



Dialogue on
Globalization

CONFERENCE REPORT
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Report of the Parallel Event "Business and Human Rights – A new approach at the UN?"

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Abstract: On 28 March 2007, FES Geneva organized a parallel event to the 4th Session of the UN Human Rights Council. The public panel discussion, which was attended by approximately 60 people, focused on the current reports of SRSG Professor John Ruggie and the actual state of affairs in the debate of business and human rights. The speakers addressed difficulties on the way to accountable business practices in regard to human rights but also mentioned possible ideas to move forward in this regard.

It is a widespread opinion that states have not done enough and neglect their responsibility to protect human rights in their legitimacies. The recent trend in the expansion of CSR policies and the vast amount of soft law mechanisms are potentially useful but can not substitute a democratic government that complies with human rights standards. The same problem applies to intergovernmental declarations that so far do not provide any specific mechanisms for the enforcement of human rights.

Gerald Pachoud emphasized that Professor Ruggie's report was not final and needed the expansion of the mandate in order to include recommendations. Lisa Misol tried to raise the attention on the many human rights abuses that did not amount to the level of international crimes. So far there was a strong lack of platforms for victims. Dwight Justice reminded that there already existed treaties such as the ILO Convention which could be possible instruments to guarantee human rights in businesses, if it was ratified and respected by all states. He agreed with Aurret van Heerden that CSR policies tended to turn states' responsibilities to businesses, but they in turn did not have any legitimacy to enforce them. Nevertheless, voluntary initiatives did not mean that they were unaccountable; therefore the value of voluntary initiatives should neither be over- nor underestimated.

1. Introduction

In its resolution 2005/69, the Commission on Human Rights called for a Special Representative, mandated to study the issue of human rights and transnational corporations and other business enterprises. Harvard Professor John Ruggie, who was appointed subsequently, embarked on the difficult journey of taking up a topic that had not previously been tackled directly by the Commission on Human Rights. Adopting an inclusive approach, Professor Ruggie tried to find new ways of dealing with the topic and reaching conclusions and recommendations on how the issue could evolve further. Yet, this task has not been fully accomplished in his latest report (A/HRC/4/35), so the mandate may be extended for one additional year.

In a meeting prior to the side event Professor Ruggie recalled, that his mandate comprised two parts. One was to construct a mapping of existing standards and complicity and the other was to give views and recommendations on how to move ahead. The first part was time consuming and in his opinion it would not have been appropriate to give recommendations be-

fore including every given aspect in the mapping. Therefore he asked for an extension of his mandate.

In the recent report five topics have been touched. First, it has been looked at common grounds among the treaty bodies. Second, it was examined what happened in international criminal law. Was there any movement visible that effected companies? It has been found out that standards for individual liability have been partly included in domestic law which opened up loopholes to sue companies. Third, the question was addressed, how states have already enforced laws in regard to their businesses. The answer was that it did not happen in a significant way. Fourth, a look was taken at soft law and hybrid multistakeholder instruments. So far they were potentially useful but they had to be taken more seriously by governments and they needed more resources, too. Lastly, voluntary initiatives among companies in the Fortune 500 were studied, but the reporting on those was weak. Unfortunately, the considerable expansion of corporate voluntary initiatives had not yet engaged many state-owned enterprises, which were becoming important players on the global stage.

2. Statements by the speakers

Felix Kirchmeier welcomed all the speakers and the about 60 present guests in the name of FES and gave a short overview about the activities of FES Geneva in regard to human rights and the longstanding involvement of FES in the issue of "Business and Human Rights".

Mentioning that "Business and Human Rights" was a key component on the human rights agenda, **Theodor Rathgeber** opened the panel.

Thanking FES for their continuing support especially in regard to the Bangkok Consultation, **Gerald Pachoud**¹ started to lay out the background of Professor Ruggie's report and its addenda. As the whole debate about business and human rights seemed to polarize over the Draft UN Norms on the Responsibilities of Transnational Corporations that were established by the Sub-Commission on the Promotion and Protection of Human Rights, Pachoud mentioned, that Professor Ruggie thought it would be better to reframe his report in order to have an effective debate. This was the goal of his first Interim Report and has it also been to the current report (A/HRC/4/35). He emphasized, that the current report could not be seen as the final report of the SRSG (Special Representative of the Secretary-General) mandate but as a mapping exercise, with neither final conclusions nor recommendations. The current report laid out a continuum of standards and practices, starting with what is most deeply rooted in international law in regard to business initiatives, moving to self regulation and voluntary mechanisms. The main finding of the report was that states should do more.

