

## **Workshop on Human Rights and Transnational Corporations- Paving the Way for a Legally Binding Instrument**

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Presentation by Carlos Lopez\*

Thank you Ambassador. It is a pleasure and honour for me to accept your invitation to share my views regarding a new legally binding instrument on transnational corporations and human rights. I join the other speakers and delegates in congratulating the Mission of Ecuador and the Mission of South Africa for this much needed initiative.

This debate is indeed urgently needed and it is timely that it takes place now, six years after the adoption by the Human Rights Council of the “Protect, Respect and Remedy” Framework and three years after the adoption of the Guiding Principles on Business and Human Rights, and. But the idea of an international treaty in this field is old - it was suggested to John Ruggie to consider during his tenure as Special Representative of the Secretary-General, but it was sidelined. More recently, in 2011, John Ruggie himself suggested an “intergovernmental process of drafting a new international legal instrument” as an option to clarify the applicability of standards on gross human rights violations to business corporations. Partly to support this suggestion, many non governmental organisations issued a joint statement in May 2011 requesting the Human Rights Council to mandate the newly established Working Group on Business and Human Rights to analyse and report on the options for an international legal instrument. Regrettably, that suggestion was not taken up then.

We are now here at a happier juncture, in which more and more States and stakeholders seem to be interested in carrying out a more serious discussion on this topic.

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I believe that a legally binding instrument is an effective and appropriate response to many of the issues that arise in the context of the activities of transnational corporations and their impacts on human rights. And my organization, the International Commission of Jurists (ICJ), supports this initiative on the basis of legal and factual analysis. But I also want to make clear that a treaty is not, and should never be seen as, the only response, nor is it the ultimate answer to the problems in this field.

First, let me quote former Secretary General of the United Nations, Kofi Annan, who in his foreword to the UNODC Convention on transnational organized crime and its protocols stated:

“With the signing of [this treaty] in 2000, the international community demonstrated the political will to answer a global challenge with a global response. If crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means. If the enemies of progress and human rights seek to exploit the openness and opportunities of globalization for their purposes, then we must exploit those very same factors to defend human rights and defeat the forces of crime, corruption and trafficking in human beings.”

I am not suggesting here that issues concerning business and human rights can be equated to transnational organized crime but I would like to highlight Kofi Annan’s key message: transnational transgression of norms call for responses at the transnational level. These responses should be based on Rule of Law principles and oriented to the protection of human rights. Such collective responses should tackle now not only crime, corruption and human trafficking but a series of other transgressions of fundamental norms, including economic complicity with human rights abuses.

To add value, a treaty should consolidate existing progress but also innovate in certain areas. Business actors have already been addressed in various ways in

existing treaties, notably -in the human rights field-, in the Convention on the Rights of Persons with Disabilities, in several International Labour Organizations (ILO) Conventions and as part of the category of “legal entities” in the Optional Protocol on Sale of Children. A new treaty should not repeat or duplicate the provisions of other treaties, nor should it go into areas that are better addressed by organizations such as the ILO and/or closely coordinated with it.

But a new treaty can and must play an important role in reaffirming and consolidating the achievements contained in dispersed sources such as general comments, regional and national jurisprudence, and non binding international instruments. For instance, it would be right that a treaty contains language that reaffirms States’ duty to protect against third party infringement of rights and businesses’ responsibility to respect human rights, including by carrying out due diligence.

In so doing, a new treaty in the field of business and human rights will contribute to the consolidation of a rule of law approach to transnational business in which no business corporation, no matter how big it is, will be above the law or escape from the jurisdiction of courts. In time, with wide ratification, a treaty will be a key element in the achievement of a level playing field for all business actors on a global scale, together with other instruments such as the Convention against Corruption.

The focus and content of an international treaty is a matter for discussion. Some commentators have suggested the need to restrict its scope to the most egregious of human rights violations and I can see that there are good reasons, and a certain urgency, to address those violations. But I am less convinced that these issues should be the only ones to be dealt with in an international treaty. To start with, the concept of “gross” or “egregious” violations is an open concept covering not only crimes under international law but also other violations of civil and social rights, as established by international jurisprudence and international instruments. In any case, an enumeration of those “egregious” violations has to

be made if a treaty aims at providing for legal liability for legal entities that engage in the commission of those violations.

Without going too much into the detail of the contents of a possible treaty in this field – and I agree that issues concerning international cooperation and oversight mechanisms should be considered as part of the discussions - I would like to expand on at least a couple of areas where I think a treaty should make a crucial contribution to the improved protection of human rights.

These two areas concern the State protection of human rights, including the prevention of abuses by third parties, and accountability and remedies. These two objectives may be accomplished by establishing, as a key element of the treaty, the requirement of domestic legislation enacting corporate legal liability for certain violations of human rights, which should be clearly defined in the text of the treaty, and the duty to provide for remedies for those violations.

Availability and effectiveness of remedies to provide redress to those who suffer harm as a result of businesses' acts or omissions is perhaps the area where there is more pressing need for action, including, but not only through, new international standards.

