



# Sixth Annual Meeting of the International Corporate Accountability Roundtable

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Center for Human Rights and Humanitarian Law

American University Washington College of Law

Washington, DC

September 8-9, 2016

## What is the International Corporate Accountability Roundtable (ICAR)?

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ICAR is a civil society organization working to ensure that governments create, implement, and enforce laws and policies to protect against business-related human rights abuse.

For more information about ICAR's work, visit: <http://www.icar.ngo>

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# Sixth Annual Meeting Agenda

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**ICAR Annual Meeting**  
**Day 1: Thursday, September 8**  
4300 Nebraska Avenue NW  
Washington, DC  
Room: CG Hall YT01-01

- 8:30 am      **Registration and Breakfast**
- 9:00 am      **Welcome and Introductory Remarks**  
Amol Mehra, ICAR  
Macarena Saez, AU - Washington College of Law  
Rebecca DeWinter-Schmitt, AU - Washington College of Law
- 9:15 am      **Reporting on Performance on Human Rights**  
*Moderator:*  
Amol Mehra, ICAR  
*Discussants:*  
Bennett Freeman, Global Witness  
Rachel Davis, Shift  
Adam Kanzer, Domini Social Investment  
Filip Gregor, Frank Bold
- 10:15 am     **Treaty Talk: Developments on a Binding Instrument**  
*Moderator:*  
Amol Mehra, ICAR  
*Discussants:*  
Dominic Renfrey, ESCR-Net  
Debbie Stothard, ALTSEAN-Burma
- 11:00 am     **Coffee Break**
- 11:15 am     **Non-Judicial Grievance Mechanisms: Addressing Limitations and Enhancing Effectiveness**  
*Moderator:*  
Cindy Woods, ICAR  
*Discussants:*  
Kindra Mohr, Accountability Counsel  
Carla Garcia Zendejas, Center for International Environmental Law  
Marilyn Croser, CORE Coalition

- 12:15 pm      **Lunch**  
*Keynote Speaker:*  
Ellen Dorsey, Wallace Global Fund
- 1:00 pm      **Commerce, Crime, and Human Rights: Enhancing the Investigation and Prosecution of Corporate Crimes**  
*Moderator:*  
Sophia Lin, ICAR  
*Discussants:*  
Seema Joshi, Amnesty International  
Mark Taylor, Fafo  
Sandra Cossart, Sherpa
- 2:15 pm      **Parent Company Accountability and Civil Litigation**  
*Moderator:*  
Sarah McGrath, ICAR  
*Discussants:*  
Christopher Schuller, German Institute for Human Rights  
Gwynne Skinner, Willamette University College of Law  
Marco Simons, EarthRights International  
Philip Mattera, Corporate Research Project of Good Jobs First
- 3:30 pm      **Coffee Break**
- 3:45 pm      **Land Rights: Addressing Corruption, Strengthening Standards, and Improving Transparency**  
*Moderator:*  
Sara Blackwell, ICAR  
*Discussants:*  
Olivier De Schutter, University of Louvain  
Chris Jochnick, Landesa  
Chloe Christman, Oxfam America
- 4:45 pm      **Open Floor and Closing Remarks**
- 5:30 pm      **Evening Reception**  
***Darlington House***  
1610 20<sup>th</sup> Street NW  
Washington, DC 20009  
*Welcoming Remarks and Toast:*  
Katie Redford, EarthRights International

**ICAR Annual Meeting**  
**Day 2: Friday, September 9**  
4300 Nebraska Avenue NW  
Washington, DC  
Room: CG Hall YT01-01

- 9:00 am      **Arrivals and Breakfast**
- 9:15 am      **Labor Rights and Supply Chains**  
*Moderator:*  
                Amol Mehra, ICAR  
*Discussants:*  
                Cathy Feingold, AFL-CIO  
                Sonia Mistry, Solidarity Center  
                Sarah Labowitz, NYU Stern School of Business  
                JJ Rosenbaum, Yale Law School
- 10:30 am     **National Action Plans on Business and Human Rights**  
*Moderator:*  
                Sara Blackwell, ICAR  
*Discussants:*  
                Paloma Munoz, Danish Institute for Human Rights  
                Jerome Chaplier, European Coalition for Corporate Justice  
                Pasience Mlowe, Legal and Human Rights Centre  
                Fernanda Hopenhaym, PODER
- 11:45 am     **Procurement and Human Rights**  
*Moderator:*  
                Nicole Vander Meulen, ICAR  
*Discussants:*  
                Bob Stumberg, Georgetown University Law Center  
                Brian Finnegan, AFL-CIO  
                Students from University of Washington, School of Law
- 12:45 pm     **Lunch**
- 1:45 pm      **Roundtable Session: Setting the Strategy and Building a Coordinated Movement**  
*Moderator:*  
                Arvind Ganesan, Human Rights Watch
- 4:00 pm      **Closing Remarks**

# Discussion I

## Reporting on Performance on Human Rights

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### *Scope*

This session focused on the importance of corporate human rights reporting through a discussion of mandatory and voluntary reporting initiatives. It also sought to highlight ways to improve both the quality and quantity of corporate human rights reports.

