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HUMAN RIGHTS AND BUSINESS: AFRICAN PERSPECTIVES

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- CONFERENCE REPORT -

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INTRODUCTION

Advancing its Human Rights & Business Programme launched in 2011, Africa Legal Aid (AFLA) convened a series of events starting May 2012, examining the interface between corporate accountability and human rights on the African continent. The programme featured a high level Pan-African conference bringing together business leaders, legal experts, civil society representatives, and public officials in Johannesburg, South Africa, 5-6 July 2012. The academic component of the programme is complemented by an editorial dimension, through the upcoming publication of an AFLA Quarterly issue dedicated to Human Rights and Business. A set of best practice guidelines in regard to the topic will also be published. A network will be established amongst businesses, civil society and public administration to further the aims of the programme. In its vision to engage young people in shaping Africa's human rights agenda, Africa Legal Aid introduced an essay competition, allowing youth to voice their concerns and solutions in regard to human rights and business accountability.

AFLA is expanding its human rights and justice expertise into the area of Human Rights and Business, because Human Rights are Good for Business, if not in the short term, definitely in the long term. Our interest in human rights and business stems from our conviction that economic and social rights, and civil and political rights are two sides of the same coin. Hence, we would like to initiate a dialogue on African perspectives on human rights and business and devise a resulting framework emphasizing those issues of special resonance for Africa. All across Africa, there is growing awareness about the need for civil society groups, particularly those working on human rights and the rule of law, to engage not only governments but also the business community in efforts to give recognition and effect to human rights protection. A favorable legal and human rights environment contributes to long term economic gains for enterprises and as a consequence, to economic progress in Africa.

Our Human Rights and Business conference (Johannesburg, July 5-6), convened in cooperation with law firm Webber Wentzel, featured a variety of experts who approached themes such as:

- The South-North aspects of human rights and business;
- Corporate social responsibility vs. corporate criminal responsibility;
- Engaging the youth in the human rights and business agenda;
- Exploration of human rights and business best practices;
- Incorporating gender perspectives.

OPENING: THE EMERGING REGIME OF HUMAN RIGHTS AND BUSINESS - AFRICAN PERSPECTIVES

Evelyn Ankumah

Executive Director, Africa Legal Aid

The Director of Africa Legal Aid welcomed participants, praising the fruitful collaboration enjoyed in convening the conference with partners Webber Wentzel, with the support of the Commonwealth Foundation, the Danish Institute for Human Rights, and the Law Society of South Africa. Acknowledging that the law firm of Webber Wentzel is primarily a commercial one, Ms. Ankumah stressed that the firm did not solely focus on profit-making, but was fully aware of the fact that it operates in a setting, a society where commerce has, or may have, negative implications for non-commercial aspects of life. Webber Wentzel displayed the kind of social awareness rarely encountered in such context, token being its Pro Bono department assigned to further the rights and interests of those it cannot generate monies from, the least privileged.

In a conversation with Moray Hathorn, the partner who heads the Pro Bono department of Webber Wentzel, Ms. Ankumah asked, "Moray do you only do pro bono work or do you also engage in commercial cases?" As he responded his work is exclusively bro bono, the next question was, "Is it because you have already generated so much money for this firm, is that why you do not need to work on cases that bring in money to the firm?" Mr. Hathorn shared that he was engaged to do pro bono and that is all he does and has done for the firm. Ms. Ankumah concluded that although Webber Wentzel is a business, more than many of its competitors, it is also a social business. It contributes to making human rights a reality. Webber Wentzel illustrates that human rights are good for business.

The theme of the conference, "Human Rights and Business: African Perspectives", she explained, is broad and can thus be viewed and analyzed from various angles. The first and classic one concentrates on the imperative to hold businesses accountable in case they violate human rights. Whereas previously governments alone were the target of human rights activism, today it is increasingly recognized that corporate power impacts upon governmental power and that business should be subject to similar human rights norms and enforcement mechanisms as governments. Public human rights responsibility and corporate human rights accountability should both be pursued, they ought to be complementary. In spite of the awareness that business' dominant goal is profit-making and that it is money which rules the world, not human rights, there is another angle to look upon the topic. This involves the notion that due observance for the rule of law, due respect for human rights can be good for business. Such perspective rests on the commercial recognition that business thrives when there is stability, when there is legal certainty. Furthermore, business may find that respect for human rights standards has the potential to

increase workers' motivation and implicitly efficiency. Last, there is another significant angle to approach the topic from, namely the African perspective. Across the African continent, legal systems do not always enjoy ideal functioning, there are still dictatorial regimes, fragile democracies, governments plagued by corruption – which all negatively impact the enforcement of rights, obstruct the endeavors of African entrepreneurs, and discourage non-African companies to do business in Africa. In today's economically integrated world, cross-border cooperation is a must and African countries should improve their legal systems to attract foreign investment, and enhance human rights protection in order to prevent exploitation.

Ms. Ankumah stressed that there are still divergent takes on the topic: companies, entrepreneurs that see human rights as an obstacle to making money, while on the other side human rights advocates who see business as a selfish evil lacking an interest in others' rights. With a view that business and human rights do go hand in hand, she encouraged discussions on how both desiderata can be pursued and what problems we encounter on the way.

H.E. Mmasekgoa Masire-Mwamba

Deputy Secretary-General, Commonwealth Secretariat

Reminding the audience that the discussion on the interface between human rights and business has been mainly motivated by the power businesses wield, not always for the benefit of people and societies, H.E. Masire-Mwamba underlined that conventionally the focus has been on accountability for human rights violations resting entirely on the state. Although much attention has been given to the role of states in human rights protection, less consideration has been directed at the impact of non-state actors on human rights protection or violations. Realizing that good human rights is good business sense and good business sense does contribute to human rights, businesses more and more engage with communities, attempting to create a backdrop of mutual respect. We witness today a need for recognizing that business enterprise can have a significant impact on human rights protection in the economic, social and cultural sphere, as well as in the civil and political sphere.

Globalization has determined a widening of the scope of human rights, she added, mentioning the Rio +20, where – among others topics - the negative impact of business and industrialization upon climate change has been raised up. In such a context, hard decisions need to be taken, difficult topics need to be approached and various scenarios need to be considered as we discuss the issue of business and human rights.

Worldwide, there are ongoing human rights and environmental abuses as a result of direct or indirect corporate action. In the African setting, there have been important precedents of states failing to safeguard the rights of persons from damaging actions of non-state actors such as transnational

corporations. A particular case to highlight is that against Nigeria and the oil extracting corporation Shell in Ogoniland, accused of violations of social and economic rights contained in the African Charter of Human and Peoples' Rights. This case was one of the very few on the African continent to showcase concerted effort to press for transparency and accountability. The remaining question, in her perspective, is to what extent states are committed to their obligations under the Charter and to what extent violations are genuinely taken into account.

Prof. Shadrack Gutto

Chair, Centre for African Renaissance Studies, University of South Africa (UNISA)
Member of the Governing Council of Africa Legal Aid

On behalf of the Governing Council of Africa Legal Aid, Professor Gutto delivered a statement outlining the framing and implications of human rights and business in Africa. Embracing the perspective that business and the state are two sides of the same coin, he considered it a pity that the Universal Declaration of Human Rights, the International Covenant for Economic, Social and Cultural Rights, and the International Covenant for Civil and Political Rights more focused on the state rather than including business too in the issues at stake. Across Africa, business has both undermined and advanced certain rights, with Prof. Gutto wondering about the possibilities to more shift the balance towards the latter.

Business, to his mind, has not only played a part in the underdevelopment of Africa, but has also historically been involved in wider abuses. During the slavery and colonialism on the continent, there was trading in human beings, and these businesses did not do it alone, but aided by royal charters from England, France and other powers that guaranteed permission for carrying on such trade. This demonstrated the inextricable link between business and the state in regard to human rights. To illustrate the point, Prof. Gutto mentioned the private colony held in Congo by King Leopold of Belgium between 1898 and 1910, where 10 million people used in exploiting the environment were wiped out - the first major genocide in the history of the world. Another recent example, that concerning Sierra Leona and the leader of Liberia, Charles Taylor – now behind bars – demonstrates that, since no business persons buying blood diamonds have been indicted, there will never be full accountability as long as the international regime on human rights, criminal justice and humanitarian law remain the way they were.

Africa has contributed the right to development to the norms of international human rights in 1981, elaborated in 2003 with the Protocol on the Rights of Women which approach sustainable development. Development links business, the people, and the state. In this regard, human rights activists must push for the human rights impact of any investment to be observed, because if we do not do so, violations will occur and persist. It is our responsibility therefore, he concluded, to ensure that we link human rights to issues of development and accountability.

THEME 1: SOUTH-NORTH ASPECTS OF HUMAN RIGHTS AND BUSINESS

Lene Wendland

Advisor, Human Rights and Business, Office of the United National High Commission for Human Rights (OHCHR)

Ms. Wendland commenced her intervention by acknowledging that human rights and business in an African context have not been sufficiently explored and that in a globalized world the old dichotomy North-South is no longer as informative to analysis as it used to be, and that instead the discussion should be focused on global issues. In this respect, the United Nations has witnessed significant progress by providing standards on business and human rights. The year 2011 marked the unanimous endorsement of the Guiding Principles on Business and Human Rights by the United Nations Human Rights Council, the first time normative standards in this field were adopted at a global level, turning the Guiding Principles into a reference point for human rights and business. They provide normative clarity and operational guidance, setting a benchmark and providing a platform for action. In this context it is of particular significance, she specified, that the Human Rights Council arrived at a unanimous consensus, given the divisive and politically sensitive nature of the issues at stake. It was the first time that the Human Rights Council endorsed a human rights document that they had not negotiated themselves. She stressed that, although the Guiding Principles are directly targeted at states and businesses, civil society, victims of corporate abuses and lawyers all have an essential role to play in their implementation.

The Guiding Principles were prepared by UN Special Representative of the Secretary General on the issue of Business and Human Rights, Professor John Ruggie. In 2005, when he was appointed by the Human Rights Council, most business enterprises deemed human rights had nothing to do with them and their only obligation was to respect national laws. At the other side of the spectrum, civil society embraced the position that businesses do impact on human rights and therefore do bear responsibilities. Member states, under considerable pressure from both sides, outsourced the problem to Special Representative John Ruggie, who was asked to identify and clarify norms of corporate responsibility under existing human rights standards, and also to clarify the role of states in respect to regulation and adjudication of business enterprises.

Throughout the following six years, the UN Human Rights Council conducted 47 multi-stakeholder consultations on all continents, including meetings with participants in Africa, civil societies, victim groups, governments, and others. In 2008, after the first 3 years of his mandate, Prof. Ruggie introduced to the Human Rights Council the “Protect, Respect and Remedy” conceptual policy framework for business and human rights, with states being assigned the core responsibility to protect against human

rights abuses, businesses being placed under the responsibility to respect human rights standards, while victims being foregrounded by focusing on their right to access to effective remedy for any corporate-related human rights abuses. After 3 years, the Human Rights Council unanimously welcomed the policy concept and extended John Ruggie's mandate to provide more operational guidance on this framework; this led in 2011 to him presenting the UN Guiding Principles to the Human Rights Council.

The Guiding Principles do not set any new legal obligations; instead, they elaborate on existing obligations and practices for business and human rights, and stipulate complementary but differentiated responsibilities of states and businesses, given their distinct roles in society. The discussion entails for instance issues concerning the duty bearers in legal terms, aspects attempted to be clarified by the Guiding Principles.

The unanimous endorsement of the Guiding Principles by the Human Rights Council provides these principles with a strong political legitimacy, Ms. Wendland affirmed. The Ruggie framework is a global reference point, as well as a benchmark for action and accountability. Given the fact that in the space of human rights and business, law and politics are two different but equally important aspects, the support enjoyed by the Guiding Principles equips them with a solid foundation, one laid jointly by all parts of the world. In addition to the political endorsement enjoyed at the Human Rights Council, the Guiding Principles have also been endorsed by the International Chamber of Commerce, the International Organization of Employers, by human rights organizations, by certain groups of investors, and so on. This legitimacy gained via multi-stakeholder engagement also presents opportunities for all those working to enhance human rights protection in a business context.

The Guiding Principles enable businesses to manage human rights risks. The business case for business and human rights is that businesses need to manage their stakeholder risks, because otherwise it can cost them money. To illustrate this point, Ms. Wendland brought into discussion cases in the oil and gas sector, which indicated value erosion linked to not managing community relations or human rights risks appropriately; in this respect, she argued that such risks are experienced also in other sectors to varying degrees. With the global standard provided by the Guiding Principles, corporate lawyers are to advise clients accordingly on the interface between their businesses activities, and human rights norms and contexts.

The principles apply to all companies, regardless of size, sector or region. The presumption that human rights standards are something solely transnational corporations should be mindful of is a fallacy, the speaker specified. Although impact may depend on the company's size, sector and context, all enterprises should be equally responsible for their human rights implications. At the same time, the Guiding Principles concern all states, since they are built on human rights obligations that all states have committed to.

Ms. Wendland observed that in a study of about 450 allegations made against companies, in terms of causing and contributing to human rights abuses, there is in fact no right that a business cannot in one way or another have an adverse impact on. This substantiates the view that providing a list of the most relevant rights is nonsensical, because central rights in one business sector may not align with essential ones in another sector. Instead, we have over 30 rights of relevance to all stakeholders. Within the scope

of the Guiding Principles are all internationally recognized human rights, so basically the International Bill of Rights, alongside other core United Nations treaties in the field. Another aspect recognized by the Guiding Principles is that human rights cannot be offset: doing well in one aspect cannot compensate human rights elsewhere - that is the core foundation of international human rights law.

As concerns the state duty to protect, states have an obligation which extends to preventing, investigating, punishing and redressing abuse through effective policies, legislation, regulation and adjudication, this covering both legal and policy dimensions. Besides ensuring effective laws and proper enforcement, also policy incentives need to be looked at. For the sake of coherence between different regulations and policies, she believed that a carrot and stick approach would turn helpful, and not just limited to the business area. In terms of extraterritorial application of the Guiding Principles building on existing international human rights law, there are elements supporting the view that states need to ensure that companies operating within their jurisdiction must respect human rights abroad, although this does not constitute a requirement.

A year after their endorsement, the Guiding Principles have been embraced by several global and regional bodies, such as the Organization for Economic Cooperation and Development (OECD). Although no African nation is a member of the OECD, some African countries are adhering to the OECD Guidelines on Multinational Corporations, which has a complaint mechanism. This implies that, to the extent that there is a violation of an OECD-based company operating in an African country, it is possible to bring a complaint to the national contact point in the home state of that company.

To follow up on the mandate of the Special Representative, a new mechanism was established by the United Nations: a cross-regional working group whose mandate is to support the effective dissemination and implementation of the Guiding Principles. The working group also undertakes country visits and has in this respect approached a number of African governments to engage with all stakeholders on the implementation of the Guiding Principles.

As concerns the contribution of African states and stakeholders to the Guiding Principles, she mentioned that Nigeria was a core sponsor in the Human Rights Council, alongside India, Argentina, the Russian federation and Norway. There were African regional participation in general and expert consultations. Also, African law firms contributed pro bono to mapping of corporate law in several jurisdictions. Nonetheless, a separate process was in place on developing principles for responsible contracting which had a strong involvement from African governments, lawyers and civil society.

Ms. Wendland wrapped up by shedding light on the relevance of the Guiding Principles to the African context. Some of the arguments put forth include: the principles provide a level playing field for rights holders and for companies in Africa; they deliver guidance on legal and policy implications relating to a diverse array of matters (for instance: outsourcing of services, negotiating investment agreements, business and conflict, overcoming barriers to legal accountability); they address both the role and responsibility of the host state. The presentation was concluded with a recommendation: the discussion of human rights and business in the African context should build on the convergence of standards already achieved following extensive consultations at the United Nations, since a different approach would not be the interest of rights holders or anyone else for that matter.

A STORY AND EXPERIENCES FROM ZAMBIA

Rodger Chongwe

International Legal Assistance Consortium (ILAC), Africa *Regional Representative*
Former Minister of Justice of Zambia

Unlike the first generation rights, which are universal to both the North and the South, highlighted Dr. Chongwe, the third generation rights are not universally applicable to much of Africa South of the Sahara. The reason for that, to his mind, is the fact that economic, social and cultural rights are being correlated to the resources available to a state party to the International Covenant on Economic, Social and Cultural Rights. Thus, the poorer the state, the less inclined it is to implement those rights.

These rights are regarded as non-justiciable and are relegated to mere pious aspirations. For instance, Article 100 for the Directive Principles of State Policy and the Duties of a Citizen of the Constitution of Zambia provides that these principles may be observed only as far as state resources are able to sustain their application, or if the general welfare of the public so unavoidably demands, and as may be determined by the Cabinet. Therefore, these Directive Principles are not legally enforceable, although referred to as rights, notwithstanding Zambia being a State Party to the International Covenant on Economic, Social and Cultural Rights.

In 2011, a new government that had recently taken over power appointed a committee of experts to write a new constitution for Zambia. There have been several attempts in the past by successive governments to produce a constitution for Zambia that would stand the test of time; however, these efforts, though well meant, have been unsuccessful because of lack of seriousness on the part of those governments. Going by the first draft produced by the Technical Committee and circulated to the public for comments, it appeared the draft was well received. The team of experts dealt with issues of political, economic, social and cultural rights extensively in an effort to make all these issues justiciable and enforceable by the courts, an example provided in this sense being Article 61 of the draft. In response to widespread concern about the inability of most Zambians to access health care, education, employment, shelter, food and clean water, there is a specific provision touching upon the availability and allocation of resources.

While political and civil rights - first generation rights - have been enshrined in the Bill of Rights in all the constitutions of the country starting from 1964, economic, social and cultural rights were only included as earlier indicated in the chapter on Directive Principles of State Policy after the amendment to the 1991 Constitution. This notwithstanding, economic, social and cultural rights play an important role in the realization of political and civil rights, and financial constraints should not be a factor in determining whether these rights are or not justiciable. Protecting rights comes at a cost, and the country should be prepared to allocate the resources needed for its citizens to enjoy a minimum of economic, social and

cultural rights. The poverty of a country does not constitute a legitimate excuse for escaping the effort to ensure citizens benefit from such rights as adequate food, education, and healthcare.

The speaker identified a current global trend, especially among countries that have ratified the International Covenant on Economic, Social and Cultural Rights, to make these rights justiciable by placing them in their Bill of Rights. Even where these rights have not been placed under their Bill of Rights, the superior courts of those countries have held the government liable to provide these economic, social and cultural rights. Illustrative of this is public interest litigation in which the Supreme Court of India has been involved, in an effort to widen the scope of locus standi of persons appearing before that court. This has now extended to the activities of the Supreme Court of Nepal, where the right to food and the right to clean drinking water were held as the responsibility of the state, including contexts of crop failure, with residents dying from starvation.

The following point brought into discussion was the issue of corporate responsibility by companies investing in African countries, specifically both local and foreign companies involved in mineral extraction industries and other activities. The South, spelled out Dr. Chongwe, is hungry for foreign investment, since most citizens in this respective part of the world find themselves unable to raise capital to meaningfully invest in their country. In the case of Zambia, country endowed with abundant mineral deposits, chiefly copper, there is need for foreign business to comply with requisite laws relating to the environment and land degradation. The central thesis here is that corporate responsibility is about articulating an alternative and comprehensive development roadmap for communities struggling with profound dislocation that the setting up of a mine represented.

Corporate responsibility performance will have to be measured not only against the provision of economic opportunities and satisfaction of basic needs, but also against its ability to facilitate better governance at the local level. Development should thus entail also institutional development as an important addition to economic and social development. Under the framework of the new constitution, Zambia has opted to decentralize political and economic power from the centre to the districts and provinces. This fits in well with the concept of institutional development, which is about local decision-making channels, and the capacities of local organizations to participate effectively in order to cope with mining, so as to mitigate negative effects and to take full advantage of opportunities.

Dr. Chongwe went on with an illustration of recent realities in his native Zambia. Some years earlier an Australian company invested in mining in Zambia. Before commencing to extract the metal, the company ordered the plantation of Jatropha trees to mitigate for the villagers' loss of cultivable land, a school for local children was built, and so was a health clinic. The villagers were also promised cleared land as alternative to their land lost to the new mine. However, because of a slump in the value of the mineral they were producing on the world market, the venture became unprofitable. The mining company pulled out without fulfilling their obligation to the local villagers, who were unable to return to their cultivable lands due to the degradation resulting from mining. There was no one left to clean up the mess left behind by mining activities. The local authority had no capacity to correct the situation, while the central government abandoned the villagers altogether.

That, he continued, is solely one example of how the local population suffers from the effects of contracts affecting their lands, while being themselves left out during the negotiations for mining activities between foreign companies and the government. When it comes to investment in mining, this continues to hold two faces: the shining public face of job creation and possible tax revenues beloved by African governments, and the hidden one of exploitation of both workers and traditional landowners, and pollution left behind. This in spite of the common expectation that any responsible company concerned with development in surrounding communities would acknowledge the particular importance of stakeholders: the local public authorities and the local communities who are supposed to be the final beneficiary of corporate responsibility interventions. Mining, he added, is obviously not the only area of difficulty. In other sectors such as agriculture, lack of respect for traditional land ownership by companies and governments is rife and unacceptable. Another aspect to be carefully addressed is the expected emergence of new industries with capacity to undermine the environmental future of generations to come.

In the field of human rights and business, Dr. Chongwe made it clear there are significant difficulties confronting many African governments about policing the regulations that may be in place to protect the interests of workers and local communities. This becomes apparent looking at the constraints in funding and staffing of these institutions meant to enforce regulations. Additionally, the effects of endemic corruption in many African countries further compromise the protection of rights of the diverse individuals and communities affected by business operations. The executive, the courts and investigative wings are all plagued by corruption, which in turn deters the protection of rights. Countries emerging from conflict or facing ongoing conflict are clearly more likely to face great difficulty rejecting investment, yet they are aware they are not able to effectively police regulations. In fact, even those countries with an appearance of stability are often fragile in responsible institutions and capacity across them.

Dr. Chongwe rounded off his intervention by reiterating that the arrival of a mine unavoidably sets in motion a process of social transformation in local communities, and the dislocation created is bound to generate conflict. In such a context, it becomes essential for companies and stakeholders to outline and pursue an alternative, compelling vision for development. Key is to understand that the strategic goal entails both an institutional development component, in addition to an economic and social development component. Companies cannot shy away from the challenge of institutional development, especially in settings where institutions are weak, and would be ill-advised to take a piecemeal, uncoordinated approach that runs the risk of slipping into old-style charity. However, he added, much of the developing Africa, South of the Sahara, has witnessed a new wave of legislation encouraging private investment, including legislation making it difficult to nationalize foreign businesses and to expropriate land on which foreign business is conducted without payment of adequate compensation.

