

COUNCIL MONITOR

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COUNCIL UPDATE – ITEM 3 SPECIAL REPRESENTATIVE ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES HUMAN RIGHTS COUNCIL, 11TH SESSION 2 JUNE 2009

Overview	1
Item 3 – Special Representative on the issue of human rights and transnational corporations and other business enterprises 1	
Presentation by the Special Representative.....	1
Interactive dialogue	2
Further information.....	4

Overview

The Special Representative on the issue of human rights and transnational corporations and other business enterprises, Mr John Ruggie, engaged in an interactive dialogue with the Human Rights Council on 2 June 2009. The Council, once again, unanimously backed the Special Representative's three pillar framework on State duty to protect, corporate responsibility to respect, and access to remedies, expressed its strong support for its operationalisation, and welcomed his 'comprehensive report'.

Item 3 – Special Representative on the issue of human rights and transnational corporations and other business enterprises

Presentation by the Special Representative

The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, professor John Ruggie, presented his annual report,¹ which recapitulated the key features of the three-pillar policy framework: 1) the State duty to protect against human rights abuses by third parties, including business; 2) the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; 3) greater access by victims to effective remedy, judicial and non-judicial.

¹ A/HRC/11/13 (annual report), Add. 1 (on State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provision, commentary and decisions).

The Special Representative emphasised that, ‘in the face of what may be the worst economic downturn in a century’, ‘there has never been a more critical time’ to address business and human rights, for three reasons. First, he stated that human rights are most at risk in times of crisis, and that economic crises pose a particular risk to economic and social rights. Secondly, he stressed that the same types of governance gaps and governance failures that produced the current economic crisis also constitute the permissive environment for corporate wrongdoing in relation to human rights. Third, he underlined that business and human rights matters more than ever because progress on this front directly contributes to the transition toward more inclusive and sustainable economic growth. He noted that ‘the solutions for the economic crisis and for business and human rights point in the same direction: governments adopting policies that induce more responsible corporate behaviour, and companies adopting strategies that reflect the inescapable fact that their own long-term prospects are tightly coupled with society’s well-being’.

He furthermore updated the Council on some of the work he had begun to develop guiding principles under each of the three pillars of the policy framework. Under the State duty to protect, he is currently examining four sets of issues. First, there is a need for Governments to preserve their ability to meet their international human rights obligations. Accordingly, Mr Ruggie noted that he is exploring the feasibility of developing guidance for investment contracts that ensure investor protection while also safeguarding the ability of States to discharge their human rights duties. Secondly, there is a need for Governments to take human rights into account when they do business with business. Thirdly, the Special Representative addressed the need for Governments to foster a corporate culture respectful of human rights at home and abroad, even when they are not connected directly to a business venture. Finally, he is examining the role of international cooperation. Mr Ruggie noted that the second pillar, the corporate responsibility to respect human rights, is the minimum requirement for companies in all situations. He added that there is a need for more concrete guiding principles for the human rights due diligence processes by which companies are able to demonstrate to themselves and other stakeholders that they respect human rights. With regard to the third pillar, access to remedy, he stated that the mandate’s ongoing work includes both judicial and non-judicial remedies.

In concluding his presentation, the Special Representative underlined that the framework already enjoys considerable support by all stakeholder groups and that, for the first time ever, there is a common platform of responsibilities to move the business and human rights agenda forward. At the same time, he acknowledged that ‘a steep climb still lies ahead’.