### *Discussion and Key Themes*

Mandatory and voluntary non-financial reporting on human rights has been increasing in recent years. This can be seen not only through the adoption of the European Union's Non-Financial Reporting directive, but also through the proliferation of voluntary instruments such as the United Nations Guiding Principles (UNGPs) Reporting Framework. Throughout this session, participants noted the need for both types of reporting and highlighted the important role that each plays.

### **Mandatory Reporting**

Participants highlighted the numerous reasons that mandatory reporting is important. Not only does mandatory reporting demonstrate that companies have human rights responsibilities, it also changes the way society measures corporate value and advances discussions around liability and accountability. Additionally, mandatory reporting increases comparability across reporting companies.

In relation to mandatory reporting requirements, participants highlighted the recent EU Directive on Non-Financial Disclosure, which requires large, listed companies to include information on human rights risks and mitigation in their annual reporting. The discussion highlighted that while this legislation is good in establishing key principles, it is weak in terms of detailing how companies should report and what metrics should be used to decide what information should be disclosed.

### **Voluntary Reporting**

Participants also noted the increase in voluntary reporting as a positive trend. New tools have been created and implemented to facilitate corporate reporting, including the UNGPs Reporting Framework. Created by Shift, the Reporting Framework aims to distill the UNGPs and make them more accessible to companies and measurable for the wider business and human rights community. Numerous participants also noted that voluntary disclosures, despite their non-mandatory nature, could still be used as tools for accountability and, if they are false or misleading, as a basis for liability. Participants agreed that voluntary reporting can drive progress.

### **Investor Viewpoint**

In relation to investor stances on non-financial human rights reporting, these views were grouped under three broad

categories: (1) those with no interest in human rights issues, (2) those interested in human rights reporting for the purpose of mitigating adverse human rights impacts, and (3) those interested based on the impacts human rights risks can have on the company's bottom line. Participants agreed that there is a need to rethink the way investors conceptualize risk so that they are not just focusing on financial risk.

### **Conclusion**

In terms of continuing to advocate for additional and stronger non-financial human rights reporting, one discussant highlighted a new initiative geared towards ranking companies based on their human rights reporting. The Corporate Human Rights Benchmark Initiative (CHRB), the first results of which will be launched in 2017, will help individuals and investors determine how companies are doing in relation to mitigating human rights impacts. This will be distinct from, but

complementary to, the UNGP Reporting Framework.

Participants highlighted some key challenges in relation to reporting. It was noted that public information from companies regarding human rights risks is usually not useful, difficult to find, or not meaningful. As such, there needs to be better information available for individuals to meaningfully engage with companies. Furthermore, the need for a reconceptualization of reporting was stressed and for greater alignment with a human rights-based approach, whereby risk is managed in relation to risks to people, not risks to the company.

Other issues flagged by participants to be addressed or explored further include: (1) the role of rating agencies in human rights reporting, (2) how to fight reporting fatigue, and (3) reconciling the terms of "materiality" and "salience" in both mandatory and voluntary reporting.

## Discussion II

# Treaty Talk: Developments on a Binding Instrument

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### *Scope*

This session presented an overview of the current status of the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) and corresponding developments around an international, legally binding instrument on business and human rights.

### *Treaty Developments*

No substantial developments took place following the first OEIGWG session in July 2015. The OEIGWG will hold its second session in October 2016 and will continue to focus on the content, scope, nature, and form of the proposed treaty.

Over the past two years, the International Network for Economic, Social, and Cultural Rights (ESCR-Net) and the International Federation for Human Rights (FIDH) have been working on a project (the “Treaty Initiative”) aimed at conducting regional consultations with affected individuals and civil society organizations regarding the content of the treaty. Based on these consultations, the Treaty Initiative has produced draft proposals on content for a number of key issues. Participants noted affected individuals and communities who have provided input into the draft proposals have felt empowered by doing so.

Additionally, participants confirmed the growing consensus that the parallel processes to create a binding, international treaty and National Action Plans (NAPs) on business and human rights are not in opposition. One participant pointed out that the UN Working Group on Business and Human Rights has called on States to engage in both processes, and both movements have energized civil society to participate in UN processes across the board. There is also increasing consensus among participants that the treaty should cover all corporations, not just those of a transnational nature.

### *Conclusion*

In 2017, the sponsors of the treaty resolution—Ecuador and South Africa—will report on the process to the UN Human Rights Council. In addition, the OEIGWG is expected to present draft content for substantive negotiations at their third session, taking place in 2017. As such, participants stressed that now is a key time to engage in the treaty discussions.

While some remain skeptical of the utility of a treaty, other participants expressed the need for increased civil society coordination and support for the treaty movement. Those in favor of increased advocacy discussed the need for civil society to present a united front in relation to external communication regarding treaty content and process expectations. Given the



diversity of actors involved in the Treaty Alliance, civil society must take time to align while still actively participating in the process. As such, some participants stressed the need to progress slowly and with purpose.

