



UNITED NATIONS
Working Group on the issue of human rights
and transnational corporations and other business enterprises
(UN Working Group on business and human rights)

First Regional Forum on Business and Human Rights for Latin America and the Caribbean

Opening statement by Alexandra Guáqueta, member of the UN Working Group on business and human rights, 28 August 2013

**This keynote speech of the Latin American Regional Forum was delivered originally in Spanish and aimed at addressing the local context.*

**Unofficial translation*

Mr. Vice President, Authorities, Representatives of the United Nations,
Honored representatives of civil society, business and Governments, ladies and gentlemen,

The Guiding Principles of the United Nations were unanimously endorsed by the UN Human Rights Council two years ago, in 2011. The same resolution created a group of independent experts with different areas of expertise and experiences on the topic of business and human rights, and gave it a broad mandate, of ten points, aimed at disseminating the Guiding Principles globally and including more audiences in the dialogue on the implementation and further development building on the Guiding Principles. This forum fulfills that function. The forum also seeks to offer a platform for business representatives, civil society and Governments, who do not always gather together in the same space, to be able to meet, talk, find common ground, express their frustrations, identify points of disagreement as well as areas where they can advance. To advance means that more companies follow the Guiding Principles and that all victims have access to remedy. Victims have that right.

The Guiding Principles refer to a specific topic: the management of adverse impacts that business has on people. Seen in context, the Guiding Principles are just one tool among many that modern political and economic players (that is, States, companies and civil society) have produced in order to construct, hopefully, a new Social Contract. For some decades, and more strongly of late, public global discontent with the highly inequitable distribution of wealth, loss of purchasing power of the middle classes, and anxiety over the physical limits the planet is reaching has made itself felt. It is enough to observe the social demonstrations that proliferate around the world. It is a fact that States and the traditional system of governance have been outpaced. This is not an excuse for States not to do their job in promoting, protecting and realizing people's rights. States must fulfill their legal obligations. But we need creative forms to deal with the darker side of globalization. At the heart of a new Social Contract are new forms of public-private alliances, new forms of accountability among States, business and citizens and new expectations as to the level of maturity of civil society in finding solutions.

The Guiding Principles were conceived of in order to intelligently combine the actions of States, market forces and the new empowerment that technology and political liberalization have brought to civil society. The Guiding Principles have three pillars, designed to be implemented simultaneously and in an integrated manner. If one of these pillars is ignored the equation does not add up. The first pillar has ten principles aimed at States. These principles take existing international treaties as their base and explain what is expected of the States so that they fulfill their obligation to protect people from possible negative impacts of business. This section, let us be clear, says that the States must review their laws and policies in order to ensure that there are no gaps, and if it were the case, to formulate new regulatory frameworks that will allow them to fulfill their obligations.

In the minds of some, the only function of the State is to punish businesses, and in the minds of others, the only function of the State is to promote economic growth. Both are wrong. With respect to business and human rights, States need to prevent the negative impacts from happening by means of effective instruments; they must protect those whose rights are being violated and must see that justice is done, which implies investigating and sanctioning in cases of violations of human rights. At the same time, States must work in favor of the progressive realization of social and economic rights for all. This means ensuring there are

appropriate conditions for the market to offer employment and for wealth to be well distributed.

According to the Guiding Principles, among the list of things expected of States are, for example:

- To ensure that policies regulating corporate governance do not restrict business' ability to respect human rights. Some companies say their only function is to answer to the shareholders (among whom many of us count indirectly through our retirement funds), then they must minimize the costs related to the adequate prevention of the adverse impacts and violations of human rights. It is time that this interpretation of businesses' duties toward society changes. In some countries there have already been reforms of corporate law to ensure that boards take into account the responsibilities of companies in the face of a broader spectrum of interest groups.
- Another expectation with respect to the State is that they review the coherence of their policies. For example, that they implement the Guiding Principles in their own businesses; that they explicitly demand clear standards of public enterprises and that contractors and suppliers that do business with the townships, regional governments and State agencies also do so.
- Another expectation is to ensure that investment agreements, free trade treaties and association contracts do not restrict the ability of States to fulfill their duty to protect people in their territory. This implies that when States sign treaties that seek to attract foreign investment, they must make sure that the conditions for protection of foreign investment that are, of course, necessary, do not impede their policy space for normative reforms to introduce requirements that seek to oblige companies to prevent, mitigate and ensure remedy, and that they do not impede sanctioning companies when there is a negative impact. The challenges that small States face in arbitration courts when multinational companies apply recourse to protect their investments are all too well known.

