

Statement by Alfred de Zayas, Independent Expert on the Promotion of a
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Transnational Corporations must be legally accountable for the negative human rights impacts of their activities: Workshop at the Human Rights Council 11-12 March 2014

Excellencies, distinguished delegates, ladies and gentlemen:

My name is Alfred de Zayas . Since May 2012 I am the first Independent Expert on the Promotion of a Democratic and Equitable International Order of the UN Human Rights Council. I am honoured to have been invited to share some views with you at this important workshop, the convening of which I endorse because of the role that Transnational corporations and other business enterprises play in today's globalized world and the impact that their activities have on the international order, which we all want to be more peaceful, more democratic and more equitable.

We all recognize and salute the pioneering work of **John Ruggie** and of the Working Group on the issue of Human Rights and Transnational Corporations and other business enterprises. The purpose of this workshop is to explore how to build on the consensus on the **Guiding Principles on Business and Human Rights**, how to continue the momentum, how to engage a process that will in itself keep the issue in the public eye and allow for fruitful debate of all of its implications.

The drafting of a legally binding instrument concerning the human rights impacts of the activities of Transnational Corporations (TNCs) and other business enterprises has been proposed. Such a treaty or convention should strengthen the United Nations "protect, respect and remedy" framework of the Guiding Principles, which were unanimously endorsed by the Human Rights Council in 2011. It should also take into account good practices worldwide and in particular the concrete progress made in National Action Plans.

As a former Secretary of the Human Rights Committee and retired Chief of the Petitions Section at the Office of the United Nations High Commissioner for Human Rights, I am a strong believer in hard law, on the codification of norms and the creation of mechanisms that ensure and promote transparency and

accountability. Many treaties and conventions have begun as soft law, as non-binding declarations, but all too often declarations are but pious words, constituting no more than lip-service to human rights and no real progress is ever achieved toward ensuring the greater enjoyment of human rights by all. This justifies the transformation of voluntary commitments or pledges into legally binding conventions with appropriate systems of monitoring by way of reporting, comparing experiences, identifying obstacles, proposing pragmatic and implementable solutions.

The vast and complex area of business and human rights is not merely the “flavour of the month”, but a continuous concern in our increasingly globalized, inter-dependent and inter-related world. Indeed, transnational corporations are hugely important international players and their activities impact the international order in multiple ways. Transnational corporations provide employment to millions of persons, promote the exchange of technology and ideas, and have a significant potential to contribute to a more stable and peaceful international order. This workshop should further explore the positive aspects of globalization.

Although TNCs are not States, they inter-relate with sovereign States and exercise economic power sometimes greater than that of some States. Bearing in mind that TNCs are not democratically elected wielders of power, and have no democratic legitimacy other than their own private-sector instruments of incorporation, the international order of the contemporary globalized economy requires that TNCs observe a degree of transparency in their activities and put into operation an effective mechanism of accountability.

Every stakeholder that exercises power must observe national and international standards for the protection of human rights in the performance of its activities, including national and international standards in the fields of labour law, housing and the protection of the environment. In order to ensure the proper application of these standards, the norms should be accompanied by appropriate implementation mechanisms as well as effective complaints and remedy procedures. The principles of State responsibility should be applied *mutatis mutandis* to the activities of TNCs.

While TNCs create wealth, they also draw significant profits. An equitable international order requires that these profits be equitably shared with the

peoples of the countries where the wealth originates. It is also necessary that TNCs bear a fair share of taxation and that they not be allowed to escape taxation by being incorporated in fiscal havens, or enjoy special exceptions and privileges, which are frequently adopted as a result of political pressures exercised by specialized lobbies, whose activities are seldom transparent and democratic.

Among possible recommendations, the Independent Expert suggests that the workshop consider proposing to the Human Rights Council that a mechanism be developed whereby States would report on the activities of TNCs registered or operating in their countries, and that the TNCs themselves should be invited to report to the Human Rights Council, based on the fruitful experience of the UPR process.

Moreover, victims of violations of human rights resulting from the activities of TNCs should be able to complain to the appropriate United Nations Treaty bodies, such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights pursuant to their respective optional protocols. Gross violations of human rights by TNCs should be justiciable not only in domestic courts but also before international tribunals.

In particular, the Independent Expert welcomes developments in the strengthening of international criminal law, particularly with respect to environmental damage caused by oil prospecting, fracking, mining activities, transport, storing and disposal of dangerous substances, logging of rain forests, etc. The application of international criminal norms should not be limited to the imposition of monetary fines, which can be easily absorbed by TNCs. The principle of personal penal liability should be established in law and practice, so that individuals who engage in corrupt activities such as bribery of public officials or who deliberately break the applicable norms of environmental protection and ecocide are also subjected to penal sanctions, including imprisonment. States should adopt appropriate national legislation in this regard as well as enabling legislation to allow domestic execution of judgments of international tribunals.

Indigenous populations are particularly vulnerable to TNCs and other business activities, as was highlighted by the Working Group on Human Rights and Business, which dedicated its first thematic report to the General Assembly to

this issue (A/68/279). Again, the UN Guiding Principles on Business and Human Rights provide an authoritative guide for States, business enterprises and indigenous peoples as to how to meet international standards with regard to preventing and addressing adverse business-related impacts on the human rights of indigenous peoples and achieve appropriate redress. TNCs should educate their executives and personnel in the fundamentals of human rights law and in particular in the existing jurisprudence and implications of Article 1 common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which stipulates in part: “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

Garnering consensus in the Human Rights Council for the UN Guiding Principles on Business and Human Rights was an impressive step in the right direction. It was the first time ever that the principal UN body dealing with human rights endorsed a normative text on any subject that governments did not negotiate themselves. Every single Council member was part of the “democratic” process that adopted the Guiding Principles by consensus.

Needless to say, I am aware of scepticism in some quarters and the defeatist argument of so-called “treaty fatigue”. I am also aware of the fear expressed by some that greater regulation might result in lesser investment worldwide and therefore less employment and less wealth. Personally, I am not persuaded, because I believe that when TNCs accept the necessity of normative regulation, they will adjust accordingly, and they will still make substantial profits in their business activities. I believe that the Guiding Principles were too long in coming, that an equitable international order needed such principles half a century ago, and that the time has now come to move forward with these principles so as to give them greater legal force. Finally, I encourage States to continue developing their National Action Plans (NAPs) on business and human rights, and to engage constructively in this discussion, about whose outcome I remain optimistic.

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