Additionally, participants discussed the possible threat of setting the bar too low in relation to treaty standards and called for greater unity in this regard.

## *Discussion III*

# Non-Judicial Grievance Mechanisms: Addressing Limitations and Enhancing Effectiveness

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### *Scope*

This session presented an overview of non-judicial grievance mechanisms, including those within development finance institutions (DFI), the Organization for Economic Co-operation and Development National Contact Point (OECD NCP) system, and the Inter-American Human Rights (IAHR) system. The session also focused on strategies for enhancing these mechanisms' effectiveness.

### *Discussion and Key Themes*

Participants noted that, overall, non-judicial grievance mechanisms are failing in providing effective access to remedy. Some of the main obstacles include lack of funding, political will, and transparency.

Across the accountability mechanisms of investment and development banks, participants observed a distinct failure of these mechanisms to provide remedy, with only about 18 to 24 percent of cases reaching an end result. Participants noted that, although there are some positive movements in these accountability offices, there is still a lack of political buy-in. As such, civil society needs to keep the pressure on these mechanisms to improve. In addition, multiple participants highlighted the growing complexity and diversity of project financing, such as through public-private partnerships.

Participants recognized a similar failure of the OECD NCP system in providing effective access to remedy. OECD Watch's "Remedy Remains Rare" report found that, out of 250 cases brought before NCPs (not including labor cases), only 14 percent had some beneficial results that may have provided some measure of remedy, none of which include compensation to the victims. Participants noted a lack of political will as a major barrier to effective remedy within the NCP system. A deeper dive into the United Kingdom (UK) NCP highlighted that two-thirds of cases filed since 2011 were not taken up by the NCP. Those that progressed to the assessments stage faced prohibitively high evidentiary thresholds. However, a recent evaluation of the UK NCP, which contained a strong critique of the mechanism, resounded within the UK NCP's office, highlighting the positive level of State responsiveness to public criticism.

In relation to the IAHR system, which some participants highlighted as having taken significant steps towards incorporating the UNGPs, a severe lack of funding and political will (resulting in part from a backlash of States against progressive judgments) has greatly crippled the mechanism as an avenue for remedy. Some participants issued calls for civil society to step up and help, particularly with the capacity and fundraising issues faced by the

Inter-American Commission on Human Rights (IACHR).

### *Conclusion*

Participants noted several future opportunities to improve the ability of non-judicial grievance mechanisms to provide effective access to remedy.

In relation to DFIs, participants discussed the Early Warning System, an international monitoring mechanism developed by the International Accountability Project (IAP) and the Center for International Environmental Law (CIEL). This tool can alert communities and civil society groups of potential human rights violations of development projects before they occur.

Participants highlighted commitments toward improving the NCP system in the G7

and the G20, especially through German leadership, as a positive trend. Participants also noted the need for and benefit of getting the private sector more involved and committed to the NCP process, specifically by framing the conversation in terms of metrics and cost-benefit analysis. Additionally, participants flagged the NCP peer review process as a leverage point in future engagement geared towards improving the NCP system. Similarly, participants pointed to OECD Watch's NCP Performance Index, a ranking tool, as useful for future advocacy. Lastly, the OECD recently dedicated a full-time staff person to measure and monitor NCP performance, which participants viewed as a positive step toward increasing efficacy.

## Discussion IV

# Commerce, Crime, and Human Rights: Enhancing the investigation and Prosecution of Corporate Crimes

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### *Scope*

This session featured ICAR and Amnesty International's Commerce, Crime, and Human Rights (CCHR) Project, which aims to address the impunity gap for corporate actors when they commit illegal acts that are linked to human rights abuses. The discussion centered on the challenges in the investigation and prosecution of corporate crimes, the Project's upcoming publication entitled *The Corporate Crimes Principles*, and potential avenues to advocate for increased corporate criminal accountability.

### *Commerce, Crime, and Human Rights Project Overview*

The session started with an overview of the genesis of the CCHR Project. To date, civil law suits have been the more commonly understood and used approach in seeking accountability for human rights violations. However, there are many challenges in obtaining civil remedy, and States have a duty under international law to protect people from human rights abuses, including by investigating and prosecuting corporate crimes. Yet, when businesses engage in illegal acts linked to human rights abuses, they are rarely, if ever, held to account.

As a result, ICAR and Amnesty International initiated the CCHR Project to understand the challenges in tackling corporate crimes and to advocate for increased law

enforcement action. This encompasses not only core human rights crimes, but also those crimes that have a human rights impact, such as toxic waste dumping, export of tools of torture, and the use of surveillance equipment that infringe on the right to privacy. Since the project started, ICAR and Amnesty International consulted over 120 investigators and prosecutors, members of civil society, and other legal experts from around the world.

With input from the consultations, ICAR and Amnesty International supported a group of eminent legal experts to develop *The Corporate Crimes Principles*, which encourage State actors to combat corporate crimes more effectively by providing practical guidance on issues such as case selection; evidence collection; identifying tools, resources, and strategies for effectively pursuing such cases; cross-border collaboration; victims' access to justice; and witness protection.