When the adverse impacts have not successfully been prevented, States and business must ensure that victims are compensated. Pillar two refers to human rights due diligence as expected from business in order to prevent, mitigate and remediate adverse impacts; while pillar three refers to the broad range of judicial and administrative measures and non-judicial

alternatives for access to remediation by States, businesses, industry bodies, multi-actor initiatives, international entities, and others.

Allow me to comment on access to remedy. It is of concern that remedy is not well understood in some parts of Latin America. Remedy has several elements: one is justice (that is, that there be a punishment), second is restitution (to put right what was wrong), that there is also compensation, and actions equivalent to guaranteeing that there will be no repetition, and there are symbolic elements of the recognition of guilt and the pain of others. When companies opt to pay and continue to pay in order to silence victims, without making an effort to seek dialogue with those affected and without changing those policies and practices that caused the problems in the first place, they are not fulfilling the spirit of the Guiding Principles. And when communities use the courts and grievance mechanisms as ways to redistribute wealth (“because businesses are rich, so they must be milked for money”) they are also ignoring the spirit of the Guiding Principles.

During the remainder of this address I would like to concentrate on two topics: one, Latin America, and two, some global trends with respect to the implementation of the Guiding Principles and debates about their implementation.

The Working Group on Business and Human Rights has had the opportunity to interact personally with civil society, with businesses and with governments in Latin America. Likewise, we have received much written communications. Some of the topics that have emerged from this engagement are the following:

- Indigenous peoples report that their rights are frequently violated by States and businesses. Approximately 25% of the communication received involves alleged or proven violations of indigenous peoples’ rights. In Latin America, indigenous peoples constitute 10% of the population. It is not a secret that numerous episodes of social conflict are related to: disagreements about the meaning of free, prior informed consent and consultation in practice, environmental impacts that affect indigenous land and that threaten their way of life, or with abuses by public forces or militias that think, or say, they are defending the rights and interests of private companies. In particular, we must point out the tragedy faced by those women who have been victims of sexual violence.

- Dialogue is difficult. In today's economy, and in many cases in Latin America, ownership of the land by indigenous peoples is the only capital they possess. They are not the owners of investment funds, nor of machinery, nor are they entrepreneurs (as indigenous peoples in Canada, the U.S. or Scandinavia) and the land is their only card to ensure that they are heard and protected. On the other hand, States are overwhelmed by the demands of an awakened and empowered society. Demands come from all citizens, indigenous and non-indigenous, from urban centers and rural areas. States need more fiscal resources and the taxes they are able to collect from extractive businesses, agriculture, energy, tourism and others are necessary for social investment. The conversation is not an easy one. Years of mistakes and discrimination have given rise to much mistrust between citizens and the State, between Latin America peoples and multinationals, and between Latin American States and foreign capital.
- Another problem in Latin America is the criminalization of protest. There have been lamentable assassinations of defenders of human rights. Even when the majority of the entrepreneurs of the countries in the region are not involved in criminal acts, there is an immense frustration among citizens when businesses turn an indifferent eye and when business leaders and associations do not always explicitly and publicly acknowledge the existence of this problem --persecution of human rights defenders.
- Among well behaved business there is frustration because they think that civil society has no basic understanding or appreciation of the social and economic benefits that business can create for society, of the collective positive impacts that exist when creation of employment increases and of the challenges companies face to operate in Latin America and compete in the global market-- the transaction costs. We cannot all live off the public sector. Resources are insufficient. We need to create business to have employment and for that we need greater certainty with respect to rules and we need constructive proposals from civil society.
- Corruption is a shared concern between enterprise and civil society. Civil society is worried that there is undue influence from business toward the State to favor business deals that enrich a few, or to bypass environmental regulations that seek to avoid damage to people's health. Corruption yields losses for business.

Business and civil society could join together to demand greater transparency and efficiency by the State at the national and local levels.

- Precarious work or even slavery in the supply chains in agriculture, in the textile sector and other economic sectors also appear as one of the major preoccupations in Latin America.

During the next two days we hope to hear about measures that States and companies have taken. Again, this challenge is not easy. Latin America has to compete in a global market. This is the Asian century – according to expert commentators - and a substantial amount of world economic dynamism, that is, access to capital, generation of employment, production and innovation, is happening in that region. Latin America has many advantages and can compete. But the commercial atmosphere is hard. The expectation in some society sectors discontent with businesses is that they close operations altogether, that agribusinesses, manufactures and extractive operations in Latin America close. This, however, will not help the Latin American people to obtain dignified jobs and a decent standard of living. By saying this, I am not granting a free pass for businesses to impact human rights. This is a call for social dialogue to mature.