Interactive dialogue

Several States² addressed the current **economic and financial crisis** and warmly welcomed the Special Representative’s key comment that ‘there has never been a more critical time’ to address business and human rights. Pakistan, on behalf of the Organisation of the Islamic Conference (OIC), underlined that, in the current crisis, lowering the guard of corporate social responsibility (CSR) or a compromise on human rights standards would be a mistake. The Czech Republic, on behalf of the European Union (EU) and the United Kingdom (UK) insisted that States should avoid lowering human rights protection to attract businesses, with the latter stressing this would be counter-productive to creating a platform for sustainable development. India encouraged the Special Representative to develop model investment and trade agreements for States. In responding to these issues, the Special Representative noted that, with regard to responsible contracting, the investment agreement issue is ‘an example of how States sometimes unwittingly tie their own hands and constrain themselves from implementing their own human rights obligations, or the ability to adopt other progressive legislation and regulation without fear of being taken to international arbitration’. He recognised that, because many agreements are often written, or interpreted, very loosely, there is a great need to add much greater precision to how those instruments are drafted, so that they will achieve two aims, namely provide investor protection, and at the same time make sure that States’ *bona fide* objectives regarding public interest considerations, including human rights, are not unduly constrained.

² Brazil, Czech Republic (on behalf of the EU), Pakistan (on behalf of OIC), Russian Federation, UK, Switzerland, Sweden, Denmark, Canada, China, France, India.

He referred to a meeting with legal experts that will be held in Paris in two weeks where it is hoped that they will be able to come up with a model agreement.

States were not in agreement on the **balance of responsibilities for protecting human rights** between States and businesses. Some States³ reiterated that the primary responsibility to protect human rights rests with the State. The Czech Republic (on behalf of the EU) underlined that the responsibility for ensuring human rights protection could not be shifted onto businesses away from States. It stressed that countries bear responsibility for human rights abuses that occur within their jurisdiction. The United States appreciated that the policy framework ‘helpfully moves the dialogue away from past efforts⁴ which blurred the roles of States and companies with respect to the responsibility to enforce human rights obligations’. India, however, underscored that it was not merely the State, but also non-State actors, particularly the business sector, which have responsibility for securing observance of human rights. Finland also emphasised that the role of the private sector was increasingly important and that there was a need for international codes of conduct.⁵ Canada noted that the specific responsibilities for both governments and companies need to be clearer. Ghana touched on the unsettled issue of extraterritoriality where businesses violate human rights outside the jurisdiction and control of the State and the State’s duty to protect against such violations. It stated that this is an area of concern for many developing countries. The International Federation of Human Rights Leagues (FIDH) insisted on the recognition of an extraterritorial dimension.

In his concluding remarks, the Special Representative reiterated that ‘it is exceedingly important not to shift the protection of human rights abuses away from States’. He added that, ‘whatever responsibilities corporations have, they ought to be independent responsibilities’, not in competition with States’ obligations under international law. He underlined that it is an important element of the policy framework that it consists of a set of differentiated, yet complementary, responsibilities, which are meant to be engaged in dynamic interaction with one another, and not one substituting the other.

With regard to the **corporate responsibility to respect and due diligence**⁶, the US stated that the due diligence approach could be a useful tool in promoting discussion about human rights risks. India, however, noted that the report showed that very few companies have systems in place to ensure that they are incentivised to undertake human rights due diligence. Denmark mentioned that ‘one of the toughest dilemmas companies faced was where national law significantly contradicted international human rights standards’. It asked the Special Representative for recommendations to companies facing such dilemmas. Pakistan (on behalf of the OIC) stated that the second pillar of corporate responsibility needed more reflection and deliberation.

Few comments were made on the issue of **access to remedies**.⁷ India noted that the Special Representative should present options to overcome the barriers to judicial remedies for victims in his next report. Denmark emphasised that the Special Representative should explore possibilities for developing criteria for a grievance mechanism in cases where the national legal, protective and monitoring mechanisms are inadequate. The International Coordinating Committee of national human rights institutions (NHRIs) warmly welcomed the reference in the report to their role with regard to effective remedies at the national level. In his concluding remarks, the Special Representative stated that it is important to understand that non-judicial remedies are ‘not a substitute for judicial remedies’, but are a separate tool, and that they ‘are a useful instrument in any context’.

Several States⁸ addressed the issue of corporate-related human rights abuses in **conflict affected areas**. The UK noted that it was keen to receive further information about the Special Representative’s plans to develop a policy tool kit for States to ensure that human rights in conflict zones were not negatively affected by corporations.

³ Czech Republic (on behalf of the EU), Sweden, US, Finland.

⁴ Referring to the Sub-Committee UN Norms.

⁵ Especially with regard to the realisation of rights of labour, consumers and local residents.

⁶ The Special Representative uses this term in a broad sense: a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.

⁷ Argentina, India, Denmark, Switzerland.

⁸ Switzerland, Sweden, Norway, UK, Egypt (on behalf of the African Group), Ghana.

Switzerland stated that ‘in countries where national law is difficult to uphold and the rule of law is not fully developed businesses has a greater responsibility’ and that in conflict zones businesses’ responsibility ‘can go beyond a simple respect for human rights’.⁹ It asked why this idea of greater responsibility in conflict zones was not raised in this year’s report. Sweden acknowledged that there are a limited number of situations mostly in countries ravaged by conflict, where the State had ceased to function or did not exercise sufficient control. It added that it was unsurprising that the most egregious corporate-related abuses typically occurred in these situations. Egypt (on behalf of the African Group) encouraged the Special Representative to pursue his objective of elaborating possible guidance on how to prevent corporate-related abuse in conflict affected areas. Norway also underlined that all stakeholders wanted greater guidance on how to prevent corporate-related abuses in conflict affected areas. Human Rights Advocates noted that there was nothing in the report on States that are unwilling or unable to respect human rights, and the fact that it is in these situations that companies have often been engaged in grave abuses. The Special Representative responded that he is aiming to start a project on conflict affected areas to initiate ‘a structured brainstorming on the part of host and home States’. He added that there is no expectation that the participating countries would reach a consensus, but that it is intended as a brainstorming session in order to generate good ideas about what policies could be adopted to provide greater guidance for countries themselves and companies, on appropriate ways for companies to behave in conflict areas, so that they do not contribute to human rights abuses.

Egypt (on behalf of the African Group) and Ghana emphasised their hope that the Special Representative’s work would evolve in the direction of elaborating a **legally binding instrument** on the human rights responsibilities of transnational corporations. While States responded positively to the Special Representative’s report and expressed their strong support for the operationalisation of the three-pillar framework, NGOs raised more concerns. They particularly addressed the need for legal reform¹⁰, noting that existing means remain insufficient, imperfect or limited; the fact that the Special Representative, again, did not propose the elaboration of an international legally binding instrument; and that domestic regulation alone will not be able to reach all corporate activities.¹¹

The Special Representative responded that, for the time being, the focus has been entirely on content, underlining his belief that ‘form should follow function’. He stated that States were ultimately ‘the deciders’ on whether there needs to be a legal instrument, and that, although he will provide recommendations in his final report, it is not his job to draft treaties.

Further information

For further information on the Council, please consult the following resources:

- Web site of the International Service for Human Rights, providing up-to-date information before, during and after sessions of the Council: <http://www.ishr.ch/council>. During the session, ISHR will provide information about the Council’s proceedings on a regular but not daily basis. You can subscribe to receive alerts of our publications by sending an email to information@ishr.ch.
- Web site of the Office of the High Commissioner for Human Rights (OHCHR) on the 11th session of the Human Rights Council: <http://www2.ohchr.org/english/bodies/hrcouncil/11session>. For direct access to reports considered, check <http://www2.ohchr.org/english/bodies/hrcouncil/11session/reports.htm>.
- More informal documents and draft resolutions are available on the ‘OHCHR extranet’ at <http://portal.ohchr.org/portal/page/portal/HRCExtranet>. Username: ‘hrc extranet’ Password: ‘1session’.

NGOs and human rights defenders seeking more specific information or individual advice on the Council session, please contact the ISHR secretariat by email or phone at +41 (0) 22 919 71 00.

⁹ As confirmed by experts to an international conference in Switzerland.

¹⁰ Europe-Third World Centre: Joint Statement, Human Rights Advocates, Nord-Sud XXI.

¹¹ Europe-Third World Centre: Joint Statement.

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