### *Discussion and Key Themes*

#### **Challenges in the Investigation and Prosecution of Corporate Actors**

The issue of political will was discussed as one of the most prominent and overarching challenges in pursuing corporate criminal accountability. Participants recognized that that in many jurisdictions, this may be the result of corporate capture.

Furthermore, law enforcement may not have the proper training to tackle corporate crime cases, and commonly lack sufficient resources and institutional support to pursue these cases. In addition, safeguards to protect victims and prosecutors from threats of physical and/or legal harm for pursuing criminal accountability are insufficient. For example, participants mentioned that the increasing use of strategic lawsuit against public participation (SLAPP) laws, or related tactics against victims and practitioners in jurisdictions that permit private prosecution, is especially concerning.

### **Potential Avenues for Advancing Corporate Criminal Accountability**

Participants explored different contexts to advance criminal accountability for corporate actors. One participant suggested focusing advocacy efforts on jurisdictions and courts that admit cases under the principle of universal jurisdiction. In addition, there should be more engagement with the International Criminal Court (ICC), which is legally mandated to pursue cases that involve core human rights crimes and has more resources and experience to tackle cross-border crimes. Although the Rome Statute only allows the ICC to assert jurisdiction over natural persons, namely, corporate officers or executives, the current conversation regarding ICC reform can be a good opportunity to advocate for an amendment to the Rome Statute to include legal persons.

The participants also discussed the need for corporate criminal accountability in the context of transitional justice and certain

truth and reconciliation mechanisms. It was recognized that *The Corporate Crimes Principles* may be a useful tool to approach some of these issues, but more work needs to be done to map out how various tools can be applied in each unique social and political context.

Participants considered how *The Corporate Crimes Principles* may be operationalized in Global South countries. Many of these countries, such as China, India, and Brazil, have become important exporters of capital and major players in the global market. Although prosecutors in home States may have jurisdiction over some business activities of Global South investors, to move the criminal accountability agenda forward, advocacy efforts need to also engage law enforcement in host States.

### ***Conclusion***

The participants agreed that *The Corporate Crimes Principles* fill an important gap and that criminal accountability of corporate actors is an issue that requires further attention. Governments need to explicitly recognize the importance of corporate criminal accountability for human rights related crimes and create the political space to allow law enforcement to pursue these cases. Prosecutors need to know that they have support from their superiors to take on corporate crimes cases, which may be resource intensive, time-consuming, and harder to secure a clear “win.” To achieve this, civil society groups need to work on all levels to create pressure for change. For example, some groups may collaborate with law enforcement to build a strong criminal case, while others may raise awareness on

the importance of corporate criminal accountability. The discussion concluded with a recognition that change will happen when law enforcement ceases to see

criminal liability for corporate actors as a novelty but rather an obvious approach to ensure justice and deter future crimes.

## Discussion V

# Parent Company Accountability and Civil Litigation

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### Scope

This session provided an overview of civil litigation and policy developments from the European and North American perspectives. It also explored opportunities for legal and policy reform in relation to parent company liability.

### Discussion and Key Themes

#### **Civil Remedies: Litigation Updates and Policy Developments**

##### **Europe**

Participants highlighted a few positive litigation and policy developments that have taken place over the last year in Europe. Participants were updated on a case against German textile retailer, Kik, which was the main client of a factory that exploded. The explosion killed 260 people and injured 32 more. In a landmark decision, a German court has accepted jurisdiction and granted legal aid to the claimants to cover their costs. Participants expressed hope that this case will open the door for future litigation and send a clear message that transnational corporations' responsibilities extend to supplier companies and subsidiaries abroad.

Important policy developments were also noted, including the pending duty of care bill in France. If passed, the legislation would hold parent companies accountable for the conduct of their subsidiaries. Participants also acknowledged

developments taking place in Switzerland, where the Swiss Coalition for Corporate Justice and other civil society groups are pushing for a national referendum that would require Swiss-based multinational companies to undertake human rights and environmental due diligence in all their business activities abroad, including throughout their supply chains and in relation to the actions of their subsidiaries.

##### **United States**

In the United States, participants highlighted major challenges in bringing lawsuits for human rights abuses involving large transnational corporations. Potential reasons for these challenges include the U.S. Supreme Court's *Kiobel* decision and its restriction on the extraterritorial reach of the Alien Tort Statute (ATS), as well as limitations on the ability of federal courts to reach foreign parent corporations. It was noted, however, that litigators are still able to pursue viable cases under the ATS, despite the limitations presented by *Kiobel*. Moreover, a positive trend that is beginning to emerge in U.S. courts is the decrease in the use of *forum non conveniens* as a means to prevent cases against U.S. parent companies for violations that took place abroad.

The Foreign Legal Assistance Statute was raised as a potentially powerful tool that enables U.S. courts to require discovery

from U.S. entities (including corporations) to assist with lawsuits in other countries. This tool has been used on multiple occasions to obtain information when subsidiaries are being sued in other countries.

