



HUMAN RIGHTS COUNCIL 20TH REGULAR SESSION

PARALLEL EVENT

Sponsored by the ICJ

**'HIGH LEVEL DISCUSSION ON ADVANCING HUMAN RIGHTS
AND BUSINESS IN THE HUMAN RIGHTS COUNCIL'**

SUMMARY NOTE OF EVENT

21 June 2012, *Palais des Nations*

The International Commission of Jurists (ICJ) is a non-governmental organisation founded in 1952, in consultative status with the Economic and Social Council since 1957. The ICJ is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. It takes an impartial, objective and authoritative legal approach to the protection and promotion of human rights through the Rule of Law. It provides legal expertise at both the international and national levels to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level.

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‘High Level Discussion on advancing Business and Human Rights in the Human Rights Council’.

On the 21st June 2012, the ICJ held a parallel event to the 20th Regular Session of the Human Rights Council entitled ‘High Level Discussion on advancing Business and Human Rights in the Human Rights Council’. The panel was moderated by Professor Marco Sassoli¹ and included Professor Andrew Clapham², Dr. Michael Addo³, Ms Harriet Berg⁴ and Ms Rachel Groux-Nurnberg,⁵ as speakers. The event was convened in order to provide delegations and civil society with a forum to explore ways for further enhancing international standards within the Human Rights Council on the issue of businesses’ human rights responsibilities. Over 50 participants, including representatives from affected communities, civil society, international organisations and members of the diplomatic community in Geneva attended.

Senior Legal Adviser to the ICJ on business and human rights, **Carlos Lopez**, opened the event recalling the objective of the meeting, which was the exploration of needs and options for an international legal instrument in the area of businesses’ human rights responsibilities. He referred to the UN Guiding Principles on Business and Human Rights⁶ (GPs) as valuable but referred to the need for the further development of standards in this area. He encouraged participants to explore options for the future with an open mind and stated that the Human Rights Council Resolution adopting the GPs⁷ speaks clearly in this regard.

Professor Marco Sassoli acted as moderator. He introduced the topic by stating that the GPs represented progress and there had been a wide uptake on a normative level. However, paper is not enough and their actual implementation is necessary, though difficult. In terms of future progress, States must remain responsible under international law but States are no longer the only actors on the international stage and it is only logical that non-state actors must be engaged. He recognized that there is a risk in this regard that the responsibility of States will be diluted. He advised that businesses must be engaged or the rules will not work. He stated that the international reality is that softer instruments do not mean less and posed two questions. First, do we need the further development of international standards and, second, should the main legislators at the international level go into more detail in regards to specific human rights problems?

Professor Andrew Clapham addressed two issues. The first was whether or not a corporation can violate international law. The second was the development of an international Code of Conduct for Private Military Security Companies (PMSCs).

Addressing the first issue, Professor Clapham referred to the US Supreme Court case of *Kiobel and Others v. Royal Dutch Petroleum Co, (Shell)*, due for a second oral hearing in October 2012. A key issue in this case is whether a corporation can violate international law. During its first oral hearing, the respondents stated that the GPs and the work of former UN Special Rapporteur on Business and

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⁵ Vice President, Corporate Responsibility and HSE, Statkraft AS, Oslo, Norway.

⁶ Un Doc A/HRC/17/31. See <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

⁷ UN Doc A/HRC/RES/17/4 (2011). See <http://www.ohchr.org/EN/Issues/Business/Pages/ResolutionsDecisions.aspx>

Human Rights, John Ruggie, suggested corporations could not violate international law. Shell quoted a sentence from a 2007 report by Ruggie: “it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations.”⁸ John Ruggie, however, submitted an amicus brief in June 2012⁹ stating that the above quote misrepresented his position because the sentence was taken out of context and did not refer to the rest of his conclusions on this subject. In his 2007 report, the former Special Rapporteur in fact had recognised that there may be corporate liability under international law for gross human rights abuses, including international crimes, such as genocide, torture, slavery, and crimes against humanity¹⁰.

Professor Clapham interpreted this submission by Ruggie to the US Supreme Court as a statement that “international law does bind a corporation”.

Professor Clapham then asked what obligations do companies have besides the obligation not to commit genocide, torture, slavery, and crimes against humanity? The GPs outline the expectation that all companies should respect all human rights but there is a need for more clarity about what human rights need to be respected and about what obligations corporations would be prepared to sign up to. He gave the example of the International Code of Conduct for Private Military and Security Companies (PMSCs), which is in the process of being drafted. With its focus on a sectoral approach, it has been possible to come up with 70 articles that go into far more detail than the Universal Declaration of Human Rights. Over 400 companies have signed the Code of Conduct. In developing this Code, the biggest challenge posed is its implementation.