Ulrik Spliid

Senior Legal Adviser, Danish Institute for Human Rights (DIHR)

Mr. Spliid opened his presentation by introducing the Danish Institute for Human Rights, Denmark's national human rights institution established 25 years ago. A recent act passed by the Danish Parliament enhances the institute's independence and the general compliance with the United Nations Paris Principles, while also reaffirming its mandate to work for the promotion and protection of human rights outside of Denmark. The DIHR has a department focused on Human Rights and Business, department to a large extent created by Margaret Jungk, who recently stepped down as its head to join the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, group established to take over from the former mandate holder, Professor John Ruggie.

The Human Rights and Business department at the DIHR works with businesses, civil society, and other national human rights institutions. The basis for the work is research and knowledge building, capacity building, human rights integration and mainstreaming, as well as international agenda-setting. Among other things, it has provided assistance to a series of large global companies, including Shell, Total and Nestle to help them adhere to human rights. Also, the Human Rights and Business department has been at the forefront of North-South cooperation. Among its notable initiatives was the Balkan Human Rights project, which provided business and human rights training to partners, and tried to get Balkan businesses to use human rights assessment tools. Balkan businesses engaged in partnership with big Western businesses already involved in human rights compliance demonstrated the importance of creating North-South networks. Between 2006 and 2009, the DIHR was involved in a project with the Dutch Aim for Human Rights, the South African Human Rights Commission and with several other stakeholders; this led to developing a specific South African human rights self-assessment tool, called "Masizibheke" ("Let's look at ourselves").

Human rights and business, he continued, is very much on the agenda of the International Coordinating Committee of National Human Rights Institutions, the global umbrella organization for national human rights institutions. Its 10th international conference in October 2010 focused on human rights and business and issued the so-called Edinburgh Declaration, which spells out that NHRIs should do more within human rights and business, including engaging with all other relevant actors. This was followed up by the Yaoundé Declaration by the Network of African National Human Rights Institutions (NANHRI) in October 2011, document which emphasizes the need for African national human rights bodies to become more capacitated with respect to human rights and business. The International Coordinating Committee of National Human Rights Institutions also has a working group on Human Rights and Business, which was chaired by DIHR until 2011. In September 2011, the DIHR organized a workshop on human rights and business to build the capacity of the Sierra Leonean national human rights institutions.

The following aspect touched upon by the presenter concerned the regulation of the extraterritorial activities of businesses. According to the Ruggie Principles, states should clearly set out the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights

throughout their operations. This, Mr. Spliid indicated, is still very much a North-South issue, as there are still more Northern companies with activities in the South than opposite. Furthermore, there is also an East-West aspect, as well as an East-South issue. According to the Guiding Principles, states are not generally required legally to regulate extraterritorial activities of businesses domiciled in their territory, but they also are not prohibited from doing so.

Strong policy reasons exist for home states to set out the expectation that businesses domiciled on their territory adhere to human rights, no matter where they do business. Among the different approaches are domestic measures with extraterritorial implications, such as reporting requirements or even direct extraterritorial legislation and enforcement, including criminal regimes. Reporting requirements could mean that a business is required to report on the human rights compliance of its worldwide activities. Extraterritorial legislation with criminal regime implies that the home state criminalizes human rights violations carried out abroad; this could even be without the activities being criminalized in the country where the violations took place.

A question on the matter is whether such extraterritorial legislation is always good. If business activities are carried out in failed or weak states, most people would probably find it positive that somebody competent tries to ensure adherence to human rights norms. But if business activities are carried out in countries with a fully functioning legal system, it is unclear whether extraterritoriality could not be considered unnecessary interference, a sort of latter day imperialism and paternalism. It might appear unreasonably cumbersome for businesses to have to adhere to human rights legislation both in their home state and in the state of activity, since this could create unfair competition if other businesses do not have similar “double” obligations.

There is also difficulty in establishing where to draw the limit, Mr. Spliid added. “Piercing the corporate veil” would probably be accepted as necessary for fully own subsidiaries and probably also for majority owned subsidiaries. But it remains an open question if we think of a subsidiary that can be argued to be under the de-facto control, even if there is not a majority shareholding. Similar is the case regarding responsibility for buying goods and services from foreign suppliers violating human rights.

Section 1502 of the Dodd-Frank Act on Wall Street Reform and Consumer Protection 2010 obliges US companies to inform the Securities and Exchange Commission (SEC) on products containing conflict minerals from the Democratic Republic of Congo. There are no penalties, but when it was introduced some critics believed it would stop trade in minerals from the DRC. However, this has not been the result so far and the provision is in fact supported by the Congolese government and civil society.

Mr. Spliid closed his intervention by inviting the floor to share their perspectives on such issues of extraterritoriality. Among other aspects to be considered: whether it useful for now, but maybe not in the long run, as the goal must be for all countries to have sufficient rules to protect human rights on their territory. Another question directed at the audience was whether in any event there is need for multilateral collaboration to diminish the risk of unfair competition.

FLOOR DISCUSSION

Ms. Lene Wendland was asked by one attendee how do we take into account, during litigation, the fact that the Guiding Principles are soft law and not every company has the same obligations. Ms Wendland clarified that, when litigating against companies, the Guiding Principles set out obligations on states to provide the remedy or appropriate laws that make room for accountability and redress for any wrongdoing. There is nothing in the Guiding Principles that prevents the development of the legal framework to enable better access for litigation of companies; the Guiding Principles actually provide specific guidance on the kind of areas that governments need to look at. The purpose of the Guiding Principles is to give more "teeth" to litigators when they are bringing legal suits against companies. The Principles provide that legal redress should be at the core where necessary, but in other cases should lend themselves to other types of redress. They also state that access to effective remedies should not be limited to legal redress, but there are other non judicial avenues that can be more appropriate in particular cases for litigants.

Another comment directed at Ms. Wendland underlined that the term "corporate culture of the United Nations" makes NGOs very concerned whether such a term is of business interest. There is a concern that the UN voice is being swallowed and UN agencies are losing their voice and are unable to intervene. Ms. Wendland reminded the public that the United Nations does not exist in isolation; it comprises 193 member states. Not all of these states have a perfect human rights record. That is the reality of the UN, that is its membership. There is an increasing involvement of civil society. It may be difficult because not all civil society is competent, but that is part of the game - the active engagement with those that are key players on a particular issue. If we had the discussion on business and human rights or the program for activity in the UNDP for instance, without engaging the business community it would be uncertain we would be better off because one doesn't develop the standards with a view to reality which is not always perfect. Opening up of the UN not just to business but also to civil society over the last few decades is a welcome development, but of course has to be managed. There need to be safeguards with private entities.

A different concern from the public regarded the status of the Guiding Principles when it comes to the historical usefulness of global voluntary cooperative and collaborative principles. Are we not leaving too much room for corporate violations, is it necessarily better than legal accountability? Ms. Wendland highlighted that the Guiding Principles are not a law-free term; they are not a set of voluntary standards. As far as the third person is concerned when it comes to state duties, those are duties that are directly found in international human rights law. In fact, if one looks at the Principles, they require effective regulation of business. That means that the responsibilities that businesses have under the second pillar will often be subject to regulation. The Guiding Principles are not some voluntary code of conduct. These are standards that will and should be, in many respects, subject to effective regulation, policy guidance and subject to accountability for breaches. They are increasingly being incorporated into contracts for example, which means that they are subject to different obligations under private law. Thus, the Guiding Principles do not create hard international law, but should also not be regarded as a voluntary code.

One conference participant observed that the Guidelines are very weak conceptually, but can be negotiated. They are so, in the sense that the obligations of states and responsibilities of business are not the same. Today the practice is that the state outsources what it ought to be doing for its people. Also, in cases of joint ventures, in regard to a business are we then talking about an obligation or just a responsibility? We need to think critically and see that some of the standards we adopt are themselves compromised. Ms. Lene Wendland answered that the distinction between obligation and responsibility was made deliberately to reflect that states have obligations under international law and companies by and large do not have them. The Guiding Principles clearly enunciate that states can outsource services, but they cannot outsource human rights obligations. Thus, states have the ultimate responsibility to ensure that human rights are not violated. Same goes for joint ventures. Nothing in the Guiding Principles prevents the international community, national governments or regional institutions from developing hard laws that speak directly to companies. Mr. Ulrik Spliid further added that he did not understand why people working for human rights have this fear of outsourcing. Because, whether pupils do not get schoolbooks in Limpopo province in South Africa because the state did not deliver them or because the company that the state hired did not deliver them, does not make a difference. If the state is strong enough, it will be able to do its job.

Mr. Rodger Chongwe was presented by someone in the audience with a situation that occurred in late June 2012 at the mine in Indaba, Zambia; one of the statements from the mining companies in Zambia was that Zambia, Malawi, Zimbabwe among others were good countries for investment. South Africa did not feature, yet it is more advanced in terms of policy and legal frameworks. Why are African countries being complicit in these violations of human rights, why are they allowing themselves to be bulldozed by Western corporations? Mr. Chongwe deemed that we are losing sight of the fact that we are dealing with companies which operate in different countries. They deal with government and they also deal with individuals at different levels. Those of us who have worked with governments, he added, know that there are exploitative practices amongst these companies; they exploit people rather than develop them. The old companies such as Anglo American established themselves in Zambia and at that time they established health centers and schools for their employees. That was the corporate responsibility at the time. What we have noticed, however, is that the new companies who have established themselves in Zambia are not doing these things; there are no laws to force them to do it. But there is a responsibility on companies to provide economic development for their employees and for the areas where they operate. Companies should also be concerned with issues of the environment in which they work. It is not the government which will protect the people who are being exploited. This is why in India for instance courts are used through judicial activism to make sure that the right of people to be sheltered from exploitation is protected. We therefore should go beyond what the law says, beyond what the courts are willing to do. There is always a deficit in the implementation of human rights due to the lack of a court in Africa, but nonetheless we can make our voices heard or else we will never develop.

A matter raised by the public was the question around traditional land. Land is the core of economic, social and cultural rights, but people working on rights issues avoid the question of land. We fear to discuss it because it becomes politicized. The African citizens and people ought to say that, if an investment is going to take place in an area, then that community should be with the state when the decisions are being made with the investor. Unless we occupy that space and leave it to the state, it will

not be done because the political class simply looks at “how much will they give me for myself”. In regard to this matter, Mr. Rodger Chongwe spelled out that in Ghana the chiefs have had a say in the negotiations, so it is happening in parts of Africa. These are issues relating to politics. In some of the workings of various democracies, there are deficits. One of those deficits, which is very prominent in most African countries, as well as in some countries abroad, is corruption. There is corruption even in our judicial systems; there is also corruption in the allocation of land by our traditional leaders, forgetting that the land is held on behalf of their people.

Mr. Ulrik Spliid was asked about the practical issues regarding the limitations of extraterritoriality: for instance, there were victims in the DRC who could not find remedies in the DRC. Mr. Spliid mentioned that here is where we talk of collaboration and networks with various law firms, for instance Webber Wentzel and big law firms in Europe. It is possible for people via these networks to bring a case against the businesses in the country where the company is based. North-South collaboration also includes civil society organizations in the third world country and civil organizations in the country where the company is based. As to the avenues to enforce these rights, in a number of countries such as Ghana and South Africa, one can complain about state and public authorities but also about businesses and individuals through the national human rights institutions. This is normally an easier way for people to get their rights to go to court. All this is only possible if the state does something in its legislation about it. Also, the press plays an important role. We should also have the North-South collaboration with the press, journalists in the third world should be trained to report and follow up on these issues. If the legal aspects are not in place, we can do these things which can set out to be as strong as the legal routes.

THEME 2: CORPORATE SOCIAL RESPONSIBILITY vs.

CORPORATE CRIMINAL RESPONSIBILITY

Arnold Tsunga

Director of Africa Program, International Commission of Jurists (ICJ)

According to Mr. Tsunga, the title 'Corporate Social Responsibility vs. Corporate Criminal Responsibility' may create an erroneous impression that corporate social responsibility in business is and can be in conflict with corporate criminal responsibility. Instead, these must be seen as complementary. What may be true is that social responsibility and criminal responsibility for corporations arise out of different sets of social and legal frameworks that impose particular responsibilities in order to guide companies to respect human rights and peoples' interests while engaged in economic or commercial activities.

On the one hand, criminal responsibility assumes a legally binding framework, compulsory for corporations to follow in respecting and protecting human rights as they do business. Failing it carries along potential criminal sanctions, which the company, corporate executives or both can face for infringement of the law. Corporate social responsibility on the other hand arises, in the speaker's view, out of socially driven or market driven frameworks and compel companies to take action that may result in the economic and social uplifting of communities in which they work, to remain competitive and profitable in a sustainable way. Because not implementing socially acceptable corporate policies usually does not result in legal sanctions but in negative image and loss of business potential, voluntary codes begin to assume a stronger compelling force than legally binding international or domestic instruments. But reliance on social accountability alone may result in both violation and protection of human rights.

In this regard, the view of the International Commission of Jurists is that a clear binding international legal framework with clear criminal and identical corporate complicity for human rights violations is the direction that has to be taken on a global scale, and community social responsibility will more effectively work in an environment with a binding framework on human rights protection. The Guiding Principles, he continued, are necessary yet not sufficient. They must be regarded as a foundation for a more legally binding international framework for corporate complicity.

The international human rights legal framework currently appears inadequate in providing legal accountability for corporate complicity in human rights violations. Corporate complicity in human rights abuses has been and is legally punished in appropriate cases via the application of international criminal legal framework as applied complementarily with domestic criminal law. Corporate complicity in human rights abuses can also be punished in the framework of the law of Torts, which some refer to as the law of delict; that has been in existence much before international human rights law. Corporate legal accountability also can be pursued in different jurisdictions through domestic pieces of legislation, such

as competition laws, environmental laws, mining laws, and in some instances through constitutionally guaranteed rights such as in South Africa.

International human rights law in itself has no legally effective mechanism for accountability in cases involving serious violations of human rights on the part of governance. There is strong perception of an impunity gap, such as in the Sierra Leone case, where Charles Taylor is being held accountable, yet the companies and business executives aiding and abetting in the extraction of diamonds may not be brought to book because of the lack of effective legal mechanisms of accountability for human rights violations. This is the gap of impunity that worries Africans, Mr. Tsunga affirmed. The same goes for international trade, where African governments find themselves weak, unable to be at the same level of technical competence in negotiating international trade agreements. That is also where the impunity gap starts and it constitutes an area of substantial concern to Africa. It is therefore essential to move beyond principles and guidelines into internationally binding legal principles for corporations involved in human rights violations.

Corporate social responsibility emerges out of a self interest that companies associate with having a competitive edge. But it is not legally binding and there are no criminal sanctions for not getting involved in corporate social responsibility. The language associated with CSR involves phrases such as "We are paying back to the society from which we extracted value." Such language leaves the impression that company executives are magnanimous, overwhelmed with pity and sympathy for the less privileged in society. In this context, the speaker affirmed his doubt there can ever be progress in ensuring respect and protection for human rights, especially in the extractive industries - where companies are allowed to create this impression that they are giving back out of magnanimous feelings and pity.

That, however, is not to deny that corporate social responsibility schemes have in fact made some difference, he continued. There are some corporate social responsibility initiatives generally more known and with an international footprint, such as the United Nations Global Compact, the International Organization of Standardization, extractive industries initiatives like the Kimberley Process in the diamond sector, labor rights initiatives in the supply chain such as the Fair Labor Association, fair trade initiatives, and so on. All these CSR initiatives of a global nature have to do with getting business operations and strategies aligned with universally accepted principles in the areas of human rights, labor, environment, and in some instances corruption. For instance, the Fair Labor Association was in court with Nestlé over the company's operations in the Ivory Coast around cocoa production and use of child labor. These corporate social responsibility initiatives that transnational corporations associate themselves with create public visibility and the impression of corporate policies having nothing to hide, but they are mostly voluntary, not legally binding.

Mr. Tsunga concluded by looking at developments in Africa, where the African Commission of Human and Peoples' Rights has established a working group on extractive industries. That group, depending on how it does its work, is going to help the African Union's policy framework on development possibly beyond the Ruggie Guiding Principles, into creating a regional and international legally binding environment for businesses and complicit human rights violations.

Roland Amoussouga

Senior Legal Adviser, Chief of External Relations and Strategic Planning and Spokesperson, International Criminal Tribunal for Rwanda (ICTR)

Mr. Amoussouga commenced by indicating that in between 1990 and 2000, three cornerstone events happened in Africa: the first one was the end of Apartheid, the second was the genocide in Rwanda, and the third - the killing of Ken Saro-Wiwa in Nigeria. As concerns the first, we see hope for a new leading country in Africa, where democratic institutions were established to ensure that the rule of law has prevalence and will serve as a new light on the continent. The second one - the genocide in Rwanda with the civil war in Burundi was followed by a significant global reaction embodied in the creation of the International Criminal Tribunal for Rwanda (ICTR), in order to bring to book those responsible for grave violations of international humanitarian law committed in Rwanda and in the neighboring countries. That was the first major development in the area of bringing accountability to the African leadership involved in the commission of genocide. The third development, the killing of Ken Saro-Wiwa highlighted corporate social responsibility, as well as the absence of corporate criminal responsibility on the continent.

It is affirmed that, because of the intense pressure from the media, civil society, NGOs and human rights groups, multinational corporations are now being forced to self-regulate in the area of human rights and environmental preservation. This self-regulating and cleansing process has been taken voluntarily by corporations and is known as corporate social responsibility, also referred to as corporate citizenship. It entails recognition that corporations are not only responsible to shareholders, but should also owe particular duty to individuals and communities, referred to as stakeholders - directly or indirectly affected by corporate operations.

Particularly important to note, remarked Mr. Amoussouga, is that the famous case of Ken Saro-Wiwa in 1995 was a perfect illustration of this paradigm shift regarding the need for corporations to become responsible for the impact of their actions. This recognizes that there is a collective right of the host state communities living in the area where the business operates or communities directly influenced by the impact of the project implemented, that they are entitled to at least social wellbeing and clean environment. Ken Saro-Wiwa was a prominent name in Africa, where the awakening process started, and where the company involved - Shell has learnt a lot from his execution. International human rights groups believe that Shell could have influenced the government of Abacha not to execute Saro-Wiwa, a spokesperson of his community, the Ogoni, who did not very much like what they were subjected to by the work of Shell in that area. The company did not do anything to influence the government of Nigeria to respect the rights of the Ogoni people, and also did nothing to deter the execution of Ken Saro-Wiwa.

Many lessons were learnt from that event and many multinational corporations have decided to embark on respect of some of the Guiding Principles. What is also very important to note, Mr. Amoussouga added, is that the whole world has witnessed conflict in Africa. These conflicts were not just because

communities wanted to fight a war, but because the state itself generated conflicts or due to powerful interests that influenced the state or part of the community.

Some traditional leaders have been associated with negotiation of agreements with corporations. Although that is good in principle, ultimately the whole community becomes the loser. The community is left without having a voice and the only voice that could bring effective change is the court system. That is why judicial activism is the key instrument available for the whole African continent if we want to ensure corporate criminal responsibility. We can ensure that at least those corporations responsible in the commission of grave human rights violation are held accountable. In situations when the state is incapable to ensure the protection of rights, when the law passed by parliament is not able to protect, what is left is for the court to play its role in interpreting the law.

The speaker further indicated that if judicial activism was not existent in the United States, we may not have witnessed the arrival to power of president Barack Obama. We would not have witnessed also some of the great work that landmarked the judicial achievement of tribunals such as those in Arusha for instance, where judges ventured into qualifying rape as an act of genocide. It was not in the book, but the judges assumed an important responsibility. Recently in Kenya, we have witnessed the rebirth of the Kenyan legal framework with the adoption of a great constitution. But also recently in Kenya there was the war between the lions and the Maasai people. With the group being attacked by the lions which were killing most of their animals, the Maasai called on the government to do something for the protection of their rights. The government declined responsibility for protecting the affected communities, so the Maasai took it into their own hands, killing the lions. Immediately the government started a crusade against the Maasai people, upholding that the community had no right to kill the predators, since lions generate revenue for the country via tourism, and that the Maasai shall be prosecuted for destroying this part of state-sponsored tourism.

We are aware, he added, that if the state is together with the business world, not in a position to give life to the Guiding Principles earlier mentioned, it is important that the court remains steadfast to do its work, ensuring that the interpretation of the law is expanded beyond what is written on paper. If we wait for the legal framework to be designed to hold corporations accountable for all the misery caused by their influence on the continent, we will never see that day. At the same time, it is important to acknowledge that many conflicts generated in Africa are sponsored by the vested interest of those who want to acquire the resources. If we go back to the 1970s, the first attempt secession in Nigeria was caused by the great, state-sponsored separation war of Biafra. During the Biafran war, grave violations of human rights were committed, but we have not witnessed accountability for those behind the attempt to acquire that vast space of the Delta - under the control of the Biafra at that time.

It is essential not to hide behind the state or behind the fact that the state might not be able to create a favorable environment for the protection of human rights. Instead, courts ought to discharge their duties and start becoming activist when it comes to charting a new way for the protection of human rights on the continent, especially when confronted by the attempt of corporations or vested interest group to acquire part of the wealth in Africa.

What is currently happening can give us a ray of hope, the speaker deemed. For instance, in the Charles Taylor case we witnessed for the first time a person coming to testify about diamonds. However, the big absentees were the major corporations exploiting the diamonds and fueling the war by arming the people who were fighting for Charles Taylor or for the Revolutionary United Front (RUF) in Sierra Leone. Because we need to move beyond that, the International Criminal Court (ICC) Secretarial Commission's statement that criminal liability will be sought for major corporations which may be involved in the grave violation of human rights is a development to welcome. Furthermore, we have seen the United Nations attempt through the report of its Security Council-appointed Expert Panel on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo, panel which has basically uncovered what was happening in the DRC. Unfortunately, we cannot expect the UN to be extremely forceful, because it is the union of 193 countries, each guided by the interests of their own corporations, of their own citizens, and so on.

It is difficult to expect the United Nations to transform the Guiding Principles into a potential convention upon which everybody will sign; this is not something that we will see in our generation. That is why the best way is to use the court available to us to ensure that this court is empowered to do its job, and by becoming more active judicially. Although the African Court on Human and Peoples' Rights was set to foster the rights of African communities, unfortunately they did not provide an avenue for the right of the people to exercise fully their rights before the court. On this particular matter, the speaker cited a recent decision in Arusha by the ACHPR, which rejected the application of a Nigerian council suing the court for having created barriers preventing African individuals or communities to approach the court relating to matters of their own survival.

Mr. Amoussouga wound up affirming we need to look at original solutions to address the issue, and the way forward is to empower courts to ensure that at least judges are fully aware of their responsibility in the society in which we are living now.

FLOOR DISCUSSION

Mr. Arnold Tsunga was addressed a question regarding the conflict between corporate social responsibility and corporate legal responsibility. What would be the answer if someone sarcastically said that there is a difference between the two in the sense that CSR refers to a responsibility that corporations take without legal obligation to do so, being more of a public exercise on their part to look good in society; whereas corporate criminal responsibility is the responsibility that comes more from the government sector in the sense that you are prevented from doing this. Mr. Tsunga responded that an erroneous impression is being created that CSR is and can be in conflict with corporate criminal responsibility. They are different, but they are not mutually destructive; they are mutually enforcing. If corporations are being encouraged to have socially responsible policy frameworks, these two acting

together may actually create a stronger environment of corporate behavior that does not result in human rights abuses.