## **Canada**

Canadian participants highlighted that *forum non conveniens* continues to be a barrier to victims seeking judicial remedy in Canada. However, there a number of interesting cases that are proceeding through the courts that have skirted this issue. These cases are currently proceeding through the Canadian courts based on their merits, and if successful, will be the first legal victories against Canadian corporations for their role in violating human rights outside Canada. Participants further emphasized that there is positive momentum building around corporate accountability issues in Canada and that the moment is right to start pushing for stronger civil and criminal liability.

## **Advancing Parent Company Accountability**

### **Challenges**

Participants agreed that the limited liability of parent companies remains a significant barrier to judicial remedy and there is a need for greater coordination and advocacy on the issue. The discussion highlighted various challenges that have prevented this work from progressing in the past. For example, to date, there has been no universal agreement on how to move forward and what approach to take, particularly in the United States. Furthermore, the legalistic and technical

nature of this topic has made it difficult to get buy-in and engagement from both civil society groups and policy makers. It was suggested that civil society needs to think about how to make the issues more accessible and understandable to non-lawyers.

### **Opportunities and Advocacy Strategies**

Several tools, resources, and strategies were explored as a vehicle to address parent company liability. Good Jobs First's Violation Tracker was discussed as a useful tool for strengthening campaigning and advocacy strategies.

The role of the legal profession was also considered. Participants agreed that legal professionals have an important role to play in advancing this agenda. As a result, civil society groups should look at ways to motivate the legal community to pursue more creative litigation approaches.

Participants also received an update on a half-day strategic workshop on parent company accountability, where a small group of legal experts considered the various circumstances when a parent corporation should be liable for the actions of its subsidiary. Key areas of consensus were presented and considered by participants, including:

1. That civil society should aim high and advocate for strict liability of parent companies for the acts of their subsidiaries, regardless of fault and control;
2. There is a need to build a movement around getting the public and policy makers to understand that limited liability should not be attached to



companies for human rights harms;  
and

3. The discussion should not be limited to parent-subsidary relationships, but should also include relationships such as franchisee, independent contractors, and any other business entity where a parent-like corporation has control. It was also acknowledged that this conversation needs to be expanded to include lead company liability in supply chains.

### **Conclusion**

On the issue of parent company liability, the discussion highlighted that positive

developments are taking place across various jurisdictions. However, there is a need for civil society to coalesce around this issue further. Participants agreed that civil society should look to find synergies across various projects and harness their collective power to deal with this issue on a global level.

Participants emphasized that parent companies receive immense benefits from their subsidiaries and yet absorb none of the risk associated with these activities. As such, this should be central to any campaign strategy.

## Discussion VI

# Land Rights: Addressing Corruption, Strengthening Standards, and Improving Transparency

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### *Scope*

This session highlighted the need for robust anti-corruption, human rights due diligence, and transparency measures to be put in place across the business and human rights and land-focused communities in order to generate cross-cutting solutions and coherent policies and practices at both the government and corporate levels. The session also provided a creative discussion on how the silo around the issue of land can be breached.

### *Discussion and Key Themes*

#### **Bridging the BHR and Land Communities**

Land rights issues have been less visible in the business and human rights arena over the past two or three years. A key cause of this has been the fact that many large-scale land deals have already been finalized or have failed in many cases, meaning that there is a perceived loss of opportunities to influence the outcomes of these types of land deals. Still, the trend toward the commercialization of land continues, and the human rights impacts of business operations that involve land warrants close attention. Companies themselves are gradually taking land rights issues seriously, as associated risks and legacy issues have become increasingly recognized within the business community. The food and beverage industry was highlighted during

the session as a sector where there is enhanced leadership on land.

Participants emphasized that land rights issues are often emblematic of the full range of business and human rights concerns. Instances of “land grabs” that involve large areas of land being transferred from local communities to investors have illuminated the significant human rights impacts of land deals. Moreover, the continuous persecution and even killing of human rights defenders has demonstrated the stark need for land rights to be prioritized across human rights and land rights communities.

Moreover, while new standards on land continue to come out, including at the Food and Agricultural Organization (FAO), the African Union, the International Finance Corporation (IFC), and industry associations such as the Palm Oil Roundtable, there continues to be very little implementation and enforcement of these standards on the ground.

Participants highlighted four key principles that land rights frameworks have focused on that are cross-cutting with business and human rights standards: (1) free, prior, and informed consent (FPIC), (2) human rights due diligence, (3) effective dispute resolution, and (4) the role of both home and host States in addressing governance issues. Some participants stressed the

potential role of investors in challenging governments to do better in relation to the fourth principle.

### **Broadening the Definition of FPIC**

The principle of FPIC has traditionally been applied only in the context of indigenous peoples under international law. However, in the context of land, this principle has been increasingly seen as applicable to non-indigenous and impacted communities. Some participants raised concerns related to this trend, arguing that the principle is only applicable to indigenous groups and pointing out that not having a limiting principle in the context of FPIC would mean that public works projects would very rarely get done. Other participants emphasized that, in certain regions and particular countries, non-indigenous communities are also severely impacted by large-scale land deals and should be meaningfully involved in the necessary consent for a project to proceed and later continue, particularly in the context of the right to self-determination under international law.

