

Panel III.1: Examples of International Instruments Addressing Obligations and Responsibilities of Private Actors

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Madam Chair, excellencies, distinguished delegates, ladies and gentlemen,

It is an honour for me to participate in the 2nd session of the open-ended intergovernmental working group (OEIWG). I would like to thank the Chairperson-Rapporteur for giving me this opportunity.

As I am taking the floor for the first time during this session, I would also like to thank the Chairperson-Rapporteur on behalf of the Working Group on Business and Human Rights for inviting us to participate in the second session of the OEIWG. The Working Group supports efforts by states to improve business respect for human rights and strengthen access to remedy for victims affected by business activities. As we have noted in our previous statements, the Working Group believes that any efforts to strengthen international standards should build upon and be complementary to the Guiding Principles on Business and Human Rights. We do hope that the process to negotiate the proposed treaty is informed by open, inclusive and transparent dialogue with all stakeholders. The Working Group looks forward to contributing constructively to this dialogue during this session and in future.

I will now proceed to express my views on the theme of this panel in my personal capacity as an academic working in the field of business and human rights for over fifteen years. I will address three questions:

- First, can international law impose direct obligations and responsibilities on private actors like corporations?
- Second, are there certain international instruments – either hard or soft – which address the obligations and responsibilities of corporations?
- Third, are there any good reasons why private actors should have direct human rights obligations?

Madam Chair, let me address these three questions in the same order. While it is true that international law was traditionally conceived as governing the relation between states, there is no legal bar to international law imposing obligations and responsibilities on private non-state actors. The distinction drawn between “subjects” and “objects” of international law and the discussion about whether corporations can be subjects of international law are not determinative of this legal question. Nor is it crucial that corporations must be able to sign or ratify an international instrument before it can impose obligations on them.

States, if they wish, can impose direct obligations on private non-state actors under international law. In fact, I will suggest that in years to come non-state actors will play a

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more critical role in both creating and enforcing norms of international law. If we look around this room, that would leave no doubt about the important role that civil society organisations are already playing in trying to craft new international law norms.

I will now provide some illustrative examples of international instruments which impose obligations and responsibilities on private actors. The Convention on Civil Liability for Oil Pollution Damage stipulates that the owner of a ship – which could even be a corporation – “shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident” [art. III(1) read with art. I(2)/(3)]. Similarly, the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment provides that the operator of a dangerous activity – which could again be a corporation – “shall be liable for the damage caused by the activity as a result of incidents at the time or during the period when he was exercising the control of that activity” [art. 6(1) read with art. 2(5)/(6)].

Article 137 of the Convention on the Law of the Sea expressly stipulates that no “natural or juridical person” shall appropriate any part of the seabed, as all rights in the resources of the seabed are vested in mankind as a whole. Article 11 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime is also case in point: it specifically requires states to obligate “commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.” My last example will be the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Article 4 of this Protocol provides that the armed groups “should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.”

In addition to treaties, there are also other international instruments which imposes responsibilities on private actors. One prominent example is the UN Guiding Principles on Business and Human Rights. Pillar 2 of the Guiding Principles makes it very clear that all business enterprises have an independent responsibility to respect human rights flowing from internationally recognised human rights.

Madam chair, in view of these examples, I think it is too late in the day to suggest that private actors like corporations cannot or do not have direct obligations under international law.

Let me finally address the third question: why do we need private actors to have direct human rights obligations? At the outset, I should note that the human rights obligations of corporations must be in addition to (and not in lieu of) state obligations.

One simple logic behind direct corporate obligations is that no *centre of power* in society should be immune to obligations flowing from human rights law. Human rights not are “uni-relational”: it matters little for victims whether the violator is a state or a private actor.

We should also not forget that although corporations have a separate legal personality, in reality they are nothing but a collection of individuals working together for a common goal. If individuals have certain human rights obligations under national or international law, these

obligations should not disappear simply because a group of individuals decided to operate as a corporation. If an individual cannot use child labour, infringe the privacy of others or pollute a river, why should a corporation be allowed to do these very human rights violative acts?

Imposing direct human rights obligations on corporations will also address the asymmetry between the rights and obligations of corporations under international law. If corporations as investors can enforce their rights under bilateral investment treaties, it will be a necessary corollary to subject such private actors to human rights obligations under international instruments.

Last but not the least, if there are direct human rights obligations on private actors, it will be easier for victims to seek remedies against the relevant corporations. This would, for example, allow victims to trigger judicial remedies without the help of state agencies. Similarly, direct human rights obligations will enhance the leverage of victims in negotiating out of court settlements with corporations.

Thank you very much for your attention. I look forward to further discussion.