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

Eighth session

Geneva, 5 – 9 May 2014

Outcome of the eighth session of the Working Group on the issue of human rights and transnational corporations and other business enterprises

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I. Summary

1. The Working Group on the issue of human rights and transnational corporations and other business enterprises held its eighth session in Geneva from 5 to 9 May 2014. It convened meetings and discussions on the following:

(a) The activities of the Working Group to promote State national action plans as a vehicle to implement the Guiding Principles on Business and Human Rights;

(b) An all-day expert workshop on essential substantive elements in a national action plan;

(c) Access to effective remedy;

(d) The third annual Forum on Business and Human Rights, to be held in Geneva from 1 to 3 December 2014, and the second regional Forum on Business and Human Rights, planned to be held in Africa in 2014 (to be confirmed);

(e) Other Working Group projects, meetings and salient issues, including its proposed country visits for 2014 and 2015; its communications to States, business enterprises and other relevant stakeholders; and its cooperation with the International Labour Organization (ILO), the United Nations Commission on International Trade Law, the World Economic Forum, the Business and Human Rights Resource Centre and the Working Group on the issue of discrimination against women in law and in practice.

The present report summarizes some of the key items discussed.

II. Activities of the Working Group on national action plans

2. The Working Group discussed the launch at the annual Forum on Business and Human Rights in December 2014 of its draft guidance on national action plans to implement the Guiding Principles.

3. The Working Group updated Member and observer States of the Human Rights Council on its road map to develop guidance on national action plans, and explained the aims of its expert workshop that was held during the week.

III. Expert workshop on essential substantive elements in a national action plan

4. On 8 May, the Working Group convened a one-day expert workshop to discuss substantive elements of national action plans to implement the Guiding Principles on Business and Human Rights and to solicit suggestions for the forthcoming guidance of the Working Group in this area.¹ Some 40 experts were invited to share their perspectives on national action plans and relevant policy areas. They took part in their capacity as individual experts, and came from a variety of backgrounds, including government, national human rights institutions, international organizations, business, civil society and academia. The closed meeting was conducted under the Chatham House rule. Discussions centered on process and substantive elements of national action plans, as well as the current level of implementation of the Guiding Principles. Prior to the workshop, the Working

¹ For more information on the guidance, see www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

Group briefed Member and observer States of the Human Rights Council on the aims and purposes of the workshop.²

5. The introductory discussions addressed several important aspects that concern a national action plan, including:

(a) The overall value of a national action plan; early lessons on their contribution to increasing awareness of the Guiding Principles and triggering national multi-stakeholder dialogue; and their role in scaling up implementation of the Guiding Principles by both Governments and business enterprises;

(b) Lessons learned from general national action plans on human rights. It was suggested that any such plans should be based on evidence and a clear understanding of existing gaps and barriers that result in an adverse impact on human rights. Furthermore, the plans should ensure inclusive multi-stakeholder participation and independent monitoring and review;

(c) The need to strengthen efforts to protect human rights defenders, women, vulnerable groups and victims, and to reflect this in a national action plan;

(d) The importance of not conflating the State duty to protect human rights with the development and enactment of a national action plan. The latter is intended to help a State to implement the Guiding Principles; it does not, in and of itself, imply that the State is fulfilling its human rights obligations;

(e) The importance of ensuring that national action plans do not lead to diverging interpretations of the second pillar of the Guiding Principles (the corporate responsibility to respect human rights) and do not discourage companies from proactive implementation of the Guiding Principles irrespective of State activities;

(f) The importance of promoting a regional approach to business and human rights to incentivize Governments to implement such a plan, and an emphasis on multilateral approaches (in line with Guiding Principle 10) to ensure international coordination and alignment;

(g) Process elements in the development, implementation and review of a national action plan. It is considered important to identify the priorities of a country and the main business and human rights issues so that a plan has focus and relevance. Institutional and legal gap analyses and multi-stakeholder consultations to identify a State's priorities and gaps in policy, regulation and laws are considered necessary. In addition, it can be helpful to involve parliamentarians and a spectrum of political parties in the process. States should also give sufficient time to explain the Guiding Principles and the aims of a national action plan to the relevant government ministries and other stakeholders. States may also elect to develop a stand-alone plan on business and human rights or to integrate the State's activities to implement the Guiding Principles into its existing plans on corporate social responsibility or economic development.