### ***Conclusion***

Participants indicated that even fully transparent large-scale land deals may have

seriously negative impacts on communities, and there remains a need to push for systematic reform that better supports local economies. At the same time, however, significant gaps remain in addressing the human rights implications of corrupt practices that pervade the current system of large-scale investment.

Various international, regional, and national instruments, such as the OECD Anti-Bribery Convention, the UN Convention Against Corruption, the UK Anti-Bribery Act, and the U.S. Foreign Corrupt Practices Act, aim to institute anti-corruption measures. Yet, these tools are currently inadequately applied in the context of land. For instance, the land titling process is often at risk of being captured by government and business elites in host States, and land is often mislabeled as “unused” or “underutilized” under eminent domain theories in order to allow for government actors to sell off large swaths of land to investors. Relatedly, large-scale land projects are often defined as being in the “public interest,” even though many of the approved projects under eminent domain claims primarily benefit corrupt elites, rather than local communities.

## Discussion VII

# Labor Rights and Supply Chains

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### *Scope*

This session focused on the current global architecture of labor relations. The discussion covered a range of issues including: the need for consistency and alignment of labor protections between countries; the importance of a worker centered movement; and expanding the work on labor rights beyond forced labor.. In addition, participants explored key challenges and opportunities for building the movement.

### *Discussion and Key Themes*

#### **Changing the Architecture of Labor Relations and Employment**

The global architecture of labor relations and employment has changed significantly in the past few decades. Beginning in the 1970s, globalization resulted in many companies restructuring their supply chains and moving production overseas. It was highlighted that this fundamentally changed labor relations and significantly weakened the bargaining power of workers.

Participants urged that, in response, civil society needs to engage on a global level to change this architecture by: (1) supporting the development of international labor conventions, (2) advocating for governments to require due diligence, (3) working to strengthen judicial remedy, (4) creating and supporting innovative models that are binding and enforceable, such as the Bangladesh Accord on Fire and Building

Safety, and (5) delving into substantive issues like child and forced labor, living wages, and procurement contracts.

#### **Creating Consistency and Alignment**

Participants stressed the importance of addressing the downward pressure on wages caused by competition between countries for foreign direct investment. Participants noted that it is important to push for adherence to international labor standards in all countries, regardless of the nationality of workers and the sectors in which they work.

This is also important for workers in the United States, who currently have little leverage to advocate for their rights because companies can simply respond by relocating to another country.

#### **Expanding Beyond Forced Labor**

Participants indicated that human rights and labor rights need to be viewed as a spectrum of various issues. Typically, attention is placed on forced labor. However, we must be inclusive of other labor rights issues as well, such as living wage, freedom of association, and gender-based violence. It was noted that companies tend to be more interested in addressing forced labor in their supply chains because there is an identifiable end and concrete result. At the same time, addressing an issue like freedom of association entails companies to be in constant conversation with workers.

Although it may be more challenging to get companies to address freedom of association, it was highlighted that civil society must push companies to focus on this issue. Participants stated that, for workers to exercise their rights such as freedom of association, essential preconditions, such as protection against retaliation and protection for whistle-blowers, need to be in place and enforced.

### **Importance of a Worker-Centered Movement**

Participants highlighted that workers must be at the center of the movement and any solutions being proposed. A key example was provided in relation to monitoring working conditions. It was stressed that workers themselves are the best monitors of working conditions, as they can identify violations on a day-to-day basis. They are also capable of addressing the violations they identify through collective bargaining at the local, national, and regional level.

### ***Conclusion***

#### **Building Power: Challenges and Opportunities**

Two challenges to building an enhanced movement were identified by participants: (1) the language used in the business and human rights field, and (2) the silos that currently exist around the human rights and labor community.

To counteract the power of businesses, participants indicated that the business and human rights movement needs to better connect with labor and other worker rights organizations. It was also noted that, to expand these connections, the business and human rights community may need to adjust the language it uses.

Participants indicated that, currently, business and human rights organizations are not always entirely comfortable with unions. Although there have been steps towards building coalition and connecting with labor organizations, it was stressed more need to be done to break down these silos and build power.

#### **Harnessing Hot Button Issues and Learning from Success**

Participants urged that civil society needs to act strategically and take advantage of issues that are “hot” on the political agenda, such as terrorism and refugees. The movement should strategize in ways that harness the attention that is being put on these issues and use it to advocate for labor rights in particular.

Participants noted that human trafficking has also garnered a lot of attention and has significant bi-partisan support. It was suggested that lessons can be learned from the work on this issue in order to inform work on other issues.

## Discussion VIII

# National Action Plans on Business and Human Rights

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### Scope

This session presented an overview on the progress of National Action Plans (NAPs) developments worldwide, as well as a debate on the benefits and limitations of NAPs in achieving progress in State implementation of the UNGPs and other business and human rights frameworks.

### Discussion and Key Themes

#### **NAPs Developments: Examples from the Americas, Europe, Africa, and Asia**

The ICAR-DIHR NAPs Toolkit has been used throughout the Latin American, European, African, and Asian regions.

