

**Mandate of the Working Group on the issue of human rights and
transnational corporations and other business enterprises**

REFERENCE: SPB/SHD/NF/NA/ff

23 October 2020

Dear Mr. Ayuush,

I am writing to you, in your capacity as Chief of the Right to Development Section at the Office of the High Commissioner for Human Rights (OHCHR), further to your letter of 16 September 2020 inviting all special procedures mandate holders to review the draft guidelines on a human rights framework for asset recovery and to share comments and views on the text, particularly in relation to good practices, such as national laws, bilateral agreements or relevant jurisprudence.

I note that the text of the draft guidelines is a work in progress resulting from the outcome of two expert consultations and extensive substantive research involving international institutions and experts in the field of human rights and asset recovery, including relevant United Nations agencies and independent human rights mandate holders. I was honoured to participate in one of the expert consultations held on 10 June 2020, and commend OHCHR on its initiative and leadership on this important topic. It is especially pleasing to see that besides the draft guidelines, a model agreement and/or model legislation provisions may be developed as part of this project.

The Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR) have acknowledged that corruption significantly undermines the enjoyment of human rights. The Working Group on the issue of human rights and transnational corporations and other business enterprises (otherwise known as the Working Group on Business and Human Rights), of which I am Chair, submitted its report (A/HRC/44/43) on “Connecting the business and human rights and the anti-corruption agendas” to the 44th session of the Human Rights Council in June 2020. The report recognized that State actors and businesses may engage in corrupt activities, and clarified how corruption involving the private sector impacts rights holders by causing or contributing to human rights abuses. The report examined how the business and human rights agenda, articulated in the [Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework](#), and anti-corruption efforts, relate to each other. It demonstrated how measures to drive responsible business practice along these two dimensions can reinforce each other to ensure policy

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coherence. The report examined what measures and good practices can be taken by States, business and civil society to address corruption when it negatively impacts human rights in the context of business related activity, with respect to both the prevention of negative impacts and the provision of access to effective remedy.

As such, it is pleasing to see that the draft guidelines, at draft Principle 6, address the role of victims, stating, "Persons whose human rights have been violated as a result of corruption have a right to an effective remedy". This is an area of overlap with the Working Group's report and the Working Group makes the following observations:

1. The Working Group highlighted in its report (A/HRC/44/43, paragraph 57) that the Guiding Principles set out that States must take appropriate steps to ensure that victims of human rights abuses have access to effective remedy. The commentary to Pillar III of the Guiding Principles notes that procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome, and that States should ensure that the provision of justice is not prevented by corruption of the judicial process. This element could be added to paragraph 54 of the commentary to the draft guidelines in order to underscore the importance of addressing judicial corruption when securing access to remedy.
2. Paragraph 57 of the commentary to the draft guidelines states "When public assets are stolen by government officials, the entire population of the State should be considered the victim of this theft." The Working Group addressed the thorny issue of who is a victim in its report (A/HRC/44/43, paragraph 65). It urges the broadest possible definition of a victim, and a definition that acknowledges the extent of the impact that corruption has on the enjoyment of human rights would greatly assist. This could be made more explicit in the commentary to the draft guidelines. Furthermore, the Working Group supports the notion that the entire population should be considered as the victim when public assets are stolen. It highlighted in its report (A/HRC/44/43, paragraph 66) instances where courts have ordered a fine to be paid by way of a remedy for "social damage" and where returned stolen assets have been requested to be used for the benefit of those harmed by the corruption. Finally, in relation to paragraph 57, the Working Group concurs that rules on standing ought to be relaxed to enable the pursuit of remedy. It highlighted in its report (A/HRC/44/43, paragraph 66) how in France, Transparency International, as a French non-governmental organization, could initiate a civil action in a case involving assets allegedly misappropriated by the son of a leader of Equatorial Guinea. The granting of standing to civil society groups to pursue access to remedy is worthy of further reflection in the draft guidelines as it may well be the only possibility that an individual or community has of access remedy.
3. It is important to note that access to remedy should be available without discrimination. States should take appropriate affirmative action to provide access to effective remedy to any marginalized or vulnerable groups who may be deprived of their human rights due to corrupt activities (a point made by the Working Group in A/HRC/44/43, paragraph 67) and which could usefully be included in the commentary to draft Principle 6.

A general observation is that the draft guidelines do not spell out the linkages between corruption and business activities and the relevance of the Guiding Principles on Business and Human Rights in this regard. Corruption is all too often seen as a political issue that is somehow off limits for human rights bodies. The draft guidelines might benefit from some more information about why human rights bodies should routinely be including corruption within their ambit. Corruption leads to human rights abuses but this is not always obvious to all actors. One way in which the connections can be further articulated is through exploring the linkages with the Guiding Principles on Business and

Human Rights, and the connections between anti-corruption efforts and the business and human rights agenda. This is work that the Working Group started in A/HRC/44/43 but it is by no means complete.

Finally, during the consultation held on 10 June 2020 the importance of going beyond the international instruments and referring to relevant regional treaties, e.g. the European Convention on Human Rights, the African Charter on Human and Peoples' Rights, and the American Convention on Human Rights, was mentioned. The Working Group has seen, through its own country visits and regional peer learning activities, that States are usually greatly invested in their respective regional treaties, and also in the question of being held accountable in regional courts with regional consequences for non-compliance. This is an important element for the draft guidelines to cover and they would benefit from more research on the ways in which the different regional human rights systems have dealt with the question of corruption and asset recovery.

One of the key objectives of the Working Group's work is to ensure better policy coherence within States, among States and regional entities and also within the United Nations System. As such, we are pleased to have the opportunity to engage in this consultation process and stand ready to assist as the draft progresses.

Yours sincerely,



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Chair

Working Group on Business and Human Rights