Further on, Mr. Tsunga was asked how this internationally legal binding framework for businesses would be set up. Mr. Tsunga considered it difficult. However, within the African Commission Framework, the African Commission on Human and Peoples' Rights adopted a resolution which resulted in the establishment of the Working Group on Extractive Industries. The target is that the African legal policy framework on environment does not create minimum conditions of compliance in a way that allows for effective protection of human rights. So if the Working Group were to adopt some form of position, it may translate itself into a declaration or something similar to the Ruggie Guiding Principles, but pertaining to Africa. But otherwise the process of how to get a legally binding framework is an issue for a number of conferences to be held in the future.

Another issue directed at Arnold Tsunga concerned the scenario in which, if one could prove that a director or a company has been directly complicit in violation of the Rome Statute, would it be possible to take such executive or company to the ICC or is it only the head of state that would be tried for violation of human rights, as was the case in the Charles Taylor trial? Mr. Tsunga clarified that there are cases where there have been prosecutions. However, such prosecutions were not within an international legal framework in terms of international tribunals for instance. To the panelist's knowledge, there has not been any international tribunal to have prosecuted a company or a director of a company for direct participation or complicity in human right violations. This is why there is a perception of an impunity gap. But as regards domestic processes, there are a number of cases where through the interpretation of domestic criminal law, people have been prosecuted in domestic spheres using domestic criminal legislation mechanisms. However, it is better to have an internationally binding legal document, he concluded.

One conference attendee asked Mr. Tsunga whether it is not the case for every human right that unless the states are willing to do something to promote and respect these rights, no matter how many binding treaties exist, nothing will happen. Mr. Tsunga reminded the public of the gap between standards and practices. Promulgating internationally binding standards is not the same as implementing them. So the mismatch between standards and practice is the issue that humanity has failed to resolve as of now, because there are so many standards. If we could just implement 20 of the standards on human rights, the world would be different in terms of peace and stability.

Someone else from the audience argued that corporate social responsibility projects are utterly useless in practice. Although conceptually sound, in practice corporations do not even consult communities that they are meant to assist. When we look at the literature, corporate social responsibility was actually conceived to work as a development tool, but in practice it sometimes does not work as a development tool because companies use it as a PR exercise to show how good they are. And again, there seems to be some contradiction when a company is willing to renovate a school, but avoids compensating individuals in the community where it has violated rights. For instance, a report by the UN revealed that it would take 30 years to rehabilitate Ogoniland. Shell does not want to compensate the people in that community, yet it is willing to build a school. So is CSR really helping us or is it diverting attention from

the real issue? In response, Mr. Tsunga observed that tension arises between profit and the need to accept human rights as we know them in terms of international human rights standards - basically a law of minimum standards, where the international community has agreed to the basic minimum conditions under which basic human rights have to thrive. So if we impose legal obligations on everyone to ensure that those minimum conditions are met, we might find that a community would prefer a situation where they are not object of pity and sympathy, but in fact claim and demand those rights.

One comment from the public brought up the process started for an African regional court. Such court would consist of a new division dealing with criminal matters, in regard to both persons and corporations that affect communities at a large scale. This has been discussed at the African Union level, but we do not see activists of African human rights pushing for it. They leave it to the technical government experts who may not even know about the issues. This depends on whether we want to address problems by linking human rights violations to criminal responsibility. For instance, we have the Ogoni case where the damage is still ongoing; these are the kind of crimes in Africa that we are not responding to clearly. But also the citizens of the countries where these companies come from, they also have a responsibility. For example, Shell is taking back and enjoying the wealth based on blood in Africa. The citizens of the host countries of such companies do not boycott or ask for such companies to be prosecuted among other things. We have to look at these principles and how they are truly being translated into some kind of reality.

Mr. Roland Amoussouga was asked if, when he mentions court activism, he refers to international courts as the ICC, the African Court on Human and Peoples' Rights, or whether all courts should be activist. How can a court be activist unless there is national legislation to enable it to do certain thing? Mr. Amoussouga responded that in the practice area of the ICTR, three members of the press have been prosecuted. The individual criminal responsibility was the guiding principle that led the prosecutor to be successful in prosecuting them. By acknowledging the guilt of those people, the court has sent a very powerful message to the community of the media. The key lesson was that if you work for the media, which has a policy of allowing journalists to move ahead and use the airwave to incite for the commission of genocide, you shall be responsible. But the court fell short of bringing into the responsibility the company itself for which those people were working. Although under national law, you can move ahead and draw the company into a suit in order to get remedy from the company, so far under our practice we have not yet reached that stage.

What was very important also, Mr. Amoussouga added, is the case of Felicien Kabuga - the wealthiest businessman at the time of genocide, who according to the prosecutors purchased all of the machetes that they used for the commission of genocide in 1994. He was expected to be brought to court in order to give the opportunity to both parties to establish his role and that of his company. Unfortunately, he is still at large. That is why the United Nations has decided that if he happens to be arrested, he shall be prosecuted by the International Criminal Court and not by the Rwandese government. He is part of the list of the three suspects earmarked for trial in Arusha. If he is going to be brought to court, it will be the first time ever to hear about what a business leader has done by using his company to arm and to promote genocidal acts in the conflict in Rwanda. That is why it is very important to get him to court, so

we can clarify the particular link between business and a business leader during the genocide events in Rwanda.

Another remark from the audience followed up on an earlier comment about the fact that those that can be brought to court are heads of state. In the Charles Taylor case, the judges convicted him for giving money, mentorship and arms; he knew what was going on there and what all this was going to be used for and therefore he was guilty of aiding and abetting, and thus for all the resulting crimes. The crimes for which he was tried included the crimes of forced marriage, rape, crimes against humanity, murder. He was given 50 years in prison. We do know that there are corporations who also support, fund and do all sorts of other things to intensify crimes committed elsewhere. In the Netherlands and in Canada, for example, they do have corporate leaders who were convicted for selling weapons in places where these conflicts were happening. So why does it have to necessarily be a head of state?

Mr. Roland Amoussouga underlined that at the international level, the law on the treaty or the resolution of the Security Council on chapter 7 gives assistance to international jurisdiction; although they did not call up on the corporations, they talk about persons responsible. And within the person jurisdiction conveyed to them, they limit it to physical persons and they understand that the physical person is not necessarily the only culprit in this matter. The courage is not there yet to give the possibility to these international jurisdictions to prosecute those corporations. The only time when one expected that something can happen was when the Security Council appointed a panel on the DRC. The DRC report came in and one would have expected that we would have moved forward to have a special tribunal that will look into that particular issue that created havoc in the DRC. But again, it was not possible at the international level to get such thing done. For instance in the Charles Taylor case, the judges stopped short of calling the companies that also aided and abetted in the commission of crimes. Just because if you look at their own statute, there is no provision for them to hold non-physical persons liable for what has happened. So they remain in the limited context of prosecuting only those people whom they can call by name and prove crimes against them on individual basis. So basically we have to be satisfied with the trend right now, because there is recognition that there is a limited international legal personality of those corporations that can come into play. We hope that the ICC, although its mandate does not expressly cover this area, will move into the right direction because things are subject to change. In addition, a state party can improve on what they have adopted as part of their own treaty to give the possibility for the court to function. This is a major step towards the positive development where the criminal responsibility of corporations will be something that our generation will hopefully witness.

Someone from the audience shared the assumption that what judicial activism presupposes is that both democracy and the judiciary function; however, it remains unclear what happens in countries where there is a democratic deficit or where there is a compromised judiciary. Another comment from the public presented the idea that in addition to judicial activism, the judges should have a basis for such judicial activism. For instance in Zimbabwe, the economic, social and cultural rights are not regarded as fundamental rights in the Zimbabwe Constitution. Therefore in that case, what basis will these judges have for judicial activism? Mr. Amoussouga agreed that judicial activism presupposes an independent judiciary, with the resources and the capacity, and well empowered to discharge its function fully and to

interpret what exists in the context of the national law. Unfortunately, due to very many ills in our society such as corruption, we do not have a very active judiciary to do its own job in the proper context and also to be able to move and to interpret to a large extent certain concepts. Thus, indeed, judicial activism relates principally to those in a judicial sector in countries with at least a functioning judicial system. Such system needs to be empowered, given the resources for its own independence in order to ascertain judicial authority over a matter that they have to adjudicate, for protecting society and upholding the rule of law.

Another comment during the floor discussion looked at judicial activism and examined if there are enough legal frameworks that take into account holding the corporation accountable for violations of human rights. There are also some multinationals that jeopardize the sovereignty of states. We as practitioners should look at the effect of investments that corporations bring into a country, regardless of the setup of the corporation. This shows the absence of the link between development and human rights. If there is a clear link between human rights and development, those that are in power will start to look at these issues differently. Obviously, a lot has to be done to create this link such as awareness, education, conferences, and the like. We should put in place a rights-based approach to development so as to assess that the investments coming up ensure that we know the consequences both intended and unintended, and to take care of them.

THEME 3: HUMAN RIGHTS AND BUSINESS ACCOUNTABILITY – ENGAGING THE YOUTH

PETER LEON

Partner, Webber Wentzel

Mr. Leon delivered a presentation concentrated on children's rights in relation to the broader area of business and human rights. Introducing the topic, he considered it worth taking note of a series of principles and standards that have a bearing on the human rights obligations of businesses.

In 2000, the governments of the United Kingdom and the United States of America convened a forum that brought together major extractive companies with prominent human rights and corporate responsibility organizations, which developed the Voluntary Principles on Security and Human Rights, providing standards for companies' responsible risk assessment and engagement with public and private security agencies. To date, seven governments and twenty companies have subscribed to the Voluntary Principles.

Since 2006, the International Finance Corporation (IFC) has required its clients to comply with a Sustainability Framework which comprises the Policy and Performance Standards on Environmental and Social Sustainability, "designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client". The Sustainability Framework includes standards relating to labor conditions, pollution prevention, community health, safety and security, involuntary displacement, and other issues.

Partly based on early versions of the IFC's Performance Standards are the Equator Principles, a voluntary set of standards for assessing and managing social and environmental risk in project financing, launched in 2003 and updated periodically. Currently, 77 financial institutions in 29 countries have officially adopted the Equator Principles, responsible for over 70% of international project finance debt in emerging markets. These institutions have undertaken to withhold financing from projects where the borrower is unable or unwilling to comply with the Principles, which relate to responsible assessment and management of environmental and social impact, including stakeholder consultation, dispute resolution, and independent review.

In 2011, Professor John Ruggie completed the Guiding Principles on Business and Human Rights, which have been endorsed by the UN Human Rights Council. The central principle is that of a "corporate responsibility to respect human rights", primarily requiring that business enterprises should "avoid causing or contributing to adverse human rights impacts through their own activities and address such

impacts when they occur", and should "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts".

If these principles are to be followed, spelled out Mr. Leon, the human rights required to be respected may be located in a number of instruments that are binding on states, if they have ratified them, but not directly binding on businesses. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the African Charter on Human and Peoples' Rights each contain human rights which are not unique to children. Notably, the African Charter includes the right to a satisfactory environment. In a complaint brought against the government of Nigeria by a group of activists from the oil-rich region of Ogoniland in the Niger Delta, the African Commission on Human and Peoples' Rights found that the Nigerian government had violated the right of the Ogoni people to a satisfactory environment, by failing to protect them from the activities of oil companies operating in the Niger Delta. This was a landmark legal development, but regrettably the Commission declined to deal with the question of holding the oil companies accountable for the same violation. This case thus serves as an illustration of the institutional weakness of the Commission in enforcing its decisions.

Specific sources of children's rights include the Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990). These instruments contain special standards of protection that are necessitated by the relative vulnerability of children to harmful practices. Child labor and the recruitment of children into armed conflict are specifically prohibited. Significantly, states are required to provide free and compulsory primary education to all children and to promote the development of secondary education.

In March 2012, UNICEF, the United Nations Global Compact and Save the Children jointly released a set of Children's Rights and Business Principles, intended "to guide companies on the full range of actions they can take in the workplace, marketplace and community to respect and support children's rights". These principles build on existing standards, initiatives and best practices". Requirements state that businesses should: respect and support children's rights; contribute to the elimination of child labor; provide decent work for young workers, parents and caregivers; ensure the protection and safety of children in all business activities; ensure that products and services are safe, and seek to support children's rights through them; use marketing and advertising that respect and support children's rights; respect and support children's rights in relation to the environment and to land acquisition and use; respect and support children's rights in security arrangements; help protect children affected by emergencies; and finally, reinforce community and government efforts to protect and fulfill children's rights.

Mr. Leon continued by bringing into discussion the issue of child labor. According to a 2010 report by the International Labour Organization (ILO), roughly 215 million children - almost 14% of the world's children - were engaged in child labor in 2008, 115 million of them - 7.3% of the world's children - in "hazardous work". In Sub-Saharan Africa alone, roughly 65 million children – 25% of the region's children - were engaged in child labor in 2008, almost 39 million of them – 15% of the region's children - in "hazardous work". These percentages are higher than in any other region, and reflect a rise in child labor in Africa between 2004 and 2008, despite a decline globally over the same period.

The ILO has adopted numerous conventions aimed at the prevention of child labor, the most important of which are Convention 138 on the minimum age for admission to employment and work (1973), and Convention 182 on the worst forms of child labor (1999). Further, in 1998 the ILO adopted the Declaration on Fundamental Principles and Rights at Work, one of the four fundamental principles of which is the "effective abolition of child labor". In 2007, the ILO's Bureau for Employers' Activities published a series of guides for employers on eliminating child labor, which provide "strategies for the prevention of child labor, the withdrawal of children from work and the protection of those children who are above the minimum age of employment and do work".

One way that employers can contribute to the prevention of child labor is to conduct independent audits of their supply chains. In November 2011, the world's largest food company, Nestlé, invited the Washington-based Fair Labor Association (FLA) to conduct an assessment of its cocoa supply chain in Ivory Coast. The recently released FLA's report "revealed the systemic and cultural challenges to eliminating child labor on cocoa farms in a nation still recovering from a divisive civil war, which left rural areas with devastated infrastructure and few alternatives for Ivorian children. The report also revealed that efforts to enforce fair labor practices are often impeded at various stages of Nestlé's supply chain because too few participants down the chain are aware of, or trained to apply, the labor code." The report recommends that Nestlé undertakes "comprehensive internal monitoring and remediation cover all parts of the supply chain [allowing] Nestlé to identify and remediate code violations more quickly." It also recommends that Nestlé should "participate in the establishment of alternative income generation activities for farmers and contribute to the development of vocational schools." In response, Nestlé has developed a plan for improvement, focused on training, monitoring and remediation.

The following topic approached by the speaker was the relation between armed conflict and children's rights**.** Children are directly affected by armed conflicts through voluntary or forced recruitment, and indirectly through the consequential impact that armed conflicts have broadly on the affected countries, such as inadequate healthcare facilities and the closure of schools. Although the 2010/2011 United Nations Report on Child Soldiers indicated that the numbers were decreasing, it is nevertheless alarming that there are new incidences of child soldiers in previously unreported countries. As recently as 12 June 2012, it was reported that children in Syria have been used as human shields, tortured in detention, and slaughtered in massacres.

The role of natural resources in having a direct or an indirect causal relationship with conflicts should also be noted. Insurgent movements like the Moro Islamic Liberation Front in the Philippines, the Janjawid Militia in Darfur, the Sudanese Army in Blue Nile State and Abiye Town in South Sudan are all examples where natural resources such as oil play an underlying role in the ongoing conflict. In the DRC for instance, as the national army and various armed groups vie for control of areas rich in mineral deposits, the recruitment of child soldiers has become directly linked with mining activities and artisanal exploitation of minerals.

The trade in conflict minerals is inextricably linked to fuelling of armed conflict, the activities of rebel movements aimed at undermining and overthrowing legitimate governments, and the illicit trade and proliferation of armaments. The consequence of this has seen gross human rights violations being perpetrated in such conflicts, a devastating impact on the peace, safety and security of people in

affected countries, as well as serious repercussions for regional stability. Thus, the issue of involvement of child soldiers and risk to business should not be considered as a secondary or tertiary concern for businesses that are concerned with their social responsibility in their operations worldwide.

In this regard, there are some suggested measures that can be taken by business. First, continuing efforts to introduce transparency into supply chains. Second, adopting due diligence policies that address risks of slavery within supply chains, while maintaining engagement with the Congo mining industry, and contributing to remediation of the problems of slavery and conflict minerals at the source in Congo. And finally, creating industry-wide support for rights-based community development efforts that will sustainably protect Congolese mining communities from slavery and other human rights abuses, in acknowledgment that these communities have been devastated by activities that have contributed to company profits for more than a decade.

One such measure taken by the minerals industry has been the Kimberley Process Certification Scheme for rough diamonds. This was launched on 5 November 2002, as declared in the Interlaken Declaration, owing to the deep concern over international trade in conflict diamonds and in light of United Nations General Assembly Resolution 55/56 (2002) calling on the international community to give urgent consideration to the problem. The Kimberley Process provides for a voluntary scheme of industry self-regulation, instituting a system of warranties underpinned through verification by independent auditors and internal penalties set by the industry. It is intended that the Certification Scheme will exclude conflict diamonds from the legitimate trade, thereby seriously reducing the role of conflict diamonds in armed conflicts. As stated in the Civil Society Declaration of the Kimberley Process Plenary (5 November 2007) that "[c]ollaboration with local civil society was identified as a priority by the three year review", from which the Kimberley Process this will gain in strength and effectiveness from broadening, deepening and financing this partnership with civil society.

In the United States, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law on 21 July 2010. This Act brought about substantial changes to financial regulation in the United States, and is of significant importance to businesses involved in the mining industry in two key respects. First, section 1502 provides for an amendment to section 13 of the Securities Exchange Act of 1934, by inter alia adding a requirement for all persons listed under sub-section (2) to disclose whether conflict minerals that are necessary (as contemplated in sub-section (2B)) originated in the Democratic Republic of Congo or an adjoining country. If so, such person is then required to submit a report describing the measures that have been taken to exercise due diligence on the source and chain of custody of such minerals, and a description of the products manufactured or contracted to be manufactured that are not DRC conflict-free. Furthermore, sub-sections 1502(c)(1)(A) and (B) require the Secretary of State to submit a strategy to address the linkages between human rights abuses, armed groups, mining of conflict minerals and commercial products. The strategy is required to include a plan to promote peace and security in the DRC by supporting government efforts, a plan to provide guidance to commercial entities seeking to exercise due diligence on and formalize the origin and chain of custody of conflict minerals, as well as a description of punitive measures that could be taken against those whose commercial activities are supporting armed groups and human rights violations in the DRC. The Secretary of State is further required by section 1502(c)(2) of the Act to

produce a map of mineral-rich zones, trade routes and areas under the control of armed groups in the DRC and adjoining countries, make the map available to the public, and provide an explanatory note thereof to the relevant congressional committees.

The speaker continued specifying that it appears this Act is one of the pieces of legislation that the London Bullion Market Association examined when drafting its guidance for refiners on its Good Delivery List earlier this year. However, there is concern that this Act has not as yet been fully implemented, although the Securities and Exchange Commission has at last set a date (22 August 2012) to vote on rules required to fully enforce the section. Despite the delay in its implementation, it is nonetheless an encouraging sign that electronics companies such as Dell and Intel have signed up to codes of conduct excluding conflict minerals from their supply chains, and jewellery retailers are pressuring manufacturers to do the same. Research indicates that, while the Act has been successful in cutting the sums earned from tungsten, tin and tantalum mining and used to support armed groups in the DRC, it has not had the same impact on gold mining.

The European Union is also taking steps towards conflict-free supply chains, Mr. Leon added. On 27 January 2012, the EU Trade and Development Commissioners committed to making supply chains more transparent, and stated that the EU would advance greater use of the due diligence standards published by the Organisation for Economic Cooperation and Development (OECD), which applies to companies sourcing minerals from conflict zones. However, although it was expected that the EU's Proposal for Directive on transparency requirements for listed companies and proposals on country by country reporting would force European companies to disclose where they source their minerals from, this was subsequently decided against. There are currently proposals on the table for new legislation in line with the OECD standards.

As for opportunities, Mr. Leon observed that the "corporate responsibility to respect human rights" is not only a source of obligations, but also potentially a source of opportunities. Businesses may make themselves integral to a country's development by playing a prominent role in the protection and promotion of children's rights, including the right to education and other socio-economic rights. While not turning into a surrogate government, businesses may become an effective partner of government and thus help to make themselves welcome in even the most statist of economies. Furthermore, for particularly companies in extractive sectors, it is important to enjoy some degree of legitimacy in their host communities and labor-sending communities (a "social license to operate"). Any contribution to the protection and promotion of children's rights could help to establish and maintain this social license. Nonetheless, businesses operating in Africa can also benefit directly from measures that promote the welfare of youth in their host country, as some African governments have begun to require businesses to train and employ a proportion of local personnel in the management of their enterprises. Thus, companies contributing to education and other essential infrastructure for youth development are making an investment in human resource development, which they may reap to their benefit in the future.

Rimona Afana

Human Rights and Business Associate, Africa Legal Aid

Taking further the earlier approached area of child labor, human rights and business, Ms. Afana directed a question at the former speaker, as well as at the audience. How do we deal with the fact that human rights violations such as child labor do not only entail a benefit for business in terms of cheap labor, but also a plus for the victims themselves? At the end of the day, those children that are being exploited - according to Western standards - do make a living that they would otherwise still need to earn in even harsher work conditions often. So what can be done about such contexts in which, besides the negative impact, there is a positive end that is removed from its beneficiaries in cases of non-abuse?

Excluding the scenario of children working for a company does not make the other more common scenario collapse: the fact that most of these children would anyways work out of their own volition to make a living, or be put to work by their families to support the household. This still is a deeply ingrained reality in many countries, especially in agriculture in rural areas and in the informal urban sector, and sometimes regardless of economic constraints. Poverty constitutes the leading driving force behind child labor, yet not the only one. There are still prevalent views which posit that work from an early age builds skills and character; children are engaged as apprentices in small family businesses and encouraged to follow in their parents' footsteps. We need to keep in mind that globally, the highest incidence rates of child labor pertain to domestic settings rather than running in correlation with foreign exploitative companies. In contexts of meager meaningful alternatives, which are in fact the rule when discussing child labor, the impact of eliminating children from the workforce needs to be closely examined. Child labor is coupled with generating much-needed additional income for sustaining the livelihoods of families or, in severe circumstances, it is about securing resources vital for the very survival of the respective children. Cheap labor is the comparative advantage of many countries and when that is taken away, it can result in a vicious circle of destitution. When it comes to child labor, there is demand just as there is supply. In such extreme cases, eradicating an abuse comes packaged with removing an opportunity. That runs the risk of advancing already precarious conditions, increasing vulnerability, and pushing children into more exploitative and hazardous activities that can irreversibly blight the future prospects of these children. We need therefore to comprehend the situation in terms of not only universal standards and effects of abuse, but also to look at the wider and deeper underpinnings of such human rights violations, and to deal with those aspects that trigger the vulnerability of certain groups. Heralding symptoms needs to be complemented with identifying and treating the underlying illness.