A steering committee has made three proposals with regard to the implementation of the Code. The first is registration or certification. If a company signs the document they have to have a certificate. However, there must be procedures, training, vetting, registration and certification to ensure this works. How you do that is still unclear.

Second, there should be effective monitoring. PMSCs are likely to be operating in a dangerous environment. They will be difficult to monitor and the monitors will need their own security, raising further questions. Monitoring will be exceptional but the prospect that they could be monitored will contribute to the process.

The third proposal regarding implementation of the PMSC Code of Conduct is a third party grievance oversight mechanism. This mechanism would oversee complaints, which in turn could trigger the need to monitor, report, and ultimately deprive companies of their certificate where there are violations. The starting point would be the premise that a corporation has an obligation, they know what it is, they sign up to it and therefore can ultimately be held accountable. Reparations for victims would also be available.

Dr. Michael Addo made clear that he was not delivering an official statement from the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (WG). He addressed the room as a member of the WG but also as a human rights lawyer and academic. He stated that the GPs were a basis for exploring future opportunities on the development

⁸ Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) at 44. This sentence was quoted in the Brief for Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Jan. 27, 2012), at 28. See also Transcript of Oral Argument at 49:7-15, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 28, 2012). Respondents argued that this statement supports the conclusion that “international-law sources on the specific offenses at issue refute corporate responsibility.”

⁹ http://shiftproject.org/sites/default/files/No_10-1491_ac_UN_Special_Representative.pdf

¹⁰ The 2007 report by Ruggie concluded that “the most consequential legal development” in the “business and human rights constellation” is “the gradual extension of liability to companies for international crimes, under domestic jurisdictions but reflecting international standards,” *Supra* 8, at 84.

of standards. He cautioned against focusing on one pillar of the Respect, Protect and Remedy framework of the GPs; the three pillars should be handled in an integrated way and any examination of remedies should be in the context of the State duty to protect and respect.

Looking back at the Ruggie process, particularly the follow up to his mandate, the former Special Rapporteur made it very clear that whoever or whatever replaces him should consider *inter alia* the challenges posed by a patchwork of standards and should consider a voluntary fund, which the Working Group is interested in exploring. Looking at international crimes in particular, the WG agree that there is a need to look forward. In the preamble to the resolution establishing the WG's mandate, the Human Rights Council did contemplate looking forward in terms of exploring options and making recommendations. There is no prohibition and no reason to consider that looking forward is precluded. However, if there is room for going forward, what is the framework for this?

Dr Addo answered by proposing two core principles. The first is evidence. The second is integrity. One of the legacies of John Ruggie is to draw conclusions using evidence. He commissioned wide research, consultations, studies and pilot projects to keep providing evidence. He piloted effective company grievance mechanisms, tried to clarify issues such as complicity, surveyed treaties and considered the issue of extraterritorial jurisdiction. Any substantial changes must be couched in the process with integrity. Ruggie was good at multi-stakeholder consultations and this should continue. A shared understanding will lead to a stable mechanism of change.

Dr Addo then asked is there a need for an international instrument? He referred to the following statement of the ICJ: 'the GPs do not themselves constitute a legally binding instrument, which necessarily limits their normative force'. In response, he stated that nobody would dispute that the GPs are soft law. But there is no basis for foreclosing future action and the WG is fully aware of this. He stated that the fact that the GPs are soft law is not a good enough reason to justify the need for a hard law document. If the process is to move forward, Dr Addo stated that he wants demonstrable evidence as to the propriety of the approach and the integrity of the process to achieve this.

He affirmed that the entire basis of the work of the WG is to carry the mandate forward but it is important that a number of specific projects are identified in this regard. The WG is particularly interested in identifying and closing gaps in effective remedies. The mandate of the WG is to identify and share good practice. It is expecting to have a number of regional consultations, depending on funding, where it will look at issues that are specific to those regions. The members of the WG are looking forward to taking stock, sharing good practice and seeking to fill gaps at their annual forum.

Harriet Berg stated that she was looking at this issue as a representative of Norway and from her own experience in a global telecommunications company. She underlined that a lot had changed since the discussion on CSR started in the 1990s. Expectations have become clearer with the GPs. Company owners and financial institutions are more aware of these expectations. The GPs have normalised an issue that was previously foreign. Companies do discuss the GPs when they meet at an international level.

