

**SECOND SESSION OF THE OPEN-ENDED INTERGOVERNMENTAL
WORKING GROUP ON TRANSNATIONAL CORPORATIONS AND OTHER
BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS**

**PANEL: JURISPRUDENTIAL AND OTHER APPROACHES TO CLARIFY
STANDARDS OF CIVIL, ADMINISTRATIVE AND CRIMINAL LIABILITY OF
TNCs AND OTHER BUSINESS ENTERPRISES**

**WRITTEN COMMENTS OF MICHAEL GIUSEPPE CONGIU
26TH OCTOBER 2016, GENEVA, SWITZERLAND**

I wish to express my thanks to the Madame Chair from Ecuador for the continuing opportunity to provide my perspectives on these important issues, and to my colleagues on the panel and to all other participants for their contributions and insights.

These written comments are meant to complement and memorialize my oral comments made during the October 26, 2016 Second Session of the Open-Ended Intergovernmental Working Group for the Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights (“IWG”).

The Persisting and Fundamental Enforcement Gap

- The parameters of corporate liability under a multinational treaty cannot be meaningfully addressed without confronting many states’ profound failures to enforce extant human rights protections. Even the most thoughtfully crafted treaty will be meaningless unless it is ratified by states that have the political, legal, and judicial infrastructure and will to enforce that treaty.
- As I opined in the First IWG Session, any treaty process should focus on the state’s responsibility under Pillar One of the United Nations’ Guiding Principles on Business and Human Rights (“UNGP”) to protect human rights. The IWG should consider shifting its focus from developing a remedial framework, to empowering host countries to better enforce their own existing laws.
- There are scores of examples of states that have ratified human rights conventions but that have objectively and measurably poor human rights records.
- For example, Belarus has ratified the Forced Labor Convention but is a “source, transit, and destination country” for individuals subjected to sex trafficking and forced labor and is identified by the U.S. State Department’s Trafficking in Persons report as a “Tier 3” nation, meaning that the Belarusian government does “not fully meet the [United States’ Trafficking Victims Protection Act of 2000 minimum standards and [is] not making significant efforts to do so.”¹

¹ International Labor Organisation, Ratifications for Belarus, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103154; U.S.

- The Democratic Republic of Congo, has ratified the Forced Labor and Abolition of Forced Labor, Minimum Age, and Worst Forms of Child Labour, Conventions, but suffers from widespread forced conscription of children as combatants. “[I]n 2015, members of indigenous and foreign non-state armed groups—including the Lord’s Resistance Army; Forces Démocratiques de Libération du Rwanda; ... and other armed groups—continued to abduct and recruit children to be used in their units.”²
- Guatemala has ratified numerous UN treaties and ILO Conventions – including the Forced Labor Convention. In 2006, an estimated 18% of children 7-14 years old and 47% of children 15-17 years old were employed, mostly in rural agriculture and domestic service. The government has not dedicated sufficient resources to properly enforce obligations under ratified treaties and concomitant local laws.³
- The Proposed Treaty should not lose sight of the fundamental tenet of the UNGPs that the primary responsibility to prevent and redress human rights violations of citizens lies with States.

Other than Enforcement, What Should States Focus On?

- States should focus on two key issues: (1) clarifying standards for corporate conduct under national law; and (2) ensuring that their own existing political, legal, and judicial infrastructures are competent to ensure effective enforcement of extant legal protections.
- In terms of clarifying standards for corporate conduct, and to the heart of this Panel’s subject-matter, I note that delineating these complex issues should be a state-specific exercise, as these matters defy uniformity. As the UN OHCHR has opined:

Department of State, *Trafficking in Persons Report*, 39, 92 (2016), available at <http://www.state.gov/documents/organization/258876.pdf>.

² International Labor Organisation, Ratifications for DRC, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102981; United States Department of State, *Trafficking in Persons Report: Country Narratives*, 136 (2016), available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2016/258747.htm>; United States Department of State, Bureau of Democracy, Human Rights and Labor, *Democratic Republic of the Congo: 2015 Human Rights Report*, 37 (2015).

³ International Labor Organisation, Ratifications for Guatemala, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102667; Understanding Children’s Work (UCW) Project, *Trends in children’s employment and child labour in the Latin America and Caribbean region: Country report for Guatemala* (Rome, Italy, Nov. 2010); U.S. Department of Labor, Bureau of International Labor Affairs, *Guatemala: The Department of Labor’s 2014 Findings on the Worst Forms of Child Labor* (Washington, DC, 2015); available at <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/guatemala>.

- *There are many differences between jurisdictions in terms of legal structures, cultures, traditions, resources and stages of development, all of which have implications for the issues covered by the guidance. For instance, some legal systems are highly codified, whereas others place more reliance on legal development through judicial decisions and precedent. Some domestic legal systems are adversarial, whereas others are inquisitorial, and some contain elements of both. Some legal systems are federal, or devolved in nature, whereas others are unitary. Some legal systems provide for corporate criminal liability, and some do not. The guidance is therefore necessarily flexible and anticipates the need for adaptation to local needs and contexts.*⁴
- The UN OHCHR’s series of non-prescriptive guidelines, published through its Accountability and Remedy Project (“ARP”), set forth key and relevant considerations for States to explore these complex issues within their own cultural, legal, and socio-economic traditions.
- One other key consideration is ensuring that corporations not be punished for, or have used against them, their considerable and continuing efforts to comply with the UNGPs through statements of policy and/or due diligence mechanisms. This complex and important work is fraught with the uncertainty inherent in certain jurisdictions where the rule of law is tenuous and existing law is unclear, requiring extensive resources and delicate balancing that should not be utilized to impute liability.
- These concepts are being tested and developed in real time, as cases filed in the U.S. under the Alien Tort Claims Act continue to weigh the parameters of extraterritorial jurisdiction against the well-established norms of comity and the appropriate *mens rea* and *actus reus* to adjudge corporate conduct.
- As another example, Canadian courts continue to explore the contours of common-law tort theories and whether, based on domestic law, international instruments like the UNGPs can be used to set an applicable “duty of care” by which a corporation’s conduct can be adjudged.
- The treaty process should thus eschew drawing blanket or non-specific conclusions on these issues and allow States to determine these issues independently through their own courts or National Action Plans.
- To ensure appropriate and effective legal enforcement, I again reflect on the UN OHCHR’s ARP, which sets forth the following critical policy objectives that should be minded:

⁴ United Nations High Commissioner for Human Rights, *Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance*, A/HRC/32/19/Add.1 (May 12, 2016).

- *Policy objective 4: State agencies responsible for investigating allegations of business related human rights abuses and enforcement of domestic legal regimes (“enforcement agencies”) have a clear mandate and political support.*
- *Policy objective 5: There is transparency and accountability with respect to the use of enforcement discretion.*
- *Policy objective 6: Enforcement agencies have access to the necessary resources, training and expertise.*
- *Policy objective 7: Enforcement agencies carry out their work in such a way as to ensure the safety of victims, other affected persons, human rights defenders, witnesses, whistle-blowers and their legal representatives (“relevant individuals and groups”) and is sensitive to the particular needs of individuals and groups at heightened risk of vulnerability or marginalization.*
- *Policy objective 8: Enforcement agencies are able to take decisions independently in accordance with publicly available policies, without the risk of political interference in their operations, and to high ethical standards.⁵*

Once again, my thanks go to the Madame Chair, the IWG, and to all participants, for the opportunity to have participated in this important work.

/s/ Michael Giuseppe Congiu

⁵ United Nations High Commissioner for Human Rights, *Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19 (July 5, 2016).