<sup>29</sup> International Accountability Project (IAP), Uniting for community-led development <https://accountability.medium.com/uniting-for-community-led-development-a9f1dba8591e>.