"The Ruggie process" was credible and relevant because of its extensive dialogue and its incremental progress combined with an extensive and open dialogue. Ms Berg stated that the process had great backing and did not just refer to existing standards but also raised standards. At the same time, many challenges remain. There is a need to make sure CSR makes business sense. There must be a comprehensive and coherent set of incentives in the market.

The fact that "the Ruggie process" was global was important. Companies are eager to see predictability and a level playing field when they go into new fields. If they don't see this they will be hesitant to take up new standards. She affirmed Norway's support for the strategy of the Working

Group to focus on implementation of the GPs but stated that ‘we are not where we should be’ when it comes to realities on the ground. There is a need to further develop an incentive structure that has to be comprehensible and coherent with the involvement of all stakeholders.

Ms Berg stated that when it comes to governments, they must communicate clearly what is expected of business. There is a need for a unified front across ministries, export credit agencies and other government agencies. Guidelines are needed for different sectors. There is a need to build on the GPs as a great tool and a great basis. Possible future work should be based on identified governance gaps that are not covered by the GPs or national or international law. There is however a need to confirm that the GPs are not working before entering further discussions on the need for international binding regulations. Diplomats are eager to see cross regional consensus. They want to know that when negotiations start there is a real possibility of success. There is also a need to make sure new standards are raising standards and not lowering them. She expressed her appreciation for the engagement of all participants and stated her belief that the current discussions can lead to progress.

Rachel Groux-Nurnberg, speaking in her personal capacity, stated that her company, which has operations in many countries in all regions, is committed to work in a sustainable and responsible manner but that the implementation of human rights can be challenging, as pointed out by the first report of the WG.

Businesses need clarity. The question for her is whether there is a need for an international instrument or whether softer instruments are better. This question should also be looked at in terms of a level playing field and predictability. In discussions between other companies at home and abroad about whether we need an international convention, the question of predictability and level playing field comes up all the time. Regional instruments are useful if they build on something more global.

However, even with an international instrument, her reality is that when project managers come to her looking for human rights guidance, tools such as checklists or instruments like the Code of Conduct for PMSCs are very useful since they are more concrete.

Ms Groux-Nurnberg stated that she cannot answer an engineer seeking guidance by saying ‘here is the UDHR, the two main human rights Covenants, the ILO Core Conventions, the principles of the Global Compact, the GPs, other regional guidelines and good luck with their implementation’. What is needed is more specific guidance on how to respect human rights in everyday activities that would provide people on the ground with concrete tools. She stated: “We need an IKEA manual on how to implement standards. We need tools to facilitate the implementation of the GPs.” Businesses want to engage with the debate and provide feedback. Sector guidance such as the European Commission’s sectoral papers on oil and gas can be useful. But it is important not just to focus exclusively on different sectors. A crosscutting approach is necessary since some of the human rights issues covered are relevant for more than one sector.

The issue of integration of human rights into a company’s value chain and day-to-day activities is very important. She did not see the creation of ad-hoc processes as the most efficient way to implement human rights. Good practice must be fully embedded in a company’s daily work. She also believed that existing processes covering human rights should be acknowledged and be linked under the human rights umbrella: for example, building on health and safety best practices. Avoiding duplication is very important: if you sit with several instruments, how to compare them and understand their possibly small differences in wording can be difficult, especially for non-experts.

In relation to the first report of the WG,¹¹ she welcomed the idea of developing performance indicators. A large number of companies report according to the Global Reporting Initiative and she wondered if the concept of human rights indicators needed to be revisited, especially in the area of human rights assessment and management, in light of the adoption of the GPs. Financial institutions have tremendous influence and should be used as a channel to promote the implementation of the GPs. In relation to the development of a new international instrument, building on GPs and having the voice of business heard is very important.

Interventions/ questions & answers

Representatives from some affected communities described how companies negatively affect their rights. In Guatemala, consultation with indigenous communities is not happening in accordance with ILO Convention 169 and there are continuing violations of the right to life, physical integrity, the environment, social cohesion and community networks. It was stated that the GPs are not known, States are not complying with their duty to regulate companies and the GPs are too limited for the protection required. Stronger and binding mechanisms were called for. A representative from South Africa asked what is the added value of the non-binding GPs if non-binding codes of conduct already exist? Michael Addo responded by stating that the GPs lead to a coherence of policy and standards. He stated that codes of conducts are very good, particularly if they can be adjusted to align with the GPs. The purpose of the implementation of the GPs was to try and address impacted communities, to encourage them to use the GPs and to educate companies to adopt them. He affirmed that Governments have responsibilities too and that the Working Group is very aware of the needs of indigenous communities, in particular.