#### **The Americas**

In Latin America, the Toolkit is being used as a reference point, as well as a methodology for the development of National Baseline Assessments (NBAs), in Chile, Mexico, and Guatemala. The Toolkit has also been utilized in the development of the Colombian NAP, which was published in December 2015. Other countries that have started the NAP process in the region include Argentina and Uruguay.

Participants highlighted the Chilean NAP as providing a strong example of a process that involves both multi-stakeholder and inter-ministerial input. The Chilean process is also aiming to align its business and human rights NAP with other NAPs underway in the country, including those on the Open Government Partnership and the

Sustainable Development Goals. NAPs are also being used throughout the region to address issues of transitional justice, such as in Colombia and Chile.

In Mexico, civil society is playing a formal advisory role to the NAP process, along with academic, union, corporate, and government actors. The NAP process is providing a platform for discussions around the strengthening of State regulators and implementation of existing laws.

It was noted, that while the IACHR has a key role to play in the development, implementation, and monitoring of NAPs across the Americas, it does not currently have the required funding and internal capacity necessary to play this role.

#### **Europe**

In Europe, the Toolkit has been used to systematically assess the quality of the NAPs published throughout the region. From these assessments, it can be seen that most of the European NAPs have involved inter-ministerial input and multi-stakeholder consultation. At the same time, however, none of the European NAPs have been informed by a NBA, and there has been a significant lack of transparency throughout each NAP's development process. In addition, none of the European NAPs have adequately contained a "smart mix" of regulatory and voluntary initiatives. In addition, a disproportionate focus has been placed on past rather than future

actions, and access to remedy remains largely ignored.

While there have been some indications that a Regional Action Plan might be developed at the EU level in order to provide guidance to Member States, there has been a halt on that commitment.

## **Africa**

While government buy-in on NAPs has been relatively slow across the African region, there are a number of processes underway. In Tanzania, for example, civil society is leading the completion of a NBA, based on the NAPs Toolkit.

NAPs advocacy throughout the region has focused on pushing governments to engage in the business and human rights agenda more directly, such as during the UN Annual Forum on Business and Human Rights. However, a key challenge in the African region is building enough political will to require human rights protections in the context of foreign investment.

The African Coalition for Corporate Accountability (ACCA) is taking leadership in terms of mapping out the various processes across the region and advising members on existing tools and advocacy strategies.

## **Asia**

NAPs processes are slowly developing in Asia, where government engagement on business and human rights issues remains at an early stage. There is work being done to support a NAP and build broader capacity on business and human rights in Myanmar, where the NAP should contribute to efforts toward sustainable peace. The

Toolkit is in the process of being translated into Japanese, but it remains unclear which government department, if any, will take the lead on a Japanese NAP.

## **Conclusion**

### **Opportunities**

A large number of participants noted the “door-opening” effect that NAPs are having across diverse national contexts, especially in terms of highlighting issues such as human rights defenders, trade, dispute settlement, parent company liability, extraterritorial obligations, indigenous peoples, and transitional justice. As such, NAPs are serving as a “hook” for more specific and direct discussions on implementation with a wider range of government departments than was previously occurring.

### **Challenges**

Several participants noted that a lack of trust across stakeholder groups, particularly in the Latin American region, could affect the success of a NAP. Some also highlighted that NBAs should be developed by the government with a neutral approach, but outside entities are most often completing them. This may result in NBAs becoming more of an advocacy tool and governments demoting their importance in the process of NAP development.

Other challenges include obtaining high-level commitment within the government, as well as adequate resourcing, both within and outside of the government, to support sustained engagement with the process. Moreover, there remains a strong need for

a formal monitoring mechanism to conduct quality assurance on NAPs.

### **Areas for Further NAPs Advocacy**

While there are several positive developments in the business and human rights space, such as the UK Anti-Slavery Act and the EU non-financial reporting requirements, these progressive steps are currently happening outside of NAPs. As such, stronger efforts should be made to point to these examples as the kind of reform that NAPs should include and/or support. This can be done through the continuation of the NAPs assessments, a structured peer review process, a NAPs

scorecard, and/or an online database such as the one that will be provided by the upcoming ICAR-DIHR Global NAPs Website.

The suggestion was also made that the infusion of business and human rights issues into other NAPs, such as those on human rights in general, corporate social responsibility, or development, might be another way to engage more governments, especially those with limited capacity and/or resources.

Lastly, participants stressed the need to bridge NAPs and treaty advocacy efforts, as these processes are interrelated and mutually reinforce one another.



# Discussion IX

## Procurement and Human Rights

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### *Scope*

This session focused on efforts to reform public procurement at the U.S. state-level, existing government initiatives on public procurement and human rights that are under threat, gaps in the recent OECD recommendations on public procurement, the key role public procurement should play in business and human rights, and how civil society can make transparency happen in public procurement.