Human rights carry not only the oft-cited cultural relativity, but also an overriding economic relativity, which needs to be recognized and addressed. The economic heterogeneity of our world leads to dilemmas that will not be settled by imposing one-fits-all standards, without introducing in the picture the form and effects of different alternative scenarios. There is a necessity to avoid thinking human rights and business in rigid moral and legal terms and instead, when necessary, consider a context-sensitive middle path after prior analysis of all relevant factors. We need to question ourselves: can and will we fill the gap that a non-abuse leaves behind? Can companies, states or ideally both engage in

filling the gap of a non-abuse, in cases where such abuse carries positive aspects, chiefly financial ones? Are we replacing a non-minus with a plus or the rhetoric of human rights and corporate accountability leaves a vacant space in many settings of seemingly black and white decisions? Eliminating a minus does not leave a context on plus if there are no critical frameworks to address the given situation, coupled with sustained action to bring the foundation to a novel design. That, in turn, is not to advocate the lowering of standards that results in a kind of race to the bottom that we have historically witnessed, to undermine the human rights discourse or to encourage abuse, but just to affirm the usefulness in embracing a critical lens on the topic, one that weights all pragmatic considerations.

Ms. Afana shared that when she attempts to introduce young people to the topic of human rights and business accountability, she conducts a simulation she had devised, called “The outsourcing dilemma”. This exercise features different scenarios on the same issue, distributed to various stakeholders, who are then asked to confront each other based on these divergent sets of perspectives regarding human rights, corporate ethics, and personal, community, corporate needs. The actors involved in this outsourcing dilemma are the company, a consumer group, a local community in a developing country, a human rights organization, and the United Nations Global Compact. Young people are split in groups, each representing one of the above actors. Debates usually turn fiery and the deliberation process is harsh and revealing. The exercise introduces another level for internalizing the topic: it makes young people not only think of the distinct needs of different people or groups, but also feel them in a simulated reality in which they pertain to a group: a setting fueling bias, interest-based perspective-taking, and antagonistic conduct. The process unveils the difficulty to define and implement moral standards; it brings forth their fluid, context-specific, intricate nature. This shows the complexity of justice, responsibility, rights and righteousness. At a secondary level, the simulation attests the need for compromise, creativity, innovation in solving such controversial issues, which highlights the necessity to create that willingness and milieu for honest, empathic, extended consultations. Another aspect is the imperative to capacitate actors in a negotiation setting, which suggest the relevance of conflict resolution training, at least for leaders of each group involved. Broadly, solving the difficulties arising in this interface between human rights and business relates to increasing that zone of possible agreement, as it is commonly referred to in conflict resolution literature.

FLOOR DISCUSSION

Mr. Peter Leon observed that child labor is as much an issue in Africa as it is in India, where children are used in the diamond industry and some of them are really young. If one looks at the African Children’s Charter, there is a requirement for provision of education. It is a very slippery slope, because effectively children involved in child labor do not generally get an education. How are they going to be employed then in any meaningful way later on in life?

Regarding child trafficking, Mr. Leon was asked by one attendee to elaborate on the issue of children working in agriculture or in mining - a widespread phenomenon in Africa as well as in the rest of the world. Is there attention being given to this issue? Another matter raised up was the distinction between youth and children. Within the context of Africa, we have the African Youth Charter as well as the African Children's Charter. The former puts the age cohort between 15 and 35; the latter puts it between 0 and 18 years. There is thus an interface of 3 years between the young person and a child. The reality is that we are confronted with the serious issue of youth unemployment, while at the same time we have to deal with issues of immorality around employment of children. How do we balance between youth unemployment and child labor, because of the practicalities in Africa and the 3 year interface in the charters? Mr. Leon explained that youth unemployment refers to children over the age of 18. That is in an ideal world. Obviously, child labor should not be happening. Youth involved in child labor have different issues.

Asked if there is an aspect of community development agreements in the mining templates, Mr. Leon answered that it has been dealt with in the Model Mining Development Agreement (MMDA). Some African countries have done this already. Some of the income made by the companies has been earmarked for development. Further questioned about how far the mining companies have subscribed to the MMDA, Mr. Leon shared that when initially published, it did not receive a good response. But the response has increased and it is increasingly being used as a template by a number of African countries.

Another problem of interest to the public was mining in the DRC, in the Katanga province for instance. That is where the best practices should be looked into. Mr. Leon responded that it represents one of the most extreme forms of child labor. One way to deal with these issues is for the companies to be named and shamed. However, it becomes more complicated when a company is not concerned with any reputation internationally.

A further question concerned proposals regarding due diligence that would impose obligations on corporations as currently exist vis-à-vis the state within the African continent, in the context of child labor. A recommendation from one conference participant was that companies could incorporate child labor into staff training and individual performance assessment. In addition, procedures and systems could be put in place for companies to audit their suppliers to ensure that credible means of age verification are in place and that young workers are employed under formal employee contracts, are not exposed to hazardous work, receive cash payment and are not paid in kind, and payment is made directly to such minors. International standards do say that children 15 years and up work, but there are several conditions that should be met in order for such work to be in line with international standards. Another recommendation concerns access to remedy. Companies should implement a grievance mechanism that ensures that reports of suspected or confirmed child labor reach the attention of management. This mechanism should be available to all workers as well as members of community, and should allow grievances to be filed anonymously.

Mr. Peter Leon was asked if he perceived big corporations being more mindful of the fact that they want to avoid reputational issues that can actually threaten their profit. Are these companies taking human rights issues into consideration before planning their activities and are they mindful of the various

initiatives to promote transparency? Mr. Leon considered that business is becoming increasingly conscious of its duty to promote and respect human rights.

A different concern coming from the audience was why African countries are in regard to resources failing to negotiate contracts that are not funding to the nations. Mr. Leon responded that they do not have the capacity to negotiate the agreements - that was the excuse in the past. Governments, considering how important these resources are, should be hiring the brightest and the best to negotiate these contracts. The African Development Bank now has a fund which is helping African governments with that capacity.

In relation to child proscription, one attendee recalled that in 2009 when the Lubanga trial was put on hold because of the prosecutor's failure to disclose exculpatory material to the defense, in East DRC people welcomed that decision hoping that one day Lubanga would be acquitted. That was welcomed because many other people who could have faced justice even before getting to try Lubanga were left out. Also, in East DRC mainly the crooks threatened could only rely on the activism or service of the youth and children. From 14 years old a child can easily be taught to manipulate an arm and not only to mainly work for people. Using those weapons was actually depicted as an act of protecting oneself and the communities – arguably an instance of legitimate defense. Thus, how do we assess such a situation where communities are threatened by armed conflict, where the state has failed and the community can only rely on the youth to protect them?

A further thought from the audience was that the problem of child labor is a testament to the failure of the state. If we look at the African Charter on the Rights and Welfare of the Child (African Children's Charter) or even at the Convention on the Rights of the Child (CRC), it sets out obligations which the state has to perform. For instance, we have Botswana vs. DRC, where Botswana is a functional state able to utilize its resources to provide for the necessities of a child. However, in the DRC the government is not in control of its resources and does not play a functional role to provide for social services to allow for a child to do the things that a child should be able to do.

Regarding armed conflict, another attendee remarked, companies can also have a different role to play. That could be to prevent armed conflict by using locations where youth unemployment is high. Youth unemployment is a contributor to armed conflict. This would fall into the positive CSR initiatives that have been discussed. Companies could also contribute to peacebuilding by hiring child soldiers.

An additional point from the public was that the questions around child labor or child trafficking were discussed at the Durban World Conference. The plan of action does point to commitment being made that these issues will be addressed. What is more complicated is also the question of child-headed households, which is a new terminology and new reality in Africa. It remains to be seen how to deal with that from a human rights point of view. Also, in rural areas children engage in labor as a way of skill development, such as harvesting crops, fetching water etc. We need to look at the reality and the context, to differentiate so we become clearer on what we really need to deal with here, and to establish when intervention is needed.

One other observer noted that there is a convergence of interests between the governments and the private sector, for instance in Uganda. Governments are found to be reluctant to lower the age of child labor. Child trafficking is a business for some people, such as traffic officers. We need to reflect on the government obligations and private sector responsibilities to make sure that nothing falls through the cracks. Mr. Peter Leon considered that what we need to do in these situations is to hold governments accountable, using institutions such as the African Commission and the Court. We need people to enforce those obligations.

Another illustration on the problem of armed conflict and children's rights looked at Uganda. Here many children were recruited into the Lord's Resistance Army and some were sold to traders. In schools some children have to work on farms to start agricultural activities to grow food for their own consumption, as well as for the consumption of the school. At the same time, in the Western world farms were run with the help of family and such farms would not have been able to operate without the help of family, including children. Also, in Uganda many live below the poverty line, so one cannot ask a poor family to stop their children from working on the land. There is a fine line between what you consider to be a task arising out of a family business versus such tasks being considered child labor. Regarding this matter, Mr. Leon thought it is all just a question of balance.

A dimension often neglected, according to someone in the public, besides the moral and legal dimensions, is the psychological one. Because communities tend to internalize or rather normalize the situation and when that happens, the only hope is to get limited public pressure or interest. This was the case early in the year in Malawi in the tobacco production, where child labor was used. Then, when engaging external players to intervene such as NGOs, they become the enemies because according to communities or as far as the government is concerned, the issue has been internalized and normalized.

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The second day of the conference was inaugurated by a brief introduction of the panel topics and speakers by the conference Chair, Mr. Moray Hathorn, Partner and Head of Pro Bono at Webber Wentzel. This was followed by a keynote speech on the interface between natural resources and civil conflicts on the one side, and human rights and business on the other, by Mr. Adama Dieng, United Nations Secretary-General's Special Adviser for the Prevention of Genocide.

KEYNOTE: NATURAL RESOURCES AND CIVIL CONFLICTS – AN AFRICAN PERSPECTIVE TO HUMAN RIGHTS AND BUSINESS

Adama Dieng

UN Secretary-General's Special Adviser for the Prevention of Genocide
Former UN Assistant Secretary-General, Registrar of the International Criminal Tribunal for Rwanda (ICTR)

Mr. Adama Dieng commenced by highlighting the significance of the conference, given the complex intersection between human rights and business, especially within the African context. His following address focused on the potential role of business, its relation to the rule of law, and to the protection of fundamental rights and freedoms.

One major question to pose, in his view, concerns why we should link business with human rights. This linkage is based on the reality that activities of multinational corporations (MNCs) operating both in developed and developing countries significantly impact the individual rights and freedoms of the people in those countries. Previously, MNCs considered themselves as having nothing to do with human rights, content being that addressing human rights constituted a direct interference in the domestic affairs of sovereign states. However, because most conflicts are partly sustained by proceeds from these powerful corporations, the link between human rights abuse and business could no longer be denied.

The history of natural resource extraction in Africa is characterized by environmental degradation, increased poverty, human rights abuse and widespread corruption. Indeed, today most regimes accused of human rights violations against their own people have managed to stay in power partly due to the multi-million concessions of natural resources to powerful MNCs. Yet, successive governments in most of these countries have squandered wealth accrued from natural resources, stashing it away on foreign bank accounts rather than investing it in badly needed social services to benefit their own people.

It was eloquently stated by the chairman of Transparency International in 1999 that "the scale of bribe paying by international corporations in the developing countries of the world is messy. The results include: growing poverty in poor countries, persistent undermining of the institutions of democracy and mounting destruction in fair international commerce. In this alliance between the MNCs and the governments or rebel groups, the most disadvantaged constituent is ordinary people who are left on their own to endure worst violations of their dignity. It is an undisputed fact that Africa is endowed with natural resources that have a potential to transform the lives of its people. Yet Africa remains mirrored in economic challenges with violations of human rights and bad governments continuing to inflict untold

suffering on its people. For example, some East African countries including Kenya, Tanzania, Uganda, and Mozambique have discovered huge reserves in gas and oil with potential to transform economies of these countries. Yet available evidence painfully demonstrates that instead of economic relief and prosperity, this discovery has the potential to inflict disproportionate misery on the ordinary people of these countries. The key question however is, whether the state of affairs unchallenged, should we simply accept that Africa suffers from a resource curse while increasingly skeptics continue to believe that Africa will continue to suffer due to the growing discoveries and exploration of these resources?"

Mr. Dieng rejected this claim and instead argued that these resources have the potential to transform the economic conditions of these countries and of the entire continent for the benefit of their people. Available evidence in different countries, such as Nordic countries like Norway demonstrates that if proceeds from natural resources are prudently managed and utilized, they have the potential to improve living conditions of the people while enhancing the development of the rule of law and respect for human rights. Similarly, oil exploitation in places such as Scotland has proved that it is still possible to harness natural resources while protecting the environment for the present and future generations. The challenge facing African countries is how to build and enhance business partnerships with multinational corporations, premised on equality and mutual benefits.

Multinational corporations have a role to play, he added, to ensure that their activities do not continue to breed violence and destitution of the already powerless and defenseless people. Specifically, multinational corporations operating in conflict-ridden countries have a special role to ensure that their activities do not become an impediment to the wide efforts of the international community to hold accountable elements of human rights abuse and all the illegal activities. Unless these companies are compelled to make their activities more transparent and to be accountable for their actions, their activities will continue to significantly encourage human rights violations and be an impediment to collective efforts of the international community to address the ongoing human rights violations on the continent.

The complacency of the international community in not adopting a binding legal framework regulating the work of multinational companies is partly premised on the belief that MNC activities are regulated by domestic legal regimes. Yet, this assumption is frequently challenged not only by the inability and unwillingness of countries to hold accountable businesses operating within their borders, but also by willful partnership between business communities and national governments to the detriment of the defenseless citizens. Corporations, especially those operating in developing countries, are increasingly challenging the traditional economic and political role of the state. Thus, the ability of some states to regulate the conduct of MNCs has diminished significantly. Indeed, some corporations are so powerful that they influence the policies set by developing countries. They do this by determining where to set up their capital. In other words, if the governments fail to enact policies favored by these companies, they can threaten pulling out their capital to other countries. All this power has enabled corporations to exercise disproportionate influence on African countries.

The most visible rule of law sector where business communities have significant impact is the financial influence they wield over law and all the institutions controlled by state authorities. For example, it has been a tendency of some governments working with multinational companies to deploy excessive law

enforcement officers to ensure that ordinary people cannot legitimately and peacefully protest the impact of corporation activities. Admittedly, it is not the responsibility of these companies to provide resources to the rule of law institutions such as judiciary or police. Nevertheless, this reason does not seal them from the obligation to ensure that security personnel working under their auspices respect human rights.

In 1999, at the World Economic Forum, the then Secretary-General Kofi Annan proposed to the business leaders a Global Compact of shared values and principles, which will give a human face to the global market. He envisaged the Compact to comprise a set of core values on the areas of human rights, labor standards and environmental practices. Underlining this motive was the need to ensure that human rights and labor standards abuse do not threaten the multilateral trade regime. Following up to this proposal, in 2000 the United Nations adopted the Global Compact 10 Principles, which companies are required to embrace and support, in areas including human rights, labor standards, environment, and corruption. In absence of an internationally binding legal framework to regulate the work of multinational companies, the UN Global Compact Principles serve as the minimum benchmark under which companies are required to operate. The moral appeal of these principles is especially visible in the developed world, where significant sections of informed masses have started to question the activities of some companies operating in different parts of the world and whose products find their way on the shelves of Western markets. However, the challenge facing these principles is their unenforceable nature in their application, especially in conflict and post conflict areas where government and their institutions are either too weak or lack interest in providing meaningful oversight into the work of these corporations.

Protecting human rights solely through obligations on governments seems rather uncontroversial if host states presented the only threat to human dignity or if states could be counted on to restrain conduct within their borders effectively. Corporate accountability is of particular significance in the context of transnational economic activities, especially when production takes place in countries where social and environmental protective standards are low or nonexistent - be it due to insufficient legislation or lack of enforcement. The major challenge to provide oversight for the activities of corporations in conflict affected areas has been the lack of an internationally binding framework to compel them to respect core values of international human rights norms. Another challenge facing post conflict and most weak countries to hold multinational companies accountable is the question of corruption. Admittedly, corruption exists in almost all countries, but in weak societies it is done with impunity.

We tried many years ago to include corruption and particularly the fraudulent enrichment of top state officials detrimental to public interest as one of the major agenda in the African Union, but to no avail, explained Mr. Dieng. While working on the merger of the Protocol on the African Court on Human and Peoples' Rights and the African Court of Justice, the establishment of a criminal division to handle that issue was recommended. Unfortunately, the permanent representative at Addis Ababa dismissed the idea. Today this idea has been brought back on the table. Mr. Dieng considered it unfortunate, because the perception was that the idea of such criminal division is maybe to ensure that people like Al Bashir and other corrupt African leaders who violate human rights be tried by an African court, while their initial idea was to have such division for corruption. Luckily, corruption was included that time as one of

the crimes justiciable before that criminal division. But as mentioned, it appeared unfortunate as it came only after the issue of universal jurisdiction was being brought as a matter of concern by the Rwandese Minister of Justice, and then a resolution was adopted which led to the adoption of the document on May 15th 2012.

As beforehand pointed out, in the developed world corruption is punished. It is extremely important that Africa follows suit. But normally some companies take advantage of weak government structures to advance their corrupt activities, by co-opting few elites into some positions of board directorship effectively silencing any voice of dissent. Corruption is often seen as a lubricant of the will, used to win contracts and concessions. Indeed, most contracts signed by multinational companies and most developing countries are so much schemed in favor of the former, that they only impoverish the majority citizens, while fueling resentment of the people against their own governments.

The international community can enhance the capacity of weak governments by supporting measures meant to strengthen governance structure to address corruption. Such measures include: capacity building for the judicial officials, domesticating draft laws, and strengthening of or establishing the office of corruption Ombudsman - all can help address the challenge of corruption. In turn, these departments can play a major role in interpreting and enforcing international human rights provisions as reflected both in international human rights instruments and domestic laws.

In conclusion, Mr. Adama Dieng clarified that he is not advocating or suggesting the imposition by the international community of a set of arbitrary or unilateral rules to regulate the conduct of multinational companies without their full participation in developing such rules. Rather, it is argued that public participation is the cardinal requirement in a healthy democracy. This is because ultimately public participation envisaged the role of states and their citizens, both legal and natural, in developing norms and values which would apportion rights and duties to both states and their people. We should collectively reject this notion which requires presence of natural resources with resource curse.

Evidence in different countries has shown that it is possible to utilize proceeds from natural resources for the greater good of the community concerned. There should be no reason thus for having a different situation in Africa. To reach this, we require strong partnership between states, civil society and business communities to ensure that business is predicated on a win-win approach for all those concerned. It will also require strong international legal regimes to impose sanctions on companies that violate human rights standards in their operations. It is clearly possible for the proceeds from gold or copper in the Democratic Republic of Congo or from oil in Sudan to fund education and healthcare services rather than fueling conflicts. To achieve this objective, the speaker added, we simply need political will and international commitments that compel business communities to fulfill their human rights obligations as responsible members of the international community. We cannot accept the claim that human rights are an available price for economic development. The presence of international mechanisms with credible monitoring systems could contribute towards making business entities more transparent and compliant to basic human rights. Also, the possibility of being exposed in the international media for human rights abuse and possible sanction for all the illegal activities will go a long way to make business communities change their behavior.

FLOOR DISCUSSION

Mr. Adama Dieng was asked what are the kinds of legal instruments that will compel compliance when existing legal standards of states have failed, who is going to prevent such violations? The commentator expressed a conviction that there have to be some other tools in our toolbox to ensure compliance, but even if such instrument were to come into play, there are doubts about the political will. Mr. Dieng considered that partnerships with all groups should be developed. For instance, currently there are many cases in Paris regarding stolen assets from Gabon, Congo Brazaville, and Equatorial Guinea. That is something we should appreciate. South Africa has offered many lessons, such as the right to housing - where an historical decision was made. Some say that this is unrealistic because people do not have this right, but in fact they do have these rights because it is in their constitution. Let us thus make sure that the instruments work. Even today changes are already happening in some areas. For instance, Shell is changing its behavior because there was pressure not only from the Western world but also from within the African continent. Eventually, what we need is an expression of an African solidarity. Mr. Dieng further shared his content with the theme on African Perspectives, because at the end of the day this is directed at Africans to see how they can make human rights and business work in the interests of their people.

One commentator followed up on an earlier suggestion to include companies into the discussion. One of the issues the speaker found interesting in his work with Western companies that are carrying out extraction in Africa is that they are open in contractual relations, but the governments are not. In this context, how do we get governments and companies to engage in the absence of international frameworks and international law? Mr. Dieng responded that ultimately adopting a new international instrument is not enough. At the end of the day, lawyers have a cardinal role to play; they have to fulfill their role as jurists. A judge who does not look through the window to see what is happening in his or her society does not deserve to be sitting as a judge. In other words, the law is not something abstract. The law is something we have to make sure that eventually is the expression of the people. We have to make sure that the law comes from the grassroots level up to the institutions. Efforts need to be made to make that happen. For instance, there is the recent experience in Kenya where the Chief Justice in about May went down to a poor area in Nairobi. This clearly shows that where there is a will to bring justice close to the people, it is possible. The Chief Justice's plan is to make sure that social action litigation and public interest litigation become part of the Kenyan judicial tradition. We have to fight for it. Because in the Western civil society there is public opinion present and there is pressure put on various institutions so that they too face justice. Let us not be idealists, Mr. Dieng highlighted. Unless we stand firmly and organize ourselves, this will not happen in one day. We also have to make sure that we, as part of the civil society, are not also corrupt. This is truly something that will take time, but it should not discourage us to make sure that we have a binding legal document.

Another inquiry from the public concerned the people having a direct international claim to be provided with minimum economic goods when the corporations are operating on their land. Mr. Adama Dieng reminded that the International Covenant for Civil and Political Rights already contains a provision

showing that individuals can go file complaints before the international court. This is despite the fact that the UN Human Rights Council is not a judicial body but a quasi-judicial body. For instance, the Netherlands back in the day was condemned by the UN Human Rights Committee (now Human Rights Council) and decided to pay compensation to an individual who complained that his rights had been violated. Furthermore, Canada was brought in front of the Committee by hundreds of people and most of those cases were dismissed. This clearly shows that people in Canada knew that they have a right to lodge complaints before that body. At the same time you have Zaire (current Democratic Republic of Congo) with Mobutu. It ratified all instruments, signed all declarations but there were hardly any cases.

