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HUMAN RIGHTS COUNCIL  
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**PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL,  
POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING  
THE RIGHT TO DEVELOPMENT**

**Written statement\* submitted by the Center for Human Rights and Environment,  
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.

[26 May 2008]

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

### **Closing the Governance Gap**

*Recommendations for the Continuation of the Mandate of the UN Special Representative on Human Rights and Transnational Corporations and other Business Practices.*

In response to the report released on April 7 2008, by the UN Special Representative of the Secretary General (SR) on the issue of human rights and transnational corporations and other business practices, we submit our recommendations to the **Human Right Council** and to the **States** that are deliberating and defining the way forward with respect to the recommendations of the SR, and to an eventual reinstatement of the mandate, which we strongly encourage.

We strongly support and stress the SR's statement in his 3<sup>rd</sup> report that **“the root cause of the business and human rights predicament today lies in the governance gaps created by globalization”** (para.3) And we strongly encourage the Human Rights Council and member States to *seriously consider and adopt* the recommendations of the SR, grounded on the 3-pronged framework of the *State Duty to Protect, Corporate Responsibility to Respect*, and the need for *more effective access to remedies*. These recommendations form a solid basis upon which to effectively continue to advance the UN's work on corporate accountability and human rights.

As you know, the multi-year and multi-stakeholder process leading up to the issuance of the SR's report evolved over several years, and was predated by a much debated and conflictive process amongst actors contributing to this field, including States, corporations and civil society. The SR's mandate and the process which ensued over the period of time that transpired during his two consecutive mandates beginning in 2005, represented an important and collaborative step forward and advancement of discussion amongst the most active participants in this debate and its evolution.

We agree with the SR that, “the business and human rights debate currently lacks an authoritative focal point.” (para 5). That “authority”, which is central to advancing this agenda, is lent to the debate by the existence of the SR and the mandate, and hence, **the reinstatement of both, is fundamental for the continuity of the UN's global effort to improve corporate accountability in the human rights realm.**

The SR stresses the need for “all social actors – States, businesses, and civil society ... to learn to do many things differently” (para.7). We agree strongly with this vision. The SR's recommendations, reflect in our view, a balanced and realistic approach which offers a workable and differentiated political platform on which to advance the evermore important responsibility before us, which is to protect victims of human rights violations perpetrated by business actors, offer reliable and effective remedies in the face of violations, while duly taking into account the State Duty to protect, and at the same time, encourage and engage the corporate sector to assume their due diligence and responsibility to respect human rights.

*We take this opportunity to stress the importance of several of the SR's recommendations, the appropriateness of the SR's approach to carrying forth the agenda of promoting human rights in the corporate sphere, and the fertile grounds which exist, as the SR has said to the*

*Human Rights Council, to “make a singular contribution to closing the governance gap in business and human rights”. (para.107)*

It is clear from research during recent years, and the wealth of information available on corporate abuse of human rights, that States’ capacity to effectively address the action of corporations *vis a vis* their international responsibility and *duty to protect* human rights, varies largely, as do the effectiveness of numerous forums that exist today offering victims diverse channels (voluntary or binding) to seek redress from corporate abuse.

Some of these forums are for example, State national courts, national ombudsmans, National Contact Points of the OECD, Inspection Panels such as those of the World Bank or the Compliance Advisory Ombudsman of the IFC, corporate voluntary principles, the UN Global Compact, and the safeguards of other public international agencies or of Export Credit Agencies. Each of these forums offer highly varying sets of norms and differing degrees of channels or guarantees to uphold the norms under which they operate. All of these, in some direct or indirect way address human rights issues, some but not all mention them explicitly. Some of these norms and channels of redress are stronger than others, some are extremely weak or completely ineffective. None however, *fully guarantee* the full range of human rights established by the Universal Declaration on Human Rights and subsequent Human Rights treaties, declarations, etc..

