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International Law Discussion Group Summary

Business and Human Rights: Closing the Gaps

A Summary of the Chatham House International Law Discussion Group meeting held on 6 November 2008.

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The meeting was chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, NGOs, and government representatives.

Speakers:

- Kanbar Hosseinbor, Foreign Office legal adviser
- Gerald Pachoud, Special Adviser to the Special Representative of the UN Secretary General on Human rights and Transnational Corporations
- Peter Frankental, Amnesty International

Introduction

For some years the international community has recognised the capacity of businesses and transnational corporations to contribute both to the realization of human rights and to serious human rights abuses. In July 2005 the UN Human Rights Council appointed Professor John Ruggie as the Special Representative of the UN Secretary-General on Business and Human Rights. His mandate included the identification and clarification of standards of corporate responsibility and accountability for human rights, the elaboration of the State's role in effectively regulating and adjudicating transnational corporations with respect to human rights and the development of methodologies for undertaking human rights impact assessments.

On 3 June 2008 Professor Ruggie presented his report, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, to the UN Human Rights Council. The discussion group considered the issues raised in the 2008 Report and the future work of the Special Representative.

Gerald Pachoud: The Report of the Special Representative

In his 2008 Report the Special Representative proposes a policy framework that is intended to provide more effective protection against corporate-related human rights harm. Gerald Pachoud reminded the meeting that this policy framework is premised on three core principles, namely the State's duty to protect, corporate responsibility to respect and the need for effective remedies. These three principles are distinct but complementary; all three are necessary for the proper protection of human rights.

Mr Pachoud informed the meeting that the policy framework had received a warm welcome from the Human Rights Council, which in July 2008 had resolved to extend Professor Ruggie's mandate for a further three years. The principal task ahead was for the Special Representative to "operationalise" the tripartite policy framework by giving practical guidance to States and transnational corporations in respect of their roles in the field of business and human rights.

The State duty to protect against human rights abuses by third parties, including business

The State obligation to protect people from others infringing their human rights is well-recognised as a core element of international human rights law. Mr Pachoud explained that the Special Representative was investigating the existing legal and policy tools available to States, in particular mechanisms in national corporate laws that States could utilise to protect against human rights abuses by businesses and transnational corporations.

One participant noted that there was a danger that the law could be viewed as an obstacle to be overcome rather than a tool in the protection of human rights. Useful legal frameworks already existed in both criminal and civil law. The participant cited the legal steps that were taken against Victor Bout, the Ukrainian arms dealer. Alex Vines, of Chatham House, had investigated the operation of Bout's companies in Africa and realised that, like other aircraft, the planes which transported their arms needed insurance certificates. Once the companies' brokers became aware of the true nature of Mr Bout's operations they had cancelled insurance contracts. The participant suggested that the cancellation of contractual obligations could be a very effective tool in the Special Representative's framework. He reminded the meeting of the success of paragraph 29 of Security Council Resolution 687 which in 1991 had instructed all States to cancel Iraqi liabilities under performance bonds. As Security Council resolutions are binding on all member States, there was much as yet unexploited potential in resolutions directing the cancellation of contracts, such as those for the sale and purchase of blood diamonds.

Mr Pachoud informed the discussion group that the Special Representative had commenced a specific project on the scope of the State duty to protect in the context of transnational corporations operating in conflict zones. The focus of this project was the operation of international businesses in the Democratic Republic of Congo. Mr Pachoud explained that the Special Representative was investigating the tools that a State should have in place in the event that it was asked to advise a domestic corporation that was

proposing to conduct business in the DRC. The project was in its early stages. The tools had not yet been identified but they would extend beyond regulation which, although required, was not necessarily the most practical answer. The identification exercise would, however, involve an examination of the range of potential tools, including advice and support, human rights impact assessments and sanctions.

The discussion group briefly considered the legal tools that could be available at an international level, such as a coordinating treaty. The OECD already had a policy for the harmonisation of export credit agencies' principles and practices which was intended to prevent individual OECD members from using their export credit agencies in a way that would have an adverse effect on human rights. The meeting discussed the possibility of a treaty which obliged States to impose due diligence standards. It was agreed that this would be very difficult to put in place without some pre-existing international framework. One participant noted that harmonisation within the international financial community was possible, but the World Bank or the OECD would be needed to broker international agreement.