Further, a comment from the audience made reference to the process of public interest litigation, taking cases to the African Commission specifically. Despite the fact that justice is available in one way or another, access is very difficult. As a small NGO working with a poor community, how can one come up with all the legal arguments, since justice is very expensive? Mr. Dieng considered that until the time comes when we are able to send to parliament people who represent society' interests, it will certainly be extremely difficult to ensure that the interests of the people are taken into account. When we talk about the public participation of people in the affairs, we still witness the lack of citizens being aware of their rights. That is why education through citizenship is fundamental, education to democracy is fundamental. We have to do it at the grassroots level in order to reconcile the people with the law. Mr. Dieng recalled that when he toured Kenya in 1992, he thought that there would be no change in the next 10 years. There will be no change unless people start at the grassroots level to mobilize. Access to justice is a critical issue. We have to make sure that people such as lawyers contribute to the education of the very poor instead of those poor people spending their meager resources to go to ordinary courts when most of those courts are corrupt, as well as the judges and lawyers. It is a long struggle, but if efforts are made at all levels, then it will strengthen the network everywhere and make sure that the lawyers accept to do pro bono work as well. Pro bono work is not something deeply rooted in this continent. We have to develop this pro bono work and that means we have to be very constructive about our social role.

One attendee observed a change in industry in terms of how they want to urge, even in Africa. At the same time, here there is this strong movement, there is a consensus that we need to see some democratization. On the side of the African political leaders, we are still lagging behind. Why are we going into agreements with corporations that are not in the best interest of the people on our continent, what will it take to change that mindset for African leaders to be able to understand that? For instance, Shell and Total will sign different agreements in Norway and different agreements in Africa. When you ask them, they say it is not their fault, it is the political leaders. What will it take to change that mindset? In response, Mr. Dieng agreed that we definitely need to change the mindset. One of his recommendations on the matter would be that from the present meeting, we would maintain a small group which will continue to reflect on this issue. This can be initially done by electronic exchanges and then from within, we can begin to see how the 5 regions on the continent as well as the Diaspora can move forward. Things are changing, but it is also for us to make that contribution.

Mr. Adama Dieng was further asked how to hold corporations accountable if states have failed, if another way of doing this is possible and how. Mr. Dieng shared that Secretary of State Hillary Clinton when visiting Lusaka stated that we need to be careful in order not to see a new form of colonialism

developed where governments do not care about the rule of law and human rights, but simply about business and dealing with the elite. She did not mention China, but everybody knew that it was a reference. Of course, China did not hide their policy and articulated that they do not interfere in domestic affairs. Once again this illustrates poor leadership. Until the time comes when we will be in a position to send to parliament people who represent our interests, it will certainly be extremely difficult to ensure that the interests of the people are taken into account.

Mr. Rodger Chongwe intervened in the discussion, making reference to the wake of paralegals. He commended South Africans for having continued in the rural areas to have the message and organization of paralegal organizations which, as he toured the country about three years earlier, were doing a praiseworthy job. At that time, Mr. Chongwe was trying to convince the government of Liberia that the rural kin of Liberia require access to justice at the village level and that all lawyers can go to the rural areas because there are very few lawyers in the country. Yet, it was the lawyers themselves who were against the idea of the establishment of paralegals. It took one year to convince the Chief Justice that perhaps that was the way forward. Even for him, it was only after he visited Malawi and discovered that the paralegal system is in existence and people have access to justice, that he changed his mind. Let us keep this spirit in our various countries, the spirit of access to justice at the lowest levels.

Secondly, Mr. Chongwe added, lawyers must be open, must speak the truth. International justice, the work of the UN Human Rights Council, in terms of the rights that they enunciate and the findings, is not implemented by the member states. So there is a deficit; we have rights without remedies. Despite the quasi-judicial nature of the above body, the decisions should be implemented by our own governments; however, they are not implemented. When we look at states in Africa, we have normal states, we have fragile states where some institutions do not function, and we have failed states where everything is dysfunctional - from the executive to the sweeper in parliament. So if there is a dysfunctional judicial system, then everybody in that system is corrupt. But then if we also have a dysfunctional executive, it will never sanction the judiciary, it will never sanction the police. So it is really not the international organizations which violate the rights of the people with impunity. They do so because our own governments are violating our own rights with impunity.

For instance, Mr. Chongwe continued, in Zambia one can get a judgment for payment of compensation from a Zambian court against the government. However, the politicians changed the law and the judgement cannot be enforced; the payment depends upon the mercy of the government in power. It is the same thing if you get a judgement against a local authority, they never pay. So where is this rule of law we are talking about? We have an international warrant to arrest Al Bashir, an indicted international criminal. But then Kenya hosts him. He can go anywhere except for the lady president of Malawi who has said enough is enough and promised to arrest him. That is the leadership we need. Therefore, we can make a law to punish the multinationals that violate these rights, but we must bear in mind that these rights have a remedy deficit. We cannot enforce them; the presidents will refuse to enforce a judgment against a company which is feeding them. So the answer is to educate the politicians, the judges and ourselves. This is because in the end, we will get a remedy when for instance the government gives the people shelter as is the case in South Africa. We will get a remedy when homosexuals are recognized and

the courts realize that difference must be treated equally. The South African example is the explanation we should give for our governments. Let us face realities, Mr. Chongwe concluded.

Mr. Adama Dieng added that there is need for academics to write more about these cases. Specific reference was made to the case of the judge who was charged for misconduct in the Charles Taylor case, issue which did not receive the attention that it deserved from within the African continent. At least with the E-reporter from Africa Legal Aid, there is something published on the case, he added. The speaker expressed his conviction that it is our responsibility, backed with the academics, to take note of these cases where we have to express the African voice. Mr. Dieng made it clear that, although he has no sympathy for Charles Taylor, he does have sympathy for the rule of law and even the worst criminal should be tried according to the principles of the rule of law. It is unfortunate what happened to the judge with a dissenting opinion. In the whole 2500 page document, there was not a single African or regional or sub-regional actor and that came as a big surprise to Mr. Dieng.

One commentator from the public observed that the scramble for African resources is not very futuristic and one can tell by the strategies that have been developed. The European Union for instance, has the Raw Material Initiative; Chinese and Japanese have their own strategy as well. So the activities of China in Africa are not necessarily a bad thing, but can be seen as opportunities. The problem is what strategies Africans are using to engage them. The Chinese are business people and have their own interests just like Africans have their interests. The framework in use by Africans is problematic. The Chinese are proclaiming their interests and Africans should also begin to do that.

Another view from the audience affirmed the need to not lose hope in terms of the justice systems in Africa. For instance, in Uganda there is huge improvement in avoiding corruption. There is still corruption at lower levels, but at least the top levels such the Supreme Court have been cleaned up. Leaders need to show an example and at the same time people from the grassroots level need to be educated so that when we come together at the middle level there will be justice for all. However, this problem is only endemic in Africa. We can be fair and transparent and acknowledge that the problem exists. But if we say that there is corruption here in Africa in the courts, what about the political influence at the international criminal justice? Within the last judgment of the Charles Taylor trial, when there was one judge who wanted to express a dissenting opinion, he was subsequently charged with misconduct and the judges prevented him from sitting in the last two audiences. This is just unbelievable and unheard of. The reason behind it was that none of the people who had paid for this trial to continue for five years wanted to see a dissenting opinion. They wanted to put Charles Taylor in prison. He was put in for 50 years and if any judge had a dissenting opinion, it would have given a lot of opportunity to the defense to succeed on maybe an appeal procedure. So let us not fool ourselves that these things are only happening in Africa. Especially at the international court as this is not being seen too often in the ICTR, but certainly as far as the Special Court for Sierra Leone is concerned, the commentator expressed extreme disappointed.

An additional comment from someone else present at the conference made reference to the reform on the continent, which attests excellent work underway. Kenya is one of the countries in Africa that will set the pace for what we need to do to take ownership of the situation. There has been a struggle for at least 15 years in the Kenyan society to change the dictatorship and to bring about many reforms. Nobody believed that after Daniel arap Moi, after what happened in 2007, we shall be witnessing what is happening currently in Kenya. Many reforms are taking place in Kenya and in order to achieve the dream, we all have to give power to the judiciary to reform the parliament, to reform the way the executive works. We need, first and foremost a constitution that is drafted with the input of everybody. The Kenyans have worked hard to come up with a constitution that is well advanced. Today what we have witnessed is that step by step the Kenyans have given voice to their own citizens at the grassroots level. The constitution of Kenya provided for a full decentralization of the administration. In each of the 47 counties there will be at least a judiciary structure to bring the judiciary close to the grassroots level. The new set of judiciary system is composed with excellent reforms. It was a battle. A vetting process system was set up for all the new judges who will be part of that judiciary. This vetting process is so inclusive; it includes members of the Diaspora, of African countries where they have something to learn together with the nationals of Kenya. They are the ones vetting judges, to allow them to be part of the vetting system. That vetting system is scrutinized publicly; it is sometimes viewed live on television and the Kenyan media reports regularly on whatever is happening. There is also a parliament fighting to maintain the status quo, not to engage in the direction that the reform and the public pressure have cast their influence on the parliament. All over there is transparency. The Kenyan people have moved very far in compelling the executive to do things in accordance with the constitution and are not stopping from bringing the executive to court. The president appointed 47 commissioners to lead those counties, but the civil society is so vibrant and moving so fast that it went to court to obtain a judgment to declare the act of the president null and void. It was the first time ever that the judiciary compelled the executive to repeal its own decision. We are witnessing so much development in Kenya which is an illustration of how far we want our countries to go. The inclusive process is something worth noting and learning from. This will not unfold easily, it is a struggle that we have to initiate on our own volition in order to change things. Nobody will come and change things for us. We have to be able to undertake this extra mile to change the mindset, to change the way we believe we should run our business. We need to look at the experiment that is happening in Kenya. Of course it will not be a perfect one, but it is worth noting.

Mr. Adama Dieng wrapped up the session, reaffirming that pro bono is very important and the fact that a law firm in South Africa chose to participate with an NGO on this important occasion is something unique. We should commend Webber Wentzel and make sure that other law firms on the continent follow through.

THEME 4: INCORPORATING GENDER PERSPECTIVES

The moderator, Dr. Pinkie Mekgwe (Executive Director of the Internationalisation Division at the University of Johannesburg, South Africa) introduced the thematic of the panel - gender perspectives on human rights and business, and followed by briefly presenting the panelists, Laura Nyirinkindi and Bonita Meyersfeld, and their respective presentation thematic.

Laura Nyirinkindi

President, FIDA Uganda (Federacion Internacional de Abogados), Ugandan Association of Women Lawyers

Introducing the topic, Ms. Nyirinkindi brought into discussion a study conducted on organizational behavior, which revealed that organizational behavior including that of businesses is heavily patriarchal in nature. Having been asked to look at business and human rights from a gender perspective, the speaker shared that she would like to adopt for her session the United Nations Women (formerly known as UNIFEM) slogan: "Equality means business". The relationship between business and gender is of fundamental importance and needs to be a strong component of any accountability framework for business and human rights.

The presentation went on with a series of facts providing a backdrop to the issues at hand. Women make up 70% of the world's 1.3 billion people living in poverty. Women constitute 1% of the world's resources and 1 out of 10 of the world's income. Women constitute 2 out of 3 of the informal employment workforce and they dominate the small and medium enterprises (SMEs). In these structures, women have less financial and personal security, less social protection and lower earnings. Women constitute less than 1 out of 7 of the world's administrators and managers in developing countries. In times of economic upheaval, women often experience the negative consequences more rapidly and are slower to enjoy the benefits of recovery. Studies by the International Trade Union Confederation reveal pervasive gender inequalities in the labor markets, with greater pay gaps between women and men in the private sector than in the public sector. Additionally, persistent gender inequalities are prevalent in the private sector regarding the number of men and women holding board level and CEO positions within companies.

Women are also underrepresented in important spaces where business is conducted and negotiated. They are underrepresented in trade unions, in national chambers of commerce, in important business societies where business happens and decisions are made. Furthermore, the judiciary is either gender blind or gender neutral, or utterly discriminatory. The issues that impact on women in the economic and business spheres are not well handled even in such important spaces that are supposed to adjudicate rights in an impartial manner. What emerges is a bleak picture of gender inequality that characterizes the business and informal sector. This leads to an entrenching of marginalization of women. In this

context, business and human rights, as well as gender equality provide a conceptual framework that analyses how a business may have differential and disproportionate or unforeseen impact on women and men as a result of the different social, cultural or legal roles, rights and responsibilities.

A series of systemic challenges are faced by women as a result of business policies that are discriminatory or gender neutral, the speaker continued. The impact sometimes is the same. Reasons vary from country to country, but some of the common factors contributing to discriminatory practices in the business world include the undervaluing of work done by women, division of the labor market on gender grounds, other stereotypes and challenges of facing family obligations. Other challenges faced by women include: sexual harassment, discrimination over marital and maternity rights, as well as social protection. In countries such as Brazil for instance, cases have been brought to court where they even ask women what kind of birth control they practice to ensure that limited maternity rights are given to women, to save on earning of course. On another note, access to financial services for women who may want to obtain startup capital is difficult in Africa, especially as they often lack collateral such as land or physical assets used to value input in the financial markets. In many African countries, married women will not obtain financial assistance without their spouses acting as guarantors; this is true particularly in Uganda.

The systematic denial of equal opportunities to women further entrenches marginalization of their status and situation. Women are also a significant group when it comes to compensation. For instance in Uganda, when the government was working hand in hand with a transnational corporation to develop electricity supply, they had to relocate whole communities. In such situations the compensation is given to the male, who is the household figurehead in terms of the patriarchal system practiced in Uganda. It then happens that the women who have to bear the brunt of relocation do not receive money, because the men would not hand over this money to the women. So women became further marginalized. This demonstrates how practices of business have an impact on the livelihoods of women.

Ms. Nyirinkindi further explained why human rights and gender equality are relevant to business. There are manifest economic advantages surrounding prevalent gender inequalities, such as increased GDP, increased household earnings, building stronger economies, establishing stronger and just societies and improving the quality of life for men, women, families and communities. There are legal frameworks that talk about the economic rights of women: the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) particularly talks about the equality of men and women in public and private spaces and the need to eliminate stereotypes that lead to discriminatory practices against women. The Maputo Protocol on the Rights of Women in Africa is also a progressive instrument; it constitutes a useful framework, especially its emphasis on women in the informal sector, because for many African women this is where they are more able to participate in with their informal skills, than in the formal business world.

UN Women and UN Global Compact have developed standards referred to as the Empowerment Principles for the private sector. These recommend the effective implementation of enterprise development, supply chain and marketing practices that empower women. These norms are slowly being embraced by the corporate world in the West, but in Africa there is no mention of corporations emphasizing these standards. It is imperative for the business world to recognize that, for companies to

operate optimally, an enabling environment must be created in which women are treated equally, hold key leadership positions and fully participate in decision-making. It is being increasingly recognized that opportunities should be created with a view to fully empower women though inclusion, non-discrimination, safety, education and training - from the boardroom to the factory, down to the supply chain. This is the thrust of the Empowerment Principles: it is as important to enrich women as it is to empower them. Corporate citizenship must reflect the integration of gender principles of empowerment and rights-based approaches.

In conclusion, businesses must have the responsibility to ensure that their actions do not make existing inequalities worse in the communities in which they work. They must embrace leveling the playing field and advancing gender equality and equity through proactive efforts.

Bonita Meyersfeld

Associate Professor of Law, Head of Centre for Applied Legal Studies, University of Witwatersrand, South Africa
Editor, South African Journal of Human Rights

Ms. Meyersfeld started off with a brief discussion on the international legal approach to gender equality. The protection of human rights in international law has always struggled to ensure that its application is rich, effective and fair; however, this aspiration has not always been successful. The model of rights protection, sculpted in the culmination of World War II, was carved inevitably by a handful of select people with a specific homogenous perspective on human rights – one that formed the priority and substance of the post Holocaust human rights framework. Over the past 50 or 60 years, individuals and groups have identified various ways in which international human rights law has not addressed the rights and needs of women. They demonstrated how generic international human rights instruments are just that: generic. They argue that women endure a particular form of harm that relates to their gender and that intersects with their ethnicity, race or religion. Many theorists over the last 60 years have called on international law to be reshaped and to embrace a feminist perspective, endeavors which have had significant success. Basically, what these efforts pointed at was that gender-based discrimination engages socially constructed differences that are attributed to women and men. Generally, these constructs benefit men in the realization of potential and impede women in the performance of theirs.

To illustrate the nature of gender-based discrimination, the speaker provided a series of examples. In England, in the inner city, the pay gap is 17%, attesting thus unequal pay for equal work between men and women. Violence against women is considered a pandemic by the World Health Organization (WHO) for women between the ages of 15 to 44; they face death and disability as a result of violence more so than tuberculosis, cancer, HIV or malaria. The majority of impoverished people worldwide are women - the so called feminization of poverty. Women represent the highest number of internally displaced

people. Furthermore, women in Sub-Saharan Africa are the fastest growing population to contract HIV. And for a woman, having a baby or living with a man represent two of the most dangerous, life threatening activities.

Within the realm of international human rights law, it was established that generic principles do not address these systemic problems. Two modes of analysis developed: the first is a separate analysis and the second an integrated analysis. The separate analysis calls for the precise and express articulation of rights of women to be developed in international law; as a result, we have the development of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and its constitutive body - what is now known as UN Women. The integrated analysis calls on international bodies and law to integrate a gender perspective into their operations. Now almost every United Nations body, from the UN Torture Committee to the UN Special Rapporteur on the right to food, to the UN organizations that address health or environmental issues - each has a policy that incorporates gender into their work.

Having considered the international human rights framework that deals with understanding the distinction between women and men, Ms. Meyersfeld shifted focus to business and human rights. The emerging area of business and human rights in international law addresses in part the power disparity between developed countries on the one hand, multinational companies on the other, and developing world societies. Unfortunately, in the speaker's view, attempts to deal with this power disparity have fallen into the same trap as the homogenous perspective of the development of international human rights law post World War II. To date the human rights debate has not identified the social and legal constructs which insist that, because you are a woman, you may not inherit property, choose your life partner, earn a decent wage, or decide on your political representation. Many of these problems no longer exist, but many of them still do. However, the field of business and human rights has witnessed a series of initiative, such as the World Trade Organization (WTO) addressing the feminization of poverty. In addition, in 2008 when the Human Rights Council (HRC) renewed the Special Representative John Ruggie's mandate, they asked him to devote special attention to women and to persons belonging to vulnerable groups, in particular children.

As to the mandate of the Special Representative John Ruggie and his team, for many people this mandate seemed counter-intuitive. Gender was seen as a discreet separate issue that could be addressed as one of the sub-issues. Notwithstanding, Prof. Ruggie took the HRC's instructions on board and he held several consultations. In 2009, an expert consultation was held with the subject of integrating a gender perspective into the framework. Two factors became evident during this consultation. The first is that most, but not all of Ruggie's team was open to gender; also, they were uncertain how to engage this crosscutting theme in their work. The second relevant factor was that international law norms were wholly inadequate to give precise answers in respect of gender, business and human rights. However, a preliminary question came up, namely: "Why should the experience of women receive special attention and what is an overarching framework? Why women and not also children or the disabled or indigenous groups?"

Ms. Meyersfeld revealed her conclusion to this question was that one should in fact integrate the perspective of all these groups into the development of an overarching framework, for three main

reasons. Firstly, the framework is designed for people who are perceived to be homogenous, but they are in fact diverse. Merely because a framework is overarching does not mean that it cannot speak to needs and perspectives of the multitudes of experiences within that group. Secondly, by asking how one's own perception of a problem may be biased towards one's own identity, other problems are being unearthed, but since you have never experienced them, you could never identify. A classic example is people in a university or workplace who one day decide to spend the entire day in a wheelchair; because they cannot move around, they start to realize how a particular building can be discriminatory. Thirdly, to women it is a simple numbers game: there are as many women as there are men worldwide. Why then should the business and human rights regime develop without their perspective? This is the analytical methodology that is at the heart of international human rights principles and, in the speaker's perspective, should be part of the business and human rights regime.

In regard to the scope of gender analysis in business and human rights, Ms. Bonita Meyersfeld considered we should look at a gender perspective in three ways. The first concerns internal operations, the second is in terms of external operations, and the third in terms of the informal economy.

Internal operations refer to the consideration of women's rights in corporate activity that revolves around employment equity. There is an enormous debate at the CEDAW level between equity and equality. Internal operations normally speak to issues around equal pay, sexual harassment, equal opportunities, positive discrimination and in certain circumstances quota systems. Although equality in the workplace is a human rights issue, it is not the only human right that occurs in respect of the human rights and business framework.

Then, there are external considerations - ways in which the operations of corporations may affect one's rights that are external to the company itself. The same way in which a corporation's activities may affect people outside of its employees, so it may also affect the rights of women outside its employees. For instance, large infrastructure projects often require the resettlement of a community. The question here is if in such context one only engages with the traditional leaders of that community, whether that perpetuates and endorses a system of discrimination and harm. In addition, if one pays the compensation to one part of the society or community, does that ensure that such money finds its way to the widows, elderly women, especially single mothers? By adopting a gender-neutral approach or thinking that the approach of consultation is homogenous and applicable to everybody, one may endorse and perpetuate forms of gender-based harm. This is particularly important in Africa, where women are responsible for about 80% of food production without remuneration, situation that can make one wonder about the possible GDP that would yield if there was compensation for such work. Another aspect concerns changes in industry. When a corporation enters into a new host state for developing a particular type of industry such as in the garment industry, often what happens is that the sector will become industrialized. Industrialization traditionally prefers the utilization of male to female employees. A classic example would be the textile industry in India. Historically, women were responsible for the creation of garments. But in the last century or so, as soon as the garment industry became more industrialized, commercialized and had widespread demand, it became a system of supply chains. Those at the top of the supply chains in the industrialized factories are men who are now taking over those positions. That which is undesirable tends to attract those who are at the bottom of the social strata and

that means that women are at the bottom of the supply chain. Those are generally home workers, stripped from the protections of the formal sector.

Finally, there is the problem of the informal sector, one which is worldwide characterized by women. There are some reasons why women are not included in the formal sector with the same or necessary regulations and protections. The choice ultimately is for each individual. One can believe that either the reason for that is that there is an inferiority complex amongst women, because women are indeed less than their male counterparts: less capable and ultimately their work is less valuable. Alternatively, one could take the view that there is a system in place that tends to oppress the value that women give to an economy. One of the abovementioned reasons applies. It is up to international lawyers, theorists and activists, Ms. Meyersfeld concluded, to decide which reason is the correct one and to challenge it.

FLOOR DISCUSSION

One concern coming from the audience was whether quotas truly help in the cause of feminism. Ms. Laura Nyirinkindi considered quotas capable of helping, provided women will be treated equally and that they will have a part in decision-making. However, she clarified, in the private sector this becomes harder to regulate. In the public sector for instance in Uganda, we have affirmative action policies and women are supposed to be represented in public commissions and so on. But studies that were done in the public sector revealed that the positions of women were pitiful. They were the ones asked to say the opening prayer or sing a song, the national anthem or some other such role. This is not the kind of inclusion that is going to determine a substantive change to make women's participation fundamental. A credit scheme was started up nationally by the government in Uganda; the payback rate for women was higher and very impressive. In the private sector, the need for relaxation on collateral and security does apply much as they are recognized in some of the micro finance credit schemes. Some women do not like affirmative action or being given jobs based on a quota basis, because they feel this undermines their individual merit. So we have to be cognizant of the differences even within the same gender.

Ms. Nyirinkindi was further asked whether it is true that there is an unwritten rule in the business sector, which limits women in the profession as an affirmation of women. But there is also a critique that women who are at the top, be it on merit, do not represent other women or work with them. Once at the top as CEOs or managers for instance, they do what any other CEO or manager would do regardless of gender. What should be done to avert this situation to ensure that women who actually make it to the top go there and represent the interests of other women? Ms. Nyirinkindi reminded the public that we tend to think all women are gender sensitive and all men are gender insensitive. This is not the case. Depending on personal dispositions and exposures and experience, people may not speak out for other women. It has to be a calculated move to make women aware of the issues and to help them speak out for other women.

An additional matter raised by the audience was the fact that, although we have managed to get all these gender inequalities have been dealt with in Uganda as far as the constitution is concerned, there is one aspect left out - the land aspect. Women do not have equal rights to land. Why is that the case? Ms. Nyirinkindi explained that in Uganda, as is the case in many other African countries, firstly women do not inherit land according to culture. This is a harmful cultural negative practice that has evolved. Thus, women do not own land. The majority of women do not have the means most of the time to purchase land in their own right even when they gain full agency as working persons or in whatever respect. In Uganda the women's movement tried to lobby when developing a law on land, to grant women at least to those who have certain status such as marital status, joint ownership with husbands over family property - including land. This was viciously fought in parliament, but one small angle was retained, which stated that the matrimonial residence where the spouses live together cannot be sold without the husband seeking consent from the wife. Still, most banks and financial institutions and private institutions pass this provision and still end up buying matrimonial property behind the woman's back. This issue is compounded when women are in a polygamous relationship and the matrimonial residence becomes quite a key issue.

One view from the public depicted the problem in terms of lack of political will to implement the law on the African continent. It is not necessarily the lack of the law; it is also a question of lack of democracy. In countries where there is respect for the rule of law, companies seem to be held accountable. Ms. Bonita Meyersfeld considered in this regard that implementation is possibly one of the biggest question marks facing international and national law. We can for instance look at violence against women and the legislation around the prevention of violence against women. In South Africa, a framework exists – it is one of the leading frameworks worldwide and yet simultaneously South Africa has the highest rate of violence against women, more so than a war zone. What is going wrong can be observed in the details of the following account. A person who is raped goes to a police station and is told that there was something they did to invite that activity or that they are somehow responsible for it. There are no measures against that police person, so the perpetrator is never arrested. This is only one instance that proves the failure to implement laws. Sexual harassment in the workplace is another key example. London is as bad as any other state in Africa in terms of inequality. If one works in a law firm in London and experiences sexual harassment in the workplace, one can by all means engage the law and the structures to protect them, yet there are slim chances for that person to ever work in London again. That is the choice that women are left with.

With regard to gender, another attendee asked what women can do in order to make businesses respect human rights and in particular women's rights. Ms. Meyersfeld explained that gender refers to the designation of roles based on one's sex. As a woman, one is predetermined to have certain characteristics. For instance, women are supposed to be nurturing and men strong and good at science. These are stereotypes with which we are all familiar. They impact on our legacy and contribute to continued differentiation. Such differentiation constitutes discrimination. The political will has a role to play, but it is also a question of demanding rights. What is being attempted in civil society in South Africa is to remind people that they can demand their rights.

Further, someone else from the audience commented that there are areas of business practice where it has been stated that women are preferred as opposed to men. For instance financial institutions would rather give women credit than men. This is because women are more able to pay back and more honest than men. Those are business women in small to medium business enterprises. When we do analysis of this nature, we need to point out certain traits that people need to know about, so that it is not always the highlighted negatives that outweigh the positive. It is our responsibility to demonstrate that. That helps to encourage other women to say it is better to do business with women or organizations where women play a business role, so you are able to achieve what you want to achieve. Ms. Meyersfeld pointed out that domestic violence in the United States that is unaddressed costs the nation 4.6 billion US dollars a year. We can only imagine how much money we would make from women who aren't battered or beaten down. There is indeed a very powerful economic argument, although there should be legality regarding it as well.

One conference attendee observed that the discussion has been about how corporates treat women. But earlier on there was a discussion on the need for active citizens. There was a suggestion that there should be education for politicians, education for just about every category of people. However, there is a sense that we are leaving out government, which is going off quite scot-free. In South Africa, the lower end of the chain and the role that women play becomes apparent in the farming communities. It is not because there are no laws or because the government is not a party to the relevant international instruments. It is the government that promotes those businesses and that sees this contributing to the economic growth. But what does the government do when those women, some of whom are not on the population register, do not enjoy civil and political rights, and in addition do not have economic, social and cultural rights in farming communities? These are the women who from time to time, depending on the owner, are deprived of access to water, to sanitation or not allowed to bury their people when they die. There was an issue raised about how the governments are complicit in the violations that are taking place. What should be done, how do we engage with the gender issues within the Ruggie Framework?

In regard to the matter earlier discussed, Ms. Meyersfeld deemed that there is to her mind a real responsibility for government intervention. Clearly, the government is getting it wrong. For instance, Anglo Platinum did what was required when it consulted with the community and consulted with government, but the government let people down. In terms of the Ruggie Framework, this is divided into three parts. The component around the state duty to protect, he due diligence is being called for. But actually due diligence is a principle of international law to enforce positive obligations. So we can expect compliance with these standards. As to the state responsibility to respect, which is a highly problematic component of the framework, Ruggie does engage the three part framework of the due diligence standard. He says that first of all, one needs to look at the country in which operations are being carried to see if there are potential human rights violations. Secondly, one must look at their own industry and see what this industry is going to do to human rights violations. Finally, one has to look at what kind of relationship issues will arise in that country. Those relationships need to be examined. The combinations of the above will provide an effective response.

An additional aspect brought up during floor discussions focused on the social constructions that have become entrenched in society and continue to perpetuate such discriminatory practices against women.

This seems to be the root of the problem and needs to be addressed. It is so entrenched that it actually becomes something viewed as inherited and advantageous for society to perpetuate. Gender has become acknowledged as a group that is homogenous, not with the intention to get into sectional issues or sectional characteristics. For example, not all women are from the same race, religion or ethnicity. Still, when we look at gender it is comprised of other vulnerable aspects. When this is compounded, it makes the issues even more difficult to address. How do then get to the root of the problem? Ms. Meyersfeld spelled out that addressing gender in equality is not about preferring one over another. Quotas are important because they help us put our own prejudices aside and ensure that we invite all players based on their capabilities in practice to the appointment platform, and from there we have a selection of people. Because of stereotypes, women often do not end up in these types of positions. And without unearthing those characteristics, policies, realities that perpetuate the status quo, we cannot solve it with a simple one-step solution.

Someone in the public expressed concern about the disparity between the substance and actual practices, vis-à-vis the implementation of all the laws in place. In particular, with a view to the SADC Protocol on Women and Development, which seems to be stuck. Do we need more laws or a different approach there? Dr. Pinkie Megkwe clarified that in fact this is one of the areas where we have seen gender groups and civil society come together and they have moved the whole process from declaration to Protocol. It is one area to look for best practices or for ways in which we want to move for inclusion. But generally speaking, the reason why we are probably stuck is because there are two countries out of all the Southern African countries that are not involved. The point though is that civil society and their alliance have actually done so much. They have ensured that there are follow-ups, they keep the lobbying from signing to ratification, even to getting ministers that are responsible for gender to come together and work out actionable programs. This persistence is one of the issues that we should be driving. Persistence in general is something that gender groups, whether it be issues of human rights or whatever kind of marginalization, have been very good in leading in this manner. These are some of the things we could look at and see whether there might be cause for application somewhere, especially when it comes to inclusivity and comprehensivity. This is because gender is not just about the women; it started out as being just about women, but it has evolved over time. Sometimes when we enter a new arena, we focus primarily on women because chances are that most of the problems exist with them. Even now as we speak about business and human rights, we tend to focus so much more on women, which is not to say that men are not at a disadvantage.

A final comment from the public looked at the UNDP initiative in Latin America regarding gender equality in the workplace. There is a gender seal certification system, which is implemented by governments in the region and these governments provide seals of certification for companies in their countries that meet certain criteria for gender equality in the workplace. It has been quite successful in several countries, particularly in Chile and Mexico where there is a community of practice that convenes yearly to discuss the lessons learned from this experience from each country. This is something that could be very relevant for the African region.

THEME 5: EXPLORATION OF BEST PRACTICES IN CONTEXT

Judge Florence Mumba (Supreme Court of Zambia and Former Vice President of the International Criminal Tribunal for the Former Yugoslavia), moderator of the panel, introduced the audience to the topic of human rights and business best practices, inviting perspectives from the panelist: Tom Nyanduga, Steven De Backer, Paloma Munoz, and Lene Wendland.

Advocate Tom Nyanduga

Former Member of the African Commission on Human and Peoples' Rights (ACHPR)
Member of AFLA Governing Council

Mr. Nyanduga's intervention examined the debate in its theoretical and philosophical context, which reveals the intermarriage of legal, social, economic and political issues; in this process, recommendations are to be reached in regard to the problem of extraction of natural resources in Africa.

The debate can be analyzed also from the angle that it is a process of the definition of relations between various groups of states, groups of interest, the interest between the North and the South, the interest between business and communities. In order to contextualize this framework, one can follow the debate regarding economic development issues. For instance, it is believed that 20% of the world population have accessed 80% of the world resources, whereby the vice versa is that 20% of the world's resources are what remains to be used by 80% of the world populations. That provides a context within which, if business is not to be compliant, we need to find avenues to correct the situation, bearing in mind that the motive behind business is profit maximization. Thus, for any obligation which imposes a cost on business, we have to find a way to ensure that such an obligation is implemented by business.

Further brought into discussion was the patrimony of states over natural resources. Since the adoption of the 1962 Resolution on Permanent Sovereignty over Natural Resources, there is a dichotomy of, on the one hand that the resources belong to the state and the people. Nevertheless, during the process of negotiation of contracts, this reality becomes more of an illusion. So one has to look at how to correct that kind of legal paradox, in order to ensure the intended effect is that benefits accrue to the people and the state.

To illustrate this point, the speaker presented three case studies. The first aspect to examine is how African states have transformed the economies, particularly after the adoption of multi-partyism, free market economies, following the liberalization of the 1980s. For instance, in a publication entitled „Boom and Dislocation" referring to the extraction of mineral resources in Ghana from a district called Tarkwa, it is concluded that mining has generated profound social conflicts, some resulting in violent confrontation,

arising mainly from land use conflicts and fair compensation schemes for misplaced communities, distribution of mining rent, and conflicts between small and large-scale miners among others. The report affirms there is a growing consciousness among the population about the impact of mining in the areas, and social movements are likely to be organized against mining in the area if steps are not taken to address the concern of the communities. The disconnect between benefits arising out of exploitation of natural resources vis-à-vis the benefits that accrue to the states and communities brings other cases to mind. For instance, the case of Bolivia - where upon the entry into power of the first indigenous president, the entire regime had to be redone in the sense that immediately you see a government trying to address previous iniquities, previous inequalities in distribution of benefits arising from natural resources. Another case study is Argentina where, even despite a long stable political and economic regime, foreign companies have not contributed significantly to the development of this country.

Also, the background to the reforms in the mid 1980s needs to be looked upon. Most of these legal reforms, policy reforms happened at around the same time and most of them refer to how most benefits were given. For instance, Papua New Guinea - a state in South-East Asia endowed with lots of natural resources, but at the state of development inferior to other South-East Asian countries which are not equally endowed - the lingering question is whether the model applied is the best one to ensure that the benefits are transferred to the state and its people. Mr. Nyanduga emphasized that when we talk of benefits, we are talking of benefits addressing basic needs, fundamental rights. This is because due to lack of resources, some of these rights are not enjoyed to the maximum, so this is the link that we have to bear in mind.

In respect to the Ogoni issue, a case repeatedly raised during the conference, the speaker considered it a landmark point in the suffering of communities living in areas endowed with resources. Looking at the decision taken up by the African Commission on Human and Peoples' Rights, also mindful of the fact that the African Commission is not an effective mechanism for ensuring that the victims of human rights violations enjoy rights, Mr. Nyanduga embraced a slightly different view. The weakness arises from either lack of political will or pure negligence on the part of states, their failing to implement even the minimum of what the African Commission has been able to come up with in addressing these concerns. The above mentioned case carries a question of massive violation of human rights, degradation of the environment, which can be paralleled to a similar situation that happened in the Deepwater crisis in Mexico regarding the oil spill. These cases can be inspected to determine problems and look for best practices.

Turning back to the Ogoni problem, one notices the complaint addressed issues with the oil consortium. The case was brought against the Nigerian government, Natural Nigerian Petroleum Corporation and Shell Petroleum Development Company. The case was against the oil consortium exploiting resources without regard to health, environmental concerns of the communities, disposal of toxic waste in violation of applicable international standards. The government in complicity with the oil consortium used its power to facilitate exploitation by the oil company and it failed to put in place mechanisms to monitor compliance with safety, health and environmental standards. The decision has been acclaimed as one of the leading decisions of the African Commission, yet it has witnessed poor implementation. The Commission addressed its recommendation to the Nigerian government to ensure the protection of

the environment, health and the livelihood of the Ogoni people. It required the Nigerian government to conduct investigations into human rights violations, which were described in the prosecuting of the spirit forces and the national oil companies and other institutions responsible for violation of human rights. The Commission also called on the government to ensure adequate compensation of the victims. The violations occurred during the military declaration in Nigeria, but by the time the decision came Nigeria had transitioned into a multiparty democracy. The African Commission thus had to sympathize with imposing this obligation on a government that was not responsible for the violations. Despite the goodwill of the successive civilian government, the major recommendations have not been implemented. In fact, Nigerian organizations have taken the matter to the Supreme Court with the intention of eventually taking the matter to the African Court to seek compliance with the recommendations. Despite these efforts, the Niger Delta is being polluted even today. Shell has not come up with any program to clean the delta, compensate the victims of the previous and current oil pollution, and this has led to the emergence of another movement for the emancipation of the Niger Delta people. In other words, the issue of the role of government to ensure that multinationals comply with obligations is lacking. Here we also have to take into account that Nigeria is not one of those any other African states, it is one of the leading African states. This raises the question: what is it that stops Nigeria from ensuring that Shell complies not only with the African Commission recommendations, but also with internationally accepted standards for health, safety and environment?

The Deepwater Horizon case concerns the oil spill which resulted after the British Petroleum (BP) oil drilling rig exploded on 20 April 2010. The operation involved two American companies, Transocean and Halliburton, the two main contractors for the oil-drilling rig. Eleven people died because of the explosion and there was a major oil spill that lasted until the 15th of July 2010, spilling millions of barrels of oil into the Gulf of Mexico. This led to disasters, which included extensive damage to the marine habitats, to the gulf tourism and fishing industry, as well as environmental effect due to the wetlands used by wildlife in the area. Immediately enquiries were initiated both by BP and by the American government. Of its own volition, BP set up a fund of almost 20 Billion US Dollars to compensate the victims and by July 2011, there were several suits brought by individuals who had been affected by the oil spill. Moreover, at that time BP had already settled 407 billion US dollars to 198 victims. However, the United States government stated through the Attorney-General that they were conducting investigations and they would prosecute any person who was responsible. BP, through their shareholders made sure that the chief executive at the time had to leave. It was not his responsibility but he assumed it, because he was responsible as the head of the company. Up to now, despite the amount that has already been paid, the company has set aside a budget of 37.2 billion US dollars, because there are other claims that were raised.

Looking comparatively at the two cases, the question reiterated by the speaker was whether it is the weakness of the African governments to address such blatant violations which indeed is the case, or it is the impunity of the companies. When one looks at Shell's behavior in Nigeria and at the prompt action taken by BP in the United States, we see two different approaches. Therefore, we might examine what the effect of these voluntary courts are - whether they are based on the philanthropy of businesses rather than on the urgent social and economic needs in order to address human rights violations.

On the issue of African mechanisms and instruments, the speaker reminded that the African Commission is engaged in the Working Group on extraction of natural resources. This is aimed at understanding the various issues of concern, because the African Charter on Human and Peoples' Rights requires for people to lay down principles which will be forwarded to the African Union and the African governments to enable them adopt legislation for addressing these problems. One other homegrown initiative is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Article 3 of the convention states that it is the general obligation of state parties to ensure respect and accountability of non-state actors involved in displacement. These non-state actors include multinational companies and other companies which might be involved in displacement. In addition, it requires states to ensure that they provide effective remedies and effective legal framework to provide for just and fair compensation and other forms of reparation to persons who are displaced because of either public or private operations. The above convention was adopted in October 2009, but only 31 member States of the African Union have signed it. Thus, the threshold for ratification or entering into force is 15 more member states and we are not sure how long that will take. Mr. Nyanduga specified that during the negotiation process, when discussing about ensuring accountability of multinational companies and compensation issues, many of the delegates were saying: "If we have adequate mechanisms at home, why should we put this in a regional instrument?" However, there are doubts that domestic legislation in various countries provides for that effective mechanism. So here the convention encourages member states to ensure that there are mechanisms which secure compliance with obligations arising out of displacement due to development projects.

The next aspect approached was the possibility of extended jurisdiction of the African Court to include international criminal jurisdiction. The speaker expressed his hope that during the forthcoming African Court summit, a draft protocol will be put to the Assembly. Nevertheless, the background to this extension of the African Court was Africa's not letting the International Criminal Court (ICC) assume its jurisdiction, particularly when the ICC through the Security Council indicted Al Bashir. Although the African Union (AU) was supposed to have concluded a protocol for cooperation with the ICC, this failed in Kampala and the AU decided that they would not cooperate with the ICC. Therefore, there was a decision to extend international criminal jurisdiction to the ICC. In the process, the drafters have come up with a novel inclusion of various other international crimes into the international criminal jurisdiction for the African Court, and this includes Item 13 of the court jurisdiction of illicit exploitation of natural resources. In the draft statute, there has been an amendment to the statute of the African Court of Human and Peoples' Rights, and it lists elements of what will constitute the crime of illicit exploitation of natural resources, which is associated to acts of a serious nature affecting the stability of a state, region or the stability of the Union. Here the question arises whether a situation is considered when a community is affected, but that does not affect the stability of the Union. On another note, a merger protocol adopted by the African Union in 2008 brought together two institutions: the African Court of Justice with the African Court of Human and Peoples' Rights. The protocol set to establish the African Court of Justice and Human Rights is yet to be ratified. In other words, despite these mechanisms, we can still wonder how Africa is prepared to put them into effect so that they ensure avenues to address these concerns.

Advocate Nyanduga further examined the decision in the Femi Falana v. the African Union case, which came out in favor of the African Union, but which in the opinion of many human rights advocates it does not progress enjoyment of human rights on the continent. It was alleged in this case that the African Union, at the level of the secretariat, should assume obligations on behalf of states that have failed to ratify the Protocol establishing the African Court and the deposit declarations accepting the competence of the court to allow direct access by individuals and NGOs. There is article 44, paragraph 6 which makes the deposit on declarations conditional on accepting the procedure. The mere ratification of the Protocol, which enabled the court to enter into force, in the absence of a declaration, does not enable an individual in a state that has ratified to access the court. In a majority decision of seven against three, the judges said that the court has to be accessed by state parties that have ratified. In other words, the court's hands are tied, it cannot grant access to individuals and NGOs from states which have not ratified or if they have ratified, have not done the declaration. A dissenting opinion says that the article is inimical to the African Charter, because if the African Charter gives the rights, the Protocol cannot take the rights from the individuals. Again, the court believes that since it is there to implement the Protocol as it is, its hands are tied and until the states either amend the Protocol or ratify the declaration, then the court is bound to interpret the Protocol as it is. In effect therefore, if the African mechanisms which are in place are not effective either for legal or political reasons, we will still find that businesses will continue to violate rights with impunity.

The discussion ultimately turned to judicial activism, aspect which had been beforehand mentioned. At one level, it means that cases have to be commenced at the national level. Nevertheless, observed Mr. Nyanduga, if lawyers are not in a position to commence these cases, we cannot expect the judges to take upon themselves jurisdiction unless the lawyers invoke civil society organizations to bring these cases to the court. The problem that needs to be addressed is that besides the courts which are in place, mechanisms need to be put in such a way that individuals can access and use them effectively. Otherwise, abuses are likely to continue until we have a mechanism that is able to address these concepts.

Steven De Backer

Partner, Head of Africa Practice Group, Webber Wentzel

The presentation focused on the mining sector in terms of human, social and environmental rights, and was preceded by an introduction about the high-level legal, regulatory and all the other developments that have occurred since the beginning of this millennium in relation to the way in which international companies do business. In the speaker's opinion, there has been a marked change in the regulatory context that attempts to shape the social and economic performance of international business enterprises.

The context was compared by Mr. De Backer to a lasso, 360 degrees of which the rope is actually lengthening and which is slowly encompassing the neck of most business enterprises. On the one point of the lasso is the expanding body of international law, which fixes not only on states, but also on corporations. Recent examples include the UN Convention against Corruption of 2003 and the UN Declaration of the Rights of Indigenous People of 2007. On the other side of the lasso emerges hard law adopted at national level, which aims to enhance transparency or tries to fix the way corporations from certain home countries, such as the USA or UK for instance, do business elsewhere in the world. Examples include provisions inserted in many companies to improve corporate governance and ethics during business. There is an Alien Tort Claims Act in the USA or the Dodd-Frank Act of 2010. The latter Act asks companies to disclose annually whether their products are DRC conflict-free and secondly, whether due diligence measures were taken by the companies to track such minerals in the supply chain. It also requires extractive companies to disclose the payments they make to foreign governments. Other examples of local legislation where there is a foreign element to it is the UK Bribery Act, the draft European Union regulations that will impose traceability obligations on European traders of wood so as to tackle illegal logging. Therefore, we have hard law of international organizations and we have hard law of countries imposing such obligations on their companies when they invest outside.

On the other point of the lasso, we also find the proliferation of soft laws, which are merely standards aimed at creating more responsible business and do not impose penalties in a conventional sense. Soft law comes from international institutions such as the United Nations and the Ruggie Framework, the UN Global Compact, European Union principles and policies for investment, policies for corporate governance or against corruption from the International Labour Organization. They can, however, also be industry-driven. For instance, in the mining industry we have Mining Minerals and Sustainable Development initiatives, Extractive Industry Transparency Initiative, and so on.

Finally, something we often tend to forget, specified Mr. De Backer, but which is also on this lasso impacting on corporate behavior is contracting between private companies. Indeed, financial institutions adhere more and more to the Equator Principles. When financial institutions enter into loan agreements with the borrower, they will actually make sure that these Equator Principles are in those loan agreements. Therefore, this lasso obviously encompasses the large companies, because of their link with USA or UK and the more stringent legislation in their home countries. The lasso will also encompass smaller mining companies, because they will be looking for finance and they will certainly be confronted with CSR requirements through these contracts for instance. This lasso is certainly and slowly tightening around the corporates, added the speaker. It could go much faster, but it however looks like it is a sort of strategy that could bear fruit in the future.

The following aspect discussed was whether this lasso has had an impact on the mining sector, which has particularly been linked to environmental and social harm, especially for poor communities in developing countries. A good basis to look at is a recent report by the Institute for Environment and Development, which viewed the progress made by the mining sector over the past 10 years especially against the Mining Minerals and Sustainable Development (MMSD) report. Over two years, hundreds of people were engaged to build a picture of where the mining sector was and how they performed in relation to growth ranging, sustainability, sustainable development issues, and the way forward. In 2002 it was

changing again, because it set certain standards and best practices for the mining sector. The recent review report mainly reveals that there have been both major improvement areas, as there have been areas of stagnation. The big success, according to the report, has been the fact that most large mining companies now seem to have come to a true understanding of what sustainable development means. They have just come to an understanding, stressed the speaker. Maybe it is about balancing the needs of society, environment and economics in the context of good governance. This understanding is also reflected in the website of various mining companies with regard to sustainability, CSR programs and development policies for instance. In a sense, the report affirms a positive development, because if we closely look at these policies we will see that health and safety, environment, security, community are no longer seen as single sides of disciplines, but more as having an effect on each other.

Looking at the mining sector and based on the report, Mr. De Backer considered the most positive conclusion is that it looks like rules have been created and set, but now we need to look at what they do in practice. From a practical perspective, we see huge amounts these days spent by mining companies in communities. For instance, the investment of mining companies in South Africa in CSR amounts to 1.5 billion Rand. Anglo-American recently announced that it would launch a 3.5 billion community trust scheme. The scheme is quite new and will benefit communities around four of its operations, but also in communities from key labor southern areas, such as Lesotho, Swaziland and Mozambique. This scheme is for a 30 year partnership.

Rules and standards have been set and there is more community development by mining companies. Still, the current problem is that we are not there yet. If we look at the practice, the impact of those community development schemes is quite slow compared to the amounts that are involved. Therefore, there are certain areas of concern. For instance, what we have seen in practice over the past 10 years is that with the mining powerhouses, some of these standards were expelled too often as part of an operational risk management perspective, while companies seemed to have increasingly embraced community issues. This has significantly lagged behind the efforts to improve environmental performance with technical solutions. The second area of concern is that, despite good intentions, mining companies still struggle to get it right based on the complexity of situations on the ground. In that respect, the mining companies actually have the same problem of translating global policy into local action as multi-stakeholder initiatives have. The multi-stakeholder initiatives have all emerged to guide the mining sector in a certain direction; nevertheless, it is still difficult to put them into practice on the ground. There are other problems coming out of the report, such as the fact that smaller companies do not fully appreciate the importance of sustainable mining. These problems sometimes persist despite good intentions in the industry. The report does not only blame the private sector, but government as well. The report states that there has not been enough progress by governments in ensuring that mining contributes to sustainable development.

Wrapping up these arguments, Steven De Backer remarked that, in spite of the problem areas still existing, the past 10 years have certainly not been lost, as they have been about setting standards and identifying best practices that explain to stakeholders what sustainable development means. The next ten years will have to be about practical implementation. It looks like we will see a move from simply reducing environmental impacts to more proactive sharing of the benefits of mining to promote social

and economic development. To the speaker's mind, there will be a move from doing no harm to that positive impact, moving away from pure corporate philanthropy or strict compliance position, to a belief that creating and sharing responsibility across a complex set of social, economic and environmental issues is the only way to be sustainable and competitive in the end. The most important reason for this change is that mining companies are now dealing with communities that are much more connected, more aware of their rights and have more expectations for mineral investments. The number of social movements has dramatically increased not only worldwide, but also in Africa.

Having the blessing of the government of a certain regime for a mining project is not enough anymore. It is now about building a project from bottom up instead of from top down. Mining companies realize that with the demand for more benefits, communities might actually help them in getting more sustainable, getting a better grasp of the future. This is because if you build up a project from bottom up, then you have the support of the communities and then it is much easier to negotiate your way out in case of certain developments. We have seen change of regimes in recent years almost leading to cancellation of certain mining concessions. We have seen in Tanzania, for instance, with the uranium project whereby the community was not taken into account. These projects are now being stopped.

In conclusion, change is happening - asserted Mr. De Backer. The lasso described was useful and has been set around the neck of those corporates. However, it is not that lasso that will create a change in terms of human rights and the mining sector. What has been triggered is a shift of mindset. We are entering into a new economic climate, one in which only sustainable business will be able to be competitive and survive in Africa. The change of mindset is a new step in the world order, a step which hopefully will be realized and which will effectively benefit the African continent.

Paloma Munoz

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Ms. Munoz started by offering a glimpse of the larger picture: within the context of international development and assistance, there is growing attention on how business operations can affect human rights of employees, individuals, entire communities, and countries. Business operations, if run consistently with human rights principles, can be a major and indeed a necessary contributor to human rights and sustainable development. Nevertheless, when undertaken without regard to human rights, they can be a destructive force undermining human dignity, freedoms, development. International markets are becoming ever more focused on developing and on emerging economies; this includes competition for emerging consumer segments, low cost production environments, and access to scarce natural resources. Mismanagement of environmental resources, social injustice and corruption give rise to human rights abuses and may jeopardize long-term stability and prosperity in these countries.

Therefore, it is increasingly important that all actors, including state, civil society and corporate sector actors be guided by respect for human rights and labor standards. Furthermore, in 2011 the United Nations Human Rights Council adopted the UN Guiding Principles (Ruggie Framework). These Guiding Principles have been incorporated into the International Finance Corporation Social and Environmental Performance Standards, OECD Guidelines for Multinational Enterprises, as well as in the 2011 EU Communication on Corporate Social Responsibility.

The framework that underlies the Guiding Principles is the state duty to protect and corporate responsibility to respect human rights, as well as the right to access to remedy for victims of corporate human rights abuses. This involves a number of duties and responsibilities for states and for corporate actors. States must ensure that adequate legal frameworks are implemented and enforced across relevant policy and legal domains. Companies must ensure that they exercise human rights due diligence to identify, prevent and mitigate potential human rights impacts. In this process, special attention should be given to vulnerable groups that may be at greater risk of vulnerability or marginalization. The UN Guiding Principles also emphasize the dynamic nature of human rights situations resulting in the need for periodic human rights impact assessment by business.

Ms. Munoz further introduced the Human Rights and Business Country Portal, which provides actors with the baseline information required in order to fulfill these duties and responsibilities. In a nutshell, the Portal is the first free resource for companies to identify, assess and address human rights risks in their operations and supply chains around the world. The portal is aimed at businesses, civil society, governments, multilateral institutions and all other international and local actors, enabling these actors to ensure that private sector investment fosters sustainable development in line with human rights standards. Through legal analysis, statistical indicators, sector briefings, poverty reduction strategy alignment, and company best practice case studies, the portal enables all stakeholders to understand the impact and responsibilities of the private sector, given the local human rights context.

The key objectives of the Portal include: providing a free, comprehensive and easily accessible resource for businesses to identify potential adverse human rights impacts of their operations and those of partners, suppliers etc; helping businesses identify due diligence steps for addressing potential adverse human rights impacts, as well as opportunities for maximizing positive ones; creating a facts base enabling state actors to address gaps in protection of human rights in the private sector; providing a tool for civil society and NHRIs to engage businesses and state actors on human rights and business; creating a resource for development actors, finance institutions, investors, and other intermediaries wishing to engage with human rights and business; and ultimately, establishing a facts-based dialogue between state, business and civil society in Portal countries, helping actors to jointly identify and address human rights and business issues through joint initiatives.

The primary target of the Country Portal approach is companies. The portal presents potential business impacts on the human rights and labor standards enshrined in the International Bill of Rights and in ILO core conventions. It pinpoints their relevance to company operations and suggests prevention and mitigation efforts. This is performed through the framework within the Portal, where companies are led through three stages encapsulated in the “Identify, Address, Assess” framework. The framework describes human rights risks, pinpoints the relevance to the company and suggests prevention and

mitigation efforts. Essentially, the Portal seeks to answer three questions. Firstly, in terms of country risk: what are the major human rights risks where companies do business or have suppliers? Secondly, in terms of company risk: what is the relevance of these risks to a company's operations and supply chain? Thirdly, in terms of due diligence: how can I manage risks, prevent violations and avoid complicity?

An illustration of this would be Kenya, which is one of the Portal countries. In terms of country risk, the issue of property and women is of concern. Women's right to property is recognized in the Kenyan Constitution. Customary law requires women to obtain permission from a male guardian before acquiring land, therefore companies face risks in terms of both violation and resulting from complicity. In terms of direct violation, societal structures in rural areas may exclude women from compensation for appropriated land. In terms of complicity risk, the company may purchase land that has been cleared of its previous inhabitants by government or other third parties. Given these risks, due diligence recommendations were made for companies operating in Kenya, which would include company policies and company procedures. In terms of company policies, companies should recognize women's rights to property under national and international law. In terms of company procedures, companies should investigate customary ownership of land and establish grievance procedures or mechanisms.

All the information is included in country briefings, which are structured according to the following sections: human rights profile, portal issues, engagement opportunities, sector profiles, and sub-national profiles. The human rights profile that discusses the political, social and economic background of the country provides Millennium Development Goal (MDG) data and basic statistical background of the country. Portal issues comprise labor issues such as: vulnerable groups in the workplace, child labor, forced labor, occupational health and safety, trade unions, working conditions. Also, they comprise analysis of community impact, such as vulnerable groups in the community, environment, land and property, revenue transparency and management, security and conflict. For each issue specific requirements or recommendations for due diligence are offered; that include human rights standards that the company should adopt, company policy, company procedures, grievance mechanisms among other things. Engagement opportunities focus on the proactive initiatives that companies can take, the positive impacts that they can have to development. The Portal pinpoints to existing government initiatives and also to other company initiatives in the local context. Furthermore, there are development priorities laid for instance by the UNDP or ILO; in this case, companies are advised how they can help to address or support that priority that was made by an international organization. Moving further, the sector profiles focus on the major sectors of the economy, on issues like GDP and employment for instance. Finally, sub-national profiles are regions whose social, economic, political, demographic characteristics give rise to additional human rights issues for businesses, besides the ones identified for the country as a whole. Furthermore, there is an international legal table to highlight exactly what international conventions a country has adopted.

The Portal involved a pilot phase, which has been undertaken over the past two years and has included stakeholder consultations and private testing in several countries. The following steps to be undertaken feature: launching the Country Portal website; expanding the Portal to cover 40 countries; country engagement processes in 10 Portal countries; establishing partnerships with local actors in all Portal countries; developing, testing and implementing a platform for local partners to participate in the

drafting of country briefings and assume longer-term ownership of briefings; and develop processes for efficient dissemination, uptake and application of country briefings in Portal countries, led by local partner organizations. The next step occurs in four stages, which include research, outreach, conducting full engagement, and updating session.

In terms of country engagement process, the components include a series of aspects. First, identifying and capacitating local partner organization. Second, consultations with business, state and civil society actors in the target countries in order to: validate country briefing contents, identify initiatives for addressing human rights and business issues, and support and facilitate dialogue among actors in the implementation of identified initiatives. Third, assessment of political risks associated with publishing of briefings. Beyond the engagement, outreach is also envisaged, to stimulate uptake beyond the period of portal involvement.

The role of local partners is key for the Country Portal and includes work with a team of experts from the Danish Institute for Human Rights (DIHR) to co-draft country briefings. This includes conducting field research for the briefing, facilitating in-country consultations with relevant stakeholders, promoting the briefings to ensure uptake and application, updating country briefings, and where relevant translating briefings into local languages. In terms of who can be a Country Portal partner, the following are considered: National Human Rights Institutions (NHRIs), civil society organizations, UN Global Compact local networks, other eligible human rights and CSR related actors. Also, partners may be identified at a regional level.

Collaboration with the United Nations Working Group on Human Rights and Transnational Corporations (UNWG) is expected once the Portal has been launched and engagement in countries becomes effective. This is because the Portal serves a complementary role to the UNWG. The Portal will actively seek to capture synergies in the following areas: due diligence best practices when engaging at the local level with stakeholders; engaging small and medium enterprises and supply chains through stakeholder consultations; mapping of key challenges such as groups that are exposed to double discrimination, like indigenous women for instance.

Ms. Munoz concluded that the next steps for the Portal, as well as from a personal perspective, include seeking engagement with states from the global North. Countries such as Canada, Australia and the United States of America should have briefings, because these countries have serious issues that do not get talked about or addressed.

Lene Wendland

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Ms. Wendland enlarged on the unanimous endorsement of the UN Guiding Principles and the working group established as a result thereof. In her opinion, it is important to keep in mind that as historic as the unanimous endorsement was, that is just the end of the beginning and the real work is ahead of us. When considering implementation, this is where the real work is going to be taking place. Having a document with a global standard is one thing. It has to come to life. It comes to life with the help of communities, individual companies and government departments. It is what we would call global governance in its broader sense to include international, regional, national and local levels. One of the strategies used diligently before and during the endorsement of the Guiding Principles was to make sure that the Guiding Principles are soft law, but to try to get the key concepts and approaches embedded in as many global governance frameworks as possible. This is because each element of the global governance frameworks regulates the behavior of companies, governments and communities. There is no single treaty. It has to come alive across a whole range of institutions and actors and instruments. Therefore, that has been the focused strategy to try to push for, with the help of various institutions. As we move forward and as we continue to have this discussion in Africa, it is important to keep in mind that it all builds on convergence of standards that have been achieved elsewhere.

One challenge that has persisted is that everyone has had his or her own approach and views on what was right or wrong. There was no real shared platform for action. But, in the speaker's perspective, we are getting there now: the convergence of approach in instruments, organization, body, community of actors attests an alignment with the core concepts. It does not mean a full-fledged incorporation, but the approach shows that the key concepts are similar. It provides fewer loopholes for those that want to escape the loopholes. It therefore strengthens accountability and strengthens the communal efforts that are being made by communities, companies, governments, stakeholders and those seeking accountability. It is the most productive approach to build on the achievements that were made regarding the Guiding Principles.

Accountability comes in different shapes, Ms. Wendland added. Legal accountability in the courts of law is one very important way to seek accountability. Accountability can also occur when human rights due diligence requirements are incorporated in contracts. It can also come about through the OECD National Contact Points. To the extent that the same approach and concept are embedded across these various types of accountability and through the use of some positive incentives, a systemic change may come about, one that is difficult to achieve on a legal basis only. If we talk about effective accountability, a legal remedy is not an effective remedy or it is an effective remedy in the rarest of cases. If we are talking about business and human rights, which ranges from the relatively mundane through to relatively large-scale abuses, we do need to ensure that mechanisms are appropriate to address different scales of human rights issues. In terms of best practice, it is still early and every principle raises a number of complex issues involving various actors. Indeed, the General Principles are like the tip of an iceberg. Therefore, to talk about best practice regarding the Guiding Principles requires its own separate enquiry

and process. The Guiding Principles are not an end in themselves, they are an opening. They have identified a range of policy issues, such as the need for coherence within government. These are not easy issues; they need to be achieved over a period of careful enquiry. There is a need for an effective regulatory system for governments to check that the laws are in place and to ensure that the companies respect human rights. That is across every policy issue that is relevant for business. It is a big task, since the Guiding Principles cover complex issues and lend themselves to different approaches.

In terms of the uptake of the Guiding Principles so far, the Organization for Economic Cooperation and Development, one month before the Human Rights Council endorsed the Guiding Principles, updated its Guidelines for Multinational Enterprises. These guidelines, which are voluntary for business but mandatory on OECD member states, are now identical to the Guiding Principles. In fact, it has extended this approach of due diligence across other issues covered by the OECD Guidelines, such as taxation and labor law. In that sense, there has been further embedding even outside the human rights realm.

Regarding the United Nations Global Compact, there was a joint statement about how the Guiding Principles constitute one of the elements of the human rights commitments that companies undertake, which has a respect and support dimension. There is now joint agreement that the respect part is an embodiment of the UN Guiding Principles. Within the International Financial Corporation (IFC), there is a requirement for companies to undertake human rights due diligence process. The Council of Europe has commitment at the ministerial level to endorse the Guiding Principles and to undertake that the Council will do whatever relevant to ensure activities are aligned with the Guiding Principles. The European Union has aligned its definition of CSR to be one that is aligned with the corporate responsibility to respect human rights due diligence and has asked EU governments to develop national action points on how they intend to go about their human rights. This is another way of embedding the Guiding Principles.

NGOs have used and continue to use the Guiding Principles in their advocacy activities. Throughout different initiatives, businesses will be made aware of the Guiding Principles. There are efforts underway through various outreach, labor and law initiatives to try and experiment with due diligence, to come up with the challenges, best practices and lessons learned for instance. For example, the American Bar Association passed a resolution endorsing the Guiding Principles and encouraging their members to incorporate, where appropriate, the Guiding Principles in their advice to clients.

There is a lot of movement happening, although a lot more is needed. Ms. Wendland ended up by urging to keep up the momentum that has been created and the convergence of standards she trusts it will lead to, which in some case has already resulted in enhanced performance. Those people who are adversely affected by business have an interest in business accountability becoming operational, practical on the ground and if this is implemented in business operations through community engagement, community activism and effective governance by governments, victims are better off.

FLOOR DISCUSSION

Debates commenced with one attendee's curiosity about the kind of leardership needed when looking at what could come out from the Working Group on Extractive Industries, looking at what has been the history of the African Commission and its work. Mr. Nyanduga, based on his experience working with the African Commission, explained that the leadership of the working group generally is composed of one or two members of the Commission and two or three members of civil society. Among the members from civil society, there are experts from Open Society Initiative, as well as civil society organizations based in the North which assist a lot in research and information. That alone cannot be adequate to ensure that we have an effective outcome of the working group. The fundamental factor is firstly the chair of the Commission, who has to be really engaged with the issues. Secondly, the secretariat has to have the capacity and confidence to conduct a search, to put up recommendations, to be on top of the issues. Without that type of capacity, there will not be any good outcome out of the working group. Special mechanisms have been on the ground for quite some time now. Mr. Nyanduga shared his belief that with adequate resources, which is a constant problem faced by the Commission, somehow the Commission is able come up with a positive recommendation. So leadership depends on who the chair of the commission is and how dedicated one is in terms of ensuring that he or she guides the process of the working group, because eventually they are responsible for coming to the court and for putting recommendations before the African Union.

Advocate Tom Nyanduga was addressed a comment regarding the SADC tribunal. The tribunal had a case of complaints from some farmers in Zimbabwe and a decision in their favor was made. But the SADC authority dissolved the tribunal; therefore, the decision has never been enforced. Mr. Nyanduga admitted that the SADC tribunal indeed is a major problem. The SADC summit decided to dissolve the Tribunal. Complainants in the Zimbabwe case received judgment in South Africa to enforce the decision. The dilemma here is how to bring together the problem of addressing legal problems with political solutions, or how to deal with political problems through legal means. In other words, the decision adopted in the African Court, which is to attach or execute against any property belonging to Zimbabwe will end up redressing the complaint by the individual. But at the same time, to what extent is it contributing to the political climate within SADC to ensure that the court is responding? This is another issue which is going to be discussed by the African Court. In this regard we need to have strong judicial institutions at the national and regional level. But somehow there is this conflict between law and politics, and there has to be a resolution of this problem.

The following matter brought up by the public was the area of business development and industrial technology; the argument now is that for too long we have spoken of best practice and best practice was spoken of with regard to Nigeria, as well as when reference was made to the oil spill by BP. The best practice allows corporations to maximize on profits. For instance, a mining company in Australia will come to a mine in Malawi because their socio-economic policies are stringent. In Malawi that is not the case. There is some sort of a change of attitude in the industry, but the junior mining companies are still

very aggressive and want to make money. Mr. Steven De Backer responded that actually that is already being embedded in legislation. There has been a whole drive of research, taking several forms. The form of research that we all read about in newspapers is about higher taxes or state participation requirements. But in almost all the new mining codes that we have seen around the African continent, the obligation to enter into community development agreements was embedded in new mining codes. This was the case in Tanzania, Kenya and Zambia for instance. It is already embedded in legislation.

From his practice as a commercial lawyer, Mr. De Backer expressed optimism, as he witnesses mining companies going beyond the community development agreement obligations, because often under the law it is just a question of checking the boxes. Clients are now thinking beyond that and saying, "If we invest in a country, should it not benefit the whole population, should it only benefit the area where we are working?" These clients enter into negotiations with governments saying, "We do not believe in this community development agreement only for the population around the mine." They want to make it wider and that is when from an economical perspective it changes. Because they are saying that the regime can now come from the South. In the past it came from the North. What they are saying is, "We actually want to be sustainable for the whole country. This is because it is the only way that we will keep the mining rights secure for the future." So there is reason for optimism: mining companies are going beyond the legislation, because they realize that is where the future lies and that is how they can be competitive. For instance, the Anglo-American Trust in South Africa has no obligation to extend the trust to the neighboring countries such as Mozambique and Lesotho and Swaziland, but they still do it anyway. This is because they know that is where the workforce comes from and that is where the future lies.

Regarding junior miners still violating human rights, Mr. De Backer added, again he shared optimism based on his practice. The work of junior miners is to flip the tassels over time. They want to make money so they get into countries, they get an exploration right, spend money on feasibility studies and mineral deposits for instance. They don't have financial strength to mine the minerals themselves. What they do at that stage is to either sell out to a bigger mining company or get stock listed to get extra money, or they go to a bank. In the three cases, for instance the bank in DRC will do human rights due diligence and will look at how you got your right and what you did during the duration. The banks under the due diligence principles actually look at the same thing and you will not get access to finance if you have violated human rights. The same goes for big mining companies when buying a junior company. There is a reputation risk when buying a mining company which has a history of human rights violations. We see that big mining companies are scared to buy liabilities.

Then, Mr. De Backer continued, there is also the question of accountability and justiciability. What we see for example in the anti-corruption drive, where there is accountability or where the penalties are huge for instance in the USA - where Siemens was charged 1.2 Billion US Dollars. Because of this accountability and justiciability, companies are extremely cautious in terms of corruption when they invest in Africa, when they buy a junior company. This is because in terms of the Bribery Act, you become liable for the history of the company that you have bought. So that sort of accountability creates a sort of atmosphere where a mining company will not be bought if there is a bad history, because the big company can be fined for billions of dollars. The anti-corruption drive shows that accountability can help.

This being said, naming and shaming of big investors can make as bad damage to them as anything else. Most of these big companies are stock listed and with the whole globalized effort, the slightest thing that comes out, such as the environmental issue in Zambia, can have an impact on the stock price. That is sort of a penalty and there are huge amounts involved. For example, mining contractors face huge problems because of corruption, as they are the ones who bring equipment into the country and they have to deal with customs and all other aspects. Because of the UK Bribery Act for instance, the mining company is also responsible for the mining contractor. So when mining companies use due diligence on contractors and they see that there is corruption involved, they will not work with the contractors. Thus, clean contractors do actually have a competitive advantage these days because they now have access to the big players. That is what is happening in this new world order.

Regarding the question on whether companies have policies, Mr. De Baker responded affirmatively. Clients want to go beyond the law, because they are taking it from an economic perspective. A lot of clients when they invest in Africa, ask Mr. De Backer and his colleagues to develop a review with human rights - the main issues, legal system in a country, and do take that into account.

Ms. Paloma Munoz was asked how the government can be engaged, which aspect of it specifically. There is a plethora of government officials, internal discrepancies and power plays. So this issue becomes a battle. If there is any methodology that is being particularly used, it would be of interest to learn it. Ms. Munoz responded that the matter is absolutely context dependent. At the Danish Institute for Human Rights a methodology to map stakeholders is being used. But at the institute there are also 140 staff working on human rights, more than half of which work around the world. They have a very strong network and presence in several countries. What they do is to link up with other departments in the institutes which have connections to governments in those countries, or systems in society that can help them link up with government. The other thing they do is to engage with local stakeholders or local partners, and they might help in that process.

The audience further expressed concern over the contradiction present: there was some optimism, but at the same time little holding back. The question was whether corporations truly take commitments to respect human rights, and what is the outlook in regard to the earlier mentioned contradiction. In response, Ms. Lene Wendland affirmed her belief in a window of opportunity, which however is not going to last forever. There is space for cautious optimism, because it is still only the beginning and efforts need to coalesce so that we reach the same discussion on how to make this work, as opposed to going back to a discussion on whether another approach would have been better. Regarding the bottom-up approach and whether it needs to be legally enforceable, it is possible to entrench the notion of meaningful stakeholder consultations in the company requirements. Many have not engaged in meaningful consultation to get the needed information. So a company can use anything that works and law might be one approach, but it is not a guarantee because it would require careful drafting and enforcement. Regarding policy commitments, there is a Business and Human Rights Resource Centre website, which is run by a non-profit. It is a repository of all data regarding business and human rights. One of their useful pages lists international policies; there are not that many policies and it would be useful to see many more. But again, the serious companies that have engaged in developing human rights and business policies know that it is not something that goes away for half an hour and then you

come up with a policy. There will be many more policies which actually work that will be a result of careful internal and external consultation with companies and their stakeholders - both internal and external, to come up with human rights policies that are meaningful and correspond to their responsibility under the Guiding Principles.

Advocate Tom Nyanduga commented about the optimism vis-à-vis the impunity issues earlier raised. Some businesses are still not aware of the Guidelines. Secondly, in regard to the existence of the OECD Guidelines on Multinational Corporations, one can still wonder with the existence of all those frameworks why there still are problems that African countries or communities are complaining about, as to achieving what is intended in those guidelines. Concerning the 10 years standard that Steven De Backer spoke about, we need to interrogate further how sure we can be that companies will comply within the coming 10 years.

Ms. Paloma Munoz also discussed the optimistic versus pessimistic sentiment that has been observed. The Danish Institute works with companies, its mandate is to engage them and to work with their due diligence policies, impact assessment, and so on. Ms. Munoz expressed optimism, because companies such as Shell, Chevron, Total, Nestle and the like have sat down at the table, are spending significant time and money and investing into their human rights policies and impacts. Also, they work with other organizations on these same issues about their operations around the world. Whether that happened because of naming and shaming campaigns such as those faced by Shell, or because of the human rights principles or both or neither, it is unclear. However, they are at the table and they are trying. So that is something, although just a fraction. It is something and it is a change.

Ms. Lene Wendland was asked whether it possible to influence the Secretary-General of the United Nations, so that at least the member states of the UN could adopt those guidelines. If we can start that way, then there is hope that in the future we might use the provisions of the guidelines to influence the powers that be, to be converted into an international covenant and in years to come, make what has been covenanted and ratified become justiciable. Ms. Wendland specified that the Guiding Principles have been adopted as far as the Human Rights Council is concerned. They, however, have not been adopted by the General Assembly. When the Guiding Principles were being developed, a number of ambassadors from major emerging markets and others were saying: “Thank goodness that you are doing this as an independent expert appointed under UN mandate, because if we as member states had to negotiate the stakes, we would never get anywhere near it”. So they were happy that someone else put out these standards and they were very ambitious. The irony of course is that these ambitious standards are elaborations of existing human rights obligations of states. So what we are trying to do again going back to the alignments and embedding is to work with the United Nations treaty bodies in their examination of states, to try to ask consistent questions of governments when they are reporting under those various treaties. This way, there is a systematic account from member states on the different treaty obligations and what they are doing with regard to human rights. The Guiding Principles are based on treaty body work, they are not about inventing new regimes. So that is one way of getting accountability. We also have a report coming out to the Human Rights Council presented by the Secretary-General, where the latter makes recommendations on how the UN system as a whole can promote a business and human rights agenda, particularly the UN Guiding Principles. One

recommendation that the Secretary-General makes is that the universal peer review process incorporates and asks questions systematically on state reporting. So there are different ways of trying to get accountability of member states for implementation of the Guiding Principles. Whether there are chances for an international court, if that is what is being implied by making these rights justiciable, of course they are depending on the embedding in global governance frameworks. They might be justiciable in different contexts. Ms. Wendland did not foresee any time soon that there will be an international court for business and human rights. If the existing frameworks can be expanded to capture the key elements, then there is justiciability across different organizations.

Prof. Shadrack Gutto commented that it is true there is a shift on development and evolution in standard setting - normative evolution as well as attitudinal change. That is positive, but if we get to practice then we see the differences Tom Nyanduga talked about, such as Shell in Nigeria and BP in the Gulf or Mexico. Those are issues that we have to address as Africans and see what it is that we are not doing, not what is it that Shell is refusing to do. This is because you have to make Shell do the right thing. We should take responsibility and ask our governments, demonstrate on the streets, write about it, mobilize and so on. We need greater levels of activism to awaken our governments, because the ballot box does not produce knowledge of the people to be leaders; it is thus our responsibility to be able to put something in their minds. In regard to what Tom Nyanduga indicated about the evolution of bringing the core elements into the African Court, that was a good update and Adama Dieng also mentioned that we tried much earlier on before Al Bashir's case and we were in Addis Ababa. Prof. Gutto further specified it was the two of them pushing and they said no. When the Al Bashir case came, they realised that it would be a good idea. Now that it is there, it is important because it goes beyond the Rome Statute, which deals with individuals. It does not deal with corporates or many economic crimes that are mentioned. As Africans, we need to do that and help ourselves, the panelist observed.

Prof. Gutto also made reference to an earlier comment by Ms. Munoz. He believed the portal approach is very useful, but we should stay careful. In regard to the use of 'property ownership', that is a volatile subject in many African countries and will remain so for a very long time. Rather than property ownership, security of tenure over land would be more appropriate, which is a broader concept than ownership. Indigenous people would find it very difficult, because it is an individualist paradigm. When free hold is given to a mining company, they exhaust the whole area and they leave but the land is still there. What does free hold mean for us, Prof. Gutto asked. It is very important to bring an African dimension, indigenous understanding of land ownership. In 1912, the British had a West African Land Commission. A Nigerian chief was asked: "Who owns this land?" Everybody was asked and they said "It belongs to us". "Who is this us?" - the British wanted to know who owned the title deed to this land. And the chief said: "This property belongs to a very large family. Many are dead." Then the British answered: "You say this land belongs to people who are dead?" They responded: "Yes and a few are living today, but countless are yet to be born. That is what we mean by this family to whom this land belongs." That is an African paradigm around land ownership. This European individualist notion is sometimes very dangerous and as Africans developing standards in Africa, we need to be very careful on really beginning to reconstruct the impositions that were made by the Europeans. Upon coming here, one is told that you marry in or out of community of property. Since when in Africa did we have something like that? These

are borrowed things, but we follow them religiously because we are still colonized in our minds. It goes to the question that women do not own land in Africa, but this is a colonial distortion of African law. That is actually colonial African customary law. A woman married into a family forever is part of that family. If the man wants to beat the woman to tell her to go, the family will tell the man: "If you want to leave this place, leave! This woman belongs to this family, she is the mother of our children and so she has nowhere to go. She belongs here." Security of tenure - that is Africa. But lawyers out of university do not teach them properly. So they end up with paradigms and arguments that are totally un-African.

Ms. Paloma Munoz clarified on the issue of land that the title was land and property, and not property ownership. The focus is on customary land rights in the local context. Under that title, they break it down to land tenure regimes, land grabbing, expropriation and a series of other issues that play out in different country contexts. When talking about land tenure to companies, it is made clear that they must respect customary law and the ILO 169 Convention on indigenous peoples' rights, which talks about the different types of the ownership rights that these people have. But this is not an African issue only. It is also a huge issue in Latin America as well as in Asia. In fact, Denmark still has a colony agreement where indigenous peoples' rights there are constantly abused in different ways. Now that companies are starting to move in mass, extractive companies were concerned about issues such as land and others. Although it is true that there is a tendency for customary land rights in Africa, it is an issue that afflicts everyone around the world in fact.

Another comment from the audience made reference to the bottom-up approach; that is what essentially the rights-based approach incurs when talking about accountability and community participation. It could be a good thing if investors are going beyond what they are normally required to do. Secondly, the Guidelines ought to be given a chance, they need to be implemented. So far they have not been implemented. So let us give the Guiding Principles a chance before we think of an international treaty. At this point the Guiding Principles are not broken, so that they would need to be fixed. On the issue of the Protocol, it is very important to have that information and to convey to investors about the situation on the ground. We should attempt to create a point of information where we talk about violations which have happened before and intended by corporations. We also have repeat offenders that everybody knows of, since there is documented information about them. All this information should be put in one place, because our governments and our people in leadership are not aware of these things. So if the governments are dealing with an investor and a mining company for instance, the first point could be to look at the source of information for mining companies. This is something that will be worthwhile for our development. In response to this matter, Ms. Munoz specified that under each series information is collected from the last two years on cases that have occurred in the country context, for example land grabbing in Uganda. The company violations are being exposed. Although the portal is aimed to help the companies address their impact, it should be used by society, governments and human rights institutions. It is therefore freely accessible to everyone.

Mr. Adama Dieng brought into discussion the UK Bribery Act, revealing that not many know are aware of it. In a survey conducted by the IDA with the OECD with about 700 lawyers, the results showed that only 125 among the lawyers were aware of the relation of the instrument to corruption. As a result of that, the OECD and a university in Boston in the USA embarked upon a project to develop an academic anti-

corruption program. This work is about to be finalized, introducing an anti-corruption program in law schools and business schools. Unless lawyers are trained when they start studying law about anti-corruption and the same with the business people, there will be less hope. This is because it has nothing to do with ethics. Secondly, Mr. Dieng talked about the relation between law and politics. In spite of the existing tension, that should not be a reason for us to allow what is happening in Southern Africa with the treatment which SADC is being given. That is unacceptable. Sometimes the ECOWAS Court may be on the edge, simply because it rendered decisions that have been accepted by the member states. For instance, Niger was condemned for slavery even before the African Court was mobilized. That is to say that the judiciary in this region, the Bar Association, law academics and even the state judiciary should stand firm and say this is not acceptable.

KEYNOTE: STATE, BUSINESS AND HUMAN RIGHTS

H.E. Mmasekgoa Masire-Mwamba

Deputy Secretary-General, Commonwealth Secretariat

H.E. Masire-Mwamba started with a brief case study: we have a situation where a government's agency goes out to promote and attract investment into the country. The target company is a textile company with links abroad that enable them to access markets internationally. The textile industry also engages in dying and fabrication of the textile. Consequently, inherent in their processes is the issue of effluents, dyes and toxic material that are used as part of the dying process. The company understands this and inquires from the government whether there are proper means to dispose of the toxic material in an environmentally friendly manner. The government, probably not understanding what this is all about, gives the necessary reassurances and is attracted. This is because firstly, there is an opportunity for job creation and secondly, the company is prepared to settle in a rural environment. Therefore, the company brings with it all the attributes of the advantages of employment generation in an area with little work opportunities. The effect is that the company does establish effluents come out of the factory. It is a challenge for the government and the company, because whatever was envisaged by either party has not come to be. Then the company threatens to pull out and the government becomes challenged by the prospects of all those people previously working for the company.

This is a story we have heard before, the speaker indicated. Anytime we deal with manufacturing or extraction for instance, anytime we deal with some sort of investment that has its positives and negatives, this is a challenge that is exposed. This example leaves behind a series of questions. Firstly, what did the government commit to; was there negotiating on behalf of the government and what was promised to the business that wanted to set up? Secondly, what were the demands that the investor

made and to what extent were those demands clearly articulated and clearly understood by both parties? Thirdly, who now deals with the challenge that the local community is faced with? Has anybody even started to package that as a human rights concern where the environment is being badly affected, where water tables are being threatened because of the toxic material that may seep through, where livestock can no longer graze because all sorts of things have affected the grass and the land is becoming barren? Who deals with this impact?

A lot of the human rights discussion started centering on the state and the citizen and there has not been sufficient focus on the role of the investor and the role of business. However, H.E. Masire-Mwamba affirmed she does see the value that direct investment and foreign investment provides to their respective countries. She continued that it will be useful to have representatives of government and business, because we all realize the need to mobilize and to ensure that the guidelines that are provided are implemented.

In the last 50 years, we have seen an increased attempt by developing countries to provide an environment conducive to business, to social and economic development, to attract this foreign direct investment which in lots of cases looks at the dynamic comparative advantage that respective governments can offer. These include favorable policies, regulations in the hope for attracting foreign direct investment. Although we talk about foreign direct investment, it is also tied to local direct investment. Therefore, even as we speak about business and human rights, it is not only the foreign companies that are coming to our shores and doing things that are not proper, but also it is a message that needs to go out to our local investors, the speaker remarked. In addition, it is not about the size of the company. As was elaborated in the earlier example regarding the small textile industry, if looking at the impact of such a small company, it could be as bad as any large company. Therefore, the notion that it is the big companies and foreign companies that are the culprits and not some coming from our own environment is something that we need to dispel.

Whilst appreciating the benefits coming out of business, we also have to be mindful of some of the power that is wielded by the governments, by corporations with host governments - depending on the various situations. Sometimes there is a tendency to compromise their authority and disregard the respect for human rights in order to encourage investment. Barriers in regulating businesses include jurisdictional and legal barriers, which are practical and financial. Moreover, one thing that we have not spoken much about is the lack of political leadership and commitment, H.E. Masire-Mwamba observed. This is because in a weaker political environment in which corruption and bad governance are the norm, it is highly unlikely that the governing machinery would be interested in enforcing stringent regulatory frameworks, particularly if those in control are also benefiting from the activities of the multinational corporations. Such regimes tend to prioritize other public and private goals over protection of the rights of citizens.

When discussing the relationship between states and business, one also has to bear in mind the country's capacity to negotiate, to ensure that they strike the best deal. One thing that can be observed in global trade agreements, if you take a country like Botswana, which is not a highly industrialized country and therefore does not trade to the same extent as South Africa for instance, is that some of the issues are negotiated in anticipation, the speaker spelled out. This is because, in relation to the

production capacity, such countries cannot yet envisage what these global trade agreements need to contain, where the safeguards for small and developing countries need to be. Small and developing countries are not yet at that level. In that case, we do have the global trade agreements going on, but to the extent that they protect the interests of the state, let alone the interests of the business in that state is somewhat affected. Sometimes by having these gaps, we allow and create a situation where the companies that operate in more highly regulated, sophisticated environments, take advantage of the fact that at a local level, there is not enough appreciation of where the issues and challenges may arise and how those can be mitigated.

A case and point would be China and what has happened in some of the developing countries. One of the key issues in the global trade agreements is the anti-dumping agreement. However, what do we define as dumping? If one is in a country that is not developed, that does not have the capacity to produce, and we have a country such as China ready to supply with the goods and services needed in the respective market, can that be termed dumping? It can be termed as dumping, the speaker explained, if we take into account that it blocks local production and capacity. Nevertheless, for now, whilst we are in this phase where we do not have that local capacity and local production, how do we go and say "We are lobbying against China for dumping in our country", yet we are not at that stage of producing? Whereas if we have a country that is more developed such as South Africa, they can say, "This is the volume that we are producing and we want to make sure that what we import in this level is much lower." These are some of the practical challenges that we have when it comes to the state and business, just talking about the balance and positioning we should have as governments, as businesses in our respective environments, let alone the issues of human rights before discussed.

The challenge of securing effective human rights compliance within business is a huge one, as has already been stated before by the former United Nations Special Rapporteur on Business and Human Rights, marveling at the enormity of the intellectual task when he embarked upon his work on the UN 'Protect, Respect and Remedy' framework as far back as 2005. We have continued to hear more about the UN Guiding Principles on business and human rights, and their relevance today and for the future. The good news is that business is increasingly receptive to what is known as human rights due diligence in corporate affairs. We have also heard that it is a drop in the ocean, but we have been encouraged that it is a growing step that a number of businesses have started to take in this respect. A major reason behind this is that the cost of conflict with host communities has shown that just litigation alone can place a significant financial and time burden on major industry. The cost and suggestion that the value of the company would be reduced as a result is an excellent way to provide incentives for businesses to streamline human rights considerations in their operations. Nevertheless, as we all appreciate, it is also good common sense.

The duty of states to protect against human rights abuses by third parties, the corporate responsibilities to respect human rights, which means to act with due diligence to avoid infringing on the rights of others, and the need for greater access by victims to effective remedy -both judicial and non-judicial, are now clearly established. It is not proper to go away with the assumption that it is only because the companies are afraid of the large amounts that they would pay if they were found to be violating human rights. There are external pressures that have also pushed businesses to respect human rights.

Human rights due diligence is now part of the OECD Guidelines for Multinational Enterprises for example, the United Nations Guiding Principles are now incorporated into the ISO standards, and major bilateral donors such as the European Union have now incorporated the UN Guiding Principles in corporate social responsibility strategy. Nonetheless, the body of knowledge and the level of awareness of local communities are on the rise also. So there is a whole host of external pressure affirming enough is enough, coupled with the need to do things differently as a way forward.

An illustrative case has been the banking crisis and human rights. The ongoing banking and financial crisis has revealed that private sector banks also have a unique responsibility with regard to the duty to respect human rights. They can and do enable human rights violations, first of all by financing activities of clients that violate human rights directly, and secondly, by themselves as banks conducting their businesses in a manner which lacks due diligence, in terms of their own operations as financial institutions. Interesting about the financial crisis has been the loss of trust in companies and institutions, among others. This has been one of the major fallouts of the financial crisis. Practical economic value increases efficiency and allows other goods and services to be derived. However, we find that a better way to build this trust is not just through the heavy penalties that have been levied, but through the adoption of values such as honor and integrity in the way that business is conducted.

The banking crisis has caused governments to commit very significant bailouts. The African continent has not been as badly scarred or as directly affected as the rest of the international community, but we have not really looked at the impact of all these bailouts on the human rights aspect. The challenge as developing countries is where to get the bailouts from, which will go in the billions of dollars or pounds. Even if those bailouts are afforded, we need to consider the diversionary effect: the resources that are being pulled out of other development windows, also the human rights that are being impacted on. For instance in the United Kingdom, banks did support the bailouts, but the next day started severe austerity measures which affected the lower earning members of the society in untold ways.

We can appreciate the human rights cost when we look at the oil spillage and environmental impact, and so on. However, when we look at the banking crisis, as in the textiles example mentioned above, the notion of human rights is somehow veiled, with no criminal liability. We have witnessed this notion emerging after the banking crisis of “Too big to fail”: that we have governments, banks and institutions that cannot fail at any cost. But what does that “at any cost” translate to when it comes to the human rights of the people that are affected?

H.E. Masire-Mwamba ended with a brief note about the principles of the Commonwealth in terms of human rights and business, and the way it engages with different actors in this regard. First, the Commonwealth has a separate unit called the Commonwealth Business Council, which deals directly with government. Nevertheless, within the Secretariat there is also direct engagement with the business community. The Commonwealth asks that a rights-based approach be used through assessment of implications of business on human rights, and encourages member states and businesses to avoid violations. There is also regular facilitation of dialogue between business, states and civil society for identifying and promoting promising practices in a country and within the region. The Secretariat is

uniquely placed to host and facilitate discussion on interrelated challenges of trading relationships and human rights in supply chains. Governments and businesses are supported to lead informed contract negotiations with objective experts, and there must be a window for reducing the opportunity for greasing of palms, for corrupt practices within governments. Importantly, national human rights institutions have to be alert and proactive, and they have to engage with their governments in monitoring human rights. Many of these national human rights institutions have empowering legislation, but some simply refuse to either test or operate according to the empowerment that they have been provided. As a result, there is not enough input from the national human rights institutions. For people on the African continent, human rights are a very timely and relevant issue that needs to embraced and taken ownership of. That is the opportunity that the national human rights institutions have; they can take this ownership and assist in moving forward. "We should not be told by anyone from outside our countries or continent. That, however, can only happen when we are vigilant and we are the people that highlight and flag and respond to the challenges that are on the ground" – H.E. Masire-Mwamba concluded.

For viewing photos taken during the Human Rights and Business conference, please access this dedicated album on AFLA's Facebook page linked below:

https://www.facebook.com/media/set/?set=a.279519832161184.62769.111108335669002&type=3

Africa Legal Aid (AFLA)

Africa Legal Aid is Pan-African human rights NGO devoted to promoting and protecting individual and collective rights throughout Africa and to challenging the impunity of gross human rights violators. AFLA provides leadership and support to key institutions and organizations working for the respect and recognition of human rights. AFLA has close working relations with the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR), the African Commission on Human and Peoples' Rights (ACHPR), the African Court on Human and Peoples' Rights (ACHPR), and the recently established War Crimes Division of the High Court of Uganda (WCD). AFLA has offices in The Hague, Accra and Pretoria.

Activities:

- Promoting and protecting individual and collective rights throughout Africa
- Challenging impunity for gross and systematic human rights violations
- Providing leadership and support to key institutions and organizations working for the respect and recognition of human rights
- Promoting and advocating for a comprehensive human rights jurisprudence for Africa

Distinctions:

- Special consultative status with the Economic and Social Council of the United Nations
- Observer Status with the African Commission on Human and People's Rights
- Observer Status with the United Nations International Criminal Tribunal for Rwanda

Tools:

The tools AFLA uses to achieve its goals include capacity-building training programs, research and analysis, media outreach, publications, targeted legal assistance at national, regional and international levels, a human rights and international justice website, a social media page, and a dedicated webshop.

Resources:

- The AFLA Quarterly
- AFLA Book Series
- The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: *An African Perspective*
- E-Reporter on Africa and International Justice