### *Discussion and Key Themes*

#### **State-Level Procurement Reform**

The session began with a discussion of U.S. state-level procurement reform, focusing on the activities of ICAR and the University of Washington in relation to Washington state procurement. To provide the context for this work, participants noted that procurement law in Washington was reformed in 2012, with the objectives of increasing flexibility and creating a single approach to state procurement. The result was the creation of a centralized procurement agency, the Department of Enterprise Services (DES), as well as fewer prescriptive rules on procurement.

Participants acknowledged that much of the groundwork for human rights related procurement reform has already been done in Washington, through advocacy movements on eradicating human trafficking and promoting labor rights. ICAR is partnering with the University of

Washington to build on this work by providing policy recommendations targeted at DES on how to integrate human rights into its procurement. Participants highlighted that, on a positive note, DES has authority to engage in broad policymaking and has substantial freedom to draft evaluation criteria. The focus of this work is on getting DES to use this existing authority to implement the recommendations, rather than attempting to pass new legislation, which may be difficult given the recent overhaul of procurement law in Washington.

#### **Fair Pay and Safe Workplaces: Implementing Regulations**

The Fair Pay and Safe Workplaces Executive Order was issued in July 2014. The Executive Order only applies domestically, as the specific U.S. labor laws it cites do not apply extraterritorially. The regulations implementing this Executive Order were released in August 2016 and will go into effect in October 2016.

It was highlighted that during the drafting process, there was extensive consultation with contractors and contracting officers. Participants saw this as positive because having contracting officers buy-in to the regulations makes it more likely the contracting officers will enforce them. However, it was noted that contractors and the U.S. Chamber of Commerce have been pushing back on the regulations. Specifically, they are trying to get an

exemption for defense procurement, and there are also efforts to defund implementation of the regulations.

### **Use of For-Profit Auditing Companies**

San Francisco has an ordinance that prohibits the city government from purchasing apparel made in sweatshop conditions. In the past, the city contracted with Worker Rights Consortium (WRC) to monitor apparel contractors and ensure they complied with the city's ordinance. A potential threat to the efficacy of the ordinance was highlighted. Specifically, it was noted that on 2 September 2016, the Office of Contract Administration tried to undermine the city's efforts by proposing that the city should be allowed to contract with for-profit auditing companies for these monitoring services, which the ordinance currently prohibits.

Participants raised the fact that this is problematic because the for-profit auditing industry has no oversight or governance role by labor (as the WRC does), and it has a track record of failing to report labor rights violations and unsafe working conditions. For example, for-profit audit companies certified the Rana Plaza factory in Bangladesh, the Tazreen factory in Bangladesh, and the Ali Enterprises factory in Pakistan as all safe. All three factories later had disasters that resulted in the deaths of over 1,500 workers combined. The concern was raised that, if the city's ordinance is amended, the city would be able to contract auditors from the same companies that certified these factories as safe. Participants agreed that any

procurement standard monitored by these auditors will be fraught with problems.

### **OECD Recommendations on Public Procurement**

The OECD released recommendations on public procurement in 2015. A human rights gap in the recommendations was flagged, given that they focus on corruption, transparency, and efficiency in procurement, but do not address human rights or labor rights in any way. Although one participant noted that corruption is a human rights issue. Unlike the OECD Guidelines for Multinational Enterprises, the UNGPs have not been embedded in these procurement recommendations, which participants saw as a failure on the part of the OECD.

### **Key Role of Public Procurement in Business and Human Rights**

It was noted that, due to the scale of public purchasing, governments have a lot of leverage and power over the market. In the context of the UNGPs, integrating human rights into public procurement is one of the most significant direct obligations of governments. Yet, governments are not doing enough to meet this obligation. For instance, in the NAPs published to date, commitment to concrete action to reform public procurement is largely lacking. Participants highlighted that this is likely because governments are hesitant to be out in front leading the way.

Participants noted that there is a key opportunity with Germany as the chair of the G20, which makes it more likely that commitments on public procurement and

human rights will be a focus for the group. Participants suggested that the history of work on corruption should be used as a model for efforts to incorporate human rights into public procurement, as there has been a lot of progress on the issue of corruption over the last few decades. Specifically, civil society should look at the drivers of that progress to inform work on human rights in public procurement.

### **Making Transparency Happen**

Participants highlighted that a lack of transparency in public procurement protects governments and business from reputation risk. Transparency was a key recommendation in submissions to the U.S. NAP, but there has been no feedback or response. It was emphasized that, in the meantime, the information necessary to make transparency happen exists. Civil society can make transparency happen by: (1) focusing on one sector, (2) mapping U.S. government purchasing in that sector, (3) profiling lead agencies, (4) profiling

government contractors, and (5) scaling up the strategy.

### ***Conclusion***

Public procurement is a key lever to increase business respect for human rights, but governments are not using this lever adequately. In fact, as participants discussed, some existing government initiatives to integrate human rights into public procurement are even under attack, namely the Fair Pay and Safe Workplaces regulations and the sweat-free procurement ordinance in San Francisco. Additionally, participants identified the human rights gap in the OECD public procurement recommendations as problematic and suggested that civil society advocate for that gap to be filled while also working to ensure that the existing initiatives currently under threat are protected. Increasing transparency was particularly highlighted as an area for further research and advocacy.

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