Corporate responsibility to respect human rights.

The essence of the responsibility to respect was that businesses and transnational corporations should ensure that their activities do not have a negative impact on human rights. Over the next three years the Special Representative would develop guiding principles on the corporate responsibility to respect.

The policy framework had re-positioned businesses and transnational corporations. The draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights had sought to impose obligations on companies akin to the State duty to protect. This shift from State obligations to non-State obligations had been a flaw in the UN Norms. Professor Ruggie, however, had reasserted the pre-eminence of State obligations. It was primarily States, not transnational corporations, that had the duty to protect against human rights abuses. Although it appeared counterintuitive, the human rights community had accepted this position because it prevented a State from using companies as a scapegoat for its own failings in the duty to protect against human rights breaches.

Mr Pachoud confirmed that the intention was for the guiding principles to cover all businesses and transnational corporations. This would include

corporations from all home States, private and State-owned companies and where the State was acting in a commercial capacity (indeed, State ownership should only increase the likelihood of corporate respect for human rights). To promote the world-wide reach of his work the Special Representative intended to travel frequently to Asia during the new mandate and would be holding meetings in India and Singapore in January.

Effective access to remedies

Mr Pachoud emphasised the need to improve access to remedies. During his first mandate the Special Representative had discovered that numerous disputes could have been resolved had the dispute resolution mechanisms had been in place earlier. The Special Representative was therefore investigating obstacles to justice.

The access to remedies project encompassed both judicial and non-judicial remedies. An internet database had been set up to catalogue the non-judicial remedies available in different jurisdictions. The database was in *wiki* form i.e. members of the public could add their contributions directly on to the site. The intention was that such a format would facilitate universal input. Mr Pachoud expected that the remedies logged would include grievance procedures, recourse to National Contact Points (see below) and international financial institutions ombudsmen. The idea was to identify which remedies would add value in the context of business and human rights.

Various participants questioned Mr Pachoud about the nature and operation of National Contact Points (NCPs). He explained that the OECD Guidelines for Multinational Enterprises, which provide standards for transnational corporations in respect of their investment operations overseas, require governments to establish national contact points, commonly known as NCPs, to promote national compliance with the OECD Guidelines. (The OECD Guidelines were not legally binding, but in practice were not voluntary as corporations had no opportunity to opt out.) The role of the NCP included the investigation of complaints against national corporations and publishing reports of its findings. In August 2008 the UK NCP had upheld a complaint against Afrimex UK Limited, a UK mineral company. Following its investigation the NCP had concluded that Afrimex's trading activities in the DRC involved various human right abuses, including sourcing minerals from mines that used forced and child labour and that the company had breached the OECD Guidelines.

Participants noted that the NCP mechanism signalled a welcome shift towards greater corporate accountability for human rights. It was noted that the UK, Dutch, German and Norwegian NCPs had recently been reformed, resulting in significant improvements in their operation. Several participants emphasised the importance of due process and impartiality by NCPs. It was noted with concern that, although the Steering Board for the UK NCP included representatives from a spectrum of government departments, including the Foreign Office and the Department for International Development, the Department for Business Enterprise and Regulatory Reform took the lead role in the UK NCP, even though its principal responsibility was the promotion of business.

Mr Pachoud emphasised that whilst the UK NCP's findings in Afrimex were laudable in themselves, it was important also to use such reports with a view to preventing similar conduct in the future. There would be companies which would have a total disregard for human rights, presumably such as those of Victor Bout, but Mr Pachoud had never actually encountered a company which admitted either that it did not care about human rights or that it was not concerned about its impact if operating in a State which was in a conflict.

The discussion group briefly considered the use of extraterritorial jurisdiction and universal jurisdiction for human rights breaches, in particular in the context of corporate structures. Mr Pachoud explained that whilst extraterritorial jurisdiction appeared to be a panacea, it was not that simple. In particular, such mechanisms would be difficult to implement in practice due to political considerations.

One participant queried why the tools in this area had not yet been identified given that much data already available. She noted in particular the work that had been completed some time ago by various bodies, including the UN Special Representative for the Democratic Republic of Congo. Mr Pachoud explained that Professor Ruggie had a very different mandate. The DRC-specific mandates had focused on arms dealers and violators of human rights in armed conflicts where sanctions would be the principal tool. In contrast the Special Representative would be considering the full spectrum of companies, the full conflict cycle and a wide range of remedies.

Some participants queried whether the Special Representative had been set too great a task. Mr Pachoud agreed the mandate was ambitious, but noted that the landscape was much more favourable than when Professor Ruggie was first appointed three years ago. For example, there was now an agreed framework. To be successful the business and human rights project would, in

addition to the Special Representative's recommendations, require political will.

Kanbar Hosseinbor: The Approach of the United Kingdom

Kanbar Hosseinbor explained that the United Kingdom was a keen supporter of the Special Representative and had welcomed the renewal of his mandate. The United Kingdom took great interest in many of the initiatives of the Special Representative and had entered into discussions as to how it could support his work, in particular with respect to the role of businesses in conflict zones. Mr Hosseinbor noted that Professor Ruggie's role complemented other developments in international law, such as the extractive industry's transparency initiative.

The United Kingdom agreed with the Special Representative's approach to State obligations. Mr Hosseinbor emphasised that the United Kingdom's position was that human rights obligations belong to the State and the State alone. States cannot attempt to pass on their responsibility to prevent human right abuses within their territory to businesses or any other entity.

Mr Hosseinbor referred to two aspects of the Special Representative's work that had been of particular interest to the United Kingdom. First, in his 2007 Report the Special Representative had considered the State duty to protect against human rights abuses by non-State actors. This had led to the United Kingdom conducting its own review of this issue, which was still ongoing. Secondly, the United Kingdom had welcomed the Special Representative's announcement on 22 September 2008 that he had established a global leadership group to advise him on means to ensure that businesses worldwide respect internationally recognized human rights standards.

Peter Frankental: Commentary on the 2008 Report

Peter Frankental agreed with Mr Pachoud that the landscape had changed significantly since Professor Ruggie had commenced his work in 2005. He noted that the Special Representative had called the business and human rights project a long journey. This label was evidently apt given the travel necessary for Professor Ruggie to fulfil his mandate and also the intellectual exercise. For example the ground covered so far has included mappings of international human rights standards that currently govern corporate activities, criminal and civil responsibility/liability, international investment treaties and related arbitration procedures, concepts of corporate complicity and spheres of influence, human rights impact assessments, as well as institutional failings

by governments and inter-governmental bodies. Significant progress had been made to date but much work remained to be done.

Mr Frankental emphasised that responsibility for advancing the business and human rights project fell to everyone and was not confined to the Special Representative and his team. In particular, widespread participation in Professor Ruggie's Mandate would be required if it is to fulfil its potential. Inevitably compromises would have to be made by all interested parties. The NGO community has had to discard its allegiance to the UN Norms as the only route towards corporate responsibility. Transnational corporations have had to discard the view that, wherever they operate, they should adhere only to national laws. Mr Frankental noted that already the International Chamber of Commerce had acknowledged in a submission to Professor Ruggie that companies should respect the principles of international standards when national law is absent, such as in zones of weak governance and conflict. Also many companies had already started to try to address the issue of conflicts between national law and international standards in their transnational operations, such as in respect of discrimination against women.

In his 2008 Report Professor Ruggie had explained that governance gaps were the root cause of the business and human rights predicament. Evidently the task ahead was how in practice these gaps could be bridged. Mr Frankental perceived that at present there was welcome momentum from many NGOs, including Amnesty International, as well as from governments and companies, which the Special Representative could utilise in framing and implementing his recommendations.

Human Rights Impact Assessments

Mr Frankental drew particular attention to human rights impact assessments, which were key both to the State duty to protect and the corporate responsibility to respect. In 2007 Professor Ruggie had published a companion report on human rights impact assessments. In it he had emphasised the importance of human rights impact assessments but had noted that few firms conducted such reports as a matter of routine (or even at all). This cast doubt on the actual commitment of companies to human rights. Mr Frankental noted that one oil company had told him that it did not conduct human rights impact assessments on the advice of its lawyers; there was a risk that by conducting assessments the company could incur criminal or civil liability for subsequent activities. Another oil company had explained to Mr Frankental that it did conduct human rights impact assessments but was unable to publish the results due to the delicate nature of the company's

relationship with the host government in question and contractual confidentiality undertakings.

There was no one agreed methodology for human rights impact assessments. NGOs had, however, established broad principles on the timing, scope and publication of human rights impact assessments. First, human rights impact assessments should be conducted at least on all extractive and infrastructure projects and should address the full spectrum of human rights. Secondly, they should be undertaken at the feasibility stage of a project. An assessment conducted late in the process, when funding decisions are about to be taken, would have little positive effect. Thirdly, the findings should be published. Published reports empower communities by providing the information necessary for them to evaluate whether to oppose or support a proposed project. Mr Frankental cited the example of Latin American indigenous communities living in oil-rich areas. If they were provided with a human rights impact assessment report they would be able to decide whether the new jobs that would be created by a project outweigh its adverse impacts. Amnesty International had noted that groups of potential victims taking action to defend their rights had, in fact, a very strong influence over companies' operations.

Human rights impact assessments could also address gaps within companies themselves. Mr Frankental had noticed a disconnect between the approach of a transnational corporation's head office, which might have a very good human rights understanding, and its business units which operated on the ground. Often ground staff would not have a similar commitment to human rights and feared that their job prospects might be affected if they reported actual or potential abuses. Transnational corporations needed to develop incentives for their business units to report and respect human rights. Mr Frankental noted that here there was a clear parallel with companies' approach to their environmental impact.

One participant urged Professor Ruggie to impose a due diligence obligation into the policy framework. He noted that the Law Society was due to publish a briefing on bribery law in late November 2008. It would be interesting to see, by analogy, if a due diligence exercise would be offered as a defence to bribery charges, or whether there would be strict liability.

International Finance

Mr Frankental noted that there was a very large gap in Professor Ruggie's report in respect of the role of international financial institutions. International

finance was central to the business and human rights project. For example, development banks are generally involved in financing international projects – both the private sector's role and that of host governments. A number of NGOs, including Oxfam Australia, had made submissions on the weaknesses in the World Bank's Performance Standards for companies. Similar critiques had been made of the Equator Principles that had been adopted by a number of commercial banks.

In addition, Professor Ruggie had addressed the issue of conflicting bodies of law - international investment agreements often contain clauses that are incompatible with the international human rights law obligations of the host state. The Special Representative had made a statement to the UNCITRAL arbitration tribunal, exhorting arbitrators to take human rights into account. Mr Frankental noted that a few years ago a meeting with international arbitrators had been held at Chatham House at which arbitrators had been asked to what extent they took human rights into account in investment disputes. It was clear from the wide range of responses that there was no common approach to the impact of international human rights law on arbitrators' awards.

Access to Remedies

Mr Frankental noted that access to effective remedies was a complex issue, in particular due to questions of sovereignty, jurisdiction and the operation of international law. As identified in the 2008 Report, the core problem was that the legal framework was operating much as it did prior to the globalisation phenomenon. For example, parent companies and subsidiaries were still generally treated as separate legal entities even where the parent was the sole shareholder. This framework made it difficult to address supply chain abuse. Mr Frankental also noted political obstacles in this area. Southern States might be reluctant to enforce laws/regulations against transnational corporations for fear that they would no longer be an attractive forum for investment, while the home states of transnational corporations were often reluctant to regulate for extra-territorial impacts because at present the effect of extending their jurisdiction was unclear. Progress was, however, being made in this field. For example, Mr Frankental noted that in 2006 Professor Ruggie had attended a seminar at which legal experts had examining the use of extraterritorial legislation to improve the accountability of transnational corporations for human rights violations. Olivier De Schutter had produced a report in the light of this seminar, addressing issues of sovereignty and extra-territorial jurisdiction. Finally, in early November the Oxford Pro Bono group of

public interest lawyers had published *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuses*, a comparative study of barriers to redress across twelve jurisdictions. This report was prepared specifically for the Special Representative.

In due course Professor Ruggie would publish his recommendations to “operationalise” his policy framework on business and human rights. Mr Frankental emphasised that it was vital that there be a strong commitment from companies, governments and inter-governmental bodies to lead and manage the implementation of these recommendations and, in particular, to ensure redress where standards were breached.

K Dilger