6. Participants discussed different options for the guidance of the Working Group on national action plans. To some, it could be an instrument to allow States to focus on a particular set of priority areas to fulfil their obligations under the first and third pillars of the Guiding Principles. To others, it could aim to capture a wider spectrum of business and human rights issues and provide à la carte guidance to give users, such as civil servants, a "leg-up" on all applicable topics. It was also stressed that the guidance should be simple to

² The expert workshop also followed a number of public and private meetings of the Working Group held on national action plans, including its open consultation in February 2014 during its seventh session, which was attended by more than 175 people, including 60 State representatives.

use, avoid creating a standard of the lowest common denominator and reflect the fact that there is no “one size fits all” approach to develop, enact and update a national action plan.

7. The workshop focused on four potentially key policy areas, identified by the Working Group, to be addressed in a national action plan: (a) trade and investment; (b) public procurement; (c) access to remedy; and (c) human rights due diligence provisions in licensing.

8. With regard to trade and investment, it was highlighted that trade agreements, investment treaties and State-investor contracts can constrain a Government’s ability to implement its duty to protect human rights. National action plans could consider a focus on human rights and labour provisions in trade agreements and integrating human rights considerations in existing international investment arbitration arrangements and mechanisms. In addition, the plans could seek to address the limited capacity of trade and investment negotiators and human rights officials to understand each other’s work and priorities.

9. With regard to public procurement, it was highlighted that many States already include some human rights provisions in their supplier contracts and in contracts for large infrastructure projects that concern public development budgets and public finance. Participants also recommended that procurement regulation and policies should be aligned with the Guiding Principles.

10. Participants suggested that embedding the Guiding Principles in State procurement activities presented an opportunity for States to exercise leadership and demonstrate its commitment to implementing the Guiding Principles. In this regard, national action plans can: (a) trigger a review of existing issues and government laws and policies specifically on public procurement; (b) assess whether relevant trade and regional multilateral frameworks allow for integration of human rights requirements in public procurement processes; and (c) recognize the importance of a human rights due diligence approach that is compatible with the Guiding Principles at the different stages of a public procurement process in order to consistently address potential and actual human rights impacts linked to the goods and services provided to the State.

11. The need to involve Government authorities at the federal, municipal and local levels in this process was also stressed as they often may be better placed to manage supply chain risks than the central Government. It was also cautioned that public procurement rules should be careful not to deter small and medium enterprises from tendering by, for example, requiring excessive documentation and creating burdensome bureaucracy. In addition, any guidance and rules concerning procurement should be kept simple and easy for procurement officials to understand and implement.

12. With regard to access to remedy, participants recalled that implementing this third pillar of the Guiding Principles– through judicial, administrative, legislative and other means – was an essential part of the State duty to protect human rights. It was argued that a national action plan should include a strong focus on access to effective remedy. It was also pointed out that the Guiding Principles already provided guidance for States (and business enterprises) on what they should do to remediate any adverse human rights impact.

13. Participants suggested that, in the process of developing a national action plan, a State should review the extent and level to which it currently provided access to effective remedy, including a detailed analysis of the barriers facing victims. It should then set out priorities for improving access to remedy. As barriers in each country varied, it was pointed out that a national action plan should be based on a national-level analysis and reflect on-the-ground experiences. It was suggested that an important way to identify barriers was through multi-stakeholder dialogue, including with representatives of civil society and with those who had experience in bringing claims on behalf of victims to court. It was also

stressed that, in developing a national action plan, States should seek to address (a) inaction by investigators and prosecutors; (b) the uneven playing field for victims vis-à-vis business enterprises; and (c) issues such as legal liability, duty of care and burden of proof. Participants discussed the issue of extraterritorial jurisdiction for the adverse impact of transnational corporations abroad, and whether this should be addressed in a national action plan. It was also suggested that national action plans should boost the mandate of national human rights institutions to work on business and human rights and address the capacity of other State-based non-judicial grievance mechanisms.