Finally, let me finish my remarks by mentioning only certain trends in the implementation of the Guiding Principles on a global level. The Working Group has already listed a broad range of these in its reports to the UN Human Rights Council. We have highlighted the alignment with the Guiding Principles by the instruments of the International Financial Corporation, the Organization for Economic Cooperation and Development (OECD) and the European Union. Within the OECD there is greater pressure to universalize performance in the so-called National Focal Points – which can receive complaints about failure to comply with the OECD Guidelines for Multinational Enterprises, which have a human rights chapter based on the Guiding Principles. And in the European Union, National Action Plans based on the Guiding Principles, are advancing. These actions will soon have impact on Latin America because they will regulate the actions of national, regional and global enterprises operating there.

Aside from these, I would like to highlight other tendencies that are also relevant for Latin America:

- At the Annual UN Forum on Business and Human Rights in 2012 held in Geneva, there was a broad consensus on the need to create a binding instrument that would allow gaps in the extraterritorial application of justice in cases involving businesses in crimes against humanity and war crimes to be remedied. This implies at least two normative changes: one is related to the possibility of charging companies with legal responsibility – penal and civil –for violations of human rights, and the other related to the responsibility of the parent companies of multinational or transnational companies with respect to actions or omissions by their subsidiaries in other countries. This instrument would not directly have an impact on the routine of companies whose impacts do not constitute crimes against humanity or war crimes. For these companies, however, the development of other legislative frameworks would be more useful, that is, public policy frameworks or private regulation to solve problems related to environmental impacts or land ownership. Therefore, there are people that argue that the political and bureaucratic effort that would be required to prepare a binding global instrument to deal with the worst violations of human rights would not have a systemic impact on the bulk of problems involving business and human rights. It turns out, though, that in Latin America and on other continents there are dozens of victims of serious crimes whose frustration with impunity has reached its limit. It is morally and socially desirable, and frankly an obligation with justice, to attend to those crimes. I can anticipate that some States, civil society and businesses will want to work on an instrument of this type.
- A second trend has to do with accountability. The market, one of the paths we have for shaping the behavior of businesses, has been introducing more and more innovative ways of demonstrating accountability, monitoring and measuring business performance. Requirements for publicly reporting on matters of human rights and for obtaining independent certifications from auditors regarding human rights impacts are on the rise by means of contracts among business partners, by means of new multi-stakeholder initiatives and by means of stock exchange requirements. As the “multi-Latinas” become globalized and foreign investment in Latin America grows, these requirements will be thrust upon the businesses of our region. It is possible that the tragedy in Bangladesh has served as a catalyst for new initiatives and even obligatory market requirements by States with regards to due diligence in the supply-chains.

- To conclude, I would like to refer to the financial sector. In June 2013, the OECD held its first global conference on corporate social responsibility, focusing on implementation of the OECD Guidelines for Multinational Enterprises. Among the information highlighted and discussed at that international event was a study on the state of play of social and environmental responsibility codes of conduct used in the financial sector today, understanding “financial sector” to include not only commercial banks that we average citizens use regularly, but a broad range of services and products that investment banks offer. One of the concrete conclusions is that there are no clear guidelines on how to implement due diligence as expected by the Guiding Principles in many of the operations of the financial sector, apart to some extent from project lending. For example, what concrete steps can be expected of a retirement fund to identify and determine which of its investments could be contributing to a violation of human rights? What we do know is that the financial sector is strategic and the way in which it undertakes its investments has repercussions on the incentives, positive or perverse, of the rest of the sectors in the economy with respect to their conduct in the social and environmental areas. It is probable that in the following years we will see some changes in the rules applying to the financial sector with respect to due diligence in the field of human rights. In any case, the topic has already been put to the OECD. Following the international financial crisis of 2008, which blew up in part due to the bad conduct of certain banks – and certain Governments – there is more social and political pressure for the financial sector to adjust its regulations. This trend will sooner or later have an impact on Latin America given the capital flows entering the region.

With this brief summary of some of the global trends, I conclude the keynote speech of this First Latin American and Caribbean Regional Forum on Business and Human Rights. I hope we will have frank and constructive dialogues.