



HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

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

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UN Working Group on Business and Human Rights statement at a workshop organised by the Permanent Mission of the Republic of Ecuador on “Human Rights and Transnational Corporations: Paving the way for a legally binding instrument”

11 and 12 March 2014, Geneva

On behalf of the UN Working Group on Business and Human Rights, I wish to express my gratitude to the Permanent Missions of the Republic of Ecuador and South Africa for inviting us to this workshop. The subject matter of this meeting is of direct interest to the mandate of the Working Group, particularly as it reminds us of the enormity of the task with which we are seized and the growing impatience among many victims and stakeholders who demand accountability, justice and redress in cases of business-related human rights abuses.

This meeting, as set out in the concept note, seeks to sensitize the international community about the need for an international binding instrument on business and human rights and the steps that could be taken towards this objective. The Working Group had the opportunity to meet with the Permanent Mission of Ecuador in 2013 when it learned about its general proposal. As expressed by some stakeholders, the underlying assumption behind the formulation of a treaty is that it will deliver:

- a) Corrections to the inadequacies in existing bilateral and multilateral investment treaties and the arbitration courts that settle disputes related to them, which often do not leave enough space for States to protect their citizens against adverse corporate impacts while providing full protection to investment;
- b) Legal obligations to force States that have so far been reluctant to adopt appropriate prevention and remedy policy and regulatory frameworks in line with the UN Guiding Principles on Business and Human Rights, including overcoming legal and practical barriers to judicial remedy; and
- c) Clear terms of cooperation needed between home and host States, especially with regards to corporate liability issues.

These are legitimate expectations. Independently of whether a treaty process is kick-started now or later, the Working Group believes the international community has secure conceptual and practical building blocks in the UN Guiding Principles that can move practice forward in both the areas of prevention and remedy.

First, it bears repeating that the current authoritative, normative framework on business and human rights endorsed in 2011 by the Human Rights Council by consensus – the UN Guiding Principles on Business and Human Rights - derives directly from and elaborates on existing legal obligations that require States to ensure that human rights are protected against abuse by *all* companies - Transnational Corporations (TNCs) as well as national companies - and that victims of abuse have access to effective remedy. Today’s debate should carefully consider the factors that impede State implementation of existing legal obligations in this space and whether and how a new legal instrument would overcome such factors, as well as the current implementation gap.

Second, great care should be taken to guard against the risk of reversing or undermining the clarity as well as the regulatory and political momentum gained so far by the UN “Protect, Respect and Remedy” Framework and the Guiding Principles. The Guiding Principles provide a holistic approach for prevention and redress, a formula that better equips us to tackle the challenges of governance gaps created by globalization, and a platform for multiple and mutually reinforcing avenues to shape corporate conduct via human rights treaties as well as market regulation. This is known as the “smart mix” of measures - national and international, mandatory and voluntary - to foster business respect for human rights.

On the first day of this workshop, the Working Group heard encouraging and interesting perspectives from experts, advocates and States on this issue and many truths were spoken. Indeed, victims need to be placed at the heart of our discussions and States need to demonstrate their commitment to the Guiding Principles by adopting National Action Plans and working to overcome existing barriers to corporate accountability. The Working Group understands the importance of building a robust global business and human rights regime and it believes that the Guiding Principles should remain at the core of international efforts to continue moving forward by, for example, activating greater international and domestic monitoring over State and corporate performance on business and human rights. The organic and unique character of the Guiding Principles, such as their articulation of the distinct and complementary duties and responsibilities of States and business and their focus on preventing and addressing adverse business human rights impacts, make them sufficiently robust and coherent.

Third, it is important to acknowledge that the business and human rights environment is not a blank slate. It has a rich and vibrant history with valuable lessons that we must not ignore. One essential lesson is that progress requires having spaces for constructive dialogue as well as consensus among States, business and civil society. Conflict and stalemate undermined previous attempts to formulate business and human rights rules. Our recommendation as a Working Group is that we do not break the lines of communication among stakeholders. We need to build on the common understanding and consensus created so far. It should not be taken for granted. The Working Group encourages interaction among States, business and civil society not only at the global level but at the domestic level too. Different sides will not always agree on everything, and multi-stakeholder interaction must not relieve States of their duty to protect human rights and the need to regulate this space. Multi-stakeholderism is not a synonym of voluntarism. Interaction and dialogue can bring the level of coordination, information sharing and pressure that can trigger policy and regulatory innovations based on the “smart mix” that combines market incentives and disincentives with more traditional human rights regulatory tools, and which can be formulated and implemented to deliver results today.

Fourth, it is imperative that the direction of any further development is based on rigorous, technical assessments and evidence of existing challenges and barriers. The Working Group, for example, has supported and provided input since last year to the study commissioned by OHCHR on the matter of corporate liability for business involvement in gross human rights abuses. This study investigates legal and practical barriers to judicial remedy for victims and also outlines some of the key questions and issues that will have to be addressed in trying to move forward. I recommend you all read it and provide submissions and comments.