14. Lastly, with regard to on human rights due diligence provisions in licensing, it was argued that, if more States required companies to carry out human rights impact assessments as part of their due diligence process, it could result in much needed standardization of such practice. Some participants recommended that States should provide guidance for companies at the “threshold” levels of human rights risks and impact, as businesses may be familiar with due diligence processes but not the substance of human rights standards. Others cautioned against recommending that States “harden” human rights due diligence requirements for companies in their efforts to implement the Guiding Principles by means of a national action plan. A number of participants stressed that any guidance on national action plans should be careful not to undermine the clarity provided on the scope and content of the second pillar of the Guiding Principles, which existed independently of whether a State has ratified and/or abides by all international human rights treaties. While it was acknowledged that the corporate responsibility to respect human rights would have to be explored in a domestic context, States should not re-interpret or narrow the second pillar.

15. It was also recommended that States could specify in their national action plan that they would undertake human rights due diligence on actual or potential impact on human rights of business enterprises that are owned or controlled by the State. This would help enhance transparency and disclosure about States’ procurement contracts, investment agreements and relationships with public or semi-public business enterprises.

IV. Access to remedy

16. The Working Group discussed the third pillar of the Guiding Principles (access to remedy) and participated in a meeting with Member and observer States of the Council on the study commissioned by the Office of the United Nations High Commissioner for Human Rights entitled “Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies”.³ It also discussed the relevance of the study’s findings for the guidance of the Working Group on national action plans.

V. Third annual Forum on Business and Human Rights and second regional Forum

17. The Working Group, which was mandated by the Human Rights Council in its resolution 17/4 to guide the annual Forum on Business and Human Rights, discussed preparations for the third Forum. It met with representatives of the World Economic Forum to discuss ways to engage new business audiences at the 2014 annual Forum and to link the annual Forum with discussions at the annual meeting of the World Economic Forum in Davos.

³ Available from www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

18. The Working Group discussed its plans to hold a regional Forum on Business and Human Rights in Africa in 2014, following the success of the Regional Forum on Business and Human Rights for Latin America and the Caribbean held in Medellín, Colombia, in August 2013.

VI. Other Working Group projects, meetings and salient issues

19. The Working Group discussed its proposed country visits in 2014 and 2015. In its resolution 17/4, the Human Rights Council requested the Working Group to conduct country visits and to respond promptly to invitations from States. Having undertaken visits to Mongolia in October 2012, the United States of America in April/May 2013 and to Ghana in July 2013, the Working Group wishes to visit countries in Latin America and the Caribbean, Eastern Europe and the Middle East and North Africa. It also discussed requesting specific visits to business enterprises and intergovernmental organizations.

20. The Working Group also discussed its planned communications to States, business enterprises and other relevant stakeholders.

21. The Working Group met with Office representatives of ILO and decided on a working arrangement to formalize existing cooperation. In carrying out its functions in accordance with its mandate as an independent expert body, the Working Group would, where appropriate: (a) consult with ILO on matters relating to the Guiding Principles that involve ILO fundamental principles and rights at work and other issues within the competence of ILO; (b) take into account relevant ILO comments and material relating to such issues in its reports and other activities; and (c) coordinate with ILO, as relevant, on follow-up action on Working Group outputs.

22. The Working Group met with representatives of the secretariat of the United Nations Commission on International Trade Law, the Swiss Institute of Comparative Law and the Swiss Federal Office of Justice to discuss cooperation in identifying good practices and challenges in the implementation of the Guiding Principles. The Working Groups was briefed on the Commission's Rules on Transparency in Treaty-based Investor-State Arbitration, which came into effect on 1 April 2014.

23. The Working Group discussed its collaboration with the Business and Human Rights Resource Centre, in particular on ways to collect data at the level of business uptake of the Guiding Principles. It also met with the Working Group on the issue of discrimination against women in law and in practice, and decided to organize a joint side event at the twenty-sixth session of the Human Rights Council. The side event would explore ways in which States and business enterprises can integrate a gender perspective into their efforts to implement the Guiding Principles. The Working Group would aim to introduce the perspectives raised during the side event into its guidance on national action plans.

24. Working Group members also provided an update on their various projects and activities, including a discussion on a project concerning indigenous peoples.

VII. Chairperson and Vice-Chairperson

25. At the end of the eighth session, Michael Addo was appointed Chairperson of the Working Group, while Margaret Jungk was appointed Vice-Chairperson.