



Speech Linda Kromjong

Intergovernmental Working Group

Panel III, Subtheme 1 – Examples of international instruments addressing obligations and responsibilities of private actors

Dear Madam Chair

Dear Colleagues

It is a great pleasure to be here and address this distinguished panel.

In the last four decades, several instruments have emerged, which directly address companies. These are for instance the OECD Guidelines for Multinational Enterprises, the ILO MNE Declaration, the UN Global Compact and ISO 26000. These instruments have different scopes and purposes:

- The OECD MNE Guidelines addressing not only human rights, but a broad area of issues, such as even taxation and science;
- The ILO MNE Declaration focusing on employment and social issues, but thereby addressing not only companies, but also governments and social partners;
- The UN Global Compact, being not only an instrument, but a movement, which brings together companies and stakeholder in an efforts to progressively implement the ten principles and thereby learn and inspire each other; and
- The ISO 26000, which not only addresses companies, but all organizations including NGOs.

What is striking, however, is that these instruments despite their different purposes and scopes are all brought in line or in the process of being brought in line with the UN Guiding Principles. The OECD Guidelines were brought in line with the last up-date in 2011, the ILO MNE Declaration is under review at the moment and ISO 26000 took the UN Guiding Principles, which were in the process of finalization at that point in time, fully into account when being developed.

We discussed in the past two days already several times the UN Guiding Principles, which is no surprise in view of the fact that the UN Guiding Principles on Business and Human Rights are the most authoritative international instrument in this area and enjoy a broad international consensus.

The UN Guiding Principles very clearly distinguish between the duties of governments and the responsibilities of companies:

Under the State Duty to Protect, all governments are required to establish, implement and enforce national laws, as well as to ensure that they themselves respect, protect and fulfil human rights and fundamental freedoms. States must also protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication. States must also

take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. These obligations cover all activities within their jurisdictions, including production for export. Governments have immense powers to enforce the law. They can investigate, issue fines, freeze bank accounts, seize assets, revoke business or export licenses, and jail violators. Additionally, judicial processes can hold individuals and enterprises accountable for past abuses. Companies don't have and should never have any of these powers, so the worst penalty a company can impose as a last resort is to stop doing business with the supplier or business partner.

Under the Corporate Responsibility to Respect, all enterprises must comply with applicable national laws, avoid infringing on the human rights of others and address adverse human rights impacts with which they are involved. Importantly, the Corporate Responsibility to Respect applies to all enterprises regardless of their size, location, ownership and sector. All enterprises, including domestic producers, state-owned enterprises and exporters, have a responsibility to avoid causing or contributing to adverse impacts through their own activities where they have control; and all enterprises have a responsibility to seek to try to prevent or mitigate adverse impacts caused by others where it does not have control.

I am stressing these duties and responsibilities under the UN Guiding Principles here in this length in order to make clear that the purpose of the different initiatives and instruments which I have mentioned beforehand is not intended to replace or undermine the state duty to protect but to complement the efforts of governments. These initiatives and instruments have, of course, also not the same status as the different international human rights conventions and treaties. Thus, it is important to have their different nature clearly in mind in the work of this intergovernmental working group.

How important the state duty to protect is in connection with these instruments addressing obligations and responsibilities of private actors, becomes also very clear when looking at U.S. human rights case law involving a corporate defendant. Out of 64 cases, 73% of cases (47) against corporate defendants appear to allege violations of rights by a State actor as the primary actor, while 27% (17) appear to focus on corporate conduct. It shows how much interlinked the different pillars of the UN Guiding Principles are.

In this regard I also want to address last week's announcement of South Africa, the co-sponsor of the resolution to establish this intergovernmental working group, to withdraw from the International Criminal Court in the Hague. What does this mean with regards to holding people accountable for the gravest human rights violations?

Allow me to come back to the international instruments addressing obligations and responsibilities of private actors and how a treaty could approach these, taking fully into account the different nature of these instruments. In the view of business, the proposed instrument could require ratifying States to:

- provide companies with guidance on national law and human rights obligations. This is especially relevant in countries with a large informal or a grey sector in which enforcement of the law is weak, as well as in countries where the law has been developed through legal proceedings.

- support companies with information. Companies analyse the impacts of their business activity with regard to human rights through a due diligence process. Smaller companies in particular often find it difficult to collect accurate and relevant information on the target regions of their investments. The proposed instrument could require ratifying States - possibly through international organisations – to set up support structures which provide companies with valid information on the concrete situation on the ground and country- and sector- specific risks.
- undertake an assessment of the biggest obstacles for companies to fulfil their responsibility to respect human rights in the country of operation, and whether state legislation is in line with international human rights instruments and actually enforced.

Thank you very much for your attention.