In response to a question on whether environmental destruction by a company can be a violation of customary international law, Andrew Clapham stated that an attack on the environment could be an international crime but it must occur in a particular context. For example, it could happen in the context of armed conflict where the destruction rose to the level of depriving communities of their means of subsistence. A company could commit an international crime where there was genocidal intent. Marco Sassoli cautioned that international criminal law does not always provide the answer. For an international crime, *mens rea* needs to be proved and, usually, a company does not aim to destroy the environment in such a way that it would fall within the restrictive prohibitions under International Humanitarian Law.

In response to a question on how investment tribunals could be used as a way of providing a forum for victims of human rights, Andrew Clapham referred to the need to include human rights clauses in contracts between States and companies with an explicit reference to arbitration. Michael Addo stated that the purpose of an investment agreement is largely for the protection of the rights of investors. However, the Conference of Trade and Development has debated the inclusion of standards at length and a new model investment agreement incorporates elements suggested by John Ruggie, consistent with the GPs, with a new clause on investor responsibilities. Since the last round of Doha negotiations, this model is online and comments are welcome. Professor Sassoli stated in this regard that civil remedies are important and human rights should be incorporated into company contracts to give rise to this form of liability. For example, countries should enact legislation stating that a State body cannot hire, allow or license a company to work, if it is not following its commitments under the International Code of Conduct for PMSCs.

Codes of conduct were, however, criticised from the floor as not providing the full answer because they do not provide for remedies and accountability. For example, decertification is not an adequate response where there are victims of human rights abuses. An examination of what needs to be

¹¹ UN doc A/HRC/20/29. See http://www.ohchr.org/Documents/Issues/Business/A.HRC.20.29_en.pdf

supplemented in the 'protect' pillar of the GP framework is necessary, as well as an examination of what type of regulation by States is needed. The 'protect' pillar in the GP is very general and it was suggested that this might be an area where a binding instrument is needed. Further, codes of conduct are of limited use because they must be embedded in another agreement to make them enforceable.

In response, Professor Clapham referred to the need for NGOs on the ground to lobby for companies to sign codes of conduct with an arbitration clause that could, potentially, go to a national court. It is a question of intellectual imagination and national NGOs should not wait for an international organisation to create a legal framework. The value added of a code of conduct is that it can go into much more detail. He recognised that a code of conduct is a small piece of the jigsaw. So there is also a need for national legislation to allow for civil litigation. An international instrument could create the catalytic movement for States to introduce such national legislation. For example, the Convention against Torture created the impetus for national legislation to prosecute those who commit torture. Perhaps we need an international instrument to create impetus.

There is also the possibility of allowing victims to sue a company in a third State, where there are assets there and some nexus connecting the case to that State, such as in the case of *Kiobel*. He stated that if an international instrument specifically allowed for this, such an avenue would be easier to pursue. In answer to a question on a possible World Court of Human Rights, Professor Clapham stated that: "a World Court of Human Rights is only far away if you think it is far away". He said that only political will is needed and NGOs must lobby for it. He also stated that an effective tool for addressing human rights abuses by companies is to publicise what has been done. Companies operate in a market place and they do not want to be tainted with bad publicity. Ms Groux-Nurnberg agreed that bad behaviour should not be rewarded and other companies should ensure that they do not enter into agreements with companies that have a negative reputation due to human rights abuses.

A representative of the South African Mission to the UN described the need for a level playing field and the need to take into account the fact that not all States are in a position to implement the GPs. Some States feel they must make a choice between human rights protection and job creation, particularly in the current economic climate.

In response, Michael Addo said that, from the point of view of the WG, all States should implement the GPs but how they do it will depend on their context and circumstances, without jeopardising core principles. He stated that the WG has a mandate to assist States in adopting national action plans and to undertake a mapping analysis to help States identify gaps. Where gaps have been identified the WG can help develop a State's capacity to implement the GPs, for example by training ministerial staff. However, the WG cannot compel States to adopt standards. States must raise awareness among their companies doing business abroad. They must exercise due diligence and a level playing field will be created by that mechanism. Human rights protection and investment do not have to be tradable. In fact companies are very sensitive to reputation damage and risk. If we get to the point where all companies are subject to the same standards then there is a level playing field.

Michael Addo concluded by thanking the ICJ and by conveying a message, on behalf of the WG, to assure the ICJ that they are reading from the same book and that the ICJ and the WG should work more closely. The WG needs more evidence and the ICJ could help immensely. He also stated that if there is any appetite for political action the WG will be looking for guidance from the core group of sponsors.