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OPENING REMARKS BY THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE
RIGHTS OF INDIGENOUS PEOPLES,
MS. VICTORIA TAULI-CORPUZ

First Session of the Open-ended Intergovernmental Working Group in Charge of
Elaborating a Legally Binding Instrument on Transnational Corporations and
Other Business Enterprises with Respect to Human Rights

Geneva, 6 July 2015



Thank you Madame Chairperson

Excellences,

Distinguished delegates,

Representatives of indigenous peoples and organisations,

Friends and colleagues,

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 to 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.

Madame Chairperson,

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 by 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 accountability 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 which provide the 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 abuse 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 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 and still developing platform for advancing in the prevention and remedy of human rights abuses in the context of corporate activities.

Madame Chairperson,

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 operations.

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”.¹ 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 to 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 the 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 to clarifying the application

¹ UN Human Rights Council Resolution A/HRC/26/9, 25 June 2014, OP 1.

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”.² 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 weakening their regulations, at the same time exposing their populations to human rights violations, in the process of attracting investment.

State’s obligation to protect

Mrs Chairperson,

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 of 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.

An international legally binding Instrument would go some way to establish balance in the international system of rights and obligations with regard to corporations and host governments. It would benefit States in their human rights obligations in relation to corporate

² Statement by the Committee on Economic, Social and Cultural Rights, *Globalization and Economic, Social and Cultural Rights* (May, 1998), at <http://www.unhcr.ch/html/menu2/6/cescrnote.htm#note18>

activities. Businesses that already respect human rights and are engaged in best-practice development would also benefit and have a clear interest in supporting and helping develop this Instrument.

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

Call for consensus

Mrs. Chairperson,

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.

Madame Chairperson,

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.

Thank you Mrs. Chairperson, and all for your kind attention.