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In a democracy every exercise of power must be subject to democratic controls. The ontology of the State is to regulate in the public interest and this has been codified in international human rights treaty law. Hence all persons living under the jurisdiction of a State have the right to be protected not only from State abuse, but also from the actions of non-State actors, whether these be paramilitary forces, private security companies, terrorists, currency speculators, vulture funds, corporate lobbyists, tax looters, pharmaceutical and other monopolies.

This important conference focuses on business and human rights. I wish to say a few words about the United Nations open-ended intergovernmental working group that has been entrusted to draft a legally binding instrument for transnational corporations. Indeed there has been very little accountability for the actions and omissions of transnational enterprises, which over the past decades have been exercising ever increasing economic and political power affecting the daily lives of all persons and sometimes endangering the foundations of organized society by interfering with the protective functions of the State in the fields of health, food security, access to clean water, environmental protection, labour standards, education and culture.

The concept of responsibility to protect means that the State must protect all persons under its jurisdiction from internal and external threats. This doctrine was enunciated by the General Assembly in paragraphs 138 and 139 of the Outcome Document of the 2005 Summit. No one can deny that the State has the primary responsibility to protect the persons living under its jurisdiction. Failure to do so may have many reasons and the international community should show solidarity by offering advisory services and technical assistance in a good faith effort to correct the deficits. A narrow interpretation of the doctrine as authority to intervene

in the internal affairs of States, and possibly intervene militarily, is not compatible with the prohibition of the use of force laid down in article 2, paragraph 4, of the UN Charter. Nothing should be allowed to erode this fundamental principle, which is also reflected in General Assembly Resolution 2625, the famous “Friendly Relations Resolution.”

A broad understanding of the responsibility to protect doctrine should empower States to take appropriate measures to regulate in the public interest, including by utilizing its budgetary and fiscal authority to fulfill its human rights treaty obligations. It is in the interest of all States and of all of humanity to recognize the need to protect the regulatory space of States and to ensure that this space is not restricted by bilateral investment treaties or by multilateral free trade agreements.

I would like to introduce a new concept into the discussion on corporate accountability: the Concept of Responsibility to Act (R2A) in the public interest. R2A attaches to governments, parliaments and courts as the guarantors of the rule of law. Bearing in mind that corporations and other enterprises exercise power that is not democratically legitimized, it is imperative that their power be regulated in a way to ensure that business activities and trade work for the realization of human rights and do not result in a reduction of the enjoyment of civil, cultural, economic, political and social rights. Democratic controls should be exercised by Parliaments and, where possible, ratified by popular referenda.

The Guiding Principles on Business and Human Rights are pious pledges that thus far have not precluded egregious abuse by transnational corporations, large-scale pollution, the devastation of whole areas of the Amazonian rain-forest and that have contributed to global warming. Notwithstanding ubiquitous lip-service to human rights, self-regulation by corporations has never worked. Indeed, the ontology of business is to make profits, not to ensure the welfare of the population. Thus R2A requires legally binding obligations on enterprises, both in the country where the enterprise is registered and

where it operates. The extraterritorial effects of business activity must be subject to national and international controls. National courts should have undiminished jurisdiction over the activities of transnational corporations, notwithstanding the existence of investor-state-dispute settlement mechanisms, which should be abolished as soon as possible. No new trade treaty should contain so-called investor protection chapters, since the proper venue for investors should be the courts of the countries where they are doing business and generating profits for themselves.

As I explained to the legal committee of the Parliamentary Assembly of the Council of Europe on 19 April 2016, the privatization of dispute settlement is incompatible with the rule of law and undermines the ability of states to fulfill their human rights treaty obligations. Therefore I have proposed that the international investment regime be examined and revised so as to make trade and investment work for human rights and not against them.

I have also suggested the establishment of an international court with specific competence to examine complaints against transnational corporations. This could be achieved by treaty. Of course, there will be no consensus in the adoption and ratification of such a treaty. But a first step must be made and gradually States may recognize that it is in everyone's interest to create a court that will give easy access to victims of human rights violations resulting from business activities. In the meantime the inter-State dispute settlement mechanism of the Human Rights Committee pursuant to article 41 of the International Covenant on Civil and Political Rights could prove to be useful.

I would like to see the General Assembly adopt a resolution referring a number of legal questions to the International Court of Justice in order to obtain an advisory opinion. Paragraph 70 of my 2015 report to the General Assembly (A/70/285) formulates a number of questions which

deserve answers from the highest judicial authority of the United Nations. Among those legal questions are

- the international status of transnational enterprises,
- their obligation not to interfere in the internal affairs of states,
- their obligations not to engage in activities that cause harm to individuals in the enjoyment of their human rights, including the obligation not to pollute
- their obligation to exhaust domestic remedies before turning to international dispute settlement mechanism
- their obligation to provide prompt, adequate and effective compensation to victims who have suffered from the activities of transnational corporations
- the competence of national courts to demand accountability for the activities of transnational corporations
- the right of victims to effective recourse and remedies

I would like to emphasize that a Treaty providing for Corporate Legal Responsibility should not stop at defining the civil liability of transnational corporations.

There must also be penal responsibility when corporate actions cause death or grievous corporal harm, when they destroy landscapes and the common heritage of mankind. Indeed, some activities of the oil and gas industry and of certain mining enterprises entail a major attack on the environment and reckless endangerment of the lives of millions of persons. Such an attack may well be justiciable as a crime against humanity pursuant to article 7, paragraph 1(k) of the Rome Statute. If business activities result in involuntary population transfer, article 7, paragraph 1(d) comes into play.

We should bear in mind that business enterprises are directed by human beings who can engage in criminal activity including corruption and bribery. The Nuremberg Trials have shown the way in prosecuting and convicting business executives of I.G. Farben, Flick and Krupp because of their complicity in Nazi crimes. In 1946 Bruno Tesch, a business executive responsible for the production and sale of Zyklon B was tried and executed.

There is no justification why business executives should enjoy impunity. The ICC statute does provide opportunities to call business enterprises to account. It is also time for the principles of universal jurisdiction to be applied in cases of corruption and other business abuses.

My 2016 report to the Human Rights Council (A/HRC/33/40) contains a long section on the need to adopt a binding treaty on corporate social responsibility, whose scope should include both civil and penal liability. The Report ends with the recommendation that States should cooperate with the inter-governmental working group on the drafting of a binding treaty on corporate social responsibility and adopt it expeditiously. The treaty should put teeth on the Guiding Principles on Business and Human Rights and provide for monitoring and enforcement mechanisms. The treaty should give recourse and remedy to victims of abusive activities by transnational corporations.

My 2016 report to the General Assembly recommends that the General Assembly revise the Guiding Principles on Business and Human Rights and support the adoption of a legally binding instrument on corporate social responsibility prohibiting “aggressive tax avoidance”, tax fraud, tax evasion and tax havens.

I THANK YOU FOR YOUR ATTENTION