This disparity and incomplete nature of the existing norms and channels, and the incapacity of the various parts of the system (which can include States, multilateral agencies, private financial institutions or companies), taken collectively, is what the SR refers to as the “governance gap”. **This gap is both relevant to the accountability limitations of the various forums themselves, as well as the incoherence of the relationship between the system’s parts.** The example given by the SR on the conflicting interests relative to the NCP forums of the OECD Guidelines for Multinational Enterprises is telling: “The housing of some NCPs primarily or wholly within government departments tasked with promoting business, trade and investment raises question about the conflicts of interest.” (para. 98) In the words of the SR, “insofar as governance gaps are at the root of the business and human rights predicament, effective responses must aim to reduce those gaps .... [and] more coherent and concerted approaches are required” (para.17).

**Reducing the governance gap in each forum, and infusing the over all system with more coherence should be the fundamental objective of the task before the UN system relative to corporate activity and human rights,** and particularly of the Human Rights Council and other relevant UN agencies that are today addressing corporate behavior and have the opportunity to shape the future agenda of the UN’s work on corporate accountability and human rights.

*By following the SR’s recommendations to implement an agenda based on the SR’s 3-pronged approach, the UN would make **an enormous** contribution to strengthening the capacity of the international system in upholding human rights, by focusing on the systems’ deficiencies (its’ gaps) , but doing so, in a way as to differentiate the responsibilities, duties, and rolls of each.* Such an approach, if adopted, would also, to the benefit of the member States, provide critical assistance to many States to improve their own capacity to control corporate actors and improve their own human rights performance and comply hence with their obligations under international law, i.e. the State’s “Duty to Protect”.

The other fundamental issue that cannot be left out in the follow-up to the SR mandate (and what we suppose will be an extension of this mandate) is the **strengthening of the existing mechanisms of redress available to individuals that suffer violations of human rights at the hand of corporate actors** or due to the failure of States to protect human rights in the context of economic activity that places such rights in at risk. The SR rightly points out that “effective grievance mechanisms play an important role in the State duty to protect ... as well as in the corporate responsibility to respect”. (para.82)

It is critical to understand that the best policy, national laws, or human rights treaties, relative to corporate action, are worthless, or in the words of the SR, “will have little impact without accompanying mechanisms to investigate, punish, and redress abuses”. (para. 82). In this respect, the SR also rightly points out that redress can occur through legal adjudication processes (para 83) or through non-judicial mechanisms (para.84). In the end, it is not important whether the solution is found through binding or non-binding frameworks (a discussion that made past attempts to find the right solution very difficult), but whether indeed a solution is found.

The SR stresses that the existing “patchwork of mechanisms remains incomplete and flawed. It must be improved in its parts and as a whole”. (para.87). He goes on to say, relative to the access remedies available to victims, “considerable numbers of individuals whose human rights are impacted by corporations, lack access to any functioning mechanism that could provide remedy.” (para.102)

Through our own advocacy work, we have utilized and tested a great many of these mechanisms in the attempt to defend victims of human rights violations perpetrated by corporations, including, the OECD Guidelines, the IFC safeguards and CAO Ombudsman, the Equator Principles, the international Human Rights tribunals, national courts, and many others, and could not agree more with the SR’s observation and evaluation of available mechanisms. It is hence, **extremely important that the future of the mandate addresses the imperative need to strengthen redress mechanisms. *This objective should be a fundamental and integral aspect of whatever solution is devised*** to carry forth the UN’s human rights and business agenda, as it *is the central and perhaps the most important piece for the present, past and future victims of corporate violations of human rights.*

As the SR has stated in his report, “the international community is still in the early stages of adapting the human rights regime to provide more effective protection to individuals and communities against corporate related harm.” The weakness of the present redress mechanisms are such that the “governance gap” which the SR has correctly identified, makes many of those mechanisms or parts of those existing mechanisms, ineffective or useless.

Some day, perhaps in a not too distant future, we shall create an International Corporate Court to receive complaints of corporate abuse. What we need today, however, is to strengthen the governance mechanisms that we have now at the national level, and at the public multilateral agencies and institutions, at the UN and regional human rights institutions, and in corporations themselves, so that they render more effective corporate accountability on human rights.

**That objective is duly served by promoting a business and human rights agenda that focuses at identifying the existing gaps and incoherences of our present governance system relative to corporate activity, closing that gap, and by offering victims of human rights violations perpetrated by corporations, effective remedies, be they in voluntary, binding or other types of legal, quasi-legal, or non-legal forums.**

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