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Geneva, May 2014

**REPORT ON THE “WORKSHOP OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS: PAVING THE WAY FOR A LEGALLY BINDING INSTRUMENT”**

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## BACKGROUND OF THE WORKSHOP

The workshop was co-organized by the Permanent Missions of Ecuador and South Africa to the United Nations in Geneva on 11<sup>th</sup> and 12<sup>th</sup> of March 2014, during the week of the 25<sup>th</sup> Ordinary Session of the Human Rights Council.

The workshop aimed at contributing to clarifying the ways in which a legally binding instrument on business and human rights would provide a framework for enhanced State action to protect rights and prevent the occurrence of human rights abuses. It also aimed at discussing the difficulties faced by developing countries when trying to hold TNCs accountable of gross human rights abuses potentially amounting to international crimes, as well as the gaps under the current soft law framework.

In this regard, the discussion tackled the extraterritorial duties of states, obstacles that victims of human rights violations face when trying to access justice and adequate remedies, including national, regional and international courts and non-judicial mechanisms.

The workshop was very well attended by Member States from various regions, as well as civil society organizations with extensive experience in the human rights law field and working with individuals and communities impacted by human rights violations.

Following is a report that captures a summary of the main presentations delivered during the meeting and points made from the floor. It also includes an overview of the main elements highlighted by the discussion.

## RESUME OF THE PRESENTATIONS

*Martin Khor, Executive Director of the South Centre*<sup>1</sup>, commenced his presentation by focusing on the importance of the issue of business and human rights especially given the increasing role that transnational corporations (TNCs) play in the world. For example, the assets in the world are concentrated in the hands of fewer and fewer companies. TNCs' activities leave massive impacts on the environment, health, human activities and human rights. He referred to several examples of transnational activities that affected human rights and health of people all around the world.

Mr. Khor gave an overview of the existing soft law instruments, including the UN Guiding Principles on Business and Human Rights (i.e. the Protect, Respect and Remedy Framework), but remarked that these instruments are insufficient. He noted the systematic violations of human rights by TNCs.

Mr. Khor mentioned five key points on why the adoption of the binding instrument is necessary.

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<sup>1</sup> The South Centre is an intergovernmental organization with 52 developing countries as members, and focuses on conducting research and supporting member countries in regard to international events and processes and national policies.



First, powerful countries can regulate the activities of TNCs, yet developing countries face a lot of limitations in practice.

Second, for host countries to regulate the activities of TNCs, they need the cooperation of home States. He added that some States are not as powerful as some TNCs. Thus, while they may exercise jurisdiction in their own territory, they are ineffective unless other States, especially home States of corporations, cooperate with them in order to enforce obligations on TNCs.

Third, there are currently limitations in regard to extraterritorial obligations of States; while home States are able to apply norms within their territory, however, the activities of TNC's leave impacts beyond the territorial jurisdiction.

Fourth, Mr. Khor highlighted the limitations of remedies available for victims, because of the weaknesses mentioned above, leaving victims unable to obtain remedy.

Fifth, there is an asymmetry between rights and obligations of TNCs. Mr. Khor noted that TNCs have been given rights through hard law instruments. For example, bilateral investment agreements and investment rules in free trade agreements recognize the rights of an investor and afford them the right to sue the State in an international tribunal, under terms very often different to those under national law. These instruments create a mechanism that extends beyond the territory of the State in order to protect the rights of corporations. Yet, he noted, there is still debate over whether TNCs have any obligations.

Finally, Mr. Khor underlined the necessity of establishing an intergovernmental group to study these shortcomings, address the obligations and liability of TNCs for infringing human rights, and explore the possibility of establishing a complaint's mechanism to provide redress to victims. He also stressed the importance of establishing a monitoring mechanism for systemic violations of human rights, and exploring the possibilities for drafting a binding instrument to regulate TNCs in relation to human rights.

*Brent Wilton, Secretary-General of the International Organization of Employers (IOE)*<sup>2</sup>, commenced his presentation by reminding the participants that in the year 2000, the draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" were not successful because it was impossible to get consensus among States on how to deal with issues as diverse as those involved with business and human rights. This procedure brought frustration to civil society, business, and States. This process led to the appointment of John Ruggie as UN Special Representative on business and human rights.

Mr. Wilton noted that the issue of business and human rights is not limited to TNCs, but one that includes all businesses. Mr. Wilton highlighted the importance of reviewing what States are doing regarding human rights, because they have the obligation to protect human rights and respect the rights of their citizens. If a State does not protect human rights, or chooses not to, the situation creates difficulties for everyone. This situation extends beyond TNCs, especially in the current world context where most businesses are local, and are not part of global supply chains.

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<sup>2</sup> The IOE gathers employers from 150 countries and from across all sectors of business.



Mr. Wilton noted the importance of exploring ways for respect human rights more effectively. Most businesses comply with the national human rights law of the States where they work. However, he added, it is necessary to help weak countries to build institutions to protect human rights and avoid problems regarding to access to remedy by victims.

Mr. Wilton was of the opinion that there will not be cohesion among States regarding the possibility of adopting an instrument on extraterritorial obligations of States, for no country will turn over its jurisdiction to another when it is capable of exercising it. He also discussed the UN Guiding Principles (UNGPs) on business and human rights, noting that they have been applied for less than three years, but during that time the work UNGPs have delivered more than what has been achieved beforehand, including on the second pillar regarding the responsibility of business to respect human rights. But more is needed in order for States to comply with their responsibilities to protect human rights.

Regarding this aspect, Mr. Wilton observed that countries should put in place clear norms and regulations for business to behave properly. Business must comply with those regulations and avoid activities that could harm human rights. If any harm results from their activities, the existence of simple and prompt remedies is required.

Finally, Mr. Wilton wondered what is going to happen with the UNGPs while the discussion of a binding instrument is held, and cautioned that the UNGPs could be ignored. He questioned whether all stakeholders would be involved in what is seen as an intergovernmental working group process. Mr. Wilton concluded by requesting participants to give a chance to the UNGPs in order to show how different parties can act properly regarding the protection of human rights.

*John Knox, the United Nations Independent Expert on Human Rights and the Environment*, expressed concern about the environmental harm caused by business and its effects on human rights, noting that these harms are often the result of the activities by TNCs. He cited a number of examples regarding pollution cases produced by corporations, such as Bhopal disaster by Union Carbide, the case of Trafigura that offloaded toxic waste in the Ivory Coast, the case of pollution caused by Texaco's operations in Ecuador, among other cases causing not only environmental harm, but violating the right to life, health, food and housing.

Mr. Knox noted that United Nations Guiding Principles on business and human rights underline a clear responsibility by business to respect human rights, and States' obligations to protect from harm caused by business. Additionally, the United Nations Human Rights bodies, such as treaty bodies, the Human Rights Council, and special rapporteurs, should make clear the procedural obligations of States to provide public assessments and avenues for public participation, and to guarantee effective remedies. Besides, States have substantive obligations, including establishing legal and institutional frameworks to protect human rights, and enhance the protection of vulnerable groups, such as children, women, and indigenous people.

Furthermore, Mr. Knox recognized that there are gaps in the system related to the duty to protect human rights in regard to business activities. On the one hand, he noted that the



obligation of the States to regulate business activities within their territorial jurisdiction is clear, but on the other hand their obligation regarding corporate conduct acting abroad is not clear. This problem is related to two reasons, the first one is due to the fact that in many cases corporations may be acting in complicity with the State, or the corporation may no longer be present under the jurisdiction of the State, so relying on territorial jurisdiction over them would not be enough adequate.

Consequently, Mr. Knox explained that one of the gaps that should be addressed concerns the possibility of home states to regulate the conduct of TNCs abroad. He explained that it is clear that States can regulate the conduct of corporations abroad on the basis of national jurisdiction, yet the question is if they have the obligation to do so.

Within this context, Mr. Knox recognized that the nature of those obligations is contested and that not all the countries agree upon the recognition of extraterritorial obligations. He reminded participants that countries which do not recognize extraterritorial obligations would not change their position during an inter-governmental negotiation. In the same aspect, a negotiation of a binding treaty could cast a shadow over the implementation of the UNGPs.

Thus, the negotiation of a treaty should be targeted in a way that would be more likely to be accepted, which as suggested by John Ruggie, could be targeting 'gross violations' or the worst forms of human rights abuses.

Furthermore, Mr. Knox suggested that it could be worthy to consider an agreement to create a special court with jurisdiction to hear cases of human rights violations by corporations, since there is a lot gaps in finding a forum to hear a claim by parties suffering from human rights violations. Even when it is clear that violation of rights occurred, in many cases there is no forum to actually present the claim asking for redress.

Mr. Knox concluded by noting that an arbitral tribunal, following the model of international law of investment, is a good example. Currently, investors are allowed through international rules to start a procedure against a State. Mr. Knox highlighted that the difference in cases of human rights violations by TNCs is that the State or other actors would be enabled to sue corporations.

*Janelle Diller, Senior Counsellor to the Deputy Director-General of the International Labour Organization (ILO)*, focused on addressing the role of the ILO in this area. She noted that the ILO does not have an official position on the issue. However, she explained that the ILO standards and methods of action extensively address government and corporate responsibilities in areas that address human rights. She remarked that any existing or proposed framework should take into account the ILO's relevant work in the matter.

Ms. Diller stressed that promoting human rights and business is a core issue under the ILO mandate. The ILO's objective is to improve the working conditions worldwide, and bring together the most representative partners on the issue -- governments, employers and workers -- to develop common international standards for conduct of business and States. These standards are applied through national mechanisms including laws, and international cooperation among states, and across industries.



The working method of the ILO involves the direct participation of all the interested parties, embedded in the notion of having a tripartite conversation that result in realistic expectations. The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of the ILO provides a link between the international labor standards and the applicability of good policies and practices by States and corporations. One of the central pillars of the declaration focuses on dialogue between the home and host States. Both should consult to provide the most positive contributions and address situations of negative affairs. Moreover, the regional offices of the ILO provide advisory assistance to Member States and technical assistance in the field.

The ILO's experience with the tripartite constituency should be considered in the context of the business and human rights framework, and the way of implementing ILO standards should also be taken into consideration. Thus, the follow up on the issue of business and human rights should consider a close cooperation with the ILO, Ms. Diller noted, as it involved issues central to the mandate of the ILO, including the tripartite cooperation.

Ms. Diller also mentioned that close coordination between the UN bodies and the ILO has been possible on many issues, and that the nature and manner of this coordination should be determined and discussed within the ILO and UN mechanisms. She noted that this coordination would be of benefit to the processes regarding business and human rights, because it will engage with the tripartite dialogue on relevant treaty obligations and labour standards both at the country level, and on issues that cross jurisdictional borders.

*Carlos Lopez, Senior Legal Advisor at the International Commission of Jurists (ICJ)*, commenced his notes by underlining that a legally binding instrument is an appropriate response to many issues that arise in the context of the activities of TNCs and their impacts on human rights, which he noted is an opinion supported by the International Commissions Jurists given legal and factual analysis. In addition, he noted that a treaty is not the only response, nor the ultimate answer to the problems in the field of business and human rights.

Mr. Lopez noted that a treaty should consolidate existing progress in the field as well as innovate in certain areas, and not repeat or duplicate other instruments. Close coordination with other organizations addressing certain issues, such as the ILO, is also needed. Mr. Lopez added that the achievements contained in dispersed sources such as general comments, regional and national jurisprudence, and non-binding international instruments, should be consolidated in the new treaty.

Regarding the focus and content of the treaty, Mr. Lopez remarked that the most egregious of human rights violations are not the only ones that should be covered by an international treaty. He noted that the concept of "gross" or "egregious" violations is an open concept that not only includes crimes under international law, but also covers other violations of civil and social rights. Furthermore, 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 violations.

Mr. Lopez commented about two aspects of the content of a possible treaty; the prevention of abuses by third parties and the accountability and remedies for victims. These objectives may be accomplished by ascertaining the requirement of domestic legislation addressing corporate legal liability for certain violations of human rights, and providing remedies there off.



Mr. Lopez explained that even if access to remedy is recognized in different international human rights treaties, practice shows that there are significant obstacles to the application of these rights in regard to transnational business activities that affect human rights.

In this regard, Mr. Lopez explained that research carried out by the ICJ<sup>3</sup> and by other groups<sup>4</sup> shows that national legislation for the protection of rights against third parties (business) is generally insufficient and is widely diverse. He concluded from this overview of States' practice that there is 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.

Mr. Lopez suggested that a new convention in the field of business and human rights could be another effective instrument in the hands of States to improve their legal framework for better protection of human rights.

*Alfred de Zayas, the United Nations Independent Expert on the promotion of a democratic and equitable international order*, underlined the pioneering work of John Ruggie and the 'Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises'. Mr. Zayas underlined the importance of the workshop as a way to continue engaging in a fruitful debate on human rights and business, and to keep this issue in the public eye. Furthermore, he stated that the drafting of a legally binding instrument should strengthen the United Nations "protect, respect and remedy framework" reflected in the Guiding Principles and take into account good practices worldwide, and progress made on national action plans.

Based on his experience as 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, Mr. Zayas addressed the justification for the transformation of voluntary pledges into legally binding conventions with appropriate systems of monitoring by way of reporting, comparing experiences, identifying obstacles, and proposing pragmatic and implementable solutions.

He reminded the participants of the positive aspects in the role of TNCs in globalization, as they provide employment to millions of persons, promote the exchange of technology and ideas, and they have significant potential to contribute to a more stable and peaceful international order. However, given their importance in the international order, TNCs require a degree of transparency in their activities and an effective mechanism of accountability.

In this regard, Mr. Zayas noted that the principles of State responsibility should apply to TNCs activities as well, and that the norms for the protection of human rights should be accompanied by appropriate mechanisms of implementation and remedy procedures. The Independent Expert recommended that a mechanism similar to the Universal Periodic Review (UPR) process should be applied, where States report on the activities of TNCs registered or

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<sup>3</sup> See country studies on Access to Justice: Human Rights Abuses involving corporations, at

<http://www.ici.org/category/publications/access-to-justice-human-rights-abuses-involving-corporations/>

<sup>4</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.





operating in their countries, and where the TNCs could report to the Human Rights Council based on invitations.

Mr. Zayas also noted that victims of human rights abuses resulting from the activities of TNCs should be able to complain to the appropriate United Nations Treaty bodies. He added that gross violations of human rights by TNCs should be justiciable in international tribunals. He underlined that the principle of personal liability should be established in law and practice, so that individuals engaged in corrupt activities and in the breach of norms of environmental protection should be subjected to penal sanctions.

Mr. Zayas observed that the fear expressed by some regarding the diminishment of worldwide investment due to the introduction of regulation is not persuasive, as TNCs will adjust accordingly to those regulations, and will still make substantial profits. Mr. Zayas concluded that it is time to move forward, building on the Guiding Principles so as to give them greater legal force, and encourage States to continue developing National Action Plans on the issue, engaging as well in the discussion of a possible treaty on human rights and business.

*Errol Mendes, Director of the Human Rights Research and Education Center at the University of Ottawa*, referred to the preamble of the Universal Declaration of Human Rights and noted that the concept of “every organ of society” in the declaration relates to theoretical persons as well. Thus in principle, corporations should respect human rights, as stated under the preamble of the Universal Declaration of Human Rights, which has become a principle of customary international law. Mr. Mendes added that the project of the “Norms and Responsibilities of Transnational Corporations and other Business” was intended to fulfill this international obligation.

Mr. Mendes suggested that the UNGPs establish that States must protect human rights by taking the proper steps to prevent, investigate, punish, and redress every violation of human rights through effective policies, legislation, regulation, and adjudication. In doing so, the State should adopt laws and policies relating to commercial transactions, investment treaties, and memberships in multilateral institutions.

He was of the opinion that the UNGPs were actually promoting the adoption of a model treaty to adopt and implement what it is actually suggested in the Principles; without such a binding framework, the UNGPs would remain just voluntary initiatives.

Professor Mendes observed that, in practice, a great number of cases such as Shell in Nigeria, Union Carbide in Bhopal, and Texaco in Ecuador have demonstrated that States’ responsibility to protect regarding corporate complicity in human rights abuses can be a losing practice without a binding legislative framework. A framework treaty could be the answer to effectively apply judicial and other sanctions, and propose economic and reputational incentives against abuses.

Professor Mendes added that the last pillar of the UNGPs regarding remedies for the victims has been applied in few states, which motivate victims to seek redress in the home states of companies and often without much success. Thus, it is clear that the three pillars UNGPs have not been an incentive for the most powerful TNCs to promote, protect, and respect human rights.



Finally, Mr. Mendes suggested that one possible initiative is for the Human Rights Council to appoint a special rapporteur that acts as a fact-finding expert in countries incapable or unwilling to investigate allegations of abuses of human rights by corporate actors.

*Michael Addo, vice president of the 'Working Group on Business and Human Rights'*, recognized the enormity of the task delegated to the working group, especially given the growing impatience of the stakeholders and victims demanding accountability, justice, and redress related to human rights abuses by businesses.

Mr. Addo noted that the Working Group has given attention to enhancing redress activities within national action plans. The Group has been working with the Office of the High Commissioner of Human Rights on a study related to fairer and more effective system of domestic law remedies for victims of human rights abuses.

Mr. Addo remarked that the current normative framework endorsed by consensus is based on existing legal obligations of States. This framework ensures that rights are protected from abuse, including by corporations.

A binding instrument should add value in regard to implementation of obligations, while not leaving aside the rich and vibrant history of the current issues. Specially, the process should take into account how stakeholders agreed to work together, and how to maintain a constructive dialogue under the new regime.

Furthermore, Mr. Addo explained how the Working Group and the UNGPs have been on high demand. In the short time since it has been established, the Working Group has received 200 requests from all over the world, and from all the stakeholders to provide technical expertise in regard to implementation of the UNGPs. Additionally, the Group received hundreds of communications regarding violations of human rights.

Mr. Addo recalled that the field of business and human rights is not static, and always requires evolution on how to apply the UNGPs. The National Action Plans have been of special interest in regard to maintaining constructive multi-stakeholder approach, respond very well to conflict situations, and are flexible to respond to the challenges of business and human rights. More especially, the National Action Plans are a tool for leveling the playing field for countries and business.

Mr. Addo emphasized that the UNGPs are not soft law, but a sui generis instrument in international law, based on binding instruments, and other voluntary initiatives, which are overall accepted by all. Finally, he noted that if the need for a binding instrument is debated at the Human Rights Council, this instrument should respond to what is required in the field, based on the gains and promises that the system has already achieved. Mr. Addo cautioned that if it repeats what has been done, or take us backwards, it would be an unfortunate result.

*Surya Deva, Professor at the School of Law of City University of Hong Kong*, observed that the issue of negotiating an international binding instrument should not be pushed back any longer. He explained the reasons why an international treaty is needed, noting that the UNGPs are not useful when used in hard cases. He distinguished those cases as one where there are no



business case for human rights, compared to cases where the respect of human rights actually produces benefits and profits for the companies. Dr. Deva also questioned the assumption that States, and only States, are capable of protection of human rights, and that they are willing and capable to do so. He noted that this is not what is currently happening, given the evidence in various case studies.

In this regard, Dr. Deva noted that the current framework that regulate companies have gaps, and that if States and business are serious regarding the protection of human rights, they should not have any problem regarding the adoption of a binding treaty.

This treaty should focus on the victims, putting aside the one-dimensional principle that only States are responsible for protection of human rights. In regard to repairing the rights of the victims, it is not important whether the responsible for the violation is a State or a company. He noted that in the 21<sup>st</sup> century not all TNCs are from developed countries, and as such all the countries should be interested in protecting their citizens from abuses by TNCs.

Mr. Deva considered that the scope of the treaty should cover all human rights abuses and all companies. In principle, it is highly complicated to adopt a treaty that just protects ‘gross human rights violations’, because it is difficult to identify a right that is more important than another. Thus, it is necessary to protect all rights, and not make any difference.

Mr. Deva suggested that stakeholders could consider developing a declaration on human rights and the obligations of companies, which notes the hierarchy of human rights norms over other norms, such as investment treaties.

Moreover, he mentioned that international law remains State-centric and that is why civil society should have an active role in the negotiation of the instrument. In that regard, he suggested the creation of a multi-stakeholders committee in each state that would be mandated with investigating the complaints presented against corporations, instead of focusing on an international committee doing it at an international level.

Finally, Mr. Deva noted that one challenge to consider is the time that would be needed to negotiate an international treaty. He emphasized that if the adoption of the treaty requires significant amount of time, it is necessary to start the negotiations now, and not delay it any further. He also suggested that the issue of business and human rights does not required just one treaty, but could require a declaration as a first step followed by a number of treaties to the declaration.

*Marcos Orellana, Director of the Environmental Health Program Center for International Environmental Law (CIEL) and adjunct professor at the Washington College of Law,* noted that the international legal order is incapable of securing the promises of the United Nations in its human rights program, because of the imbalance of international law pertaining to business and human rights. While business benefits from a binding legal regime designed to advance corporate interests, communities suffering from corporate abuse do not find effective remedies.



In this regard, Mr. Orellana remarked that the call for a binding instrument on business and human rights is a clear sign that this lack of balance should be tackled using the broad set of tools available to the international community.

Mr. Orellana explained that the notion of development as an ever-increasing economic system has been used to justify violations of human rights throughout the world. This approach is now recast in the context of sustainable development.

Furthermore, weak institutions and corruption does not only affect developing countries, but also developed countries, as corporate interests hijack democratic institutions. He recalled what John Knox suggested earlier, reaffirming the importance of a legal framework on environmental protection that takes into account human rights obligations. Nevertheless, when States try to do so, they get challenged through multi-million lawsuits, such as the case of Pacific Rim Mining Corporation against El Salvador, among others.

The examples given during the presentation of Mr. Orellana demonstrated that the current system undermines democratic governance, as it gives corporations rights and resources not available to other actors. This context generates a lack of equality under law. Mr. Orellana discussed the concepts of 'indirect expropriation' and the right to compensation if benefits or expected profits of corporations are affected by new policies of regulations for the benefit of public interests. Mr. Orellana noted that corporations enjoy rights under international law, but not obligations.

He added that States are obliged to protect people under its jurisdiction. Yet when States take measures in this regard they expose themselves to multi-billion dollar arbitrations. Weak governance systems are resulting in impunity, Mr. Orellana added.

The question whether corporations can or cannot have obligations under international law was also addressed. Mr. Orellana reminded the participants that a similar question was proposed to the International Court of Justice, which stated that Intergovernmental organizations were subjects to rights and obligations. Regarding individual liability, he stated that the International Criminal Court has reaffirmed this notion. In this regard, Mr. Orellana mentioned that some multilateral agreements in international environmental law have established an obligation to criminalize certain conduct. For example, the Basel Convention for trans-boundary movement of hazardous wastes and their disposal established obligations for the State to criminalize certain conducts.

Mr. Orellana also addressed the issue of extraterritorial obligations, stating that the State of nationality of the corporation, ie the home State, is responsible for regulating the conduct of the legal entities created under its jurisdiction. He clarified that there is a critical gap in this area where host States are unable or unwilling to regulate corporations effectively or complicit in human rights violations and where home States do not exercise effective control extra-territorially.

He noted that the Maastricht Principles were developed with the objective of addressing this gap; these principles have been developed on the basis of existing law and restate obligations of states to protect extraterritorially. Mr Orellana further noted that the Maastricht Principles may be applied without conflicting with the principle of self-determination and no



interference. In concluding, Mr Orellana suggested that in order to begin to address the imbalance apparent in the international legal system and particularly to overcome the critical gap in respect of effective regulation of corporations, a binding treaty could be tailored to address the extra-territorial obligations of home States and secure effective remedies in cases of violations.

*Cephas Lumina, the United Nations independent expert on foreign debt and human rights,* suggested that the experiences witnessed during the financial crisis present a scenario where society cannot rely on business to self-regulate in a manner by which their activities do not affect human rights.

The Independent Expert accepted that the UNGPs are an important initiative, but noted that the fundamental problem is the lack of sanctions. The UNGPs reaffirm the idea of voluntary principles. He underlined his support for the elaboration of a binding instrument.

Mr. Lumina discussed the case of regulating Export Credit Agencies (ECAs). He explained that these agencies are not transnational corporations, but they have transnational reach as they operate as the principal source of public finance for foreign corporate involvement in large scale industrial projects in developing countries and emerging economies. He added that ECAs have acquired an active role after the global crisis.

Mr. Lumina mentioned that these agencies operate in secrecy, almost invariably, and that some norms that regulate their activities guarantee their confidentiality, which is worrying. These companies have sometimes backed projects that resulted in serious impacts on the environment and local communities.

This is why, Mr. Lumina added, ECAs should act with transparency, accountability, due diligence and with strict compliance with the agreed international standards on human rights.

Mr. Lumina acknowledged the value of national actions plans, and recommended that even if a binding instrument is elaborated, the national actions plans will give effect to it. He stated that it is necessary to have a legally binding instrument that considers all the challenges exposed in the workshop, and recognized the importance of addressing the extraterritorial obligations of States and the scope of application of the instrument.

Finally, Mr Lumina concluded by recognizing the importance of pushing for a better international standard-setting in the area. He considered that even if some home states will still be reluctant to approve this instrument because they fear additional obligations on them and their business enterprises, they should understand that these efforts would motivate business to demonstrate that human rights norms are seriously implemented.

## **HIGHLIGHTS FROM THE FLOOR INTERVENTIONS**

Several participants, representing States and civil society organizations, commented from the floor during both days of the workshop. Following is a recap of some of the main points that were repeated in those interventions.

Some States noted the importance of addressing issues of business and human rights given the massive increase in investment flows and the role of TNCs witnessed during the last twenty



years. Several delegations, such as the European Union, United Kingdom, and Ireland noted the importance of focusing on the transformation of UNGPs into actions on the ground, through implementation of national action plans with the participation of business and civil society organizations.

The European Union stressed the importance of a multi-stakeholder approach to this complex discussion and the importance of enhancing the discussion on mechanisms for remedy.

Other delegations, like the Cuban and Ethiopian, stressed the importance of the initiative on a binding instrument on business and human rights. Cuba noted the importance of the UNGPs, but questioned whether they are useful in cases where TNCs violate national law and victims seek redress. Cuba added that while states could expropriate a company that have caused damage, however the investment agreements limit the policy space available for governments to take action in response.

Civil society groups speaking from the floor, including FIAN International, Franciscans Internationals, CETIM, Transnational Institute (Global Campaign to Dismantle Corporate Power and Stop Impunity), ESCR-Net, and Friends of the Earth International, supported the initiative towards a binding instrument on business and human rights. They highlighted several cases of corporate abuse leading to violations of various rights, including right to life, labor rights, rights to food, water, and health, as well as environmental rights, and freedom of expression.

Civil society groups participating in the meeting noted the structural asymmetry in economic and political power of TNCs vis-a-vis states, and the inadequacy of currently available international instruments in providing effective monitoring and remedy mechanisms. They concluded that this situation often leads to a state of impunity.

Groups called on the Human Rights Council to start a process towards developing an instrument of hard law on business and human rights, which covers all human rights violations. They insisted that limiting such instrument to 'gross violations' would be considered as an attack on one of the core human rights principles-- that on the indivisibility of human rights. They also stressed the importance of strengthening extraterritorial obligations of states.

The ESCR-NET recalled the statement emerging out of the 'People's Forum on Human Rights and Business' (Bangkok, November 5-7, 2013), which has been supported so far by more than 150 organizations. The statement called for a binding instrument, providing for international monitoring and accountability mechanism, protection of victims, whistleblowers, and human rights defenders, and ensuring access to effective remedy including through exercising extraterritorial obligations where needed.

## **MAIN ELEMENTS HIGHLIGHTED IN THE WORKSHOP<sup>5</sup>**

### **General considerations**

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<sup>5</sup> These elements were addressed by more than one presentation



- The importance of building on lessons learned from the history of addressing the issues of business and human rights, including the experience of discussing the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”;
- Recognizing that there are gaps in the international legal framework related to the duty to protect human rights in respect to business activities, and the concentration of related instruments in soft law;
- Underlining the importance of the issue of business and human rights, especially given the increasing role that TNCs and businesses play in various sectors and aspects;
- Recognizing the asymmetry between rights and obligations of TNCs; while TNCs are offered rights through hard law instruments, such as bilateral investment treaties and investment rules in free trade agreements, and have access to a system of investor-state dispute settlement, there are no hard law instruments that address the obligations of corporations to respect human rights;
- The importance of continuing the pursuit of implementing the UN Guiding Principles (UNGPs) on business and human rights and the development of national action plans based on the GPs;
- Noting that the obligation of States to regulate business activities within their territorial jurisdiction is clear, but on the other hand their obligation regarding corporate conduct acting abroad is not clear.

### **Practical suggestions for the way forward, presented during the Workshop<sup>6</sup>**

- Establishing an inter-governmental working group that would address the following tasks: study the shortcomings of legal instruments in the area of business and human rights, address the obligations and liability of TNCs for infringing human rights, explore the possibility of establishing mechanisms for complaint and redress for victims, and explore the possibilities for drafting a binding instrument to regulate TNCs in relation to human rights;
- Setting up a monitoring mechanism for systemic violations of human rights;
- Undertaking an initiative at the Human Rights Council to appoint a special rapporteur that acts as a fact-finding expert in countries incapable or unwilling to investigate allegations of abuses of human rights by corporate actors;
- Developing a declaration on human rights and the obligations of companies, which notes the hierarchy of human rights norms over other norms, such as investment treaties;
- Establishing a multi-stakeholder committee in each state that would be mandated with investigating the complaints presented against corporations.

### **In regard to the proposal of negotiating a legally binding instrument on business and human rights**

- There were different opinions in regard to the impact on the UNGPs of pursuing a legally binding instrument; while some participants considered that it would strengthen the UNGPs and complement the progress on national action plans, others considered that it would hinder the process of progress on UNGPs given the limited time and resources available to governments;

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<sup>6</sup> These suggestions were included in the presentations of speakers and presented as possible options for consideration



- Some were of the opinion that UNGPs were promoting the adoption of a model treaty to implement what is suggested in the Principles;
- On the scope of application of a possible treaty: some considered that limiting a binding instrument to ‘gross violations’ would make the proposal more practical and accepted by States, whereas others noted that a treaty should cover all human rights abuses since it be highly complicated to adopt a treaty that just protects ‘gross human rights violations’, because it is difficult to differentiate between rights in terms of importance.
- On extra-territorial obligations of States; there was overall recognition of the importance of addressing these obligations while underscoring the challenges involved in the discussion of jurisdiction;
- Overall it was perceived that a possible treaty should consolidate existing progress in the field as well as innovate in certain areas, and not repeat or duplicate other instruments.
- Close coordination with other organizations addressing certain issues, such as the ILO, was underlined;
- Note was given of the important role that civil society could play in this discussion.





*Annex: Agenda of the workshop*

<b>DAY 1</b>	<b>DAY 2</b>
<b>Moderator:</b> Ambassador Luis Gallegos-Permanent Representative of Ecuador to the United Nations	<b>Moderator:</b> Ambassador Abdul Samad Minty, Permanent Representative of the Republic of South Africa
<b>Speakers:</b>	<b>Speakers:</b>
<b>Mr. Martin Khor</b> , South Center	<b>Mr. Errol Mendes</b> , Director of the Human Rights Research and Education Center at the University of Ottawa
<b>Mr. Brent Wilton</b> , International Organization of Employers	<b>Mr. Michael Addo</b> , Working Group on Business and Human Rights
<b>Mr. John Knox</b> , Special Rapporteur on Environment and Human Rights	<b>Mr. Surya Deva</b> , Professor at the School of Law of City University of Hong Kong
<b>Ms. Janelle Diller</b> , International Labour Organization	<b>Mr. Marcos Orellana</b> , Center for International Environmental Law
<b>Mr. Carlos López</b> , International Commission of Jurists	<b>Mr. Cephas Lumina</b> , independent expert on foreign debt and human rights
<b>Mr. Alfred Zayas</b> , Independent Expert on the promotion of a democratic and equitable international order	