International human rights treaties, such as Article 2 of the International Convention on Civil and Political Rights, guarantee the right to access to a remedy and that right extends to instances of violations of rights by third parties. But, practice shows that there are significant obstacles, normative and practical, to the application of this right in the context of transnational business abuse of rights. Those difficulties have to do with, amongst other things, prevailing rules on jurisdiction, the legal capacity of alleged victims to sue, equality of arms, enforcement of judgements and knowledge and awareness-raising among the affected people.<sup>1</sup>

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<sup>1</sup> See generally, Skinner, G, McCorquodale, R, De Schutter, O. "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business", ICAR, CORE and ECCJ, 2013.

The 2008 UN Framework on Business and Human Rights rightly recognised in relation to access to remedies that the “patchwork of mechanisms remain incomplete and flawed. It must be improved in its parts and as a whole.”<sup>2</sup> The situation does not seem to have improved since then. The unanimous recognition that the area of remedies needs more urgent attention led the Human Rights Council to request the newly created Working Group on Business and Human Rights “to explore options and make recommendations...for enhancing access to effective remedies”,<sup>3</sup> a request which regrettably the Working Group has not heeded until today.

There is an important accountability deficit in the area of business human rights responsibilities. There are in fact very few examples of business corporations being held to account due to a number of factors. Some groups have used the system of National Contact Points established under the Organization for Economic Co-operation and Development Guidelines on Multinational Enterprises, with mixed results. While civil litigation is theoretically possible in all countries it is overall rarely used. In most cases litigators have preferred to sue in a small number of North American and European countries; an option that entails additional difficulties for the plaintiffs in terms of distance, transport, and knowledge of the forum. In any case, there can be huge variations in domestic law which creates a problem for the application of rules on choice of law in private international law. Most existing international instruments in the field of business and human rights are conceived pre-eminently as promotional tools for positive engagement, rather than as accountability tools.

The obligation of States to protect rights against abuse by third parties, including by business corporations, is widely recognised,<sup>4</sup> as it is the duty to establish a national legal framework as a key element for the protection of rights. While many States have in their national legal framework provisions establishing legal liability of legal entities (including business corporations) many others do not or only have it partially. The result is a patchy system of legal accountability that

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<sup>2</sup> UN Framework “Protect, Respect, Remedy”, A/HRC/8/5, para. 87

<sup>3</sup> A/HRC/RES/17/4, Operative paragraph 6(e)

<sup>4</sup> John Ruggie Report, A/HRC/4/035, paras 10 and ff

leads to protection gaps that are more acute in certain jurisdictions than in others.

Research carried out by the ICJ,<sup>5</sup> and by other groups,<sup>6</sup> shows that legislation and practice that protects rights *vis a vis* private actors (i.e. businesses) is generally insufficient and is widely diverse. These findings are consistent with those of comparative research commissioned by the European Union in relation to criminal legal liability of legal entities (including business enterprises).<sup>7</sup> Nearly 50 per cent recognises legal liability of legal entities for all offences. Countries that adopt legal liability of legal entities only for specific offences do so mostly with regard to trafficking in human beings, sexual exploitation of children and child pornography, environmental crime, illicit trade in human organs and racisms and xenophobia.<sup>8</sup>

The main conclusion we can draw from this overview of States' practice is that there is a strong correlation between the recognised offences susceptible to be committed by legal entities and the international conventions that require States to act in relation to human trafficking, child pornography and others.

Thus, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children and Child Pornography provides, in Article 3.4, a requirement for States party "to establish the liability of legal persons" for sexual exploitation, transfer of organs, forced labour, illegal adoption of a child, child prostitution.<sup>9</sup> This Convention together with The Protocol to the Convention against Organized

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<sup>5</sup> See country studies on Access to Justice: Human Rights Abuses involving corporations, at <http://www.icj.org/category/publications/access-to-justice-human-rights-abuses-involving-corporations/>

<sup>6</sup> Ramasastry, A, and Thompson, M. Commerce, Crime and Conflict: Legal Remedies for Private sector Liability for Grave Breaches of International Law, FAFO 2006; Oxford Pro Bono Publico, Access to Justice, 2008.

<sup>7</sup> *Liability of Legal persons for offences in the EU*, G. Vermeulen, W. De Bondt, Ch. Ryckman, IRCP-Series, Vol. 44, Antwerpen, 2012- p. 79 and ff

<sup>8</sup> Ibid. p. 83

<sup>9</sup> See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002. Article 3.4 of the Optional Protocol builds on the model previously adopted in the UN Convention on organized crime and the Convention against corruption, among others.

Crime to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; the 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law;<sup>10</sup> the ICC Statute; the Basel Convention on the Control of Hazardous wastes and their disposal; and, several ILO Conventions have provided the impetus for this, albeit still limited, progress in national legal frameworks for the protection of human rights. I suggest that a new convention in the field of business and human rights will be another effective instrument in the hands of States to improve their legal framework of protection for better legal protection of human rights.

Thank you, Ambassador.

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<sup>10</sup> Council of Europe, Convention on the protection of the environment through criminal law, adopted on 4 November 1998, Strasbourg  
<http://conventions.coe.int/Treaty/EN/Treaties/Html/172.htm>