First it was pointed out that states predominantly remained responsible for the protection of human rights. There was a tendency that within the current Corporate Social Responsibility (CSR) debate, states seemed to take in a back seat role, whereas the role of the state should be to advocate human rights to businesses. Professor Ruggie and his team conducted a survey among all UN member states in order to find out, what states had actually done in regard to this aspect. Only 29 states replied; a fact which gave important input for

conclusions. This low rate of response seemed to highlight that the issue of business and human rights was not a priority for states. More importantly, the report underlined the fact that some states did not fully comprehend their duty to protect against human rights abuses within their jurisdictions, and by not doing so, they might break their obligation.

Pachoud also mentioned the possible consequences of the ratification of the Rome Statute of the International Criminal Court. This could provide a basis and an approach to prosecute businesses for human rights violations amounting to international crimes, providing that the domestic jurisdiction recognized criminal liability for legal persons. This eventually might have an impact on business activities abroad in future times. It should be seen as a red flag which should make companies react. In this context the question was raised as to what happened with crimes that did not amount to international crimes? To date, within the UN treaty system no effective real mechanism existed to fix detailed obligations of businesses in regard to human rights violations.

When talking about what still had to be done, Pachoud emphasized the interaction with treaty bodies for the best protection of human rights. Furthermore, when focusing on soft laws and voluntary initiatives, intergovernmental declarations like the ILO Tripartite Declaration and the OECD guidelines were mentioned. Nevertheless Pachoud drew attention to the fact, that these guidelines indeed provided respect for human rights but did not name any specific steps how to guarantee them.

He concluded that more solid accountability mechanisms and an effective platform for potential victims were needed and still had to be developed. Referring to next steps, Pachoud talked about the extension of one year for Professor Ruggie's mandate in order to submit recommendations to the Council and to move forward. Subsequently, Professor Ruggie and his team wanted to try to go into two directions. First, they wanted to look at the substance because mechanisms had to be effective, and had to go beyond a declaration. And second, they wanted to try to indicate effective ways to move forward. As voluntarism and binding standards had their limits it had to be thought in new dimensions. Finally, the extension of the mandate would keep on relying on inputs

¹ due to a change in the time schedule of the HRC session, Prof. Ruggie was not able to participate personally in the discussion but sent his personal special advisor Gerald Pachoud instead

and comments from all stakeholders in order to draft the final report.

Mentioning the lack of platform for victims as one of the shortcomings of the recent report, Theodor Rathgeber gave the floor to Lisa Misol.

Opening her statement, **Lisa Misol** raised three questions: First, what was the issue? Second, what was the special role of the Council in regard to the issue? And third, if the mandate was extended for one year, how could the process be pushed forward? Misol continued by pointing out three problems. First, globalization had sped up but had not been matched by more protection for human rights victims through the action of states or companies. There existed all different kinds of abuses and of international crimes, but again, the fact was stressed, that the world was full of abuses that did not rise to the level of an international crime but that nevertheless made deep impacts.

To illustrate some of these hidden examples, Misol named indigenous peoples and the threats of land seizure they had to cope with, the consequences to livelihood because of development projects and business, not mentioning the human rights impact of environmental destruction. Indigenous peoples were in a weak position versus the power of companies and states with their security forces. Second, she gave the example of villagers who were often hired as subcontractors by a mining company that assigned abusive security forces to coordinate the mining operations, with the result that the villagers were threatened, detained, beaten and underpaid. As last example Misol named safety and health violations in relation to workers' human rights. These abuses normally did not make it into the headlines and states were often not able to address the issues or simply had not set the priority to do so. The victims did not obtain adequate access to justice, so there was no prevention and no remedy. There was a gap in protection functions. The Council had an important role to address these problems globally, that was why it should be everyone's wish to have a strong Council. But the debate was complex and the Council at the moment was preoccupied with institution building. That was why Professor Ruggie had such an important role. He was the one who had to provide the Council with information and eventually encourage it to act. It had to be emphasized that action on these is-

suces was needed. That was why the next period of Professor Ruggie's mandate would be so important. Also Misol emphasized that it was the state's primary responsibility to protect human rights. But in order for the Council to take up recommendations, it had to be made sure that not only abstract issues such as complicity were discussed but also that everyone understood the reality of abuses and inadequate access to justice.

The coming year would be an opportunity to work more in order to develop recommendations. There were processes needed, the opportunity for a wider discussion and the possibility to make additional efforts to include victims, because they did not have many channels and had to be made part of the discussion. Misol closed her discourse by suggesting that various actors beyond the Rapporteur, such as NGOs and civil society could do more to create more awareness and document abuses by companies. They would have to continue to push for regulation and make people aware of the seriousness of the issue.

Having experience with binding instruments to uphold labour rights, **Dwight Justice** of the International Trade Union Confederation (ITUC) was given the floor. He focused on the fact, that there were already numerous ILO conventions that specified and explained how economic rights should be implemented. There just had to be found a way to convince states to ratify and respect these treaties and conventions. The ILO as a UN agency was set up to develop standards which emanated from the Universal Declaration of Human Rights. Therefore, ILO instruments applied to states.

The ITUC was involved in soft law initiatives and voluntary mechanisms but also saw limits to this approach. Part of the problem was the Corporate Social Responsibility (CSR) phenomenon which had created interest in how to transform states' responsibilities to companies, whereas businesses could not replace the role of the state. The case of freedom of association, i.e. the right of workers to form and join trade unions was one of the special concerns that illustrated the problem. Although many codes of conduct required that freedom of association was respected, this freedom was dependent on respect for a range of civil and political rights. But it was not within the ability of a company to ensure these rights let alone to substitute for them. The CSR environment had

not been helpful in this regard. Justice mentioned that many were very excited about the voluntary possibilities in human rights issues but he warned of this euphoria. There was a need of regulation and warranty through the state. It was problematic that businesses were forming organizations in the name of CSR, as some of them preferred not to allow unions and basic political rights.

Justice concluded that soft laws through voluntary approaches did not represent a satisfactory way. Since workers should work in an appropriate legal surrounding and should enjoy rights such as freedom of association and collective bargaining, he stressed that this could only be contributed by forming unions. Today there were more than 500 companies with a CSR policy and an enormous amount of information about it, but this was not necessarily the right way, it was not safe and attention had to be paid to this tendency. The focus needed to be shifted from what business was really unable to do to those measures that were within the power of business to actually do.

As last speaker **Auret van Heerden** of the Fair Labor Association (FLA) saw his personal role in trying to build a bridge between civil society and businesses. He noted that the best way of protecting rights at work was to have a democratic state with good labour laws backed by an industrial relations system in which organized labour and employers negotiated collective agreements.

He reported on his own experiences of South Africa, where in the 1970s black workers did not have equal rights and how the opposition movement eventually succeeded in campaigning for better laws, unions and democracy. Since 1994 South Africa had one of the strongest union movements in the world. He felt that South Africa was something of a best practice. But even in democratic countries, it was not necessarily guaranteed that human rights were protected to the fullest extent.

Globally, governments were failing to enforce labour laws and collective bargaining and union movements were declining, which meant that there was less protection for rights at work. Some initiatives like CSR groups and multistakeholder monitoring initiatives have tried to fill this legal vacuum. Many stakeholders expected multinational companies to pick up the responsibilities and tasks of gov-

ernments. But the problem was that they did not have the legitimacy of an elected body. It was dreadful how some companies tried to advertise their way to ethical status by a CSR policy. If companies or other non-state actors were to assume state-like functions they needed legitimating features like multi-stakeholder participations in their governance and transparency in their operations. In order to find out which company was serious about their CSR policy one just had to look at its transparency. Van Heerden saw transparency as a good measure for compliance with human rights standards. He regarded this as a key test for seriousness in CSR. Although democratic government and labour law enforcement were the ideal, there were very few countries where these conditions applied and therefore interim solutions to protect rights at work were needed. Van Heerden hoped that the next report by Professor Ruggie would be creative in this respect and that it would advance the search for new forms of protecting human rights.

Given the opportunity to comment each others' statement, Lisa Misol said that Professor Ruggie should not put too much emphasis on voluntary CSR policies and called again for more solutions than that. Dwight Justice commented that he could not see an effective networking between state and business in this regard. There had to be representative structures and rules one could appeal to and that was something which was not guaranteed by voluntary initiatives. There were no rules and no democratic structure. Gerald Pachoud agreed with Lisa Misol that there was not only one solution to this complex problem especially since there were many governments that did not do what they should be doing. Auret Van Heerden added to this comment, that democratic governments were a precondition to a change in the complex business and human rights issue. And this would take a very long time. In addition he remarked, that a company, that once adapted a voluntary initiative could be held accountable for not abiding to this self-chosen regulation. Therefore he said, that voluntary did not mean unaccountable. Such an initiative could for example be based on ILO standards etc.

3. Questions and Comments

In the following open discussion and dialogue with the audience, several questions and comments were raised.

First it was stated that a dual approach was needed. The value of voluntary initiatives should not be disregarded but there were still too many gaps on the state and multilateral level. Labour laws alone would not suffice. And it should not be forgotten that also the global economic pressure drove down labour rights. The question was raised what were the ways to guarantee protection to human rights abuses and whether there were more possibilities through the UN or on bilateral level. How could there be redress in future? Would it alone be a state challenge? Or was there a possibility for the UN to be used to form national laws? *Lisa Misol* commented on the questions by saying that state mechanisms were the primary means but that they could be supplemented by multistakeholder initiatives. The latter were needed to meet minimum credibility criteria if they were to be of value.

Another NGO uttered its surprise that even though the Norms were claimed to be “dead” they were not even mentioned once by Ruggie’s report as a kind of soft law mechanism, as some governments already used them voluntarily as human rights standards. Was this not a reason to keep them “alive”? To work out the Norms was an effort of about 30 years that was just rejected in the end. How could one believe now, that something new was going to work out? *Gerald Pachoud* replied by saying that the Norms did not have enough political support so one should ask whether a UN discussion without results was wanted or if it was better to try to find a new way. *Dwight Justice* mentioned that the easy part on the Norms was done but the transposition function was not accomplished. It simply was not clear yet how complex terms like sphere of influence and complicity should be understood. There was still the idea that there was a trade-off between rights and trade efficiency. Political will would finally be needed, even though this might currently be more difficult than ever. It was also interesting to observe that governments were not blaming each other for not applying to human right standards in businesses. States should denounce each other for not respecting ILO standards. He stressed again, that he would rather stick to the ILO standards than inventing something new.

One comment was made on the underlying logic that developing countries in order to attract businesses violated human rights as one accompaniment of social dumping. How could the opposite logic, that because these countries wanted to attract business, they had to have certain human rights standards be promoted? Economists may argue that bad jobs were better than no jobs. And if rules concerning human rights had to be applied by developing countries how could it be guaranteed that there would be sufficient appropriate jobs? *Auret van Heerden* brought in the example of Jordan which had a Free Trade Agreement (FTA) with the USA starting on 27 December 2001. The Jordan FTA vaguely required parties to “strive to ensure” harmonization with international labour standards. An NGO wrote down human rights abuses that were happening from there on and as a result of this report the government acted. This showed that these kinds of mechanisms worked and that NGOs and civil society were needed to make a difference.

It was suggested that attention should be drawn to the impact of companies on such basic rights such as the right to food. The speaker also suggested that there was a need to explore the “development of extraterritorial obligations of states”. Could not that be used by Professor Ruggie as well? *Gerald Pachoud* answered that this indeed could be seen as one of the tools that states could use and also *Lisa Misol* said that this was still not given the attention it deserved.

The last speaker that was given the floor emphasized again the very important role of the Special Rapporteur. Even if he did not agree with the UN Draft Norms, he should not undermine the outcome of other human rights bodies. In a time where generally the interpretation of human rights standards was loosened this was not a good example. The speaker observed that the report of Professor Ruggie was not moving into the right direction because the voice of the victims was not made heard sufficiently. The existence and pattern of human rights violations should be the basis on which the Special Rapporteur should build his analysis about standards, protection gaps and remedies. From the voice of the victims tools should be developed. Otherwise the HRC would end up in a general academic debate only.

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