Now let me turn to today's challenges, opportunities and priorities to promote the global uptake of the Guiding Principles and tackle some of the harder questions relating to State monitoring and corporate accountability.

It is important to stress here that the Guiding Principles are in high demand. During our short tenure as a Special Procedures mandate holder, tasked with promoting the effective and comprehensive dissemination and implementation of the Guiding Principles, the Working Group has received more than 200 requests from all regions of the world, and from all stakeholder groups - including victims, grass roots civil society organizations, transnational NGOs, Governments, international organizations, business associations, individual companies, multi-stakeholder initiatives, and unions - to raise awareness, provide technical expertise, foster dialogue and help kick-start processes leading to: (a) the development of State National Action Plans, and to: (b) further clarification of good practice and the practical steps that States and business enterprises must take in order to meet their respective duties and responsibilities set out in the Guiding Principles. We have also received many communications concerning specific allegations of business-related human rights abuses and we have processed 19 letters of allegation as of March 2014 concerning cases in Asia-Pacific, Latin American, Western and Eastern European regions. The Letters of Allegation have been sent not only to the State concerned, but also to the business involved and to their home state where applicable. Many of these communications were issued jointly with other relevant Special Procedures mandate holders. So far, 16 of these have been made public in "Communications Report of the Special Procedures". Furthermore, the Working Group guides the Annual and Regional Forums on Business and Human Rights, with the first Forum for Latin America and the Caribbean attracting 400 representatives from the region. These Forums are key a platform for engaging stakeholders and exchanging practical experiences and challenges.

The Working Group's strategy has been to reach new audiences globally, to embed the Guiding Principles in existing governance bodies to harness their accountability process and use it in favour of human rights, and to encourage the practical implementation of the Guiding Principles on the ground. This has been done with a view to make the Guiding Principles a common point of reference in a rapidly evolving field, increase opportunities for effective remedy, and cultivate an environment conducive for the uptake of the Guiding Principles.

The journey towards wide and comprehensive implementation of the Guiding Principles has only begun and stronger commitments by States and businesses are urgently needed. At the same time, the Working Group has witnessed important progress. Take, for example, the debate initiated in the Council of Europe on a non-binding instrument on the Guiding Principles, the OECD's work to develop further guidance on human rights due diligence in the financial sector, the growing number of National Action Plans that are currently being formulated by States, the alignment of multi-stakeholder initiatives with Guiding Principles language, among many others. The annual Forum on Business and Human Rights has helped highlight these developments, including progress on uptake of the Guiding Principles in key sectors and by the business community.

Concerning our work on remedy, in compliance with Resolution 17/4 (2011) para 6 (e)¹, the Working Group has given attention to this matter by:

- Engaging with regional human rights mechanisms to make them aware of the concrete aspects of the Guiding Principles, which they can use to activate State and corporate human rights due diligence as a form of remedy and ensure that companies use their leverage to effect change in their supply chains;
- Facilitating exchanges among different types of non-judicial grievance mechanisms, such as the OECD National Contact Points, the complaints mechanisms of public finance institutions, national human rights institutions (NHRIs) and company-level grievance mechanisms to identify good practices and gaps; and
- Engaging with UN human rights treaty bodies.

The Working Group has also made strong recommendations to States to review their provisions to enhance remedy for victims of adverse corporate impacts as part of their National Action Plan processes. Finally, we continue to explore further options in our support for the study commissioned by OHCHR to assess the legal and practical barriers to effective judicial remedy in the context of gross human rights abuses. The Working Group takes the view that recommendations should be based on robust and verifiable evidence.

While the Working Group acknowledges that implementing the Guiding Principles can take many forms, it is committed to promoting State National Action Plans because they have the potential to promote constructive multi-stakeholder dialogue on issues of business and human rights and respond to the challenges posed by conflict situations. They can also be the basis for domestic-level uptake of the Guiding Principles. In addition, National Action Plans accommodate all three pillars of the Guiding Principles and they are sufficiently flexible to respond to the range of business and human rights problems that a country may face as well as the diversity of regulatory environments. Above all, National Action Plans are a key instrument to help level the business and human rights playing field around the world. Global problems cannot be solved by a small number of countries or companies alone. It is the Working Group's belief that wherever the future of the business and human rights agenda takes us, be it a treaty or the creation of a recourse mechanisms or a monitoring body, the vehicle of a National Action Plan will continue to be relevant.

Now, scaling up implementation is indispensable. The Working Group proposes to start an annual State National Action Plan review process to encourage the sharing of lessons, targeted capacity building to beef up State implementation where it is most relevant, as well as to catalyse international action through transparency.

Ladies and gentlemen, these are some of the important gains and promises of the Guiding Principles as a sui generis regime, in tune with the realities of existing legal regimes and the common global normative platform for action. The proposal for a binding instrument should not lose sight of these gains and promises. The Working Group welcomes this opportunity to join this debate.

I thank you for your attention.

Michael Addo, on behalf of the UN Working Group on Business and Human Rights

¹ Paragraph 6 (e) reads: "To continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas."