



Business and Human Rights: Commencing discussions on a legally binding instrument

This double issue of the South Bulletin focuses on an important issue - human rights, transnational corporations and other business enterprises.

More specifically, it publishes reports on the first meeting of the Human Rights Council's Working Group on a legally binding instrument on TNCs and other business enterprises with respect to human rights.

This issue, and the working group, have attracted the attention of hundreds of civil society groups around the world, as getting redress for the adverse effects of businesses, especially TNCs, is a long-standing topic.

The reports in this Bulletin cover general overview, and the discussions on the scope of application of the instrument, the obligations of states and businesses, and standards for legal liability and building mechanisms for access to remedy. The opening speeches of the Chairperson and a Special Rapporteur are also included.

We hope you find this a useful record of the working group's initial session.



The Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights had its deliberations on 6-10 July 2015 at the UN in Geneva.

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Introducing this Special Issue on Corporations and Human Rights



Demonstration against the adverse effects of TNCs taking place outside the UN building in Geneva by NGOs in support of a treaty on business and human rights.

This is a special issue of the South Bulletin. Firstly, it is a double issue, carrying the numbers 87 and 88, and having double the usual number of pages. Secondly, it is all about one issue: human rights, transnational corporations (TNCs) and other business enterprises.

The event linked to this is the first meeting of a working group in the Human Rights Council on human rights, transnational corporations and other business enterprises, which took place in July 2015 in Geneva.

This issue has had quite a long and important history. It is an important issue because there have been many adverse human rights effects of the activities of TNCs, and it has often been difficult or even impossible for the victims to get redress.

This is especially if these victims are in developing countries. They and their governments are usually too weak to make the foreign companies accountable for their environmental, health or other effects.

The domestic systems of law and enforcement may firstly be inadequate to take on giant transnationals. These companies and their executives can

also return to their country of origin and then often be outside the reach of the people and countries in which the adverse effect took place.

More than three decades after the Bhopal tragedy in 1984, the many thousands of victims and their families still have no redress from the American company. The people of Niger Delta in Nigeria whose lands were contaminated by Shell have fought for but not yet obtained justice. The indigenous people of the Amazon in Ecuador have been pursuing court cases against the oil companies that polluted their forests, water and damaged their health, but so far without remedy. There are hundreds, thousands of cases in which local communities all over the world have similarly tried in vain to get justice.

In 2014, some countries introduced a resolution at the Human Rights Council. The resolution (A/HRC/RES/26/9) was adopted by the Council in June, with the decision to establish a working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights. As indicated by its name, the working group

has the mandate to establish a binding treaty or other binding instrument.

The first meeting of this working group was held in July 2015 in Geneva. The resolution had directed that the group's first two sessions be dedicated to conducting constructive deliberations on the content, scope, nature, and form of the future international instrument.

It also recommended that the first meeting serve to collect inputs from States and relevant stakeholders on possible principles, scope and elements of such an international legally binding instrument.

This issue of South Bulletin carries several reports on the first meeting of the working group. These include an overview report of the meeting (including the opening session); the sessions on scope of application of the instrument; the obligations of states and businesses; standards for legal liability and building mechanisms for access to remedy. The opening speech of the Chairperson of the working group (Ambassador María Fernanda Espinosa Garcés of Ecuador) and the very good keynote address by the Special Rapporteur on the Rights of Indigenous Peoples (Victoria Tauli-Corpuz) are also published for the record.

The reports provide summaries of the manifold views of international and national experts, government delegations, international organisations, civil society organisations, on the wide range of issues linked to the issue of TNCs and human rights and to the working group.

We hope you find this a valuable record of these issues and views and of the first session of the working group.

Business and Human Rights: Commencing historic discussions on a legally binding instrument

A meeting of a working group of the UN Human Rights Council recently discussed a treaty on the human rights effects of transnational corporations and other business enterprises. Below is a report of the meeting, which is followed by additional articles reporting on the discussions that took place on various substantive issues covered by the programme of work of the first OEIWG session, including: the scope of application of a prospective treaty; obligations of States and obligations of corporations under human rights law; the legal liability of TNCs and other business enterprises; and mechanisms for access to remedy. The articles will cover perspectives of states, experts, and civil society organizations.

between 1982 and the early 1990s under the UN Commission on Transnational Corporations. The "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" were also discussed at the beginning of the millennium (i).

There are a number of other codes and guidelines addressing the role of business and its interface with human rights that the UN system has established, including the ILO Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy (1977), the WHO based code on Marketing of Breast-Milk Substitutes (1981), and the Guidelines for Consumer Protection (based on a UN General Assembly resolution in 1985), among other instruments (ii).

Resolution A/HRC/RES/26/9

Resolution A/HRC/RES/26/9 was co-sponsored by Ecuador and South Africa, and supported by Algeria, Benin, Bolivia, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, the Russian Federation, Venezuela, and Vietnam.

The resolution provided that "the first two sessions of the open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises shall be dedicated to conducting constructive deliberations on the content, scope, nature, and form of the future international instrument..." (Operative paragraph 2 of Resolution A/HRC/RES/26/9).

It also recommended that "the first meeting of the open-ended intergovernmental working group serve to collect inputs, including written inputs, from States and relevant stakeholders on possible principles, scope and elements of such an international legally binding instrument" (Operative paragraph 5 of Resolution A/HRC/RES/26/9).



The intergovernmental working group had its deliberations on 6-10 July 2015 at the UN in Geneva.

By Kinda Mohamadieh and Daniel Uribe

The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (hereafter referred to as OEIWG) successfully completed its deliberations over five days on 6-10 July 2015. The OEIWG was set up by Human Rights Council (HRC) resolution A/HRC/RES/26/9, which was adopted on 26 June 2014, at the 26th session of the HRC.

Resolution A/HRC/RES/26/9 was a historic step in the discussions on business and human rights under the United Nations (UN). Civil society groups played a crucial and active role

throughout the process. Two major messages came out of the deliberations of the OEIWG: that the United Nations Guiding Principles and a legally binding Instrument on business and human rights are two complementary and reinforcing processes, and that a prospective Instrument should cover all human rights and human rights violations.

Discussions on business and human rights have a long history, including most recently the adoption of the UN Guiding Principles on Business and Human Rights (See A/HRC/17/31 and resolution 17/4 of 16 June 2011). Previously, these issues were tackled under the draft UN Code of Conduct on Transnational Corporations, which underwent a decade of negotiations

Opening session of the OEIWG

The first session of the OEIWG was attended by representatives of Algeria, Argentina, Austria, Bangladesh, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Ghana, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Iran, Iraq, Italy, Kenya, South Korea, Kuwait, Latvia, Libya, Liechtenstein, Luxembourg, Malaysia, Mexico, Moldova, Morocco, Myanmar, Namibia, Netherlands, Nicaragua, Pakistan, Paraguay, Peru, Philippines, Qatar, Russia, Singapore, South Africa, Switzerland, Syria, Thailand, Trinidad and Tobago, Tunisia, Ukraine, Uruguay, Venezuela and Vietnam. In addition, the Holy See and the State of Palestine participated in the sessions. Not all Member States that attended the opening session were represented or actively participating throughout the working days of the OEIWG.

The OEIWG was also attended by the European Union, the Organisation for Economic Co-operation and Development, Council of Europe, UN Women, UNICEF, ILO, UNCTAD and the South Centre.

Many NGOs attended as observers and played an active role in organizing side events as well as speaking in the various sessions.

The opening session was started with a speech by the **Deputy High Commissioner for Human Rights, on behalf of the United Nations Secretary-General**. The High Commissioner for Human Rights, through a video intervention, stressed that “there is no conflict between advocating for implementation of the UN Guiding Principles and supporting international legal developments to further enhance protection and accountability in the business context”. “To the contrary, each of these initiatives should be viewed as positive steps in the progressive development of international human rights standards”, the High Commissioner added. He encouraged all stakeholders to build progressively on the UN Guiding Principles on Business and Human Rights (UNGPs) and all existing human rights instruments. “Achieving these ends will require a spirit of consensus and an unwavering commitment to strengthening the protection of human rights for all people

in all circumstances”, the High Commissioner underlined.

The Working Group elected Ambassador María Fernanda Espinosa Garcés, Permanent Representative of the Republic of Ecuador in Geneva, as its Chairperson-Rapporteur by acclamation. Ambassador Espinosa Garcés was nominated by the representative of Guatemala on behalf of the Group of Latin American and Caribbean Countries (GRULAC).

INTENSE DISCUSSIONS AND LONG CONSULTATIONS ON THE PROGRAMME OF WORK

The process of adopting the programme of work for the first session of the OEIWG witnessed some intense discussions and consultations. The Chairperson-Rapporteur presented a proposed work programme that included seven sessions besides the opening session. The sessions addressed elements prescribed by the mandate of Resolution A/HRC/RES/26/9; it included a panel on principles for an international legally binding Instrument, a second panel on scope of coverage of the Instrument and the issues pertaining to concepts and legal nature of transnational corporations (TNCs) and other business enterprises under international law, a third panel on human rights to be covered under the Instrument with respect to activities of TNCs and other business enterprises, a fourth session on obligations of states, a fifth session on responsibility of TNCs and other business enterprises to respect human rights, including prevention, mitigation and remediation, a sixth session on legal liability of TNCs and other business enterprises, and a seventh session on national and international mechanisms for access to remedy.

The representative of the European Union delegation made two proposals for amending the programme of work, including adding a first panel entitled “Implementation of the United Nations guiding principles on business and human rights – a renewed commitment by all States” and adding the word ‘all’ before the word ‘business enterprises’ wherever it appears throughout the programme of work.

Most delegations taking the floor in the session noted their concern with

regard to the suggested changes proposed by the delegation of the European Union and pointed that they were ready to adopt the programme of work as it was presented by the Chairperson-rapporteur. A number of delegations also argued that the proposition to add the term ‘all’ before any mention of ‘business enterprises’ could have the effect of amending Resolution A/HRC/RES/26/9. Several delegations stressed that the Working Group should conduct itself in accordance with Resolution A/HRC/RES/26/9 and did not have the mandate to alter a resolution of the Human Rights Council. A number of delegations stressed that they did not see any contradiction between the United Nations Guiding Principles on business and human rights and Resolution A/HRC/RES/26/9, but that they approach them as complementary processes.

The session was halted for the purpose of undertaking informal consultations on the proposals presented by the delegation of the European Union, which extended for several hours until late in the afternoon.

Upon return to the formal session, the Chairperson-rapporteur presented a revised version of the programme of work, including an additional panel on the UN Guiding Principles with the participation of Mr. Michael Addo, chairperson of the Working Group on the issue of human rights and transnational corporations and other business enterprises. The delegation of the European Union presented an amended proposal in regard to the addition of the word ‘all’, which entailed adding a footnote to the programme of work stating the following: “this programme of work does not limit the scope of this intergovernmental working group taking into consideration calls to cover TNCs and all other business”. The delegation of the European Union mentioned that this suggestion was not its own proposal, but that it was reflecting discussions that took place during the informal consultations. The majority of delegations that took the floor objected to the proposal, leading the Chairperson-rapporteur to declare the adoption of the programme with only the addition of one panel on the UN Guiding Principles on business and human rights, as the first panel.

The approach of the European Union delegation to the consultations per-



The deliberations of the OEIWG taking place.

taining to the proposed work programme was perceived by several participants in the OEIWG, including many NGOs, as amounting to attempts towards obstructing the adoption of the programme. For example, Brid Brennan, from the Global Campaign to [Dismantle Corporate Power and Stop Impunity](#), stated: "We believe the Representative of the EU Delegation has no official formal mandate to corral 28 member states into silence on such an important matter as human rights and transnational corporations. As civil society organizations and social movements, present here in the UN today, we protest the disruptive behavior of the EU, and we challenge the EU member states to declare their position on this matter, and not simply repeat the EU stance" (iii).

It is worth noting that the delegation of the European Union and most of the delegations of European Union Member States did not attend most of the remaining sessions under the programme of work.

OPENING STATEMENTS

Deputy High Commissioner for Human Rights

Ms. Flavia Pansieri, Deputy High Commissioner for Human Rights, noted that Resolution A/HRC/RES/26/9 acknowledges that "transnational corporations and other business enterprises both have the capacity to contribute to economic well-being, and cause adverse impact on human rights", and that the challenge of the OEIWG is to "harmonize economic activity with the protection of human

rights".

Ms. Flavia Pansieri recognized the important and legitimate role that civil society actors and national human rights institutions have in promoting human rights in the economic sphere, and in monitoring and advocating for prevention and remedies of abuses.

The Deputy High Commissioner highlighted that the diverse voices participating in the OEIWG will bring important perspectives for the identification of effective ways of preventing and redressing business related human rights impacts and ensuring greater accountability for those impacts. The Deputy High Commissioner urged States, and other participants, to use the meeting as an opportunity to advance "more effective protection of human rights in the economic sphere".

Ambassador María Fernanda Espinosa, Chairperson-rapporteur, Permanent Representative of Ecuador to the European Office of the United Nations and other International Organizations

After her election as Chairperson-rapporteur of the OEIWG, Ambassador María Fernanda Espinosa addressed the first session of the OEIWG where she noted that this was the first time that an intergovernmental negotiation was being conducted on the issue of an international regulatory framework for transnational corporations and other business enterprises with regard to human rights. Ambassador Espinosa reminded the participants that the dialogue for such a

framework dates back to more than forty years ago, and that it is on the basis of those efforts that the first session of the OEIWG was going to be conducted.

Ambassador Espinosa added that the mandate given by Resolution A/HRC/RES/26/9 is clear, and involves taking further steps towards an international binding regulatory framework on human rights and transnational corporations. Likewise, the objective of the treaty is not to adversely affect the business sector, but rather for the international binding instrument to be a tool for setting clear and universal norms for the protection and promotion of human rights in regard to operations of transnational corporations and other business enterprises.

The future Instrument, Ambassador Espinosa highlighted, will also promote an environment of certainty and clarity, not only to positively foster international investment, but principally to promote, protect and respect human rights.

Ambassador María Fernanda Espinosa acknowledged the support of more than one thousand non-governmental organisations (NGOs) around the world, noting that this support is "display of a global trend that serves as driving force for the adoption of an international instrument". Finally, Ambassador María Fernanda Espinosa extended an open invitation to all actors committed to the protection of human rights to participate in the OEIWG.

Keynote Speech by the Special Rapporteur on the Rights of Indigenous Peoples

Ms. Victoria Tauli-Corpuz, Special Rapporteur on the Rights of Indigenous Peoples, recalled that since the 1970s, indigenous peoples have been at the forefront of discussions on corporate human rights abuses. The Special Rapporteur noted that indigenous peoples have been victims of corporate activities which have negatively impacted their traditional territories without consent. She added that, even today, indigenous peoples and other communities continue to suffer this negative impact.

For the Special Rapporteur, the adoption of Resolution A/HRC/RES/26/9 "represents a significant development" and is a response to calls from around the world to strengthen human rights law with regards to cor-

porate-related human rights abuses.

Ms. Tauli-Copuz acknowledged that some progress has been achieved by the adoption of the UN Guiding Principles in 2011, and that an international legally binding instrument on business and human rights could contribute to redressing the gaps and imbalances in the current international framework. Therefore, the “search for a new international legally binding instrument and the implementation of the Guiding Principles should not be seen as contradictory, but rather complementary objectives”.

The Rapporteur highlighted that currently, foreign investors and transnational corporations have strong rights and enforcement mechanisms, while international and domestic rules dealing with responsibilities of corporations and other businesses are in the form of soft law. For the Rapporteur, an international legally binding instrument would “significantly help in establishing the much needed balance in the international system of rights and obligations with regard to corporations and host governments”.

Furthermore, the Rapporteur stressed that the instrument should take into account the principles of indivisibility and interdependence of all human rights, and that the future legal Instrument must clarify the extraterritorial obligations of states to ensure access to effective remedies, and recognise the primacy of human rights above all other systems of law. Moreover, the Rapporteur observed that the instrument could potentially benefit various stakeholders not only victims of human rights abuse. Businesses that already respect human rights and are engaged in best-practice development have a clear interest in supporting and helping develop this Instrument.

GENERAL STATEMENTS

Several states took the floor to present general statements in regard to the mandate of the OEIWG.

Algeria took the floor on behalf of the African Group. The delegation of Algeria recognised that “notwithstanding the positive contribution that TNCs make towards poverty alleviation and development, through ... long-term investments driven by States’ priorities in productive activities with improved access to modern tech-

nology, skills and technology transfer and international markets, the benefits are not always holistic”. The delegation of Algeria also added that “human rights violations, such as in the area of environmental degradation, dumping of toxic wastes and child labour by TNCs and other business enterprises, affect, marginalise and impoverish groups disproportionately and exacerbates human rights concerns in different parts of the world”. Likewise, Algeria added that “business and human rights agenda are closely linked to key social and economic rights enshrined in the African Charter of human and people’s rights”. Finally, the delegation highlighted that “while there are positive measures undertaken nationally and regionally... actions must be initiated for the progressive development of an international legally binding instrument”.

South Africa stressed that “transnational corporations and other business enterprises are the key drivers of globalization and owners of a big share of the global wealth [...] and are able to exert influence over global policy making”. The Permanent Representative of South Africa highlighted that “the notion of corporate social responsibility has no force of law and cannot be used for legal remedy in litigation by competent courts”. South Africa observed that currently individual national action plans create a situation where gaps persist. Uniform standards, set off in a future Instrument, can complement national action plans. In addition, South Africa noted that international human rights law lays down obligations on states to act in certain ways or refrain from certain acts in order to promote and protect human rights and fundamental freedoms. On the other hand, the lack of international human rights law binding on TNCs and other business enterprises points to a major legal void that needs to be addressed in order to end impunity for human rights violations committed by these entities. Many states are at a disadvantage in terms of power relations with TNCs, added South Africa. The proposed treaty would create a legal framework, including a number of principles, which would resolve several of these complex issues, and provide legal protections and effective remedies in quest of maximum protections for victims of corporate human rights violations. South

Africa noted that the foundation of international human rights law lies in the Universal Declaration of Human Rights, which speaks of the entitlement of everyone to enjoy these rights and does not indicate duty bearers of the obligations. Legal obligations on actors other than states should not be precluded from this theory. States are hardly the only entities capable of infringing on human rights, South Africa added. The obligations to promote, protect, and fulfill all human rights should therefore extend to all situations in which these rights are violated, irrespective on who places them in jeopardy. TNCs and other business enterprises must conform to the UN core values and principles and existing human rights treaties. South Africa cautioned that the influence of TNCs on the decision making of the UN bodies have already been felt in the entire system. It is essential that necessary measures be taken to prevent human rights violations and provide remedies for victims of human rights violations when committed, South Africa stressed.

The delegation of the **Russian Federation** supported the creation of the OEIWG on the basis of an understanding that “[diluting] the discussion of such a complex and complicated matter will be inappropriate and it would need to be studied in depth and discussed in the broadest possible format, taking into account all stakeholders”. The Russian Federation explained that it “does not share the view that we need to urgently draft a new legally binding document on business and human rights, such step...[the Russian Federation considers]...is currently premature”. The delegation also stated that “it is too early to discuss the actual substance of this new document, and that at this point the main topic should not be the elements and principles, but more a discussion on the viability of the treaty and whether it is realistic and expedient to draft such a treaty on this basis”. Finally, the delegation stressed that the work of the OEIWG should be based on a “gradual development of the Guiding Principles”.

The representative of **Pakistan** recognised the support for the development of a new binding Instrument “in order to protect the human rights of victims of abuses

committed by transnational corporations, which should be both norm setting and remedial in character". The importance of the UN Guiding Principles was also acknowledged and the delegation considered them "as an important reference point in the course of work" of the OEIWG. The representative of Pakistan stressed that "access to justice and effective remedy are unquestionable rights of the victims of TNCs' abuse in all its forms and manifestations", and added that "the transnational corporations are protected and shielded by hard laws, whereas the victims of TNCs abuse are provided with soft laws to safeguard their rights". Thus, Resolution A/HRC/RES/26/9 gave the OEIWG a clear mandate "to address this serious anomaly". Finally, the representative of Pakistan observed that the intention is not to "discourage the good work and positive role played by a number of these TNCs in our countries [but] to encourage their valuable investment in our states, with full responsibility and due respect to the human rights of all individuals".

The **delegation of the European Union** appreciated that a panel on the implementation of UN Guiding Principles was integrated in the programme of work. It also stressed that "... it is still not clear [to the European Union] as to why what was tested during the lunch break did not fly, but ... we have not blocked the adoption of the program of work and we think that should be appreciated, and we have done so to make sure that we can get started with the discussions". The delegation also stressed that as there was no possibility to resolve this issue in the programme of work, "consultations for the next steps should start in an inclusive and transparent manner as soon as this session ends, with a view to ensure effective progress in this process". The delegation of the European Union asked that all the remarks made by the European Union be recorded in the report of the session. Finally, it highlighted that the European Union is "committed to continue working with States across regions to effectively implement the UN Guiding Principles on Business and Human Rights" and "committed to continue their work for the protection of human rights defenders and civil society".

Switzerland reminded the OEIWG that "companies are required to uphold human rights, but protection of human rights is a fundamental duty of the State". The delegation stated that "Switzerland currently prioritizes the application of the UN Guiding Principles on Business and Human Rights, and the development of national action plans". The delegation also specified that it currently does not support the "drafting of an international treaty", as Switzerland would like to avoid an "excessive polarization of this debate".

Bolivia stressed the importance of urgently moving forward towards building a more fair and equitable international legal framework to regulate TNCs and other business enterprises in respect to international human rights law.

China supported the OEIWG noting that TNCs are playing an important role in the global economy and are contributing to economic development and to better use of resources. They also contribute to development of science and technology and mankind as a whole, China added. Nevertheless, China pointed out that when it comes to labor resources, environment, protection of human rights, and fair trade, TNCs can also cause problems. In this context, China supported the efforts by the international community in order to ensure that trade leads to greater promotion and protection of human rights. China added that an international legally binding treaty in this area is a complex issue, and encouraged all parties to participate openly and constructively in the works of the OEIWG. China noted the importance of taking into consideration the specificities of each country, including the specificities of countries' legal systems, social norms and traditions, cultural history, and stage of development. China noted that with the principles of inclusiveness and openness, solutions acceptable to all parties could be found. China emphasized that the ultimate objective of a future Instrument is to ensure that TNCs do contribute to economic and social development of their host country and improve living standards of all people. China added that the Instrument is not intended to undermine the positive contributions that corporations can undertake.

Cuba reiterated its support to the process of establishing binding obligations on TNCs in domestic and international law in order to guarantee that their activities comply with respect to human rights standards. Cuba underlined the need to respect the mandate adopted by the Human Rights Council under Resolution A/HRC/RES/26/9 and called on all states to participate transparently in this process.

Argentina noted that they will participate constructively in the process of the OEIWG, and welcomed the convening of its first session. Argentina is one of the countries that co-sponsored the UN Guiding Principles, the representative added, as they believe it is a useful tool. Argentina added that negotiations on a Treaty can help make progress in implementing the Guiding Principles.

Indonesia underlined that the OEIWG marks a historic moment and a new phase of a common endeavor with regard to global human rights' promotion and protection. In particular, Indonesia added that human rights' promotion and protection also belongs to transnational corporations and other business enterprises. At the national level, Indonesia continues to raise awareness on the need of business to respect, promote and protect all human rights in line with the national development agenda. Indonesia underlined the importance of taking an incremental, inclusive and comprehensive approach, in line with Resolution A/HRC/RES/26/9. Indonesia encouraged all relevant parties and stakeholders to build a positive and conducive atmosphere to move together, to own the process, the issues and the outcome. Indonesia noted the importance of taking into consideration as well the international political economy, development, and the environment.

Venezuela reiterated the support to Resolution A/HRC/RES/26/9 and the importance of establishing global mechanisms and norms through a binding instrument.

Egypt pointed to the decades in which the international community aimed at developing comprehensive body of international human rights law. In this context, the primary responsibility to promote and protect human rights and fundamental freedoms lie with the state, Egypt added. TNCs are also a main driving force of economic

globalization, whereby the activities of TNCs have far reaching effects on human rights. In this context, business enterprises should avoid infringing on human rights of others and address adverse human rights impacts resulting from their operations. Egypt added that ensuring respect of human rights by TNCs will not be fully guaranteed without a legally binding instrument.

Brazil pointed to the internal discussions undertaken in its capital on the issue of business and human rights. The representative of Brazil noted that this issue is considered a cross-cutting subject that falls under the competency of all ministries. An inter-ministerial working group has been set up to develop a national position in this area. Brazil does not see opposition between the self-regulatory Guiding Principles and a binding instrument, the representative of Brazil's delegation added. The delegate pointed to social responsibility of corporations as a parallel issue that Brazil incorporates under its investment facilitation agreements.

India underlined that issues of TNCs and other business enterprises are important areas where the international community should work together, not only to encourage business to respect human rights but also to hold them accountable for violations arising out of their operations. India added that the UN Guiding Principles have limitations in respect to their impact in regard to victims of violations by corporations. The OEIWG presents an opportunity for states to discuss, in a focused manner, the issues of corporations and human rights, and plug gaps that may arise from business operations. Often, due to the sheer size and clout of TNCs, states are unable to hold them accountable for human rights violations, India noted. In such situations, the international community must come together to seek justice for the victims. India underlined the importance of moving forward based on the direction established by Resolution A/HRC/RES/26/9, and an approach that balances between realism and ambition. India called for respect of the mandate of Resolution A/HRC/RES/26/9, and the importance of avoiding attempts for dilution or diversion of this mandate.

Representatives from the Council of Europe, the Organization of Economic Cooperation and Development and the



NGOs demonstrating against adverse effects of TNCs on human rights and the environment, outside the UN building, during the meeting of the working group.

International Coordinating Committee of National Human Rights Institutions also took the floor to give general comments.

HIGHLIGHTS ON SOME OF THE SUBSTANTIVE ISSUES DISCUSSED BY THE OEIWG

The United Nations Guiding Principles and a legally binding instrument; two complementary and re-enforcing processes

One of the major messages coming out of the deliberations under the first session of the OEIWG, including from participating Member States, experts and civil society representatives, was that there is no contradiction between the process of following up on the Guiding Principles on Business and Human Rights and the process of pursuing discussions pertaining to a legally binding instrument on transnational corporations and other business enterprises with respect to human rights. To the contrary, most comments in this regard stressed that a legally binding instrument would re-enforce the process of the Guiding Principles.

As noted above, this message was first enunciated by the **High Commissioner for Human Rights** in his opening words to the OEIWG. Several states noted a similar position.

For example, **South Africa** noted that a legally binding instrument will be a logical extension and advancement from the UN Guiding Principles on Business and Human Rights. South Africa added that a large number of

countries supported the Guiding Principles and the process towards a legally binding instrument because there is no contradiction between the two areas. The impression must not be given that there is any opposition between the processes; they are two forms of complementary actions to strengthen mechanisms in support of victims of human rights abuse, South Africa added.

Pakistan noted that the UN Guiding Principles would be an important reference point in the course of work of the OEIWG.

Egypt noted that they have been always supportive of the Guiding Principles and do not see any contradiction between them and the mandate of Resolution A/HRC/RES/26/9.

Indonesia stressed that they support the UN Guiding Principles and are trying to implement them at the national level.

Argentina pointed that they co-sponsored the Guiding Principles and believe that negotiations on a legally binding treaty can help in making progress in implementing the Guiding Principles.

Venezuela also expressed that there is no contradiction between the Guiding Principles on Business and Human Rights and a future binding Instrument.

Many of the invited experts expressed a similar opinion. Dr. Bonita Meyersfeld, director of the Centre for Applied Legal Studies at the Universi-

ty of Witwatersrand in Johannesburg pointed out that the binary between the UN Guiding Principles and a legally binding instrument is “incorrect and destructive”.

Professor Robert McCorquodale, Professor of International Law and Human Rights at the University of Nottingham noted that the Instrument should build on the UN Guiding Principles and the conceptual steps made by the UN Guiding Principles in regard to responsibility of corporations and access to remedy.

Professor Surya Deva, Associate Professor at the School of Law of the City University of Hong Kong, noted that if a state is not engaging with the treaty process then it would not be serious about the Guiding Principles.

A prospective instrument should cover all human rights

Another clear message that came out of the deliberations at the OEIWG was that a prospective Instrument should cover all human rights and human rights violations. On this topic, it was noted that the UN Guiding Principles pointed that business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights (see commentary to UNGP 12). It was also underlined that human rights are universal, indivisible and interdependent as recognised in the Vienna Declaration and Programme of Action (1993). Furthermore, it was noted that there is no clear definition of gross violations of human rights under international law.

Cuba noted that a prospective Instrument should be based on a broad scope. Violations of human rights by TNCs often involve economic, social, and cultural and environmental rights, in addition to the right to drinking water, health, food and development among other rights. The specific vulnerability of indigenous groups, children, women and persons with disabilities should be taken into consideration, Cuba stressed. It will be counterproductive to have a limited view of the scope of rights to be covered by the Instrument, according to Cuba.

South Africa noted that all human rights are universal, indivisible, interdependent and mutually reinforcing, as recognised by the Vienna Declaration and programme of work (1993). The

Instrument should cover all human rights, including the right to development. The power that TNCs and other business entities enjoy gives rise to an equal responsibility in relation to human rights and fundamental freedoms, South Africa added.

Ecuador noted that cases of human rights abuse by TNCs often involve the violations of various rights including the right to health, food, healthy environment, housing, development and other economic, labor, social and cultural rights. This was already recognized by the UN Guiding Principles. The consequence is that the responsibility of corporations applies to the whole spectrum of human rights, Ecuador added. The scope of a future binding Instrument should not be limited to gross violations of human rights, according to Ecuador, because that will mean maintaining the gaps and lack of protections for victims of corporate human rights abuse.

Similarly, **Bolivia and Venezuela** stressed the universal, interrelated, and interdependent nature of all human rights. Consequently, the Instrument should cover all human rights, according to the two delegations.

China added that a future Instrument should cover the widest scope including the right to development, while striking a balance between the individual rights and collective rights, especially the collective right to development and the right to peace.

Among experts, Dr. Hatem Kotrane, member of the UN Committee on the Rights of the Child, noted that limiting a future Instrument to gross violations of human rights will be equivalent to tolerating certain violations on account that they are less important. He added that all human rights are universal, indivisible, closely linked and cannot be organized in a hierarchy.

Professor Surya Deva, Associate Professor at the School of Law of the City University of Hong Kong, noted that we know that corporations can violate all human rights, a fact that was acknowledged by Professor John Ruggie. He called on the OEIWG to consider the option that all international human rights instruments, not only the existing ones, but also those that might evolve in the future, to be covered by the Treaty.

ADOPTION OF THE REPORT OF THE FIRST SESSION OF OEIWG

At the end of the session, the Chairperson-Rapporteur, Ambassador Maria Fernanda Espinosa Garces, presented the members and observers of the OEIWG a report on the deliberations of the meeting, which was adopted ad referendum. The members of the OEIWG will have two weeks to send in suggestions and recommendations. The report will be presented to the thirty-first session of the Human Rights Council, in accordance with Resolution A/HRC/RES/26/9.

Taking the floor during the session of the report's adoption, **Pakistan** acknowledged the efforts invested in organizing the session and regretted that some Member States decided voluntarily not to participate in the working group, hoping that they will participate in future sessions. Pakistan added that the future Instrument should focus on addressing the lacunae in the international legal order, and should be limited in application to the practices of TNCs and other business enterprises with transnational character. The character, stature, operational reach, political clout and financial power of TNCs at times surpass the resources of smaller states putting them at a disadvantageous position, Pakistan added. Any attempt to alter the mandate of Resolution A/HRC/RES/26/9 and introduce new interpretations to broaden the scope of the working group will be counterproductive, according to Pakistan. It will not only dilute the main objective, which is to focus on the operations of transnational businesses, but could also have serious impacts on the workings of any future dispute settlement resolution bodies in this context. It is essential to follow a focused and targeted approach by keeping the national businesses outside the scope of this working group, according to Pakistan. Pakistan added that focus should be on bridging the gap in access to remedy and accountability. Pakistan also outlined the importance of extra-territorial jurisdiction of home states of TNCs in cases of violations committed outside their national borders, without affecting the sovereignty of other states. Pakistan also noted the importance of voluntary consultation

mechanisms between courts of home and host states for better coordination and evidence gathering, provision of adequate financial resources for victims of TNCs' abuses to facilitate redress of grievances, and provision of technical and capacity building for developing states to effectively protect all human rights of their citizens, including the right to privacy against extraterritorial surveillance and data monitoring. Pakistan also underlined the importance of setting a safety mechanism to protect TNCs from frivolous cases. Pakistan added that the enactment of loser-pays rule can be detrimental to victims in case they lose a case, and requires further deliberations.

South Africa characterized the session of the OEIWG as a historic session, and underlined their expectation for consultations in the period towards the second OEIWG.

The Philippines reiterated its support to the mandate set by Resolution A/HRC/RES/26/9 and its support, in principle, to the recommendations outlined in the report presented by the Chair. Philippines highlighted the importance of taking into account the view of affected peoples and communities as well as business enterprises, and noted the importance of an inclusive, transparent and constructive process that will allow the OEIWG to produce robust, ambitious, yet doable instrument. The Philippines underlined the importance that the work ahead be carefully balanced and produce a set of high standards that enhance, and not result in limiting or derogating from, existing rights. The Philippines stressed the importance of an Instrument that is flexible enough to apply in various contexts and called for consultation with stakeholders to be conducted at the national level.

In closing, several Member States took the floor to reiterate support of the process and preparations towards the second session of the OEIWG, including Venezuela, Egypt, Bolivia, Algeria, Ecuador, Cuba, Morocco, China, and Brazil. In addition, China noted the importance that the Working Group absorbs the opinions and views of all parties while insisting on the principle of the intergovernmental process.

Several civil society groups spoke

as well in support of the process (see later section for more on the input of civil society groups).

In closing, the **Chairperson-Rapporteur, Ambassador Maria Fernanda Espinosa Garcés**, congratulated the Working Group for a positive outcome as a result of its deliberations, in compliance with the mandate established through Resolution A/HRC/RES/26/9, while acknowledging the diversity of opinions given the complex nature of the theme. The Chairperson noted that the Working Group is participating in the improvement of international law, which is a huge responsibility. She noted that the Working Group has finished the first stage of what would continue to be an open-ended, participatory and inclusive process that could end with a legally binding instrument. She noted that Member States and civil society organizations have renewed the relevance of the United Nations, as a multilateral space, in regard to issues of corporations and human rights. She added that if the Working Group manages to complete this process, it will show that the United Nations and the Human Rights Council in particular, is able to respond to the challenges and social and economic dynamics of our times.

BROAD SUPPORT FROM CIVIL SOCIETY ORGANIZATIONS

Civil society organizations took a central role throughout the deliberations of the first session of the OEIWG. Groups were active both inside the United Nations through constructive additions to the substantive debates and through mobilizations and outreach outside the United Nations.

According to the Global Campaign to Dismantle Corporate Power and Stop Impunity Groups, this process is a historic opportunity to end the impunity of TNCs and improve - in the long term and on a global scale - the protection of human rights all around the world.

Several civil society groups, including Friends of the Earth and the Transnational Institute (TNI), regretted the "non-constructive attitude of Western countries, including the European Union", pointing to their "attempts by all means and till the last minute to derail the working group's process". In their

closing statement, these groups underlined their major concern that the same countries that are proactive when it comes to promoting the interests of TNCs through the negotiation of new free trade agreements and bilateral investment treaties are obstructive when it comes to protecting human rights and holding TNCs accountable. "With the shameful exceptions of the EU, United States and several other rich countries, the States who were present should be commended for their engagement with this vital process," noted Anne van Schaik, Sustainable Finance Campaigner with Friends of the Earth Europe (iv).

Rolf Künemann, Human Rights Director of FIAN International, pointed that "the participating states, legal experts and civil society worked hard and successfully to get key human rights issues on the table. The Treaty Alliance (v) contributed a variety of views in order to enrich the debate. Diversity of views is strength. We insist that the EU replaces disruptive tactics with an honest dialogue, in good faith. The Treaty Alliance will be on alert during the intersessional period and will intensify its mobilization" (vi).

For more information on the inputs and activities of civil society groups in this process, please check: <http://www.treatymovement.com/>.

Endnotes:

(i) The Norms were approved in August 2003 by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, but the UN Commission on Human Rights did not approve them and took no further action in that regard.

(ii) For example, the UNCTAD-based Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (adopted in 1980 by the UN General Assembly) and the Draft International Code of Conduct on the Transfer of Technology (not adopted by the General Assembly).

(iii) See: "A victory vis-a-vis the upcoming UN Treaty on TNCs and human rights", statement appearing on <http://www.fian.org/> (10.7.2015)

(iv) See: "A victory vis-a-vis the upcoming UN Treaty on TNCs and human rights", statement appearing on <http://www.fian.org/> (10.7.2015).

(v) The Treaty Alliance is a group of networks and campaign groups around the world joining to collectively help organize advocacy activities in support of developing a binding international instrument to address corporate human

rights abuses. Some of the groups involved include: CETIM, CIDSE, Dismantle Corporate Power Campaign, ESCR-Net, FIAN, FIDH, Franciscans International, Friends of the Earth International, IBFAN-GIFA, Indonesia Global Justice, International Commission of Jurists, Legal Resources Center, PAN AP, Transnational Institute, TUCA. More information is available at: <http://www.treatymovement.com/>.

(vi) See : "A victory vis-a-vis the upcoming UN Treaty on TNCs and human rights", statement appearing on <http://www.fian.org/> (10.7.2015).

More information on the first session of the OEIWG is available on the following web-sites:

<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/Session1.aspx>.

Webcast of the sessions available at: <http://webtv.un.org/>.

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Highlights of some elements of discussion and points of view shared during the OEIWG's session

- Generally, the negotiations on an international binding instrument on business and human rights are perceived as a historic moment by proponents from among states and civil society organizations, and as a new phase of common endeavour in the promotion and protection of human rights;
- The adoption of a legally binding instrument in this area is complex, and all parties are invited to actively participate in a transparent and constructive manner with the OEIWG to ensure effective progress;
- TNCs are a main driving force of economic globalization and have far-reaching effects on human rights, as well as the economic, social and political contexts they operate within. Therefore, businesses must have an obligation to respect human rights commensurate with the potential impact on human rights resulting from their operations;
- The UN Guiding Principles are an important tool for the promotion and protection of human rights, but have limitations with respect to the impact for victims of human rights violations by corporations;
- There are no contradictions between the process of implementation of the UN Guiding Principles on Business and Human Rights, through national action plans, and the process pertaining to the adoption of a legally binding instrument; both processes are complementary and reinforce a common purpose;
- Major legal voids with respect to the rights of victims affected by corporate violations should be addressed by a future instrument, taking into consideration the specificities of countries' legal systems, social norms and traditions, and stages of development.

Business and Human Rights

Discussing the scope of application of a prospective instrument

A meeting of a UN Human Rights Council working group recently discussed a treaty on the human rights effects of transnational corporations and other business enterprises. Below is the second part of the report on the meeting, focusing on discussions concerning the scope of a prospective treaty.

By Kinda Mohamadieh and Daniel Uribe

Resolution A/HRC/RES/26/9 adopted by the United Nations Human Rights Council on 25 June 2014 established an open-ended intergovernmental working group to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" (Operative paragraph 1, Resolution A/HRC/RES/26/9).

It also recommended that "the first

meeting of the open-ended intergovernmental working group serve to collect inputs, including written inputs, from States and relevant stakeholders on possible principles, scope and elements of such an international legally binding instrument" (Operative paragraph 5, Resolution A/HRC/RES/26/9).

The first meeting of the open-ended intergovernmental working group (OEIWG) discussed the scope of a prospective instrument over two consecutive sessions. One session addressed the businesses to be covered

by the Instrument, including the concepts and legal nature of transnational corporations and other business enterprises in international law. Another session addressed the scope of human rights to be covered under the Instrument.

A clear message that came out of the deliberations at the OEIWG was that a prospective Instrument should cover all human rights and human rights violations. On this topic, it was noted that the UN Guiding Principles pointed that business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights (see commentary to UNGP 12). It was also underlined that human rights are universal, indivisible and interdependent as recognised in the Vienna Declaration and Programme of Action

(1993). Furthermore, it was noted that there is no clear definition of gross violations of human rights under international law (for more details of the discussions on this point, see part I of the report entitled "Business and Human Rights: Commencing historic discussions on a legally binding instrument", SOUTHNEWS, No. 93, 14 July 2015 available at: [http://us5.campaign-archive1.com/?u=fa9cf38799136b5660f367ba6&id=62fa395837&e=\[UNIQID\]](http://us5.campaign-archive1.com/?u=fa9cf38799136b5660f367ba6&id=62fa395837&e=[UNIQID])).

This part of the report will focus on the deliberations concerning the businesses to be covered by a prospective instrument. These discussions particularly tackled a footnote in the preambular section of resolution A/HRC/RES/26/9, which provides that "Other business enterprises" denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law".

The concept note for the first OEIWG session¹ indicates that "[This] issue has already triggered a lively debate. Some States and other stakeholders have requested a broad interpretation of the footnote, not limited only to businesses with a transnational character, but applied to all business enterprises". The concept note adds that "States and relevant stakeholders are invited to engage in a substantive and constructive discussion in order to address this concern. Therefore Member States and other stakeholders are invited to provide their views and positions

on this matter during the first session of the OEIWG".

Highlights from the discussions

Three interrelated issues were tackled by the interventions of experts, states, and civil society organizations in this session, including: (1) whether a prospective instrument should be applied to all business enterprises or to transnational corporations only, including a discussion of the meaning and interpretation of the footnote in resolution A/HRC/RES/26/9, (2) the possibilities and approaches to defining the notion of 'transnational corporations' under international law and (3) the legal status of transnational corporations under international law, mainly with regard to the possibility of recognising corporations as subjects of liability under international human rights law.

CONTRIBUTIONS FROM EXPERTS

Four experts participated on the panel including Stephanie Blankenberg, head of the Debt, Development and Finance work at the United Nations Conference on Trade and Development (UNCTAD) Division on Globalization and Development Strategies; Michael Congiu, shareholder, Littler Mendelson PLC; Chip Pitts, lecturer at Stanford Law School; and Carlos M. Correa, special advisor on trade and intellectual property at the South Centre.

Stephanie Blankenberg noted that from a macro-economic point of view, the size of corporations does matter.

When comparing corporate sales and countries' gross domestic product (GDP) over recent years, it can be noted that around half of the leading 100 economies have a size comparable to transnational corporations (TNCs). If we measure companies' impact in value added, she added, about one third to one fourth of the world's largest economies would be comparable to companies' sizes. According to the Financial Times Stock Exchange multinational index, which is composed of the largest multinationals that derive 30% or more of their revenue from outside their domestic region (i.e. the region where they are incorporated), the net market capitalization for 700 constituent companies account for around USD 30 trillion. Most of these companies are incorporated in the US, followed by Japan, the United Kingdom, and France. American multinationals account for USD 11 trillion in net market capitalization. By contrast, the GDP of China was close to USD 10 trillion in 2013, and that of India was around USD 2 trillion in the same year.

Stephanie Blankenberg pointed out that two elements should be taken into account when discussing corporations. One is the size of their operations; this element is not enough to clarify the impact that companies have in the world economy. Another is the extent of control that these companies can exert over "economic, as well as social and political decision-making relative to other stakeholders, that is relative to national governments, civil society constituents, employees, and international organizations."

Ms. Blankenberg added that "[w]hat makes transnational corporations subjects of potential concerns [...] is not the companies themselves, not their size nor their reach... what makes them subject of potential concerns is the absence of countervailing power that can channel their productive capacities towards constructive collective outcomes".

Ms. Blankenberg explained that the immediate post war period witnessed a fast expansion of TNCs' role in the global economy. This period was associated with policy cooperation between advanced economies and the emergence of the Bretton Woods system that favoured the rapid expansion of international trade. Since then, there



Voting results of Resolution A/HRC/RES/26/9 during the Human Rights Council session held in June 2014.



Panel on the scope of application of a prospective instrument

has been a fundamental shift in power relation between TNCs and states. This shift was driven by technologies that facilitated management of large companies across borders, the deregulation of many economic activities, and the financialization of the global economy as a parallel process affecting TNCs that favour 'short-termism' in investment strategies. The shift in power of TNCs vis-a-vis states is also reflected in the mechanisms available to corporations under trade agreements and investor-state dispute settlement mechanisms, added Ms. Blankenberg.

While TNCs from developing economies are on the rise, Ms. Blankenberg pointed out that national accounting often does not give reasonable figures that reflect the relative weight of developing economies in the global economy. She gave an example of China, where 90% of the high technology exports are produced by foreign companies, thus controlled directly or indirectly outside China.

Ms. Blankenberg pointed to the legal instruments available to companies, such as limited group liability and the ability of large companies to use existing legal instruments in order to negotiate the responsibilities that they have.

In principle, she added, it is important to recall that not a single economist ever argued for private market economies not to be regulated. In conclusion, Stephanie Blankenberg stressed that "there is a strong argument in favour of international regulation in the globalized international economy [...] to channel the potential of private - and large companies in particular - into a path of inclusive and sustainable growth for the benefit of all".

Michael Congiu, of Littler Mendelson and expert on international labour rights and business and human rights, observed that defining multinational corporations is very difficult. He added that it is "very difficult for a multinational entity to understand where it has individual members in its supply chain, where particular products are coming from and to control those individual entities on a daily basis in order to ensure that they are obeying their human rights obligations".

Mr. Michael Congiu considered that there has been important progress in the area of business and human rights,

pointing to the experiences of the UN Guiding Principles (UNGP), the OECD Guidelines, national action plans adopted by the United Kingdom, and consultations carried out by the United States and the Netherlands, among other examples.

Mr. Congiu stressed that "The UNGPs are rather clear that those principles apply to every business entity, whether it is a small entity, a large entity, a transnational entity, a domestic entity, a state owned entity or a private entity". He added that "any treaty process that moves forward should also be of that same scope; it should cover every entity that does business".

In the case of a treaty that has some sort of liability attached to it, "if you focus all of the liability at the very top of the supply chain or value chain, the entities that are within the supply chain, domestic entities in particular, need to be incentivized to comply with their human rights obligations", Mr. Congiu noted.

On the issues of scale, Mr. Congiu proposed a two-fold process: first addressing the "norms that are going to be covered by the treaty", and secondly, "the standards that will be used to determine whether a particular norm has been violated".

Michael Congiu referred to the case of the Alien Tort Statute of the United States. He explained that under this statute it is necessary to be "able to establish that there is an international consensus as to whether a norm can be applied against a corporation, and also to determine the standard by which that norm has been violated or has not been violated".

Mr. Congiu was of the opinion that "there is no international consensus whether corporations can be held liable under international law, as it is a widely debated issue". According to

Mr. Congiu, the only norms identified as having "sufficient international consensus to hold corporations accountable on a legal level are what are known as *jus cogens* norms, or gross human rights violations".

Professor Chip Pitts of Stanford University noted that "there is actually not much divergence, globally or in the United States, and certainly among the scholarly community, about whether corporations can be subjects of international law". Professor Pitts argued that the concept of the 'law of nations', which is literally quoted in the US Constitution, in the bill of rights, and referenced in the Alien Tort Statute is more of a universal concept, and definitely involves more than state actors.

In addition, Professor Pitts described the deep history of international courts in enforcing international rights. He mentioned the study carried out by Professor Jenny Martinez² in regard to "courts that were sitting between Britain and other countries, including Latin American countries, and ultimately the United States, in the XIX Century [...] they heard over 600 cases, applied international law against both State and non-state actors to free over 80 thousand slaves". The modern slavery act of the UK "is intended to apply throughout the supply chain to try to stamp out trafficking and slavery", Professor Pitts noted.

Likewise, Professor Pitts also recalled the opinion of Judge Posner in interpreting the Alien Tort Statute of the United States. According to Professor Pitts, Judge Posner "had no questions whether corporations can be subjects of international law, and can be held civilly and criminally liable". Professor Pitts added that "from a comparative law perspective, in every region of the world there are patch work decisions in that same vein, sometimes



The Bhopal Mother—The monument in Bhopal remembering the thousands who were killed and permanently disabled by the 1984 toxic gas release.

it is under tort law [...] sometimes it is customary international law”.

For these reasons “as a technical legal matter, there is no barrier to corporations being subjects of international law, and it would be one of the considerations of this international working group whether to make that possibility a global reality”, Professor Chip Pitts concluded.

Professor Carlos Correa of the South Centre pointed out that the central issue to be addressed concerns the objective of the international instrument. If the aim is to resolve the issues raised by the international operations of TNCs and their ability to commit violations in some countries where there is lack of sufficient remedy to tackle the damage that might have been caused, then the footnote in Resolution A/HRC/RES/26/9 explains the intention of the States that started the process towards a legally binding instrument. Such objective would “focus on the issue of lack of jurisdiction and the issues arising from cases of transnational corporations trying to escape their responsibility through benefiting from complex corporate structures”.

On the other hand, if the aim is to “strengthen in a binding way the principles to ensure that all commercial businesses comply with their human rights obligations, this would be a conceptually different objective which has very different practical implications”, Professor Correa noted. In such a case, “[M]onitoring will be impossible, due to the thousands of local businesses that might be subject to the binding instrument, and furthermore these businesses would be subject to domes-

tic systems”, Professor Correa added.

Professor Carlos Correa recognised that “at a national level, there are many examples of legislation and jurisprudence that deal with the issue of control of subsidiaries and indirect control over businesses, in addition to numerous examples in tax law, commercial law and intellectual property law”.

Additionally, Professor Correa noted how corporations under investment law managed to establish “mechanisms to link the activities of some apparently independent companies with those companies that control them”. He added that “the doctrine of economic unity allows us to tackle the true relations that exist among companies that are formally independent”. Professor Correa concluded that these precedents “might be valuable when we try to establish the rules for the operation of this instrument”.

On definitions, Professor Correa noted that if the aim of the instrument is to address the conduct of TNCs, then “it is necessary to define transnational corporations on the basis of the precedents we have at national and international levels”. He argued that there are examples in international agreements that have dealt with these issues; for example one approach might be not to have a specific explicit definition of transnational corporations.

Professor Correa explained that there are international agreements that have generated substantial impact, which do not have specific definitions. As an example, he mentioned the International Centre for Settlement of Investment Disputes (ICSID) conven-

tion³, specifically Article 25, which refers to investment but does not define what an investment is. The “definition has been established by jurisprudence, through what came to be known as the Salini test⁴, Professor Correa held. Other approaches mentioned by Professor Correa include delegation to national law, whereby each country would define the term ‘transnational corporations’, or an intermediate referral system by which “a basic definition might correspond to national laws, subject to control by international law under internationally agreed rules”. He added that different models can be adopted here.

Professor Carlos Correa highlighted that reaching an agreed definition of ‘transnational corporations’ could be difficult and it would be important to opt “for simpler options which will allow for a swift and more effective way forward”. He also pointed to precedents under the Draft UN Code of Conduct on Transnational Corporations, ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the OECD Guidelines.

CONTRIBUTIONS FROM STATES

The representative of **Bolivia** called attention to the importance of “legal certainty and swift progress in negotiations”, adding that the discussions must focus on “[making] sure that transnational corporations cannot evade their human rights responsibilities”. Bolivia added that “due to the transnational nature of their operations, size and structure ...transnational corporations have high impact on human rights and [...] many of them have been able to escape their responsibility and duty to respect human rights on the basis of jurisdictional grounds, using complex structures to evade laws”. For Bolivia, the scope of coverage of a prospective instrument should reflect the mandate of Resolution A/HRC/RES/26/9.

The representative of **Namibia** noted that the prospective instrument should focus on transnational corporations, but not exclude other companies. Namibia added that “most operations of transnational corporations in host states are through locally incorporated subsidiaries”. The delegation of Namibia considered that “a level

playing field, or uniform international human rights standards for all businesses, across and within all states, would be in the interest of all of us". Namibia stressed that the objective of the process is "to protect the weak amongst us, both host states with little or no regulatory frameworks, as well as affected workers and communities ...".

Pakistan highlighted that the "scope of application of a prospective instrument is directly related to the primary objectives of the instrument and [should] redress the gaps and imbalances in the international legal order, in order to ensure that transnational companies and other foreign companies do not escape liability based on jurisdictional grounds". The delegation of Pakistan also noted that UN Guiding Principle 14, while recognizing that "the responsibility to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure", also provides that "... the scale and complexity of the means through which enterprises meet their responsibility may vary according to these factors". In this regard, "domestic businesses are covered by national laws, and unlike transnational corporations, they cannot wind down their economic activity in one country and move to another in order to avoid fulfilling their obligations", Pakistan added. For Pakistan, it is this supranational status of transnational corporations that need to be specifically addressed while outlining the prospective legally binding instrument. Any attempt to change this basic scope can be detrimental and could have serious impact on the working of any future dispute resolution mechanisms.

The representative of **Cuba** considered that the main objective of this process should be to fill the legal gaps that persist in human rights law and other areas of international law regarding universal norms for transnational corporations. Cuba added that the importance of filling these gaps requires focusing on the transnational types of enterprises. The delegation of Cuba noted that different alternatives could be considered in this regard; a definition of transnational corporations could be one choice, but another possibility could be no including a definition of transnational corporations. Cuba added that they are open to discuss the matter and listen to the different opin-

ions with a view to reaching "a common vision that we can then reflect in a legally binding instrument".

Ecuador underlined that "the main objective should be to fill existing gaps in international human rights law" which should "generate international norms for transnational corporations ...". Ecuador stressed that the phenomenon of transnational corporations "is not diminishing, but is growing", noting that the past decades lacked a serious discussion on "how these corporations can be monitored". "This body [the OEIWG] in fact seeks specifically to address this issue and find solutions to these questions", Ecuador added. The delegation of Ecuador noted that "it is not always possible to come to agreement on a definition of a specific term under international law. Nevertheless, it is possible to arrive to a common understanding on the operational use of concepts". "Many definitions may go out of date as things change ... but this should not be an obstacle to reaching operational agreements that work in practice", the delegation explained.

The delegation of the **Russian Federation** stressed that the scope of the discussion "should focus on the phenomenon of the transnational activities of corporations", because the difficulty of accountability in extraterritorial operations are related to these transnational activities. The Russian Federation noted that "there is no definition of what a transnational corporation is, which is universally accepted". While recognizing that there are many definitions depending on different factors, the Russian Federation stressed that "there is no single universal definition, and for any treaty, a definition will be necessary". The Russian Federation also raised a question pertaining to the legal status of transnational corporations, noting that "presently transnational corporations do not have legal standing under international law".

CONTRIBUTIONS FROM CIVIL SOCIETY ORGANIZATIONS

With respect to the definition of transnational corporations (TNCs), **CIDSE**⁵, on behalf of a group of civil society organizations⁶, considered that attempts to define TNCs are likely to prove futile, as an entity could be considered "transnational" in view of multiple alternative variables such as shareholding, operations, business relations, loca-

tion of offices, nationality of shareholders and directors. Moreover, **CIDSE** noted that "any attempt to limit the treaty's scope by providing a definition of targeted corporations - thereby excluding a subset of companies - will inevitably result in lawyers advising enterprises how to bypass the given definitional contours, and would thus provide loopholes in the protection against business related human rights abuse". **CIDSE** presented a proposal for the application of a hybrid approach, which entails that "conceptually, the treaty would not exclude any specific type of business; but in its substance, it would focus on developing provisions for transnational operations, thereby addressing the current challenges to hold transnational corporations to account". **CIDSE** underlined that the objective of negotiating a treaty is "to address governance gaps related to transnational business enterprises and problematic home-host state dynamics that come with it". Thus, the "treaty's main objective and focus needs to be on provisions for transnational operations of business, such as the obligation of states to regulate the extraterritorial activities of business, and to provide mutual assistance between states in investigating violations and in enforcing judgements. It is these types of provisions we are looking for in the treaty, which clearly go beyond the domestic level", according to the statement made by **CIDSE**.

CETIM pointed out that in the globalized economy, TNCs have become major and powerful actors, and their activities are often associated with human rights violations. Several hundred TNCs control most of the production and marketing of goods and services, and around 80% of trade takes place within global value chains (GVCs) controlled by TNCs, **CETIM** added. The group noted that some TNCs are more powerful than states. The group pointed to the case of British Petroleum (BP), which was forced by the US government to pay USD 18 billion in compensation for the damages resulting from the Gulf of Mexico oil spill in 2010. However, in other cases, such as the environmental damage due to Chevron's operations in Ecuador, victims are still waiting for compensation even after they received a court judgement in their favor. **CETIM** stressed that TNCs cannot be



Protest in regard to the oil spill in the Gulf of Mexico, held in New Orleans.

above the law. The mandate of the working group provides an opportunity to fill in the gaps in international law, the group stressed. The prospective Instrument should clearly establish the obligations of TNCs to comply with international standards in the area of human rights, labor rights and environmental protection. It should also establish the joint responsibility of TNCs with subsidiaries, sub-contractors, licensees and local enterprises that they de facto control, CETIM added.

The representative of the **International Network for Economic, Social and Cultural Rights (ESCR-NET)**, speaking on behalf of 16 organisations⁷, stressed that “in principle all conduct by all types of business enterprises, whether local or transnational, should be addressed in the legally binding instrument”. The statement by ESCR-NET stressed as well that “[T]he footnote in the preamble [of Resolution A/HRC/RES/26/9] should not be interpreted as limiting in any way the scope of possible discussions in the Intergovernmental Working Group or any analysis or recommendations that may be reported back to the Council on a future treaty”. The statement by ESCR-NET added that “a ‘full scope’ approach to the future instrument is consistent with the current practices and understandings within the United Nations, and addressing TNCs and all business enterprises does not mean a ‘one - size - fits -all’ approach. The concern about the application of certain standards as a ‘one-size-fits-all’ approach was considered by the experts in the former UN Sub-Commission on the Protection of Human Rights when they drafted the Norms and Principles of Human Rights applicable to TNCs

and other business enterprises. It was also a concern for the Special Representative of the Secretary General on TNCs and other business enterprises, John Ruggie. Both mandates made it clear that while human rights standards were addressed to all business enterprises, they would be applied in a differentiated manner”.

FIAN International (FoodFirst Information and Action Network) underlined that “the treaty has to focus on TNCs”. The representative of FIAN underlined that an “existing gap is the lack of determination of liability of parent and controlling companies under the jurisdiction of states other than those of the affected [communities]”. For these reasons, FIAN considers that the treaty must set “clear regulations on the separate and joint extraterritorial obligations of states, in line with the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights”. “Legally, this will imply setting standards for national companies belonging to TNCs and economic groups”, FIAN added.

FIDH (The International Federation for Human Rights) considered that a “legally binding instrument must address the human rights violations arising from the activities of all business enterprises”. FIDH added that “[T]he treaty must address the transboundary nature of corporate related human rights abuses at the same time as addressing ways to ensure accountability for parent companies, subsidiaries, outsourcing firms, contractors (whether corporate or government contractors) and entities in the supply chain”. FIDH pointed out that the “situations [FIDH] investigate are often complex and involving both domestic and transnational corporations. In Brazil, FIDH investigated a case involving the direct and indirect responsibility of a transnational corporation and the direct responsibility of four domestic companies. In the Occupied Palestinian Territories, FIDH looked at business relationships between a French transnational corporation and an Israeli telecommunications company. In Ecuador, FIDH documented abuses linked to the operations of a Canadian junior company subsequently acquired by a Chinese consortium but which remains registered in Canada...”.

The Women’s International League

for Peace and Freedom (WILPF) called for an instrument that has “a wide scope and covers all kinds of business enterprises”. All companies, domestic or transnational may violate human rights and should be covered by the instrument, according to WILPF. The group noted that “special attention should be given to transnational companies. Whereas one single country may be successful in preventing human rights violations by domestic enterprises, the same task cannot be successful for transnational companies unless international agreements, such as the one foreseen, are elaborated. Thus, a more extensive part of this instrument should be applicable to transnational companies...”.

Endnotes:

¹The concept note was proposed under the responsibility of the designated Chair, Ambassador Maria Fernanda Espinosa, Permanent Representative of Ecuador to the United Nations in Geneva. The concept note is available at this link: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/Session1.aspx>.

²Jenny S. Martinez, “Antislavery Courts and the Dawn of International Human Rights Law”, *The Yale Journal* 117:550 (2008), pp. 550-641. Web version: http://www.yalelawjournal.org/pdf/628_0k11d7z9.pdf (accessed on 16 July 2015).

³Convention establishing the International Centre for Settlement of Investment Disputes, adopted on 18 March 1965, and entered into force 14 October 1966.

⁴See: *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (2001), paras. 51-58.

⁵An international alliance of Catholic development agencies.

⁶The group included SOMO, Brot Fur Die Welt, IBFAN, IBFAN-GIFA, Global Policy Forum and Friends of the Earth Europe.

⁷Amnesty International, The Center for Legal and Social Studies (Argentina), CIDSE, Colombian Commission of Jurists, Due Process of Law Foundation (USA), ESCR-Net Corporate Accountability Working Group, Earthrights International, The Global Initiative for Economic, Social and Cultural Rights (USA), Franciscans International, International Accountability Project, International Commission of Jurists, Mining Watch Canada, National Economic & Social Rights Initiative (USA), Project on Organizing, Development, Education and Research (Mexico), Video Volunteers (India).

Highlights of some elements of discussion and points of view shared during the OEIWG's session

In regard to the subjective scope of a prospective Instrument:

- There is a common understanding that the prospective Instrument should address the gaps and imbalances in the international legal order in order to ensure that business enterprises do not escape liability on jurisdictional grounds, given the complex corporate structures, which often leads to lack of effective remedy for victims;
- Generally, there is agreement among legal experts that there are no legal limitations to recognizing corporations as subjects of international law;
- The discussion about corporations should address the size of their operations and the extent of control that these companies exert in society. The UN Guiding Principles recognise that “the scale and complexity of the means through which enterprises meet their responsibility may vary according to these [size, sector, operational context, ownership and structure] factors”;
- There are differentiated views on the subjective scope of a prospective Instrument and the type of businesses that the Instrument will cover; fundamentally, whether the Instrument should focus on transnational corporations or cover all business enterprises. However, there is overall agreement that all entities linked to a transnational corporations, including subsidiaries and entities in their supply chain, should be covered by a prospective Instrument;
- Several stakeholders were of the view that the footnote in Resolution A/HRC/RES/26/9 does not necessarily limit the possible discussions in the OEIWG in regard to scope and coverage of a prospective binding Instrument on business and human rights. Others were keen to pursue an explicit interpretation of the footnote with the purpose of ensuring that all business enterprises are to be covered under a prospective Instrument;
- Even though reaching an agreed definition of the term ‘transnational corporations’ could be difficult, different options for a common understanding on the operational use of this concept could be developed. It was suggested that the operational use of concepts would depend on the aims set for the prospective Instrument;
- Some participants suggested that the prospective Instrument could avoid excluding any type of corporation, but concentrate on the transboundary nature of human rights abuses, and adopt an approach based on the doctrine of ‘economic unity’ to address the accountability of parent companies, subsidiaries, outsourcing firms, contractors, among others, as already applied in several domestic and international law regimes.

In regard to human rights to be covered under the prospective Instrument:

- All human rights are universal, interrelated and interdependent, thus the prospective Instrument could reflect that through covering all human rights violations;
- Violations of human rights by TNCs often involve economic, social, and cultural and environmental rights, in addition to the right to water, health, food and development among other rights;
- The role of transnational and other business entities in the international sphere allows them to enjoy benefits and protections, such as under international investment treaties, and gives rise to an equal responsibility in relation to human rights. Within this context, some argued that a prospective Instrument should cover the widest scope of human rights, including the right to development;
- Generally, there was agreement among participants that a prospective Instrument should cover all human rights. Limiting a future instrument to address some gross violations of human rights would be equivalent to tolerating certain violations.

Business and Human Rights

Discussing obligations of States and businesses

A meeting of a UN Human Rights Council working group recently discussed a treaty on the human rights effects of transnational corporations (TNCs) and other business enterprises. Below is the third part of the report on the meeting, focusing on discussions concerning the obligations of States with respect to operations of TNCs and other business enterprises, including extraterritorial obligations, and the obligations of businesses.

By Kinda Mohamadih and Daniel Uribe

Resolution A/HRC/RES/26/9 adopted by the United Nations Human Rights Council (HRC) on 25 June 2014 established an open-ended intergovernmental working group to “elaborate an international legally bind-



The Global Campaign to Dismantle Corporate Power, together with the Treaty Alliance and social movements in Switzerland, organized a week of mobilizations during the meeting of the OEIWG in Geneva.

ing instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (Operative paragraph 1, Resolution A/HRC/RES/26/9).

It also recommended that “the first meeting of the open-ended intergovernmental working group serve to collect inputs, including written inputs, from States and relevant stakeholders on possible principles, scope and elements of such an international legally binding instrument” (Operative paragraph 5, Resolution A/HRC/RES/26/9).

On the content of a prospective Instrument, the first meeting of the open-ended intergovernmental working group (OEIWG) included a session entitled “Obligations of States to guarantee the respect of human rights by TNCs and other business enterprises, including extraterritorial obligations” and another entitled “Enhancing the responsibility of TNCs and other business enterprises to respect human rights, including prevention, mitigation and remediation”.

Discussion on the obligations of States

CONTRIBUTIONS FROM PANELLISTS

Professor Hatem Kotrane, Member of the UN Committee on the Rights of the Child, noted that States have obligations to respect, protect and fulfil human rights. The obligation to respect requires States not to hinder the enjoyment of human rights, therefore not to facilitate or otherwise foster abuses of human rights, either directly or indi-

rectly. Professor Kotrane added that States are obliged to ensure that all actors, including corporations, respect human rights.

Speaking from his experience with the UN Committee on the Rights of the Child, Professor Kotrane added that States carry the obligations to “ensure that all political, legislative and administrative decision-making related to transnational corporations and other business enterprises are taken in a public and transparent way, making full and systematic account of the effect that these entities may have on the rights of the child”. In cases where States are commercially involved with private entities, and in cases of public tenders, Professor Kotrane noted that States should allocate these contracts to those companies that respect the rights of the child. Likewise, “State agencies, particularly state law-enforcement agencies, should not be involved in violations of the rights of the child or enable such acts to be committed by third parties”.

In regard to the obligation to fulfil human rights, Professor Kotrane spoke of the importance of awareness measures and dissemination of human rights standards among corporations. He also stressed the importance of a stable and predictable legal and regulatory framework that enables States to protect human rights, *inter alia*, through well-defined and properly implemented laws on labour, employment, health, occupational safety, the environment, corruption, etc.

Professor Kotrane underlined that “children could be more vulnerable than adults when faced with violations

of their rights” since the consequences of this harm could be irreversible and the impact could persist during their entire lives.

On extraterritorial obligations of States, Professor Kotrane made reference to the United Nations Guiding Principles (UNGPs) and recalled that States have the obligation to protect against abuses committed by their enterprises in their territories and in the territory of a third party. He explained that such obligation entails taking appropriate measures to prevent, punish and adjudicate violations through effective policy making, laws, and adjudication mechanisms, including complaint procedures.

Taking an example from the work of the UN Committee on the Rights of the Child, Professor Kotrane emphasised that States should account for violations committed against children by their transnational corporations when operating outside their territory, by way of ensuring that such violations are addressed by the laws of the country in which the corporations are based as well as in the territory in which they function. He gave the example of the application of extraterritoriality in the case of the ‘Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography’. In this case, “the competence of the courts is broadened to take account of violations when the perpetrator is living in the territory of the relevant state or it is living outside the state but it has the nationality of that State”. When applied to transnational corporations, Professor Kotrane suggested, “States should be competent to exercise extraterritorial jurisdiction when TNCs have their base or their headquarters in a particular country”.

Professor Krotane added that extraterritorial obligations involve both the States of origin and host States in which business enterprises operate, including “where they have branches and also where they develop their economic activities via outsourcing and partner companies”. In order to operationalise this obligation, Professor Kotrane explained that States have an obligation, pursuant to the Convention on the Rights of the Child and its Optional Protocols, to uphold the rights of children in the context of extraterritorial activities of TNCs when there is a



Panel on the obligations of states

'reasonable' link between the state and the activity in question. The term 'reasonable' applies when certain circumstances are fulfilled in regard to the location of the enterprise and the location of its activities, Professor Kotrane added.

Kinda Mohamadih, Associate Researcher at the South Centre, noted that the duty of the States to protect human rights from violations by private entities is well established under international human rights law. She added that a prospective instrument could focus on clarifying the means and measures by which states should fulfil these existing obligations, thus build on the large body of opinion and jurisprudence emerging from universal and regional systems of human rights.

Ms. Mohamadih indicated that "the identification and clarification of these obligations [...] is expected to support States in encountering the current challenges facing the protection of human rights with respect to corporate human rights abuses, particularly when facing an enterprise of transnational character". These cases cannot be addressed "through the frameworks and mechanisms available to the State on its own, but necessitate international cooperation", she added.

Ms. Mohamadih referred to opinions and general comments adopted by the UN Human Rights Treaty Bodies, which recognised that States have obligations *vis-à-vis* acts committed by private persons or entities that could impair the enjoyment of human rights, and that States also have positive obligations to exercise due diligence to prevent, punish, investigate or redress the harm caused by private entities. She underlined that "in order to meet this duty, States should regulate certain activities of private individuals and bodies by adopting effective measures to prevent future injury and respond to past injury".

In addition, Ms. Mohamadih high-

lighted that "under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish such acts". In this sense, the States' obligations "*vis-à-vis* third parties is an obligation of conduct, which entails the duty of the state to comply with the expected conduct as established in its international commitments". Ms. Mohamadih explained that "the actions by non-state actors do not have to be attributed to the state; rather the state's obligation would be part of its due diligence in relation to activities of corporations within their jurisdiction". This obligation of due diligence by the state "would fall within the three-fold responsibility of States to respect, protect and fulfil human rights".

She cited examples of opinions by the European Court of Human Rights and the Inter-American Court of Human Rights indicating that "states are not directly responsible for human rights abuses committed by third parties, but that they can be responsible for failing to take measures to prevent and punish the occurrence of such violations". Moreover, Ms. Mohamadih pointed out that the "UN Guiding Principles on Business and Human Rights could assist in this area, as they provide a basis that recalled the obligations of states in regards to human rights due diligence".

On international cooperation and extraterritorial obligations, Ms. Mohamadih affirmed that "extraterritorial jurisdiction under a prospective instrument is a core enabler of a binding treaty to be effective and to fill gaps in the current international legal order, which often hinders victims in terms of accessing effective remedies". She mentioned different UN Human Rights Treaty Bodies' comments and observations. In General Comment 14 on the right to health, the Committee on Economic, Social and

Cultural rights considered that "To comply with international obligations States have to ... prevent third parties from violating the rights in other countries, if they are able to influence these third parties by way of legal or political means...". Specifically in regard to corporations, the Committee on Economic, Social, and Cultural Rights provided that States should take steps to "prevent human rights contraventions abroad by corporations which have their main seat in their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant." Ms. Mohamadih also pointed to General Comment 16 (para. 43) by the Committee on the Rights of the Child. Ms. Mohamadih also recalled that "the Guiding principles have pointed that States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations". Overall, there are no controversial perspectives or doubts on the States' extraterritorial jurisdiction over their own corporations, Ms. Mohamadih noted.

The application of these extraterritorial obligations could be addressed by imposing on parent corporations an obligation to comply with certain norms wherever they operate and allowing jurisdiction of courts in the home state of transnational corporations over cases brought by victims of human rights abuse done in the host state of the transnational corporation, Ms. Mohamadih proposed. She pointed that "some States reviewing their approach to investment treaties have also been addressing extraterritoriality under the new models they are adopting", which in turn will "allow the home state to exercise extraterritorial jurisdiction where this appears necessary in order to avoid impunity and where victims would have no effective remedy before the national court of the host state", Ms. Mohamadih concluded.

Dr. Marcos Orellana, Senior Attorney and Director of the Human Rights and Environment Program at the Centre for International Environmental Law, noted that the duty to protect is now firmly established in international law. In the ambit of environmental rights, for example, juris-

prudence from the various regional human rights systems of protection clearly articulates positive human rights obligations to address environmental risks posed by third parties, he added.

However, Dr. Orellana noted, some countries share the “idea that their human rights responsibilities end at their territorial borders”. A gap “arises when a home state enables the creation of a corporation under its national legislation, but fails to control it when that corporation engages in transnational activity”, he added. Dr. Orellana stressed that current economic globalization requires “for international cooperation, including the effective articulation and application of extraterritorial obligations”. For these reasons “a global partnership based on extraterritorial obligations is a key building block of the binding instrument”.

Dr. Orellana referred to the UN Guiding Principles, which state that “states are not generally required and not generally prohibited under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and, or jurisdiction”. Nevertheless, Dr. Orellana noted that “this conclusion has been heavily criticized for failing to account for the newest jurisdictional frames in key instruments [basic human rights treaties]”, and to adequately reflect the body of work of treaty bodies.

Dr. Marcos Orellana recalled that several treaty bodies have explicitly recognised extraterritorial obligations, but that there are differences with regard to the relevant tests triggering these obligations. While the Human Rights Committee and the Committee against Torture have made use of the test of ‘effective control’ over the actor, the Committee on Economic, Social and Cultural Rights has adopted the ‘influence standard’, he explained. Dr. Orellana added that “the General Comments on the right to food, water and sanitation, health and social security refer to extraterritorial obligations, and while the language used is one of “should” that denotes a non-binding voluntary frame, the statements are however made in the elaboration of the content of obligations of States Parties under the Covenant”. Likewise, “a specific General Comment on business and the right of the child elaborates on extraterritorial obligations on the basis of

a ‘reasonable link’ between the corporation and the State”, Dr. Orellana added.

Dr. Orellana argued that while tests for triggering the extraterritorial obligations (ETOs) of States may vary, “the recognition of ETOs is widely affirmed”. He also examined the ‘reasonable linkage’ test, as further articulated and clarified in the Maastricht Principles on Extraterritorial Obligations in the area of Economic, Social and Cultural Rights. The Maastricht Principles “are a restatement of jurisprudence, of the work of the treaty bodies and of the work of the special procedures”, he explained.

Dr. Orellana added that the Maastricht Principles “highlight all throughout that extraterritorial obligations should be discharged in full respect for principles of territorial integrity and non-interference under the UN Charter”. Extraterritorial obligations can be triggered in three specific situations, he added: when there is effective control; when the conduct brings foreseeable effects; and when the state has a position to exercise decisive influence.

Dr. Orellana continued by explaining that “a reasonable connection exists, for example, where the harm originates in a State’s territory, or is in violation of a peremptory norm, or is a crime under international law, or the corporation or its parent or controlling company has its centre of activity, is registered or domiciled or has its main place of business or substantial business activity in the state concerned”. The basis for this approach is reflected in jurisprudence built over “decades of international legal practice. Accordingly all states must take necessary measures to ensure that non-state actors, which they are in a position to regulate, do not nullify or impair the enjoyment of human rights”, Dr. Orellana added.

Dr. Marcos Orellana pointed out that there are various possibilities for operationalising states’ extraterritorial obligations. For example, he mentioned due diligence requirements for prevention purposes, disclosure requirements, and reporting requirements. In the ambit of redress for violation, he mentioned the possibilities for removing obstacles to the exercise of jurisdiction, broad rules of standing, removing the ‘forum non convenience’ doctrine, and

mechanisms of assistance to victims to facilitate access to justice. In addition to removing obstacles to the exercise of jurisdiction, there may be cross-border cooperation in the investigation and mutual recognition of national decisions.

Dr. Orellana also addressed the issue of the scope of application of a prospective binding instrument. He noted that when dealing with operationalizing extraterritorial obligations, the concern of scope does not arise because, by necessary implication of the subject matter of extraterritorial obligations, the binding agreement would focus on the transboundary activities of corporations without the need to define what a transnational corporation is.

In conclusion, Dr. Orellana noted that extraterritorial obligations of States are a “necessary step forward in securing a global partnership against corporate impunity”. He observed that “ETOs provide the structure and systemic tool that can help the binding instrument address the imbalances and close the gaps in the current international legal order, and the Maastricht Principles provide legal guidance on how to operationalise these ETOs in the binding agreement”.

Mr. Richard Meeran, partner in Leigh Day, spoke based on his experience with various cases brought on behalf of victims of corporate human rights abuse. At the outset, Mr. Meeran noted the case of Thor chemicals, a UK multinational operating in South Africa. In the 1990s, three workers died and many others were poisoned at its factory. Thor was fined 5,000 USD, but was later sued for substantial damages in UK civil proceedings, he noted. Shell avoided liability for environmental pollution in Nigeria, but recently settled a UK action for 60 million pounds. Mr. Meeran also mentioned the case of British Petroleum, which accepted to pay 18.7 billion USD in settlement made for the US victims of the Gulf of Mexico oil spill.

Mr. Meeran noted the importance of action in host states, including as a deterrent against future violations. But in general, for various reasons, criminal sanctions are inadequately enforced by host states against multinational companies, he noted, and adequate legal representation of victims is

rarely available in host states. While significant progress has been achieved in different home states in holding parent companies liable, progress can be replicated and improved upon through a treaty, Mr. Meeran added. At the same time, he spoke of the significant deficiencies in access to remedies, even in home states, including various procedural and practical obstacles. These could also be rectified in a treaty, Mr. Meeran suggested.

There are a number of limitations and challenges that could be addressed in a prospective treaty, according to Mr. Meeran.

The exercise of extraterritorial jurisdiction by home states of transnational corporations raises issues of infringement of sovereignty of host states, Mr. Meeran noted. For example, South Africa initially objected to the apartheid reparation actions in the US. However, he added, this should be weighed against the realization that in cases of violations by multinational companies, the alternative to a case in the home state is in effect a denial of justice to victims. In circumstances where a multinational parent company controls activities from its headquarters, the multinational's home state has an interest in regulating the conduct of the parent company, Mr. Meeran added.

Mr. Meeran gave an example of European law (The Brussels I regulation), under which suing a defendant in its domicile is mandatory. Thus, irrespective of any sovereignty issue, EU courts must accept jurisdiction in a claim brought against an EU domiciled corporation.

Mr. Meeran addressed the issue of 'forum non convenience', a doctrine exercised by the courts of the US, Canada, Australia and the UK, whereby courts that have jurisdiction in certain cases decline to exercise it on the grounds that there is a more appropriate forum in the multinational's home state. The dramatic effects of this doctrine were seen in the Bhopal case and the Asbestos Miners case where many of the claimants died during the period when jurisdiction was being addressed. Following a 2005 ruling by the European Court of Justice, 'forum non convenience' is no longer available in cases involving European Union defendants, including in the UK, Mr. Meeran explained. As a result, since 2005, multi-

national cases have moved faster in the UK courts. 'Forum non convenience' is however alive and kicking in the courts of the US, Canada, and Australia, Mr. Meeran cautioned.

According to Mr. Meeran, proving liability is simpler where the parent company is responsible for alleged harm, citing the *Trafigura* case, or where the host state subsidiary submits to the jurisdiction of the home state, as happened in the *Shell Nigeria* case that submitted to the jurisdiction of the English courts.

Mr. Meeran addressed the issues pertaining to 'corporate veil'. He noted that 'corporate veil' have been overcome in the UK cases through applying a tort based approach where it is alleged that the parent company owed a 'duty of care' by virtue of its role in relation to the alleged harm, thus in respect to its own acts and omissions. Under this approach, the shareholding of the parent company is not the point; the issue is what role was played by the parent company as a matter of fact. The same principle can thus apply outside the multinational context or group, in a supply chain context, Mr. Meeran suggested. This approach has been so far only positively endorsed by the UK courts. Mr. Meeran explained that under rules of private international law (the Rome II Regulation) it is the law of the host state that will invariably apply, but national laws of many states seem to contain provisions that can be developed in a manner similar to that which has occurred in the UK.

In regard to evidence, Mr. Meeran noted that it is necessary to have access to internal documents in order to establish the relationship between parent company and subsidiary. In the UK and US, he noted, there are effective discovery and disclosure procedures, but elsewhere restrictions on access to documents have severely hampered the lawyers of the victims. To address that, he proposed to reverse the burden of proof, thus to assume that the parent company is liable unless it can prove otherwise by producing the documents that will shed light on what was going on in the internal processes of the company.

In conclusion, Mr. Meeran made three specific propositions: to abolish 'forum non convenience' in human rights cases or denial of 'forum non

convenience' where a claimant can show that they cannot attain justice in the host state, acceptance of the principle of parent company 'duty of care' and the delineation of circumstances when that will apply, and reversal of the burden of proof to put the onus on the parent company to prove that it was not in control of the relevant functions.

CONTRIBUTIONS FROM STATES

Mexico posed a question on whether the obligation of States to ensure respect of human rights by businesses includes an obligation to provide an adequate forum under the legal figure of '*forum necessitates*' or 'forum by necessity', including the possibility of using this figure for civil remedies, its feasibility and practicality.

The **Russian Federation** raised a point in regard to the application of economic sanctions by some States on a unilateral basis, which it considered to be a matter that relates to States' duties to protect human rights and also the duties of enterprises to uphold human rights. Russia pointed out that economic sanctions, or unilateral coercive measures, have become a very comfortable instrument for achieving political and economic aims in the international context. Despite the fact that the negative impacts of such sanctions are universally recognized when it comes to all areas of human rights, in particular violating social, economic and labour rights, and the rights to health, development, food and work, nevertheless these economic sanctions are still being broadly applied by some countries and some economic groups - including some regional groups, Russia underlined. While states that introduce such economic sanctions are violating human rights, transnational corporations are also being drawn into violating human rights, Russia added. Russia questioned whether corporations that are seeking to uphold human rights should submit to the introduction of unilateral sanctions by States. Russia also questioned whether states have the right to coerce their TNCs into upholding sanctions which they have introduced.

Ecuador referred to the UN Guiding Principles that reaffirm the existence of States' obligations to protect

against all human rights abuses that may be committed by corporations or business enterprises in their territory or within their jurisdiction. This obligation includes the adoption of necessary measures to prevent, investigate, sanction and remedy abuses through policy, legislation, regulation and effective adjudication. States should ensure that policies, regulations and laws promote effective human rights enforcement, offering guidance to TNCs and requiring reporting from TNCs as to how they address human rights throughout their operations, Ecuador noted. In regard to extraterritoriality, Ecuador referred to UN Guiding Principle 2, which recognises that States should set out expectation that all business enterprises domiciled in their territory or jurisdiction should respect human rights throughout their operations. According to Ecuador, this recognition derives from the realization that transnational corporations could make use of the territorial limitations of laws in order to avoid potential prosecution by States, or avoid being sued by victims for human rights violations they might have been responsible for. According to Ecuador, States should also guarantee, within their legal systems, the possibility to bring complaints against enterprises for alleged human rights violations, even if those violations are committed outside their territory. Ecuador also referred to the recognition of extraterritorial obligations of States by the International Court of Justice, the Inter-American Court of Human Rights and the European Court of Human Rights, as well as the United Nations' thematic experts.

China was of the view that improving the domestic legal system, strengthening the capacity of enforcement, enhancing the awareness of protection of individuals and collective rights, and effectively protecting vulnerable groups fall under obligations of all governments. Due to some historic and present reasons, developing countries may lag behind in this area, particularly when regulating transnational corporations (TNCs), according to China. Developed countries could work jointly with developing countries, particularly the host countries of TNCs, to strengthen their capacity in this regard, China added, in order to reduce the negative impacts of business activities and human rights violations. Moreover, TNCs should comply with the laws, regula-



The collapse of the eight-storey garment factory in Rana Plaza in Dhaka turned attention to the role of multinationals and issues of labor rights and workers' safety.

tions and custom in the host countries, according to China, and fulfil social responsibilities that benefit local people and their livelihoods. On the issue of unilateral coercive measures, China underlined its opposition to such measures, noting that they impede economic and social development and the right to development, and asked the Working Group to give due consideration to this issue.

Cuba considered that a prospective instrument should cover obligations on States, ensuring that their legislation requires transnational corporations (TNCs) to respect all human rights, including when they operate in other states. Cuba noted that States have existing obligations to take necessary measures that address human rights violations by corporations and avoid impunity for human rights violations by TNCs. Derivative companies should abide by human rights obligations and the law of the states where they operate, according to Cuba. Cuba also stressed the importance of addressing extraterritoriality. Human rights treaty bodies accepted that states cannot turn a blind eye to what is happening beyond their borders and that they should adopt measures to prevent violations committed by corporations without infringing on sovereignty of other states, Cuba explained. With regard to unilateral coercive measures, Cuba noted that they represent systematic violations of human rights and jeopardize economic development. Cuba referenced international legal provisions that prohibit such measures, including the Geneva Convention against Genocide.

Ghana addressed the suggestion to reverse the burden of proof and questioned whether it could act as a disin-

centive for home states of TNCs to join a prospective instrument, as this approach would be violating the fundamental principle that one is innocent until proven guilty. In regard to discovery of documents, Ghana noted that in cases where it is established that a company is a subsidiary or branch of a parent company, then the question of vicarious liability would also be established. Accordingly, the discovery of documents is not directly necessary to establish the responsibility of a parent company in such cases, according to Ghana. If it is a question of civil liability, then vicarious liability would facilitate engaging the liability of the parent company, Ghana explained. Discovery of documents would be important in cases of criminal liability, Ghana added. On the question of definition, Ghana referred to an example from the area of the law of the seas, and particularly the definition of enterprises as addressed by UNCITRAL. Ghana called for reconsidering the inclusion of domestic enterprises under the scope of a prospective treaty. Ghana referred to its practice in regard to establishing a commercial court in order to ensure that cases involving businesses are dealt with expeditiously and with expertise.

Bolivia noted that a prospective binding instrument could reaffirm obligations of states that already exist under international instruments and conventions, such as the protection of human rights against abuses by third parties, including through investigation, adjudication, and redress for such violations. Bolivia underlined the importance of addressing extraterritoriality in order to ensure that victims are able to avoid cases of impunity and address the legal void in which

enterprises may escape standing trial. Bolivia called for a framework where enterprises are obliged to respect human rights in all countries where they operate, with full respect of sovereignty. Bolivia also concurred that unilateral coercive measures are violations of human rights.

Venezuela noted the importance of strengthening domestic legislation to regulate enterprises and to ensure preventive mechanisms are in place. Venezuela noted that extraterritoriality requires careful examination, taking into account national sovereignty while focusing on combating impunity. Venezuela also added that unilateral coercive measures are tantamount to human rights violations.

CONTRIBUTIONS FROM CIVIL SOCIETY

Following is a summary of few positions taken by civil society groups during the session.

The **International Federation of Human Rights (FIDH)** called for a treaty that establishes obligations on States to adopt regulatory measures regarding corporate abuses of human rights. This includes requiring business enterprises to adopt policies and procedures that seek to prevent and redress negative human rights impacts wherever they operate, and to establish enforcement mechanisms. FIDH noted that States' duty to protect must be interpreted as applying to both home and host States, which is a position consistent with the authoritative interpretation of UN treaty bodies. FIDH noted that extraterritorial obligations are increasingly codified in diverse fields including in human rights, humanitarian, labor and environmental law. Despite the adoption of the UN Guiding Principles, serious obstacles persist in regard to closing accountability gaps, resulting from the lack of legal clarity in regard to States' duty to protect human rights, in particular regarding States' extraterritorial human rights obligations. FIDH pointed to their work experience in various regions, which speak to the urgent need to clarify - in law - States' expectations vis a vis businesses, including to clarify the nature of conduct by a business entity that will give rise to legal liability, and the provision of an adequate and accessible forum to pursue appropriate remedy. FIDH added that companies should be subjected to

appropriate sanctions for failing to respect human rights, including for failure to adopt or comply with internal policies and procedures. FIDH referred to the decision of the US Supreme Court in the *Kiobel* case under the Alien Tort Statute, which is a significant court decision questioning the application of States' extraterritorial obligations and States' ability to redress egregious human rights violations even when committed by its own corporations that occur beyond its borders. This is another illustration of the unequal playing field resulting from a patchwork of judicial decision interpreting particular, and sometimes varying national law, according to FIDH.

The **Colombian Commission of Jurists** pointed out that extraterritorial obligations are a missing link in the protection of human rights. The Maastricht Principles clarify that States must adopt and enforce measures to protect economic, social, and cultural rights with respect to a corporation's conduct abroad, where that corporation, "or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned", according to the Colombian Commission of Jurists. The Commission referenced a study on the impact of Canadian mining in Latin America by 'Due Process of Law Foundation', which found patterns on home State financial and political support, including by embassies and development agencies, for transnational corporations domiciled in its territory, without requiring that these corporations comply with international human rights standards. The report also noted undue influence by the home state in the domestic legislative processes of the host state, the shielding of home state companies from accountability through free trade agreements, and the persistence of inadequate legal frameworks in home states to prevent and punish human rights violations caused by transnational corporations abroad, despite governmental knowledge of these abuses. Corporate Social Responsibility policies have not, and by definition cannot, solve the problem of a lack of implementation of state extraterritorial obligations, according to the Colombian Commission of Jurists.

FIAN International pointed that a prospective treaty should stipulate that

states must adopt and enforce measures to protect human rights through legal and other means in each of the following circumstances: a) when the harm or threat of harm originates or occurs on its territory; b) where the corporation, or its parent or controlling company has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities in the State concerned; c) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a company's activities are carried out in that State's territory; d) where any conduct impairing human rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over the corporations bearing responsibility or lawfully transfer them to appropriate jurisdictions. FIAN noted that the treaty should also stipulate for cooperation of states - including mutual legal assistance, joint investigative bodies, cooperative adjudication and enforcement.

Franciscans International called on States to require companies of a certain size and impact to adopt and periodically report on their policies and procedures and other standards of conduct aimed at preventing, mitigating, monitoring, and accounting for actual or potential adverse human rights impacts they cause or they are complicit with, wherever they operate or cooperate. The group also called for mandatory due diligence, in particular of parent companies in relation to the activities of their subsidiaries. Mandatory due diligence should also apply to major retailers in their entire supply chain process, the group noted. Franciscans International called for States to ensure mandatory and meaningful consultation and participation of potentially affected communities in decision making. Moreover, the group noted that in order to prevent the root causes of human rights abuses, States should ensure respect of human rights in all trade, investment, and other business-related bilateral or multilateral agreements, treaties, and contracts with other states. A human rights based approach should be explicitly mentioned in such agreements and must prevail in case of conflict, ac-

Highlights of some elements of discussion and points of view shared during the OEIWG's session

In regard to obligations of States:

- States have international human rights obligations to respect, protect and fulfil human rights, provided for under several existing human rights conventions. The States' obligations also include positive obligations to exercise 'due diligence' to prevent, punish, investigate and redress the harm caused by private entities;
- Different regional and international courts and tribunals have considered that states are not directly responsible for human rights abuses committed by third parties, but that they can be responsible for failing to take available measures to prevent and punish the occurrence of such conducts;
- Economic globalization requires for international cooperation, including the effective articulation and application of extraterritorial obligations, which would provide for an essential element under a prospective Instrument and enabler in order to effectively fill gaps in the current international legal order;
- Various UN Human Rights Treaty Bodies have recognized the extraterritorial obligations of States, and accepted that States cannot ignore the fact that they may influence situations outside their borders, even in the absence of territorial control, and that with this power comes responsibility;
- These obligations include preventing third parties from violating the rights in other countries, if they are able to influence these third parties by way of legal or political means. Likewise, these obligations include the duty of States to adopt measures to prevent, investigate, adjudicate and redress such violations;
- While the recognition of extraterritorial obligations is widely affirmed, there are differences with regard to the relevant tests triggering extraterritorial obligations; some approaches use the test of 'effective control' over the actor, while others adopt the 'influence standard' or the 'reasonable linkage' test;
- When considering extraterritorial jurisdiction of courts, it is important to address the challenges arising from difficulties in obtaining evidence and testimonies abroad;
- Different obstacles undermine the possibility of holding corporations accountable, leading to significant deficiencies in access to remedies, including various procedural and practical obstacles. These could be addressed under a prospective Instrument, through - for example: removing obstacles to the exercise of jurisdiction of home State courts and broadening rules of standing, abolishing the 'forum non convenience' doctrine in human rights cases, accepting the principle of parent company 'duty of care' and the delineation of circumstances when that will apply, and reversing the burden of proof to put the onus on the parent company to prove that it was not in control of the relevant functions.

cording to Franciscans International.

The **International Baby Food Action Network, the Pesticide Action Network Asia and the Pacific, Brot für die Welt, Friends of the Earth Europe, the Global Policy Forum, and the Society for International Development** pointed that most corporate violations of human rights are occurring outside of their home countries, highlighting the cases of Syngenta and Nestlé based in Switzerland. The groups explained that Syngenta produces a highly hazardous pesticide named "paraquat", which poisons thousands of plantation workers and farmers who spray it without protection and without having been trained to reduce risks. However, Syngenta continues to produce and sell this

product knowing that it seriously endangers health, therefore violating the right to health of exposed communities. The groups added that Nestlé has been violating the WHO Code on the Marketing of Breastmilk Substitutes since decades. The group pointed that Switzerland has failed to appropriately regulate the conduct of corporations domiciled in its territory and/or jurisdiction and thus, has left Syngenta and Nestlé free to perpetrate their abuses abroad.

The **International Organization of Employers (IOE)** noted the shortcomings of extraterritorial jurisdiction including the higher costs involved in pursuing remedies in foreign courts and sustaining such cases over several years. The IOE pointed to the challeng-

es facing foreign courts when they must rule according to foreign legal principles and the difficulties in obtaining evidence and testimony abroad. The group pointed that extraterritorial jurisdiction is available for allegations against multinationals and not domestic companies, which would continue to leave victims of domestic companies without access to remedy. The group highlighted that the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law identify some important elements which governments should consider with respect to improving access to State-based judicial remedies. They called for improving domestic judicial systems and monitoring of the judicial performance within the UN supervisory machinery.

The **International Service for Human Rights** focused on protection of human rights defenders. The group noted that given the capacity of human rights defenders to prevent, mitigate and ensure accountability for human rights abuses, it is crucial that States do more to ensure that business, both at home and abroad, do not threaten a safe and enabling environment for human rights defenders, but rather contribute to and protect it. A treaty should enshrine this obligation, according to the group. International Service for Human Rights pointed out that the roots of human rights violations in the context of business are found in the lack of a free, prior, informed and safe consultation with communities, civil society and human rights defenders. The group noted that despite the existence of Guidelines for the protection of human rights defenders - such as those developed by the EU, Norway, Switzerland, the implementation of these guidelines is often weaker when the defender in question is working on alleged abuses in the context of international investment.

Discussion on the responsibility of TNCs and other business enterprises

CONTRIBUTIONS FROM PANELLISTS

Bonita Meyersfeld, Director of the Centre for Applied Legal Studies and Associate Professor of Law at the

University of Witwatersrand in Johannesburg, spoke of three concepts: language of responsibility; integration of human rights standards into a corporate structure; and scope of multinationals' human rights obligations with respect to free, prior and informed consent.

In regard to language, at the heart of the Guiding Principles is the distinction between the notion of 'duty' as applicable to states and the notion of 'responsibility' as applicable to corporations, Ms. Meyersfeld explained. The language of 'responsibility' in the context of 'corporate social responsibility' (CSR) acts as a vehicle that distorts and collapses two very distinct issues: on one hand charity and on the other hand compliance with international human rights law. According to Ms. Meyersfeld, this conflation is problematic for several reasons. CSR is a selection of a set of projects that are voluntary in nature. These projects focus on specific subject matter, such as construction of schools or hospitals. This is distinct from compliance with international human rights law, which implies generic wide ranging obligations, Ms. Meyersfeld explained. International human rights law does not allow for the type of rights' selection that characterizes CSR. If we are serious about fundamental human rights' protections, then it is important to recognize that the 'pick and choose' approach means that corporations may simultaneously commit grave human rights violations while undertaking public charitable once-off projects, cautioned Ms. Meyersfeld. There is also no way to monitor compliance with the CSR projects articulated by corporations, she stressed.

Regarding integration of human rights throughout a corporate structure, meaningful integration of all human rights can only occur if all entities- including subsidiaries, supply chains and franchises - are all subject to stringent human rights standards, noted Ms. Meyersfeld. These must be implement-

ed by the corporate structures irrespective of the legal distinction between subsidiary and other entities and irrespective of geography, she stressed. She gave the example of appointing a human rights' specialist who have the same power to decide on investments and project selection as economists, risk specialists, commercial lawyers, and other technical experts. Ms. Meyersfeld underlined the need to be specific in articulating practices to enhance human rights obligations. Human rights lawyers and specialists must delineate how corporate operations and multinational corporations (MNCs) must comply with human rights obligations, she added.

Ms. Meyersfeld pointed out that there are two approaches in order to practically understand what an MNC's obligations might entail. First is how a corporation ensures its internal operations comply with human rights obligations. This includes how it treats its employees, contractors, and supply chain. Second is how a corporation ensures that its external operations comply with international human rights law, how it treats effected communities, health and wellbeing of those exposed to its operations, and how it addresses consumer protection, environmental considerations and other consequences of its conduct. The first is more clearly articulated in the large body of instruments on labor rights, Ms. Meyersfeld noted. The more difficult aspects rest in the second area in regard to the external operations of MNCs.

According to Ms. Meyersfeld, there is an excellent starting point in the Guiding Principles, including the 'due diligence' obligations under pillar 2. She pointed out the challenge of testing the extent to which corporations undertake a thorough investigation into how their operations may compromise human rights, and what happens if their 'due diligence' reveals the potential for harm, and whether such a result would lead to a decision not to proceed with

the project. This dilemma arises in the cases of free, prior and informed consent (FPIC), she added. For example, FPIC suffers many flaws in regard to consultation, including timing, the methodology, and the objective of consulting versus that of obtaining consent.

In regard to timing, Ms. Meyersfeld noted that community consultation should happen throughout the life span of the project, although it seldom does. It is highly unlikely that a decision to proceed with a project will change as a result of communication with communities. So the consultations take place at a time in the project when the powerful players in the process have taken a decision to proceed.

In regard to methodology of consultation, Ms. Meyersfeld was of the view that it is unlikely that a corporation will give the full range of information about the project to effected communities. There is in addition a serious critique of the extent to which FPIC excludes marginalized subgroups within a community. Some corporations might approach FPIC with a 'box-ticking' approach. So the methodology used in FPIC often involves superficial engagement with community leaders of effected communities based on information that is selectively provided, she explained. If an MNC is serious about its commitment to social and economic development, there is no justifiable reason that a corporation should not facilitate legal representation on behalf of effected communities, Ms. Meyersfeld added. It is only through an equal and equivalent bargaining relationship, preconditioned on symmetrical level of information that effective consultation can occur, she stressed.

Surya Deva, Associate Professor in the School of Law in the City University of Hong Kong, noted that the intergovernmental working group should build on the second pillar of the Guiding Principles, while avoiding the temptation of a blind complementarity with the Guiding Principles that ends up adopting their deficits. He highlighted that the Guiding Principles are not an end in itself; rather they are merely one of the means to achieve an end of ensuring that companies comply with their human rights obligations.



Panel on the obligations of businesses

On the meaning of the term “responsibility”, Professor Deva noted that while the term under international law may mean liability for breach of legally binding obligations, the Guiding Principles do not use the term in that sense. He noted that it might be preferable to avoid the term “responsibility” in the context of a legally binding international instrument. Or at least a clear definition should be provided to avoid any confusion.

Professor Deva went on to question whether the responsibility of companies be merely to “respect” human rights. He explained that States have tripartite duties in relation to human rights, but the second pillar of the Guiding Principles limits corporate responsibility to “respect” human rights. While respecting human rights is a basic minimum, this might not be enough in certain circumstances. According to Professor Deva, the duty to protect may be useful in the context of parent vs. subsidiary company or in relation to one’s suppliers. Moreover, the responsibility to fulfil may also be relevant in certain circumstances, Professor Deva added.

Professor Deva cautioned against being carried away by the process of ‘due diligence’. He noted that ‘due diligence’ in a corporate/commercial context is very different in nature from how due diligence should be employed in a human rights context. He distinguished between obligations of conduct and obligations of result, questioning whether the former is adequate in relation to one’s own conduct as opposed to the conduct of other entities.

Professor Deva stressed the importance of a treaty that provides for “effective” remedies to the victims to ensure that companies comply with their human rights obligations. In regard to ‘effectiveness’, he made reference to the twin test of preventive and redressive efficacy, including reasonable certainty of redress in a timely manner and at an affordable cost. He added that the treaty should make the violation of human rights a costly business by companies, whereby a number of incentives and disincentives should be offered.

Professor Deva added that non-judicial mechanisms work better in the shadow of strong judicial mechanisms. He also stressed that victims should

have a say in what remedies they want to avail in particular situations. He noted the need for public apology for corporate wrongs, pointing to the problems with non-admission of guilt in, and the confidential nature of, settlements with companies.

Professor Deva spoke as well of the importance of preventive remedies like injunctions. Unlike the Guiding Principles, the proposed treaty should suggest concrete ways to overcome procedural, substantive and conceptual obstacles in access to justice, he added. He also pointed to the added value of institutionalizing the role of CSOs in enforcing human rights against companies.

Professor Deva concluded by pointing to the importance of taking into account uncertain future adverse consequences of corporate activities, such as in the case of untested chemicals or technologies. He suggested that all TNCs may be required to contribute to a “victim’s fund” in proportion to their annual turnover or net profit.

Karen Curtis, Deputy Director of the International Labour Standards Department at the ILO, reflected on core ILO labor standards, stressing that it is important for a prospective treaty to build on labor standards in international and national law, and ensure that any results are complementary. Curtis recalled that core labor standards have universal recognition and have attained nearly universal ratification, and that the 1998 ILO Declaration on Fundamental Principles and Rights at Work embodies a constitutional obligation for all member states to respect, promote and realize the principles relating to abolishing forced labor and

child labor, freedom of association, effective recognition of collective bargaining and elimination of discrimination.

Ms. Curtis explained that the ILO provides a supervisory mechanism for freedom of association, to promote respect for basic freedom of association and collective bargaining principles. International labor standards have a unique role as standards that have been drafted and adopted with the input of businesses and reflect a consensus between governments, businesses and unions, as the three stakeholders in the ILO, she added. It imposes obligations on businesses via states’ international and national commitments, Ms. Curtis explained. She added that international labor standards bolster action for the protection against rights’ abuses in the labor context and buttress measures for access to justice and availability of remedies for victims of abuse.

In 2014, Ms. Curtis noted, the international labor conference agreed the protocol to the Forced Labor Convention and the recommendation with supplementary measures to protect against forced labor. These two instruments aim to bolster existing instruments recognizing that there were gaps in implementation concerning government and business responsibility. Ms. Curtis explained that the protocol refers to due diligence and calls on governments to support due diligence by both public and private sector to prevent and respond to risks of forced labor. The recommendation refers to obligations of government to provide guidance and support to businesses to take effective measures in order to identify, prevent, mitigate and account



A woman at a leaking oil wellhead near a community in the Niger Delta, Nigeria, which is affected by oil spills by a multinational oil company.

Kadir van Lohuizen/NOOR

for how they address the risk of forced labor in their operations. The recommendation also highlights the critical need for international cooperation in order to have effective mechanisms to combat and eradicate forced labor, including between labor law enforcement institutions, criminal law enforcement institutions, and calls for mutual legal assistance across borders. It also calls for government to mobilize resources for international technical cooperation and assistance and sharing of good practices to realize the full eradication of forced labor.

Ms. Curtis added that the ILO launched the fair migration agenda, including the 'fair recruitment' initiative, which addresses transnational cooperation to combat forced labor and trafficking. This initiative, which puts social dialogue at center, includes enhancing global knowledge on recruitment practices, strengthening laws and enforcement mechanisms, promoting fair business practices and providing access to remedies, according to the panelist. This initiative will be implemented in collaboration with the international trade union confederation, organizations of employers, governments, UN agencies, civil society organizations and other stakeholders.

Cross border considerations were also taken into account in the Domestic Workers Convention (2011), added Ms. Curtis, which requires that migrant domestic workers recruited in one country must receive a written job offer that is enforceable in the country that they will be going to. Ms. Curtis also referred to the Maritime Labor Convention, as an example of how the ILO can review the questions related to enterprises and ensure respect by the floating enterprises (or ships). She noted that a critical element in this experience was the involvement of businesses in the standard setting and implementation.

Thomas Mackall, Vice President of Sodexo Group, spoke of evidence emerging from surveys of the business community attitudes. A survey by the WBCSD (World Business Council for Sustainable Development) showed that 95% of respondents are familiar with the UN Guiding Principles on Business and Human Rights; 90% of respondents believe that an organization's business strategy should include explicit consideration to respecting human

rights; 60% of respondents have a standalone public human rights statement or policy in place; two thirds of respondents have in place programs, policies or regulations that explicitly encourage the implementation of UN Guiding Principles or other guidelines; 75% of respondents have processes in place to assess potential human rights impacts; and two thirds of respondents employ measures to monitor and track their human rights performance.

Mr. Mackall noted that the WBCSD results are consistent with a survey conducted by 'The Economist Intelligence Unit', which found that 83% of businesses agree that human rights matter for both business and government, and 71% stated that they believed their responsibilities to respect human rights go beyond simple obedience of the law.

Mr. Mackall stressed the importance of equipping individual states to fulfill their duty to protect human rights. He referred to the first pillar of the UN Guiding Principles, noting that Principle 3 provides that countries have to enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps. A comprehensive human rights regulatory framework by countries applicable to all societal actors, including all businesses, is critical to enhancing remedies and promoting respect for human rights, he added. He also called for support and resources to enable host states to implement their respective commitments and duties to protect human rights. Mr. Mackall called on states to eliminate the gap between their laws and human rights standards. He added that host states should have clear rules defining what behaviors are expected, what behaviors are unlawful, and what liabilities and penalties are associated with violations, in addition to effective and integral inspection and enforcement capabilities. Mr. Mackall suggested that the supervisory machinery of the UN Human Rights Council could be improved to require governments to take steps to implement their duty and report on progress.

On issues of scope, Mr. Mackall was of the view that any work to promote respect for human rights must include all businesses, not simply transnational corporations or other businesses that may have a transnational character. He

noted that simply focusing on transnational companies or companies with a transnational character by definition limits the potential reach of the 'protect, respect and remedy framework' embodied in the UN Guiding Principles. Mr. Mackall added that creating what would effectively be two different standards or differing sets of obligations for transnational and domestic businesses also threatens to undermine what the UN Guiding Principles are trying to achieve.

Mr. Mackall underlined that work on a treaty should help to sustain the momentum that is building within the business community in regard to the UN Guiding Principles. He added that the work of the Open-Ended Intergovernmental Working Group should help governments provide support to companies who need guidance and direction about creating appropriate due diligence programs.

CONTRIBUTIONS FROM STATES

Cuba noted that a future binding instrument should clearly set out direct obligations for enterprises, and set out the principle obligations of TNCs when it comes to prevention, mitigation, and compensation for human rights violations that might be committed as a result of corporate operations. Cuba proposed that the working group examines the precedent of UN instruments that include existing duties and responsibilities for legal persons. The Instrument should reflect the principles of transparency and public access to knowledge in order to ensure proper oversight of corporations' actions and prevention of violations, according to Cuba. Key aspect of the Instrument is to overcome legal gaps and ensure that TNCs can be held responsible for violations and recognize their legal accountability in either home or host state. Cuba sought the panellists' views on including under the future instrument reliable mechanisms for accessing human rights enforcement and the way in which corporations fulfil human rights obligations.

South Africa noted that transnational corporations and other business enterprises are active in some of the most essential sectors of national economies such as communication, technology, infrastructure development

and the extractive industries. They play a significant role in the economy. Nonetheless, development is not only economic; it is also about human development, South Africa stressed. Hence, the increased threat to human rights by the operations of many corporate entities cannot be ignored. The responsibility of the corporate sector is also illustrated under Pillar II of the UNGPs, which indicates that corporations should “address adverse human rights impacts with which they are involved”, South Africa explained. This lays the ground for liability and accountability of these entities in international human rights and humanitarian law. It is therefore imperative to ensure universal application of uniform standards in this area, according to South Africa, which would ensure equal protection and effective remedies for all.

Bolivia noted that under national legislation, all individuals have the duty to protect human rights. There is room for improvement and strengthening of national legislation, Bolivia added. Due to their complex structures and leveraging of economic power, many TNCs can circumvent responsibilities; accordingly this is the gap that should be addressed, Bolivia noted. Bolivia called for establishing clear direct duties and obligations for transnational corporations under a prospective treaty, and to ensure that they would be accountable for any violations of human rights.

Palestine called for a legally binding instrument that addresses the direct obligations of corporations under international law. While States have the primary responsibility to protect human rights, by means of legislative and judicial measures, the responsibility of corporations to respect human rights entails a direct obligation to prevent, mitigate and redress the human rights abuses occasioned by their operations, Palestine explained. Where a business enterprise finds that it causes or contributes to, or that it may cause or contribute to an adverse human rights impact, it should take the necessary steps to end or prevent such impact, according to Palestine. Where an enterprise is unsuccessful in mitigating risks of adverse human rights impacts, it should consider ending the business relationship, Palestine added. The non-fulfilment of these obligations could entail the direct attribution of the viola-

tion of human rights by the corporation. Palestine pointed to the increase of risks in conflict-affected areas, where businesses could support or profit from internationally unlawful conduct by States. This is of particular relevance in contexts of occupation, where the occupying State is unwilling to protect human rights effectively within the occupied territory and is in fact itself committing human rights violations within the occupied territory, Palestine explained. As an example, the Palestinian delegate noted that a number of Israeli and multinational corporations have linked their business operations to Israel’s settlements in occupied Palestine, thus facilitating and profiting from the illegal construction and growth of the settlements. This despite clear international laws and standards that require businesses operating in conflict zones to ensure that their activities do not cause or contribute to violations of laws applicable to situations of armed conflict. Palestine stressed the importance that the legally binding instrument includes language aimed at preventing and addressing the heightened risk of abuses by business operating in conflict situations, which includes situations of foreign occupation. Due consideration should be given to principles relating to respect for international humanitarian law and the right to self-determination, Palestine added, including permanent sovereignty over natural resources.

Ecuador noted that TNCs enjoy sufficient legal personality to enjoy direct obligations under international law. Ecuador recalled that placing direct obligations on corporations is not new under international instruments, and referred to the example of the UN Convention against Corruption (2003), UN Convention on Financing of Terrorism (1999), and the international Convention on Civil Liability for Oil Pollution (1992). Ecuador added that the prospective instrument should attach obligations to TNCs and other business enterprises, such as due diligence and due care for human rights, and should provide for remedies when violations take place.

Ghana stressed the importance of prevention, which places emphasis on environmental impact assessments before a company is given the license to operate. Ghana spoke of situations where technologies used by a company

could cause harm; compensation means one should establish that the company was aware of these defects to establish liability. Ghana noted that the standard of assessing compensation should take into consideration generational impacts, including liability for destruction of indigenous livelihoods. Ghana posed a question in regard to the possibility of substituting the use of the term ‘multinational corporations’ by ‘foreign and local companies’. The use of the term ‘multinational’ stems from the nature of the companies’ operations, Ghana suggested. So if there is a local company buying goods from a foreign company that uses child or forced labor, that could be an operational conduct of transnational character, but the entity will not be characterized as multinational. Ghana called for carefulness in addressing the scope of enterprises to be covered by a prospective treaty. Ghana added that there should be a *lex specialis* that deals with activities and conduct of companies in conflict zones, referring to the model of the Kimberley Process in the case of diamonds. In regard to peer pressure, Ghana suggests reverting back to the Universal Periodic Review (UPR) mechanism until a legally binding instrument is adopted, whereby the UPR could include a section that reviews the extent to which countries under review implement the UNGPs.

China addressed the issues pertaining to corporate social responsibility, and explained that China’s corporate law addresses how businesses operations have effects beyond those on stakeholders, which extend to the larger market and public order. China explained that administrative requirements by the ministry of commerce regulate foreign investments made by Chinese companies and stipulate that these investments shall not undermine the sovereignty, security and social order of China, shall comply with China’s laws and regulations, shall not harm relations with other countries, and shall not violate international treaties that China is a party to. It also stipulates that Chinese businesses shall respect laws, conventions and traditions in the destination country, make positive efforts in the environmental area and seek integration in the local context. China’s foreign company law stipulates that the foreign investments in China shall comply with China’s laws and regulations and shall not un-

dermine China's social interests, China added.

Venezuela stressed that prior and informed consent is essential and the symmetry of information flows shall be ensured. Venezuela highlighted the importance of holding companies accountable for due diligence and the importance of compensation, including public apology.

CONTRIBUTIONS FROM CIVIL SOCIETY

FIAN International noted that obligations of TNCs and other business enterprises include abstaining from any conduct, project or activity impairing the enjoyment of human rights, or causing ecological harm, or running a real risk of doing so; reporting on policies to prevent harm to the enjoyment of human rights and the ecology; carrying out independent ex-ante and ex-post human rights and environmental impact assessments and adopting the required corrective measures in order to prevent or eliminate harm to the enjoyment of human rights and to the ecology. This obligation can be regulated in different ways depending on the size, nature and capacity of the business legal entity, FIAN noted. Obligations of TNCs and other business enterprises include providing effective and transparent information for individuals and communities potentially affected by their activities, in addition to respecting results of prior and informed consent, and establishing a vigilance plan in order to identify risks to the enjoyment of human rights and the ecology, FIAN added. FIAN pointed to the importance of applying the precautionary principles when there is no certainty if an activity will impair the enjoyment of human rights or will harm the ecology. Moreover, FIAN noted that corporate obligations include abstaining from influencing or impeding previous consultations with affected communities or individuals carried out by states in exercise of their obligation to protect.

The Institute for Policy Studies (IPS) noted that a prospective legally binding instrument must reaffirm the hierarchical superiority of human rights norms over trade and investment treaties. IPS addressed the implications of Investor to State Dispute Settlement (ISDS), which is included in most investment treaties. ISDS is a

purely one-sided tool that gives rights to investors without any obligations to respect human rights. According to IPS, ISDS discriminates against communities that are negatively affected by activities of these investors. IPS pointed to several instances where states attempting to protect human rights through public policy have been challenged through ISDS claims and then forced to pay millions from public money to TNCs. IPS noted that if a prospective treaty does not supersede the ISDS provisions, States' ability to protect human rights will continue to be subverted.

The International Federation for Human Rights (FIDH) noted that the second pillar of the UN Guiding Principles recalls that companies should exercise human rights due diligence "in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts". FIDH stressed the need to go beyond

the old voluntary approach to responsibilities of businesses, and focus instead on proactive strategies for businesses to avoid committing or contributing to adverse human rights impacts. FIDH recommended that States adopt policy and regulatory measures to ensure companies are required to conduct human rights due diligence when operating at home or abroad, including through their business relationships and throughout their supply chains. Parent companies should have a duty to ensure their subsidiaries' compliance, FIDH added. FIDH stressed also the particular attention needed to conflict prone areas and occupied territories. Legislation should establish appropriate criminal and civil liability to sanction companies that have caused or contributed to human rights abuses, according to FIDH. Current discussions in France and Switzerland regarding the possibility to make 'due diligence' mandatory in domestic legal systems are positive steps, according to FIDH.

Highlights of some elements of discussion and points of view shared during the OEIWG's session

In regard to the responsibility of TNCs and other business enterprises to respect human rights, including prevention, mitigation and remediation:

- Overall, it is agreed that gaps exist in the international legal framework, particularly in regard to responding to complex structures and economic power of transnational corporations, which allow them to circumvent their liability in both home and host States;
- The second pillar of the UN Guiding Principles could provide basis for developing corporate obligations, although the future instrument should go beyond the UN Guiding Principles and contain concrete mechanisms to overcome procedural, substantive and conceptual obstacles to guarantee the right to access to justice;
- The language of 'responsibility' as used under the UN Guiding Principles and in the context of 'corporate social responsibility' acts as a vehicle that distorts and collapses two very distinct issues: on one hand charity and on the other hand compliance with international human rights law;
- While States have the primary obligation to protect human rights, by means of legislative and judicial measures, the responsibility of corporations to respect human rights entails an obligation to prevent, mitigate and redress the human rights abuses occasioned by their operations;
- Several States are of the opinion that a prospective Instrument should include clear obligations of corporations and should set out their principal obligations when it comes to prevention, mitigation, and compensation for potential human rights violations that might be committed as a result of corporate operations;
- Businesses should conduct human rights impact assessments before and during their operations in order to prevent violations or to stop them. Non-fulfilment of these obligations should entail direct attribution of violations to the corporation;
- A prospective treaty could build on the work of the ILO and the labor standards in international and national laws, and ensure that any results are complementary;
- Several participants called for reaffirming the hierarchical superiority of human rights norms over trade and investment treaties under a prospective Instrument.

Business and Human Rights

Identifying standards for legal liability of TNCs and other business enterprises for human rights violation and building national and international mechanisms for access to remedy

A meeting of a UN Human Rights Council working group recently discussed a treaty on the human rights effects of transnational corporations (TNCs) and other business enterprises. Below is the fourth part of the report on the meeting, focusing on discussions concerning the legal liability of TNCs and other business enterprises and mechanisms for access to remedy.

special attention to the “disadvantaged position of victims” in relation to TNCs, as the latter have “access to much more resources and expertise than the affected communities”. Currently, there are well-known obstacles to hold corporations accountable, Professor Deva highlighted, noting in particular:

i. The complex corporate structures built on the principles of separate corporate personality and limited liability;

ii. The doctrine of ‘*forum non-conveniens*’, and;

iii. The procedural rules governing discovery proceedings, standing, legal aid and class action.

Professor Deva considered that different standards should be applicable for civil and criminal liability. Since “states have diverse legal systems and traditions” the prospective treaty should consider providing some “flexibility as to how standards are applied under domestic systems”, Professor Deva recommended.

Furthermore, Deva considered that achieving legal certainty with regard to these standards is necessary to avoid “frivolous or vexatious litigation”. Professor Deva stressed that international mutual assistance and cooperation for the collection of evidence and enforcement of judgments is critical for a new instrument on business and human rights.

In regard to types of conduct that the prospective instrument should regulate, Professor Deva specified that both actions and omissions should be regulated. He also called for covering the conduct of TNCs acting on their own in addition to the conduct of their subsidiaries and supply chain partners. Professor Deva added that the



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Demonstration outside the UN in Geneva during the meeting of the OEIWG.

By Kinda Mohamadieh and Daniel Uribe

The seventh and eighth panels of the open-ended intergovernmental working group on a legally binding instrument on transnational corporations (TNCs) and other business enterprises with respect to human rights discussed the standards for legal liability to be applied in case of human rights abuses committed by TNCs and other business enterprises and building national and international mechanisms for access to remedy, respectively.

Resolution A/HRC/RES/26/9 adopted by the Human Rights Council on 25 June 2014 established an open-ended intergovernmental working group to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations

and other business enterprises” (Operative paragraph 1, Resolution A/HRC/RES/26/9).

It also recommended that “the first meeting of the open-ended intergovernmental working group serve to collect inputs, including written inputs, from States and relevant stakeholders on possible principles, scope and elements of such an international legally binding instrument” (Operative paragraph 5, Resolution A/HRC/RES/26/9).

Standards for legal liability of TNCs and other business enterprises

CONTRIBUTIONS FROM PANELLISTS

Professor Surya Deva, Associate Professor at the School of Law at the City University of Hong Kong, called for



Panel on the standards for legal liability of businesses

prospective treaty should also “propose appropriate standards to deal with situations of corporate complicity [...] with State agencies and state-owned enterprises or with other private corporate actors”.

Deva stressed the importance of a flexible approach when addressing the responsibility of legal persons attributable to wrongful conducts due to the diverse legal systems currently existing. “The *mens rea* element of ‘intention’, ‘knowledge’ or ‘negligence’ could be established, for example, with reference to the existing policies and practices of a company. Corporate culture within a given group – whether it is the culture of conscious ‘hands off’ approach or of ‘extensive supervision’ – could also be taken into account to determine whether a company should be liable or not”, Professor Deva explained.

For Deva, the “existing approaches to piercing the ‘corporate veil’, which are limited to certain circumstances, are highly problematic and should be changed”. As a matter of principle, the parent company should be accountable for human rights violations if not otherwise proven that they did not know, or that they did not have to know, or that they put in practice mechanisms for prevention, Professor Deva argued.

Mr. Roberto Suarez, Deputy Secretary-General of the International Organization of Employers (IOE), observed that a legally binding instrument on business and human rights requires precise definitions. Suarez noted that, as a first step, it is necessary to determine the kinds of conduct that will be considered violations. Mr. Suarez recalled the report prepared by Jennifer Zerk for the Office of the High Commissioner for Human Rights, which stated that:

“...the first difficulty in achieving convergence in practice (principles and policies) comes with finding a suitable definition of the corporate conduct to

be targeted that corresponds to the full range of behaviours that amount to gross human rights violations and deals adequately with the concept of corporate complicity”.

Mr. Suarez explained that a “formalist and legalist statement that all international human rights should be covered by a binding instrument” is not an adequate approach. Rather, it would be necessary to identify the specific immediate needs of victims and its relation to a negative business conduct, Mr. Suarez added. In addition, it is important to identify the areas in which States are willing to commit their own jurisdiction, he added. Mr. Suarez explained that this approach would include considering the following factors:

i. For which norms is it prudent or realistic to expect that companies could be held accountable as the primary actor?

ii. How to address the challenges when a company is implicated in a violation in tandem with a government actor, the so-called corporate complicity?

iii. How to account for the complex and changing structure of companies that are composed of different legal entities?

Mr. Suarez stressed the importance of legal certainty as basis for a reasonable approach to civil and criminal liability of natural or legal persons, at the domestic and international levels. In addition, he noted that the ‘due diligence’ approach reflected in the UN Guiding Principles “has to do with the expectations of society”, which sometimes could entail “much more serious economic impacts compared to a long legal process linked to theoretical civil liability process”.

Similarly, Mr. Suarez raised several elements in regard to transnational litigation, including the costs associated with such litigation, the different legal standards and approaches of each

jurisdiction, and the lack of clear responsibility among governments in case of cross-border cases.

According to Mr. Suarez, the effective forum for addressing these issues is at the domestic level, noting that significant injection of resources, both financial and technical, at domestic level as well as responsible attitude by governments is needed.

Dr. Carlos Lopez, senior legal adviser in business and human rights of the International Commission of Jurists, noted that the term ‘responsibility’ in law implies the existence of a violation or non-compliance with a legal duty or obligation. This means that in law “responsibility presupposes the existence of an obligation”.

Likewise, in law the term ‘responsibility’ refers not only to actions, but also to omissions that may harm human rights, he added. For Lopez, this harmful conduct can be committed by a natural person – the director, the manager or the chair of a company in representation of the company – or by the business as such through its agents, or in its various legal forms. Dr. Lopez stressed that there is no impediment to assign legal responsibility to a company, either as a legal person or as a group of natural persons.

Dr. Lopez highlighted that the meaning of legal responsibility entails the existence of a wrongful conduct which is in violation of an obligation. This conduct should be defined in a “clear and unequivocal manner”, Dr. Lopez added.

Furthermore, concentrating on clarifying the action or omission will allow the prospective treaty to avoid the complexities associated with the question of defining what a transnational corporation is. A harmful action can happen in a national context or outside of it, and by a natural or a legal person. It is not necessary to define if these subjects are transnational or not, what is important is defining whether the harmful conduct happened in the national territory or outside of it, Dr. Lopez explained.

Companies can be held liable under various types of responsibility; it might be criminal, civil or administrative, noted Dr. Lopez. Not all harmful con-

duct should be criminal and subjected to sanctions; it might also be subject to civil remedy or administrative sanctions. Dr. Lopez stressed that generally the wrongful conducts which require criminal sanction are the most serious, and their investigation and sanction requires the public prosecutors or other bodies, to have a preponderant role.

There is a strong argument in regard to the duty of States to protect human rights, and as such the violation of these rights should be “tackled from the point of view of public law and not private law”, Dr. Carlos Lopez noted. He added that most cases involving the violation of human rights by corporations involve civil responsibility, better known as ‘tort law’ under English common law, and this is the reason why it would be important to emphasize the role of public law in the protection of these rights.

In regard to attributing responsibility to businesses, Dr. Lopez suggested different models since “the practice and the legal traditions in States are very different”. For example, not all countries recognise the possibility of attributing criminal liability to legal persons, he stressed. Nonetheless, other countries do recognise the attribution of administrative sanctions to legal entities, such as businesses, while others recognise such responsibility in the director or head of the company.

Dr. Carlos Lopez underlined that, in international law, there are a series of obligations for States to include in their national legislation with regard to conducts that can be identified as crimes, and other types of conduct that can be sanctioned through civil and administrative means. He referred to the [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#) as an “inspiring example”. Article 3 of this instrument provides for the obligation of States to introduce legislation establishing certain conducts as criminal offences, and also provides for States to establish the liability of legal persons for these offences, subject to the legal principles of the State party. Such liability may be civil, criminal or administrative. This Protocol “defines the harmful conduct, establishes the State responsibility to sanction the behaviour, and also establishes the responsibility of the legal person”.

Dr. Carlos Lopez concluded by proposing that the prospective treaty should provide the obligation of States to incorporate in their national criminal legislation the definition of a series of harmful conducts against human rights, which should be defined with clarity and certainty. This legislation should be applicable to natural and legal persons, as provided by the national legal system of each State, when the conducts are perpetrated outside or within the borders of the State. Likewise, States should incorporate civil and administrative sanctions for these conducts. Finally, the act of aiding or abetting, and the attempt of perpetrating these conducts, should also entail sanctions, according to Dr. Lopez. Moreover, the attribution of liability to businesses, as legal persons, should not limit the attribution of individual responsibility to the director, president or manager of the company, he added.

Ms. Sanya Reid Smith, legal advisor and senior researcher at the Third World Network, discussed the implications of international trade and investment agreements on States’ legislation, policies and their human rights obligations. The current scenario seems to suggest that these international agreements give strong rights to transnational corporations to bypass their legal obligations in host countries with effective impunity, according to Ms. Reid Smith. Under investment treaties or investment chapters in free trade agreements, investors have their rights protected and may benefit from an unlimited amount of monetary damages, and monthly compound interests on unpaid awards.

Ms. Reid Smith gave examples of how TNCs manage to use the international investor-state dispute settlement

mechanism (ISDS) in order to evade their obligations and to attain monetary damages for presumed wrongful acts committed by the State under such agreements. Furthermore, Ms. Reid Smith pointed to a recent study that examines how successfully States have been able to raise the issue of investors’ violation of domestic laws under ISDS cases, particularly violations of human rights obligations, environmental law, labour laws, etc. This study showed that from all the cases examined, there was not even one case where the ISDS tribunal agreed with the State’s position of raising the claim. Likewise, a similar analysis looked at ISDS cases publically available until May 2010 and revealed that US companies have benefited from a broad interpretation of their procedural rights ninety-eight per cent (98%) of the time, and there are similar percentages regarding substantial rights (See: Gus Van Harten, “Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration” (2012), 50 *Osgoode Hall Law Journal*).

Ms. Reid Smith cautioned that the “mere threat of one of these cases” leaves a chilling effect on both developed and developing countries in regard to regulatory action, including for human rights obligations. Ten UN Human Rights rapporteurs have expressed concern about the investment treaty provisions that give foreign investors such strong rights, especially given the big gap between the rights given to foreign investors and those of victims of human rights violations by TNCs, due to the difficulties that victims must face to effectively sue a TNC.

Ms. Reid Smith exemplified this issue by examining what happens if a domestic company violates an environ-



Industrial plants like this one can cause havoc to the environment and the health and human rights of people in the area.

mental law or a human rights regulation in the host country. In such a case, the host country can sue the company in its own courts leading to a penalty. On the other hand, if the host State tries to do the same with a foreign investor, the latter “can effectively ‘appeal’ the decision of the highest court of the host country under the investment treaty provisions on ISDS, whereby the tribunal would examine whether the host government, including its courts, violated the investor’s rights. They do not tend to take account of any human rights treaty obligations”.

There are over 3000 concluded investment treaties. Although they were designed to protect nationals of the States parties to the agreements, sometimes these treaties give a broad and loose definition of the protected investor or investment, Ms. Reid Smith noted. She gave the example of the plain tobacco packaging case against Australia, where the complainant bought shares in one country in order use protection under a treaty signed by that country with Australia, even though the company is incorporated in another country that does not have a similar treaty concluded with Australia.

Ms. Sanya Reid Smith highlighted that investment treaties have various definitions of investors whose rights are protected. It could refer to shares that an investor holds, or cover entities if they have been established under the laws of one of the States party to the Agreement, or if they have substantial business activities or have their primary site of business in one of the States party to the agreement, or if they have their seat or headquarters there. Cases brought over decades have interpreted these provisions to see whether or not an investor is covered by the investment treaty provisions.

Several countries have been developing new investment treaty models, in which they clarify obligations on investors and on the home country of the investor, Ms. Reid Smith noted. For example, some new treaties provide for the duty of investors to respect corporate responsibility, require mutual cooperation between home and host States, and establish obligation on foreign investors to respect human rights and on the home State to allow in its courts cases on the civil liability of investors resulting from their acts in the host State. In other cases, the new treat-

ty models establish direct link between the obligation of investors to comply with human rights provisions in order to benefit from the treaty, which tends to create a balancing mechanism, Ms. Reid Smith concluded.

CONTRIBUTIONS FROM STATES

South Africa stated that the footnote in resolution 26/9 is justifiable. The thresholds for respect of human rights by local business entities must be foreseen in national legislation. The footnote does not undermine the work States could undertake to enhance human rights standards in their national legislation, and to strengthen the role and capacity of regional mechanisms and institutions. In this context, the proposed treaty will serve to complement and reinforce such measures, South Africa noted.

The primary purpose of the exercise undertaken by the open-ended intergovernmental working group is clearly outlined in resolution 26/9, and focuses on regulating in a uniform manner the operational activities of TNCs and other business enterprises that have a transnational character, South Africa explained. The global reach of transnational corporations and other business enterprises in their operational activities have had social and political impacts disproportionate to their legal and social obligations, both nationally and internationally, the delegate stressed. It is therefore inconceivable to equate local businesses with TNCs who drive globalisation and own a big share of global wealth. Without an understanding of the obligations that TNCs and other business enterprises bear with respect to fundamental rights, it would not be possible for victims of rights’ violations to claim access to remedy against these entities.

South Africa pointed to British Petroleum’s payment of 18.7 billion US dollars as remedies to victims in the case of Deepwater Horizon, while many other disasters go on unaddressed. South Africa noted that this case reflects the double standards applied today given the differences in relations TNCs have with States, and the consequent differences in the ability to hold corporations accountable of their actions.

South Africa noted that the discus-

sions in regard to a prospective treaty are important for the work undertaken by the intergovernmental working group on private military and security companies.

Cuba highlighted that a future legally binding instrument on TNCs and other businesses enterprises should clarify the basis for legal responsibility of companies, including the conduct that will be considered a breach of human rights’ obligations.

According to Cuba, the future instrument should consider the legal loopholes that companies use to escape responsibility for harmful conduct, including by operating through subsidiaries. The working group should consider defining the basis for determining corporate ‘nationality’, Cuba added.

Cuba noted that there are no obstacles to allocating responsibility to companies as individual entities or as a group of entities. Cuba also underlined that natural persons working in companies should have responsibility in the case of harmful acts carried out by the company. The treaty should also take into consideration the diversity of national legislation and the procedures that exist in various jurisdictions.

Cuba also noted the importance of addressing the case of private military and security companies.

Venezuela addressed the proposition of listing the harmful conducts and violations recognised in international law under a future instrument, as illustrated in Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Venezuela noted that the instrument should cover all human rights, and accordingly the list of conducts that could be included should be comprehensive and linked to domestic laws of States. It is important to address how the drafting and listing of these conducts would ensure the effectiveness of the instrument at the time of determining responsibility and sanctions that correspond to the harmful conduct. The list could be non-exhaustive, according to Venezuela.

Ecuador pointed to the importance of addressing the ‘proof of nationality’ of the corporate actor. Ecuador added that practice in this regard varies among States, but in general, criteria

used consider the legal registration of the company, the place of its headquarters, the place of administration control and financial control or the territory in which the majority of its business or operations take place.

Ecuador also pointed to the importance of clarifying the basis for determining the responsibility of the whole company, or the responsibility of each of the operational levels of the corporate structure, using criteria such as 'effective' control, the extent of the misconduct and the link between the parent company and its subsidiaries. Ecuador spoke of the principles of 'attribution' that will allow for establishing the chain of responsibility within the complex corporate structures of transnational corporations.

The model that could be most effective for addressing the responsibility of corporations is one that recognises the responsibility of the enterprise as a whole, according to which the violation of human rights is attributable to the whole company, including the different levels of its internal structure. Ecuador also raised issues pertaining to the implication of the 'corporate veil'. Ecuador referred to the application of the principles of "duty of care" in several judicial decisions, whereby the parent company has to take the necessary due care in regard to the actions of the subsidiaries, including the design and applications of standards for human rights throughout its operations and at all levels of its corporate structure. The UN Guiding Principles also make reference to the 'duty of care' in several areas pertaining to due diligence and the duty to identify, prevent, mitigate and remediate human rights violations.

Mexico raised questions on how the future instrument could establish a normative hierarchy that ensures the primacy of human rights above the rights of investors. Mexico also addressed how international mechanisms, including ISDS tribunals and regional human rights courts, should address and interpret provisions of the future instrument and existing bilateral investment treaties that could be conflicting.

Bolivia considered that a legally binding instrument on transnational corporations and other business enterprises with respect to human rights should allocate legal responsibility to

transnational corporations and their directors. Bolivia stressed that parent companies should also be liable for the acts of their subsidiaries, supply chains, licensees and subcontractors for actions that hamper or impair the enjoyment of human rights.

The Russian Federation recognised that the discussion of the standard of legal liability applicable in cases of corporate misconduct is of most importance, as it may entail the responsibility of legal entities or natural persons depending on the different applicable legal systems. Russia pointed to the direct link between the standard of liability applicable to corporations and international investment and trade agreements. For Russia, it is necessary to discuss the transnational operations of corporations because the actions of national companies fall under domestic jurisdictions and the implementation of domestic law depends directly on the domestic judiciary. Russia also supported the appeal for the working group to deal with the question of private military companies, which according to Russia is a classic example of transnational activity.

China addressed the effectiveness of a future instrument in regard to the protection of the interests of host countries and those of parent and subsidiary companies, while not affecting the host countries' attractiveness to foreign investment. China also pointed to the importance of effective attribution of legal liability to parent companies, their subsidiaries and supply chain companies, as this issue may entail the use of domestic laws and regulations of different countries and also relates to attraction of foreign investment.

Ghana addressed the relationship between the OEIWG on business and human rights and the OEIWG on private military and security companies (PMSCs). The legitimate work relationship existent between some of these companies and the UN - for example to protect UN assets in conflict zones - should not be confused with the phenomenon of mercenaries, according to Ghana. The risk entailed in the OEIWG on business and human rights addressing the issue of PMSCs is two fold. Ghana noted. First, it would take the risk of duplicating the effort of the OEIWG on PMSCs. Second, it could lump the different categories of PMSCs together.

South Africa recalled that the Human Rights Council provided a mandate to the OEIWG on private military and security companies (PMSCs) to conclude a binding instrument to regulate their activities. South Africa explained that the mandate given to the working group on a legally binding instrument on transnational corporations and other business enterprises addresses the corporate violations of human rights, while the OEIWG on private military and security companies is mainly concerned with the regulation of these companies. South Africa added that the case of 'floating armouries' in the high seas should be considered by the OEIWG on business and human rights, as they fall within its mandate.

CONTRIBUTIONS FROM CIVIL SOCIETY

SOMO¹ recalled that it is necessary for States to transform the voluntary corporate responsibility to respect human rights into mandatory corporate obligation. The future treaty could consider the UNGPs and the OECD guidelines as a base to elaborate different modalities, particularly with respect to parent company and supply chain liability. SOMO noted that clarifying the concept of complicity is a key element in order to avoid businesses 'outsourcing' their responsibility for a wrongful conduct that should have been known or was known by the parent company, or is committed by a linked entity, such as a business partner, the host state or other non-state actors. SOMO highlighted the complex organizational structures of business relationships. For those reasons, in cases of corporate human rights abuse, the burden of proof should be shifted from the claimant to the defendant, according to SOMO. In such cases, the corporation will be responsible to prove that human rights due diligence was conducted to prevent violations, rather than the victim being obliged to prove that the company did not fulfil its obligation to respect human rights, SOMO added.

Friends of the Earth International noted that voluntary measures adopted by corporations and their financiers are not enough. The future treaty should establish shared liability of TNCs for the acts and operations carried out by their subsidiaries, supple-

ers, licensees and subcontractors. Various examples have shown that voluntary codes of conduct, although useful, “do not hold sufficient weight to solve problems of the company’s own making”, Friends of the Earth International affirmed. The group stressed its concern in regard to the role of corporate financial institutions, and suggested that legal liability of TNCs should also be extended to the institutions financing their wrongful conduct.

The **Institute for Policy Studies and the Transnational Institute** noted that the prospective instrument should integrate a new approach to the principle of attribution of criminal liability into the field of international human rights law and international criminal law. The discussions over a future treaty could elucidate the different mechanisms available for victims to attribute the consequences of acts or operations carried out by corporations, the groups added. Likewise, the future instrument must reaffirm the hierarchy of human rights norms. In addition, the new binding treaty should consider possible tools to address cooperation between judiciaries and magistrates belonging to different jurisdictions, the groups added.

Franciscans International² noted that a future treaty should provide for statutory cause of action in cases of human rights abuses committed by TNCs as well as other business enterprises. The groups noted that complicity should be understood as co-responsibility in criminal offences, involving adverse impacts on human rights. Additionally, the future instrument should clarify liability for human rights abuses perpetrated by complex corporate structures, including liability of parent companies in cases of abuses committed by its subsidiaries. Franciscans International added that the lack of proper ‘due diligence’ mechanisms to protect human rights must trigger legal liability of companies. The group recommended clarifying grounds for criminal, administrative, and civil liability for all human rights abuses as guaranteed by international law; establishing corporate criminal liability for certain severe human rights violations; attributing responsibility for natural and legal persons; ensuring that criminal proceedings do not prevent victims from seeking civil remedies; defining liability for parent companies, includ-

Highlights of some elements of discussion and points of view shared during the OEIWG’s session

In regard to standards of legal liability of TNCs and other business enterprises:

- There is no impediment to assign legal responsibility to a company, either as a legal person or as a group of natural persons;
- Companies could be held liable under various types of responsibility; it might be criminal, civil or administrative. Since states have diverse legal systems and traditions, the prospective Instrument should consider some flexibility as to how standards are applied under domestic systems;
- A prospective Instrument could require States to establish in their domestic legislation certain minimum conducts as obligations for corporations, and clarify various types of responsibilities, as well as criminal, civil and administrative liability;
- The types of conduct fostering legal liability for corporations should not be limited to direct liability for the harm caused by corporations, but should cover aiding or abetting, and the attempt to perpetrate such conducts;
- The liability of financial institutions supporting or financing projects hampering, or will hamper, the enjoyment of human rights could also be considered under a prospective Instrument;
- Designing a prospective Instrument should address and clarify the “attribution of responsibility” to businesses, given that the practices and the legal traditions in this regard vary among States ;
- The approach that considers the responsibility of the enterprise as a whole, according to which the violation of human rights is attributable to the whole company, helps in addressing the responsibility at different levels of the corporate structure and helps in avoiding situations where businesses ‘outsource’ their responsibility for wrongful conducts to a linked entity (i.e. contractor, sub-contractor, and subsidiary, among others in the supply chain);
- In addition, a prospective Instrument could tackle issues pertaining to the ‘proof of nationality’ of the corporate actor, which is also approached in different ways by States: some consider the legal registration of the company, the place of its headquarters, the place of administration and financial control, or the territory in which the majority of its business or operations take place.

ing negligence and casual link; and criminalising situations of complicity, including negligence and omission.

FIAN International considered that the prospective instrument should provide a “legal framework prescribing the conduct to be considered as harming the enjoyment of human rights”. This framework should include States’ domestic and extraterritorial obligations, and the provision of criminal, administrative and civil liability for businesses involved in human rights offences. FIAN International proposed the following elements for consideration:

i. Corporate groups should be obliged to disclose their corporate structure, including enterprises forming the group, contractual relationships

or specific supply chains;

ii. Mechanisms to lift the corporate veil used in other fields of law, such as competition, taxes or labour law, should also be used in human rights;

iii. The working group should explore different theories and models to determine criminal liability on the basis of *bona fides* and effectiveness principles;

iv. The burden of proof regarding ‘due diligence’ should be shifted to the defendant in order to ensure equality of arms and due process for the victims;

v. Clear norms and definitions for ‘complicity’ of parent or controlling companies is needed in cases of harms caused by subsidiaries or linked legal

entities.

Centre Europe Tiers Monde (CETIM)³ proposed that the prospective instrument should require States to allocate civil and criminal liability to legal and natural persons in cases of human rights abuses perpetrated by TNCs. This liability should extend to direct offences committed by corporations, and to acts amounting to aiding and abetting in those abuses. The future instrument should also consider joint responsibility of TNCs with respect to wrongful acts committed by their subsidiaries, supply chain providers, licensees, and even financiers, according to CETIM.

Amnesty International stressed that the doctrine of separate legal personality often frustrates legal claims against parent companies and constitutes a major legal barrier for accountability and justice. States should address this challenge by providing 'due diligence' duties to parent companies in order to guarantee that their subsidiaries' operations do not harm human rights. These 'due diligence' duties may refer to international due diligence standards, and the burden of proof in this regard should fall with these companies.

The **International Federation for Human Rights (FIDH)** raised issues concerning the regulation of private security and military contractors (PMSCs) and access to remedy for victims of human rights violations by these companies. It was recalled that for more than a decade, the Centre for Constitutional Rights has represented claimants for war crimes and torture against PMSCs in US Courts, including on behalf of four Iraqi alleged torture victims at the Abu Ghraib prison. These procedures have been found to satisfy the Kiobel 'touch and concern' test in the appeal phase, after they were dismissed under the 'political question' doctrine. For this reason, FIDH urged the working group to clarify and affirm the liability of companies, including PMSCs, for their participation in human rights abuses, and stressed that the contractual relation of those companies with sovereign States, or the United Nations, should not serve as a shield from legal liability. In particular, the immunities enjoyed by States or the UN should not be attributed to private corporations, FIDH stressed.



Panel on mechanisms for access to remedy

The **Economic, Social and Cultural Rights Network (ESCR-Net)** noted that the prospective instrument should consider "corporate complicity and parent company responsibility for the offences committed by its subsidiary". The attribution of legal liability to the legal entity should also consider the responsibility of directors and managers, ESCR-Net added. The Network proposed that the working group may use as reference in the development of standards for allocation of legal liability to corporations section 12.3 of the current Australian Criminal Code that provides that elements of fault - other than negligence—could be attributed to a corporate body when it "expressly, tacitly or impliedly authorised or permitted the commission of the offence".

Building national and international mechanisms for access to remedy

CONTRIBUTIONS FROM PAN-ELLISTS

Lene Wendland from the Office of the UN High Commissioner for Human Rights (OHCHR) presented the OHCHR Accountability and Remedy project (ARP), which focuses on enhancing corporate accountability and access to remedy for victims, particularly in the most severe cases of business-related human rights abuses. According to Ms. Wendland, the ARP was initiated to support more effective implementation of Pillar III of the Guiding Principles. The outcomes of the project will focus on practical and action-oriented guidance and recommendations for States, suitable for a range of legal systems and traditions, and developed through an evidence-based methodology.

Ms. Wendland explained that the ARP process commenced in May 2013 through an initial study on domestic law remedies. The project included a period of public consultations and a global online consultation in June 2015 (A progress report is expected to be

presented to the Human Rights Council in June 2016). The conclusions from an earlier study provided the starting point of the ARP study, particularly in regard to the legal, financial, practical and procedural barriers to accessing judicial remedies that victims of severe human rights abuses face, and the variations among national jurisdictions that may exacerbate inequalities and create legal uncertainty for companies and affected persons. "The present system of domestic law remedies is patchy, unpredictable, often ineffective and fragile", Wendland contended.

The ARP program of work includes six distinct, but interrelated, projects addressing issues identified as creating obstacles to effective access to judicial remedy. These projects include: Project 1: Tests for corporate legal liability; Project 2: Roles and responsibilities of interested states; Project 3: Overcoming financial obstacles to legal claims; Project 4: Criminal and administrative law sanctions; Project 5: Civil law remedies; and Project 6: Domestic prosecution bodies.

Ms. Wendland explained that the ARP project is based on a two-track approach to data gathering. The first approach consists of a global on-line consultation, designed as an "umbrella process" to obtain information from States and other stakeholders about present State practice. This approach aims at ensuring broad stakeholder input as well as geographical diversity. The second approach consists of a detailed comparative process that covers about 20 different-focus jurisdictions and research by law firms and legal experts from the perspective of civil society and plaintiffs.

A report on the progress of the ARP was presented⁴ during the 20th Session of the Human Rights Council. The report included preliminary findings from research and issues that require further attention from the OHCHR. Some uncertainty was noted on States'

attitudes and practices in relation to some key issues such as exhaustion of remedies, 'universal civil jurisdiction', among others. Likewise, States' implementation of extraterritorial jurisdiction appears low even though explicitly provided for by international conventions. In addition, the report also noted a contraction of legal aid in many States, whereby measures to overcome financial obstacles are required, including new funding mechanisms, the use of the office of the Ombudsperson and of other means of litigation aside from civil litigation. Law-enforcement cooperation is a key element to guarantee access to effective remedies for victims, Ms Wendland concluded.

Richard Meeran, Partner at Leigh Day and Co., stressed that national mechanisms have interrelated legal, procedural and practical hurdles facing access to remedy. Particularly in cases of civil litigation, issues as 'forum non conveniens' and legal liability of parent companies are key barriers to overcome. Mr Meeran also highlighted that cases related to corporate complicity in human rights violations perpetrated by the State are difficult to prove factually and legally, as it is necessary to prove that conduct of police or military was in fact influenced or controlled by such corporation. In addition, the principle of "foreign act of State", which is similar to State immunity, precludes the courts of one State from exercising jurisdiction in a case against another State, with exception of commercial matters. This argument is often used in cases involving corporate complicity with a State's harmful conduct, whereby the court would first ascertain that the host State has acted unlawfully, but this would entail the home State judging the legality of the host State's conduct.

Other aspect to consider is the payment of damages, Mr. Meeran noted. It is true that payment of damages by a multinational company has the potential to deter bad conduct as well as provide redress for victims, he added. But in the case of the European Union, the Rome II Regulation now applies to choice of law in tort cases and stipulates that damages will invariably be assessed by reference to local levels, Mr. Meeran explained. This reduces the deterrent effect and also reduces the financial viability of cases for victims' lawyers, especially in smaller cases.

Moreover, there are additional procedural hurdles affecting access to justice for victims of human rights abuses by corporations. Access to documents/discovery and availability of class action procedures are some of these cases, according to Mr. Meeran. Class action procedures enable one or few representatives to advance a case on behalf of a large group that falls into the class definition, which reduces the expenses and resources required by enabling aggregation of cases and determination of common issues through representative cases. Likewise, this type of procedures are important because it protects claims from becoming time-barred, Meeran explained. Without class action legislation, individual victims are required to file court claims before the statutory deadline.

The overriding practical hurdle according to Mr. Meeran is the availability of funding for legal representation. It is clear that without effective legal representation there will be no effective access to remedy, which not only requires legal representation, but legal representation that guarantees equality of arms. Substantial and technical resources are required over a protracted

period of time to pursue a claim against a multinational corporation (MNC). It is well known that these corporations are capable of deploying an array of lawyers and experts to try and overwhelm their claimants, which is not the case for victims who obviously cannot afford the costs of these procedures. Furthermore, Meeran noted that the nature, scale and complexity of cases involving corporate human rights abuse limits public funding and reduces the probability of guaranteeing equality of arms. Similarly, the resources required and the nature of litigation generally makes it unrealistic for public interest law centres to act if not in conjunction with other law firms that could afford to act on a contingency basis, Mr. Meeran explained. Consequently, legal representation is rarely available for victims to pursue claims in MNCs' host countries and is also relatively scarce in MNCs' home countries.

Even lawyers acting on a contingency basis face substantial financial disincentives because there are high risks associated with the magnitude of the legal and procedural barriers that claimants have to face, Meeran explained. For example, lawyers' fees or other expenses may not be paid if there is an unfavourable outcome, and the costs of carrying such cases for an uncertain period with an uncertain outcome will also represent cash-flow risks. In addition, the principle of 'loser pays' applicable in some jurisdictions, such as the United Kingdom, South Africa and Australia, enables lawyers representing victims to be paid if the case finally succeeds, but just once the procedure is over and does not entail payment of costs in full, Meeran added. He also noted that there is a downside of the 'loser pays' principle, namely that the victims could end up being liable for the MNC costs. In the United Kingdom for example, qualified one-way costs (QOCs) has been introduced in injury cases, where the defendant only pays if it loses, but claimants will not pay even if they lose.

For these reasons, low financial value cases, which involve small numbers of claimants, are not financially viable in general terms under any system, according to Mr. Meeran. For instance, the Rome II Regulation, stipulating damages at local levels, reduces the financial value of the claim, and hence



Demonstration in light of the Bhopal disaster, which is considered the world's worst industrial disaster.

the viability of these procedures. Similarly, cases involving a large number of claimants are more financially viable, but entail higher risks. MNCs could threaten to make victims' lawyers personally liable for costs incurred by MNCs in their defence, which could create a further disincentive.

To conclude, Mr. Meeran stressed the importance of capacity building. The collaboration and the involvement of US lawyers in the South African Class action is a good example in this regard. Since 2003, Mr. Meeran has worked together with the South African Legal Resources Centre (LRC) on the gold miners' silicosis litigation through a series of test cases until 2013, which have entailed a significant amount of capacity building.

Nabila Tbeur, Special Advisor to the President of the National Council for Human Rights in Morocco, spoke on behalf of the Working Group on Business and Human Rights of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. Ms. Tbeur pointed out that national human rights institutions (NHRIs) are independent public bodies established by national law or constitutions to promote and protect human rights, through *inter alia* monitoring, formal investigations, advice to government, reporting to international and regional human rights supervisory mechanisms, research and human rights education. More than a hundred countries in the world have an NHRI. These institutions are subject to periodic re-accreditation with reference to the UN Paris Principles to assure their independence and objectivity. NHRIs are organised at regional level according to

four networks, in Africa, the Americas, Asia and Europe.

Ms. Tbeur focused on the role and potential of NHRIs, in coordination with other judicial and non-judicial grievance mechanisms, to contribute to access to remedy in cases of business-related human rights abuses. An 'effective remedy' could encompass different types of reparations, such as restitution, rehabilitation, compensation, satisfaction, public apologies, changes in relevant laws and practices, and guarantees of non-repetition, Ms. Tbeur noted. Additionally, the right to remedy also includes procedural rights, for example the right to an effective investigation, the right to information, and the right to legal and other assistance necessary to claim a remedy, Ms. Tbeur stated.

The UN Guiding Principles on Business and Human Rights have recognised, in Guiding Principle 25, the potential role of NHRIs amongst different non-judicial grievance mechanisms. Moreover, NHRIs also play an important role in monitoring and holding the State and business to account with regard to their respective duty to protect and responsibility to respect human rights under Pillars 1 and 2 of the UNGPs. Likewise, Ms. Tbeur noted that the [Paris Principles relating to the Status of National Institutions](#) include business and human rights in their scope, which was recognised in the [2010 Edinburgh Declaration](#) adopted by the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights and four subsequent NHRI regional action plans on business and human rights.⁵

Ms. Tbeur highlighted that over

recent years, NHRIs have steadily increased their efforts to put this human rights and business mandate into action, across all four regions of the world. Different cases involving human rights abuses by corporations have been brought to the attention of NHRIs, which involve corporations, security and finance companies, among others, she added. In the period of January-November 2012 the Indonesian Human Rights Commission handled 5,422 human rights cases, from which 1,009 were complaints against businesses in areas such as land and labour disputes, Ms. Tbeur explained. Similarly, NHRIs have undertaken formal investigations on the impacts of human rights abuses resulting from the operations of businesses in their countries and have engaged as independent observers or mediators in cases of conflict between rights-holders and businesses, she added.

Ms. Tbeur noted that despite progress made since the adoption of the UN Guiding Principles, the UNGPs have not yet impacted sufficiently on the daily life of individuals and communities throughout the world. Persisting tragedies caused by business enterprises or state failures in regulation or enforcement reveal that adequate prevention and control mechanisms, including judicial remedies, are still weak at national level, she added. Moreover, government responses to recommendations made by NHRIs, and attacks on the independence of NHRIs, recently recognised as human rights defenders within the UN system, and attempts to undermine their mandates and efforts to protect human rights, continue, Tbeur cautioned.

Tbeur pointed to the importance of broadening the discussion in the OEIWG to include, not only transnational corporations, but equally the broad range of business enterprises operating domestically. She also pointed to the importance of maintaining a strong focus on the primary duty of states to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

Ms. Tbeur underlined that the value added and effectiveness of a future instrument would depend on its ability to complement existing national, regional and international efforts to implement the UNGPs and reinforce the



The burning and destruction of forests affect human rights in manifold ways.

role of state-based non-judicial mechanisms and non-state-based grievance mechanisms, described by Guiding Principle 27, alongside a comprehensive, efficient and appropriate judicial system. Finally, Ms. Theur emphasised that NHRIs seek to participate actively in the discussion of a prospective treaty.

Chip Pitts, lecturer at the Law School of Stanford University, stressed that a new treaty should clarify, simplify, harmonize and ensure that States' duty to protect and the duty of corporations to respect are reflected on the ground and are given a meaning in practice. Similarly, the prospective treaty must shore up good initiatives that have been applied at the international level and avoid regression, Pitts added.

In relation to barriers in access to effective remedy, particularly on equality of arms and funding, there are some good practices to build on, Pitts highlighted, giving the example of the Inter-American Court of Human Rights and the European Court that provide funding for victims. Similarly, the Statute of the International Criminal Court provides grounds for criminal liability of corporations at the domestic level.

Professor Pitts emphasised that it is at domestic level where enforcement happens, while international and regional remedies are secondary and last resort remedies. Resort to regional and international remedies usually requires exhaustion of local remedies, whereby the principle of complementarity would be applicable, Pitts explained. This raises the requirement to prove that States are unwilling or unable to act, limiting the possibility of victims to bring cases to these courts, Pitts added.

International treaties have also helped in cases of environmental harm, Pitts noted. The Basel Convention allowed the European Union, particularly the Netherlands, to pursue the prosecution of Trafigura to successful settlement. Moreover, even where formal law of the domestic jurisdiction does not directly incorporate international law, its courts and judges are increasingly looking at international law.

Another trend is the criminalization of corporations when they commit crimes at the national level. Nevertheless, Professor Pitts emphasised, it is wrong to say that any violation of human rights is a crime. There is a need to

distinguish international crimes in customary and treaty law from civil liability and administrative liability, he added. Each State has different approaches to their application and it will be basic to respect the realities of different jurisdictions, their history and traditions. The key issue is to guarantee an effective remedy, beyond only monetary remedy, Pitts underlined. Every so often a specific injunctive relief and apology are needed. As a matter of example, Pitts recalled that the Inter-American human rights system covers a full range of remedies. The prospective treaty could cover a full scope of remedies that meet the criteria of UNGPs and that are recognised in the [UN General Assembly resolution on the right to a remedy and reparation for victims](#), Pitts added.

Pitts noted the need to work on a comprehensive jurisdictional approach in order to overcome procedural hurdles, such as '*forum non conveniens*', 'touch and concern' principle in ATCA, or act of the State – State's immunity principle. It can be done by simplifying rules for choice of jurisdiction, applicable law and effective remedy, amongst others, he added.

Professor Pitts remarked that the treaty has the opportunity to be innovative in relation to the institutional options. The institutional framework that might emerge from the treaty could receive complaints, elevate good practices, do research and cooperate with other institutions in the UN framework.

CONTRIBUTIONS BY STATES

Ecuador highlighted that access to justice is one of the most important issues raised during the first session of the OEIWG, and is one of the clear gaps in cases of impunity for human rights violations perpetrated by corporations. The lack of balance between the influence and power of corporations on the one hand, and the limited resources available to victims on the other, are hurdles that should be overcome by national mechanisms and institutions. The delegate of Ecuador remarked that allowing victims to bring their claims to the jurisdiction of the host and home State is one of the objectives pursued by the international treaty.

Ecuador recognised that the project carried out by the Office of the High

Commissioner of Human Rights will be a valuable asset for the discussions of the OEIWG. Likewise, the proposal for creating an international body to hear cases of human rights abuses perpetrated by corporations should be carefully analysed. The prospective treaty must be based on an institutional framework capable of guaranteeing its implementation in an effective manner, and that contributes in the fight against impunity in cases of human rights abuses perpetrated by corporations, Ecuador added.

Namibia recalled two of the conclusions cited in the study of the OHCHR Accountability and Remedy Project (ARP), including that "variations between national jurisdictions may exacerbate inequalities and create legal uncertainty for companies and affected persons" and that "the present system of domestic law remedies is patchy, unpredictable, often ineffective and fragile". Namibia recalled that there is clear evidence that an international legally binding instrument ought to cover all businesses, that is domestic businesses, domestic businesses with foreign operations, as well as TNCs.

Cuba recalled the need for a future treaty that establishes mechanisms to which natural persons whose human rights have been infringed by TNCs could resort to in order to have binding redress. Cuba noted that the complementarity of such body with domestic legal systems should also be discussed.

China stressed that national law plays a dominant role in the regulation of TNCs. Nevertheless, due to limitations in national laws, including in both home and host States of corporations, the human rights responsibilities of TNCs have not been addressed and human rights violations by corporations have not been deterred. China noted the importance of establishing a multilateral human rights coordination mechanism through effective consultation between host and home States, with the aim of enhancing cooperation on 'due diligence' investigations, administration of justice and enforcement of judgments. The different economic and development conditions of States, and their history and cultural characteristics must also be taken into account, as States have diversified approaches to the protection of human rights. In addition, the need to understand the imbalance between TNCs

and the host country in terms of capacity, resources and level of knowledge, and the gaps between developed and developing countries is required in order to develop fair and equitable rules acceptable to both parties. China pointed to the importance of enhancing technical assistance and capacity building by developed countries under a prospective treaty.

Bolivia noted that effective resources should be available in order for the future instrument to guarantee the right of reparation of victims of human rights abuses perpetrated by TNCs. Bolivia underlined the importance of strengthening mechanisms for legal and judicial redress and the rules for application of sanctions in order to avoid impunity.

Nicaragua recalled that issues of reparation and remedy are fundamental aspects for States. Nicaragua added that remedy is a responsibility assumed by States. In Nicaragua for example, the government licensed a forestry company and indigenous communities were affected due to the operations. These communities complained to the Inter-American Human Rights Court, which ruled in favour of the communities and Nicaragua was responsible for redress. In the framework of a prospective instrument, it is important to identify how a TNC would take responsibility, as the treaty only bounds States. Nicaragua noted that it is familiar in human rights instruments to include provisions creating monitoring bodies, while States have the option not to recognise the competence of these monitoring mechanisms. If such approach is adopted in the future instrument, then it will complicate the process towards effective remedies.

Venezuela underlined that OEIWC should ensure the most direct and expedite access to judicial and administrative mechanisms for redress to victims. Likewise, Venezuela pointed out that it necessary to fully respect exhaustion of local remedies before regional and international mechanisms kick in. The future instrument should also lay down obligations for TNCs to respect and uphold the law of host States, Venezuela added.

Ghana questioned whether the test of remedy effectiveness is based on quantum or on the effectiveness of institutions at the national level. Ghana

also raised the case where a State refuses to be a party to the treaty, and the effect such cases will leave on the possible creation of an international forum. Ghana stressed the participation of civil society in “naming and shaming and putting the pressure” on TNCs.

El Salvador noted that when there is conflict between companies and States, there is already a mechanism and a process to deal with such cases under international investment agreements. These procedures have often concluded in favour of companies despite their participation in human rights abuses. El Salvador stressed that it is important to clarify the relationship between international investment agreements, including investor-state dispute settlement, and the future instrument on business and human rights.

South Africa noted that benefits to host countries from corporations are not automatic. Therefore regulations are needed to balance the economic requirements of investors with the need to ensure that investments make a positive contribution to sustainable development. Human rights standards should be upheld while governments retain the policy space to regulate in the public interest, South Africa added. Human rights are enshrined in South Africa’s Constitution and the judicial system of South Africa has adjudicated successfully various cases involving corporations and big conglomerates for human rights abuses. South Africa also pointed to their experience in reviewing investment treaties and designing a new approach with appropriate balance between the rights and obligations of investors while ensuring the respect for human rights. The success of the international treaty cannot only lie in the State’s duty to protect human rights, but rather it should be a “comprehensive and balanced manner of addressing the obligations of TNCs and other business enterprises with respect to human rights, including their adherence to existing regulations and policies and extra-territorial obligations”, South Africa stressed. This approach will contribute to closing the governance gap and ensuring that TNCs and other business enterprises could be held liable for human rights violations. This approach should also ensure universal application of uni-

form standards on a global scale and address the widely perceived inequality in rights and obligations, South Africa concluded.

CONTRIBUTIONS FROM CIVIL SOCIETY ORGANIZATIONS

CIDSE⁶ noted that impunity and lack of remedy is clearer when abuses take place in “in weak governance zones and conflict affected areas”. CIDSE advocated for a treaty that urgently provides access to justice and promote non-judicial remedies. CIDSE underlined the importance of addressing extraterritorial jurisdiction, including the obligation of home States to provide access to judicial remedy whenever victims cannot access effective judicial remedy in their own State. The treaty should include the principle of complementarity between the home and the host State jurisdiction, according to CIDSE. A ‘consultation clause’ that obliges the home State to consult the host State before exercising its extraterritorial jurisdiction could be included in the treaty, CIDSE proposed. The group also proposed that the treaty address mutual legal assistance and cooperation in order to ensure access to effective remedy, particularly in the collection of evidence, and the enforcement of judgments. CIDSE noted that the treaty should consider establishing a new monitoring and enforcement mechanism whereby corporations could respond to allegations before this international mechanism.

FIAN considered that the treaty should include the obligation of States to adopt effective remedy mechanisms, including administrative, quasi-judicial and judicial remedies, and should ensure restitution, compensation, indemnity, rehabilitation and guarantees of non-repetition. FIAN noted that the main barrier for access to justice is the lack of remedy mechanisms in the home State of the corporation. This access should be ensured in cases where: a) the harm or threat of harm originates or occurs in its territory; and where b) the business enterprise or its parent or controlling company has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned. FIAN also referred to the principle of ‘equality of arms’ and suggested on this matter that States

should have the obligation to ensure qualified legal assistance and avoid costs or other procedural hurdles for victims. FIAN also addressed the enforcement of domestic judgments and recognised the importance of ensuring that patrimony of parent or controlling companies could respond for conducts of linked companies harming human rights. FIAN also suggested that a treaty body in charge of monitoring the implementation of the instrument could be created.

Franciscans International⁷ proposed that the treaty should require States to provide for civil damages in cases of human rights violations committed by corporations. Franciscans International pointed to the challenges faced by victims of corporate violations, including impediments to the disclosure of documents, exclusion of causes of action in domestic law, territorial jurisdictional limitations, and complexity of corporate structures, among others. In order to tackle these impediments, Franciscans International suggested that the international instrument should require States to ensure access to effective remedy through judicial, administrative, legislative or other appropriate means, to establish general jurisdiction of the courts where the company is domiciled, and to require States to exercise jurisdiction over human rights abuses committed by their companies outside their territories. Franciscans International also proposed provisions dealing with the circumstances under which the corporate veil would be lifted, and addressed the need to shift the burden of proof, ensure that damages are adequately quantified in favour of victims, and address any financial barriers to access effective remedy.

The **International Federation for Human Rights** (FIDH) highlighted that human right defenders have been victims of attacks from corporations. FIDH noted that access to justice in some countries have become increasingly difficult as a result of legislative reforms or regressive judicial decisions. Therefore, a treaty must include provisions to ensure affected individuals, communities and peoples access to effective remedies in both host and home States of corporations. FIDH proposed that a prospective instrument should remove barriers to remedy, especially the corporate law doctrine of separate

Highlights of some elements of discussion and points of view shared during the OEIWG's session

In regard to mechanisms for access to remedy:

- The current systems of remedies for victims of corporate human rights abuses are patchy and inconsistent, complicated by jurisdictional challenges as 'forum non conveniens', asserting the liability of parent company, and availability of funding for legal representation;
- A prospective Instrument should help in attaining equality of arms for victims in the face of TNCs' reach and access to resources. One way a prospective Instrument could help overcome these obstacles is through shifting the burden of proof from the claimant to the parent companies;
- A prospective Instrument should address the issues pertaining to enforcement of national judgments and legal cooperation, including in regard to the collection of evidence, witnesses' protection, discovery procedures, and enforcement procedures (including freezing of assets);
- A prospective Instrument could establish an international body in charge of monitoring the fulfilment of obligations set under the treaty, and/or hearing cases involving corporate-related human rights abuses. In such a case, it is important to recognize the principle of 'exhaustion of local remedies';
- 'Effectiveness' of remedies to victims entail the twin test of preventive and redressive efficacy, including reasonable certainty of redress in a timely manner and at an affordable cost;
- The role of national mechanisms to support victims of human rights abuses, including through legal aid and National Human Rights Institutions, could be enhanced in home and host states;
- It is important to consider the value of non-judicial mechanisms and preventive remedies, like injunctions.

legal personality and limited liability, *forum non conveniens*, and other financial constraints and procedural hurdles. FIDH also highlighted the importance of extraterritorial civil and criminal jurisdictions, and the application of the principle of complementarity including effective and robust supra-national remedial mechanisms.

The **Transnational Institute** (TNI) focused on the need for effective bodies of enforcement that oversee compliance, particularly the possibility of setting up a public centre with the capability to inspect the practices of TNCs. TNI also proposed the creation of a world court or tribunal with the jurisdiction to sanction and enforce judgments and possibility for victims to submit claims pertaining to business-related human rights abuses.

Endnotes:

- ¹On behalf of Friends of the Earth Europe, Global Policy Forum, CIDSE, Brot für die Welt, IBFAN and IBFAN-GIFA.
- ²On behalf of Sisters of Mercy-Mercy International Association, Centre for Re-

search on the Environment, Democracy and Human Rights of the DRC, GRUFIDES-Peru, IBASE-Brazil, SIN-FRAJUPE-Brazil and NGO Mining Working Group.

³ On behalf of Friends of the Earth International, World March of Women and the Campaign to Dismantle Corporate Power and Stop Impunity.

⁴ UN Doc. A/HRC/29/39, 7 May 2015 available online at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Pages/ListReports.aspx>, accessed 5 October 2015.

⁵ See: <http://nhri.ohchr.org/EN/Themes/BusinessHR/Pages/Capacity%20Building.aspx>, accessed 7 October 2015

⁶ On behalf of SOMO, Friends of the Earth Europe, Brot für die Welt, IBFAN, IBFAN-GIFA and Global Policy Forum.

⁷ On behalf of Sisters of Mercy - Mercy International Association, The Center for Research on the Environment, Democracy, and Human Rights of the DRC, GRUFIDES, IBASE, SIN-FRAJUPE, NGO MINING WORKING GROUP

Chairperson's Opening Statement for the First Session of the OEIWG on Transnational Corporations and other Business Enterprises with respect to Human Rights

Treaty Alliance



The Deputy High Commissioner for Human Rights (left) and Ambassador María Fernanda Espinosa Garcés of Ecuador, Chairperson of the OEIWG, speaking (right).

With great appreciation I address you today in such a significant moment to thank you, on behalf of Ecuador, for the support I received to be appointed as Chairperson of this Open-ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights, an appointment that I will conduct with impartiality and in compliance with the established procedures.

The discussions within the United Nations on a regulatory framework for transnational corporations and other business enterprises with respect to human rights dates back to more than forty years ago, and it is on this basis that today we start a new stage in which we will carry out, for the first time, an intergovernmental negotiation on this matter, with the wide participation of civil society and other relevant stakeholders.

Since the adoption of Resolution A/HRC/RES/26/9 by the Human Rights Council on 26 June 2014, the discussions on the need for a binding instrument establishing a regulatory frame-

work on business and human rights was finally settled. Now we must focus in the next steps that we must take, in accordance with the clear mandate given by the Human Rights Council, for an international binding instrument to regulate the activities of transnational enterprises and other businesses in international law to enjoy the broadest support and recognition. The time that will take us to achieve this aim will depend in our own work and the constructive spirit of our participation in the process.

The sponsorship of Resolution 26/9 was shared with South Africa, whom I publicly thank, and together with the rest of the sponsors, we concur in the vision of bringing equilibrium where there are legal voids that have not been covered by other measures or international instruments on the matter.

In a world in which almost eighty percent of goods are produced by outsourcing methods through supply-chains located in different territorial jurisdictions, it is important to have general and universal norms in the human rights field that provide securi-

ty for the benefit of all: States, businesses and, particularly, human beings whose rights could be at risk because of wrongful corporate conduct. The philosophy leading this initiative has as basis the principles of equity, legality and justice that must prevail in the international context in the interest of all, particularly for those who have been victims of violations and abuses against their human rights by businesses acting against the law.

What was above-mentioned should not be misinterpreted, nor assumed that this process intends to affect the business sector. It should be recognised that transnational corporations can have a positive impact in different areas of economy and society, generating employment and investment. These corporations have a role in the sustainable development process.

Even more, in the last years the expressions of interest and commitment on the fulfilment of human rights by businesses' representatives have increased. These expressions allow us to sustain that the possibility of undertaking binding commitments from early voluntary rules should not imply additional efforts for businesses, particularly for those that currently comply and respect human rights.

Recent good practices by corporations have shown that nowadays businesses have much to gain by respecting human rights, as this will directly benefit their image and consumers will show interest in their products or services. On the contrary, behaviour adversely impacting human rights of persons or communities will lead to a negative corporate image difficult to overcome, particularly on an era in which civil society and social networks freely

expose and massively disseminate their ideas.

From this perspective, a binding instrument will constitute the ideal tool to establish clear and universal norms on transnational corporations and other business enterprises with respect to human rights. These rules will apply in a non-discriminatory manner and in a predictable context through an international framework for the fulfilment of human rights, bringing hope, justice and equilibrium to those who have been affected by harmful corporate conduct. An environment of legal certainty and clarity is always positive to encourage investment.

During the adoption of Resolution 26/9, as well as in the preparatory stage of this first session, it was evidenced that some States still have reservations about the task mandated by the Human Rights Council through this resolution, and these countries have preferred not to participate in this debate. Even if such decision is respectable, I hereby invite again all Parties to reevaluate their decision, because the best time and place to elucidate and share their concerns and doubts in a clear and democratic way is in this intergovernmental working group. The participation, dialogue and processing of agreements and dissents are the very essence of the multilateralism that we must defend and strengthen.

I must also emphasise that, during this preparatory stage, much has been speculated on the role that the United

Nations Guiding Principles on Business and Human Rights will have in the process for the adoption of a binding instrument. Some voices have even sought to initiate a controversy between both initiatives by attempting to confront both of its respective proponents. I would like to clarify that it is in the interest of all that both procedures are considered from a perspective of mutual reinforcement. Even though the Guiding Principles are not binding, they are the tools some countries are using in accordance with their reality and interests for the moment. They also constitute a reference that we have at our disposal. Without doubt, the Guiding Principles will be one of the sources frequently used in our debates. The recognition of its importance has been reflected in the program of work, and we trust that all the contributions received will allow us to lay the foundations of our more ambitious goal, a future international binding instrument.

The manner in which the work will be carried out was laid out in the concept note developed under my supervision, as well as in the Program of Work that was submitted for the consideration of States sufficiently in advance, and that was enriched by the contribution of some States without affecting the text of the resolution, its mandate, or the possibility to reach agreements in the proposed subjects of the agenda. This was one of the main tasks in the last stage of numerous consultations carried out by the Mission of South

Africa, the Mission of Ecuador and by myself since September last year until this date, as a clear gesture of our trust in sincere and open dialogue, and democratic mechanisms to reach consensus. I can express with satisfaction that Ecuador and South Africa exhausted all their efforts until the end for everyone to participate in this process, and I would like to thank all those who, independent of their position with respect to the mandate of Resolution 26/9, gave us their time to explain our ideas and hear theirs.

I would also like to thank the strong and decisive support of the civil society, given through more than one thousand non-governmental organisations around the world; as well as the support given by the European Parliament and the Holy See, among other stakeholders. This is indicative of the global trend that pushes forward the need to have an international binding instrument that regulates, in a clear and universal manner, the respect and compliance of human rights by transnational corporations.

I must recognise that among the subjects that we will discuss, some have generated concerns that cannot be solved in this early stage, because the work of the working group is just starting. This is the reason why I extend an open invitation to all actors who are really committed to human rights to participate in our debates and call for their support in the fulfilment of my duties, but especially I call for their support in the work we start today. Likewise, in my capacity as Chairperson, I reiterate my commitment for guaranteeing an inclusive, transparent and democratic process that considers different voices of interest through a constructive dialogue, meant to foster sustainable economies and more just and equitable societies.

This statement is an unofficial translation by Daniel Uribe, Visiting Researcher at the South Centre. The original statement in Spanish is found at

http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Ecuador_Opening_Statement.pdf



“There are no words,” Rigoberta Mechú stated after taking her hands out of the oil pits operated by Texaco in Ecuador. The affected communities alleged that between 1964 and 1992 Texaco’s oil operations polluted the rainforests and rivers in Ecuador and Peru.

Towards a New Binding Instrument on Human Rights and Transnational Corporations

Below is the keynote speech by the United Nations Special Rapporteur on the rights of indigenous peoples, Ms. Victoria TAULI-CORPUZ, at the First Session of the Intergovernmental Working Group on Elaborating a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.



Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz.

It is for me a great honour and privilege to share these words with you in such a historic gathering. Today, I would like to provide some reflections on the various and important themes that this working group will be examining in accordance with the mandate granted by the Human Rights Council in resolution 26/9.

These reflections stem from my experiences in working with indigenous peoples in all parts of the world, first as an indigenous rights advocate, then as a member and chair of the Permanent Forum on Indigenous Issues, and currently in my capacity as Special Rapporteur on the rights of indigenous peoples.

Indigenous peoples have been at the forefront of discussions regarding the human rights abuses committed by corporations since the 1970s. For decades, indigenous peoples have been victims of corporate activities in or near their traditional territories, which have

depleted and polluted their traditional territories without their consent, putting many peoples at the verge of cultural or physical extinction. Today, little has changed in relation to this situation. As reflected in the communications I have received in my capacity as Special Rapporteur, indigenous peoples and other local communities continue to suffer disproportionately the negative impact of corporate activities, while community leaders and activists suffer a true escalation of violence on the hands of government forces and private security companies. Many of the displacements of indigenous peoples from their ancestral territories and the extrajudicial killings of indigenous activists usually happen in communities where there are ongoing struggles against corporations. *My predecessor in the mandate, Professor James Anaya, concluded that extractive and other large scale corporate activities constitute today 'one of the most important sources of abuse of the rights*

of indigenous peoples' in virtually all parts of the world.

The adoption of the Human Rights Council Resolution 26/9, establishing this Working Group represents a significant development. The United Nations responded to calls from around the world, including the persistent appeals of indigenous peoples, to strengthen the architecture of international human rights law in order to adapt further to the challenges posed by corporate-related human rights abuses. While the global economic trends are increasingly characterized by dominance of corporations, their role extends beyond the capacities of any one national system to effectively regulate their operations. *The issues at stake are global, and so should be the response.*

In one of my first statements after my appointment last year, I welcomed the adoption of Resolution 26/9 where I said that "this will be a much needed step towards ensuring that gross human rights violations against indigenous peoples that involve transnational corporations and business enterprises become a thing of the past." You mentioned in your invitation letter to me to speak before this historic session that "the high levels of impunity of corporate misconduct and the lack of procedural remedies for victims is still a concern that requires and deserves full attention". Indeed, such impunity should be prevented at all costs and the need for a stronger instrument to address this cannot be overemphasized enough.

Too often those whose human rights are affected by the operations of businesses (for too long considered the externalities of business activity) are left without any real access to effective remedies, and often states themselves are without the requisite tools to hold corporations accountable where needed. This is a matter which concerns me the most because the weaknesses of States, corporations and the United

Nations in providing effective remedies creates desperation and hopelessness is a fertile ground for the operations of criminal transnational syndicates.

An international legally binding instrument on business and human rights could contribute to redressing gaps and imbalances in the international legal order that undermine human rights, and could help victims of corporate human rights abuses access remedy.

I acknowledge that some progress has been achieved in the area of human rights & business in recent years. Notably, the adoption by the Human Rights Council in 2011 of the UN Guiding Principles on Business & Human Rights marked a significant step forward, particularly by clarifying many elements of the State's duty to protect human rights from business related human rights violations, and acknowledging also that businesses themselves have responsibilities to respect human rights. The three pillars on which the Guiding Principles are based, the 'Protect, Respect and Remedy Framework', identified the respective responsibilities that pertain to the various actors.

I fully concur with the opinion expressed by the High Commissioner for Human Rights in one of his statements. *The search for a new international legal instrument and the implementation of the Guiding Principles should not be seen as contradictory, but rather complementary objectives.* While we continue searching for viable alternatives to fill existing accountability gaps, the principles should continue to be used as an interim while we continue developing the platform for advancing in the prevention and remedy of human rights abuses in the context of corporate activities.

The mandate established by Resolution 26/9 is highly relevant and necessary. Corporations are key actors in shaping and influencing economic, as well as political, social and cultural issues, activities and frameworks all over the world, including production and consumption patterns and livelihoods of communities. While the global economic trends are increasingly characterized by the dominance of corporations, their role extends beyond the capacities of any one national system to effectively regulate their opera-

tions.

As foreign investors, corporations are benefiting from an international protection regime that is consolidated through rules under bilateral investment treaties and/or free trade agreements and other regional arrangements. This system is enabled through an investor-state dispute settlement mechanism and far-reaching rules for recognition and enforcement of arbitral awards. Reform of the international investment protection regime, including the substance of the treaties and the investor-state dispute settlement mechanism, is emerging as an issue of concern for both developing and developed countries.

What we see more and more is that foreign investors and transnational corporations are provided with very strong rights and extremely strong enforcement mechanisms. On the other hand global and national rules dealing with the responsibilities of corporations and other forms of businesses are characterized by the form of soft law. They fall short of legally binding instruments that allow for achieving balance in the rights and responsibilities of these actors. We face a context where corporations still lack international legal responsibility commensurate with their role and influence in international and domestic affairs. At the same time, there are gaps in the international legal framework in regard to the duty to protect human rights and access to remedy. The last pillar under the UN Guiding Principles, on access to effective remedy, acknowledge the limitations of national remedies and the need for more clarity in regard to access to effective remedies.

An international legally binding Instrument would significantly help in establishing the much needed balance in the international system of rights and obligations with regard to corporations and host governments. Also, it could potentially benefit various stakeholders not only victims of human rights abuse. Businesses that already respect human rights and are engaged in best-practice development have a clear interest in supporting and helping develop this Instrument.

The mandate of the open-ended intergovernmental working group on International Legally Binding Instrument on Transnational Corporations

and other Business Enterprises with respect to human rights is "to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" (i). Most cases in the area of civil litigation against companies involve issues of economic, social and cultural rights and environmental damage. As such, the Instrument is expected to take into account the principles of indivisibility and interdependence of all human rights.

UN HRC Resolution 26/9 takes us one step further along this pathway toward strengthening the system of human rights law, and this opportunity for the Intergovernmental Working Group must be seized upon to address two urgent global realities, the first being access to remedies and the second relating to the need to uphold the primacy of human rights in the context of business activities.

At the present time, the ability for communities and people affected by corporate human rights violations to access remedies is very weak and such remedies do not even cut across all jurisdictions. At the same time, in many cases corporate human rights violations touch upon the interests of more than one country's jurisdiction. In this sense, for the Intergovernmental Working Group to make real advances in providing access to effective remedies, the future legal instrument must clarify the extraterritorial obligations of states to ensure access to effective remedies within all states that are connected to the corporations in question. Fortunately, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights go a long way in clarifying the application of law in this context, and will provide a powerful resource for the Intergovernmental Working Group to call upon for guidance.

A second key opportunity for the Intergovernmental Working Group concerns the possibility for a new international instrument, within the context of business activities, to reinforce the fundamental principle of international law which recognizes the primacy of human rights above all other systems of law.

As recognized by the Committee on Economic, Social and Cultural Rights in

their 1998 Statement on Globalisation “the realms of trade, finance and investment are in no way exempt from these general [human rights] principles” (ii). The global reality for many communities, as well as States from all parts of the world, is that corporations today have the ability under international trade and investment law to sue states when they pass laws that aim to improve human rights and environmental protections. In this context, the international community is failing to realise the guarantees of the international human rights regime.

The work of the Intergovernmental Working Group can also benefit corporations by producing a level playing field for investment across all states. In this sense, the Working Group has the opportunity to develop standards for all states that codify within international law the regulatory advances being made within some jurisdictions on a piecemeal basis. Providing this type of regulatory clarity and certainty, within international human rights law, provides a uniform approach which will benefit all corporations. This advance would also undermine the practice of some corporations to seek out for investment jurisdictions with weak regulatory environments, thereby creating negative incentives for other corporations to do likewise, resulting in what some refer to as the race to the bottom. Similarly, for states, this advance in international law would also undermine the ability of their counterpart states to weaken their regulations, at the same time exposing their populations to human

rights violations, in the process of attracting investment.

State’s obligation to protect

This brings me to a crucial question. Any discussion on an international legal instrument regulating the responsibility of corporate actors in relation to human rights should not divert the attention from the important responsibilities that pertain to States in fulfilling their obligation to protect their own citizens against corporate activities. Unfortunately, in the Americas, in Asia and in other parts of the world more often than ever, *States are silent witnesses or victims of corporate abuse, but they are all also, either by action or by omission, responsible to a certain extent in these abuses. The line that separates corporate interest from State policy is sometimes blurred.*

In this connection, I hope that the discussions in this forum will also contribute to make concrete progress in this regard.

Call for consensus

Today, I would like to recall the spirit of consensus-building underlying the Guiding Principles, and to appeal to all participants, including Member States and civil society actors, to revive this spirit. Nobody should feel estranged from this process.

I am encouraged to see representatives of indigenous peoples and organisations, and I hope that adequate room will be given to their participation in future sessions of the Working Group.

I would like to conclude by reiterating my gratitude for the opportunity to address the distinguished members of the Intergovernmental Working Group and all who are present. As I wish you all success in your discussions this week, I would like to remind you that we should not lose sight of the ultimate objective of this exercise, which should not be other than *strengthening the protection of human rights against abuses committed in the context of corporate activities. For indigenous peoples, as well as for many other human communities of the world, the issues at stake are just too high.*

Endnotes:

- i. UN Human Rights Council Resolution A/HRC/26/9, 25 June 2014, OP 1.
- ii. Statement by the Committee on Economic, Social and Cultural Rights, Globalization and Economic, Social and Cultural Rights (May, 1998)

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Palm and acacia plantations in Indonesia often employ burning techniques to clear land of old growth, but the fires frequently get out of control and affect thousands of people living in the region.

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