United Nations A/HRC/14/29

General Assembly

Distr.: General
16 April 2010

Original: English

Human Rights Council
Fourteenth session
Agenda items 2 and 3
Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the High Commissioner for Human Rights on her Office's consultation on operationalizing the framework for business and human rights*

Summary

The present report is submitted in response to Human Rights Council resolution 8/7 in which the Council requested the High Commissioner for Human Rights to convene a two-day consultation on the issue of human rights and transnational corporations and other business enterprises, bringing together the Special Representative of the Secretary-General, business representatives and all relevant stakeholders, including non-governmental organizations and representatives of victims of corporate abuse, to discuss ways and means to operationalize the "Protect, Respect, Remedy" framework on business and human rights put forward by the Special Representative. The report contains a summary of the proceedings from the consultation which took place on 5–6 October 2009 at the Palais des Nations in Geneva.

* Late submission.

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I. Introduction

1. In Human Rights Council Resolution 8/7 concerning the mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises ("the Special Representative"), the Human Rights Council requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) "to organize, within the framework of the Council, a two-day consultation bringing together the Special Representative, business representatives and all relevant stakeholders, including non-governmental organizations and representatives of victims of corporate abuse, in order to discuss ways and means to operationalize [the Special Representative's] framework, ..." (OP. 6).

2. The present report contains a summary of the proceedings from the consultation which took place on 5–6 October 2009 at the Palais des Nations in Geneva. Given that the aim of the consultation was to provide broad input to the process of operationalizing the "Protect, Respect, Remedy" framework for business and human rights, the report does not contain specific conclusions or recommendations. Recommendations from participants are instead given throughout in relation to the sessions during which they were made.

3. Following the Human Rights Council's emphasis on inclusive participation of all relevant stakeholders in the consultation, OHCHR engaged in consultations with Government delegations, civil society organizations, business representatives, inter alia, about the agenda and the identification of relevant speakers for the consultation. A dedicated website was created five months in advance of the event, inviting all interested parties to register. A particular effort was made to facilitate the participation of representatives of victims of corporate abuse through outreach to relevant civil society networks and other channels. All national human rights institutions were notified about the consultation and invited to participate. In the end, more than 250 participants from all stakeholder groups registered for the consultation, not counting Government delegations. The list of participants is available on the consultation website.

4. The agenda for the consultation was structured around the three pillars of the framework, with multi-stakeholder panels in different sessions addressing a range of issues arising from efforts to operationalize the framework. Both the agenda and the panellist presentations are available on the consultation website. Each session allowed time for extensive discussion from the floor. An effort was made to allocate time for comments from representatives of States, civil society, business and national human rights institutions.

5. The consultation was chaired jointly by Her Excellency Bente Angell-Hansen, Ambassador of Norway, and His Excellency Martin Ihoeghian Uhomoibhi, Ambassador of Nigeria.

6. All stakeholders were invited to make written submissions on issues related to the consultation both before and after the event. A total of 30 written submissions were received, which have been posted on the consultation website. A list of the contributing organizations and individuals are contained in the annex.

7. Stakeholders were also invited to organize side events during the two days of the consultation. A summary of the proceedings from the side events is contained in an Addendum to the present report (A/HRC/14/29/Add.1).

II. Opening statements

8. The United Nations High Commissioner for Human Rights, Navanethem Pillay, opened the consultation by stating that the issue of business and human rights has evolved significantly over the past years. The High Commissioner recognized that placing business and human rights firmly on the agenda of the Human Rights Council is in no small part due to the important advocacy and campaigning role played by civil society. While not all allegations made against companies for human rights violations may be true or justified, there are sufficiently well-founded examples from around the world of human rights being infringed as a result of corporate activity. The High Commissioner also recognized that many companies have acknowledged the link between business activity and the enjoyment of human rights, including through signing up to the United Nations Global Compact, which asks companies to respect and promote human rights.

9. The High Commissioner stated that the framework for business and human rights provided a much-needed clarification of the roles and responsibilities of States and corporations respectively with regard to human rights in a corporate context. After more than a decade of discussion, the affirmation of a corporate responsibility to respect human rights both set a new and clear benchmark and represented an important milestone in the evolving understanding of human rights in our societies. The High Commissioner stated that importantly, the framework also kept the focus on those who feel their rights have been impacted by corporate activity by emphasizing the need for access to more effective remedies, both judicial and non-judicial, for victims of corporate-related human rights abuse. In other words, the framework highlighted the fact that there are three parties to any corporate-related human rights issue: States that fail to protect; companies that fail to respect and individuals and groups whose right or rights are infringed. It is therefore necessary to focus on all pillars of the framework when discussing business and human rights.

10. The High Commissioner invited all participants to present stories of their own experiences of corporate-related human rights violations and examine ways to make the framework operational. She also expressed the hope that the discussions would give all actors — States, companies and civil society — a better understanding of what is required in operational terms to secure respect for human rights in a corporate setting.

11. In his opening statement, the Special Representative described some key challenges in addressing the issue of business and human rights. Firstly, because companies can affect the entire spectrum of internationally recognized rights, and not only a limited subset, the quest to construct ex ante a delimited list of business-specific rights for which companies would have some responsibility is unrealistic. This fact needs to inform the policies of States and companies alike.

12. Governments currently lack adequate policies and regulatory arrangements for fully managing the complex business and human rights agenda. Although some States are moving in the right direction, overall their practices exhibit substantial legal and policy incoherence. The most widespread is “horizontal” incoherence, where economic or business-focused departments and agencies that shape business practices conduct their work in isolation from and largely uninformed by their Government’s human rights agencies and obligations, and vice versa.

13. The Special Representative went on to note that, with rare exceptions, even large multinational companies lack fully fledged internal governance and management systems for conducting adequate human rights due diligence. Businesses tend to focus on the requirements of their legal licence to operate, only slowly discovering that in many situations meeting legal requirements alone may fall short of the universal expectation that

they operate with respect for human rights – especially, but not only, where laws are inadequate or not enforced.

14. Similarly, most companies lack grievance mechanisms whereby affected individuals and communities can raise concerns, because this is not required by the law. Companies thereby deny those who are adversely affected by their activities an opportunity to resolve issues that may be readily remediable and at the same time deny themselves an effective early-warning system.

15. The incidence of corporate-related human rights abuse is higher in countries with weak governance institutions. The worst cases occur, usually, in armed conflict-affected areas. In those situations, access to justice by victims can be particularly difficult and the use of extraterritorial jurisdiction might be one way to close such impunity gaps.

16. The Special Representative affirmed that victims of corporate-related abuses need change now and that neither a strictly voluntary approach nor pursuing lengthy negotiations on an international treaty or court for legal persons would deliver the necessary change within an acceptable time frame. However the "Protect, Respect, Remedy" framework represents a solid foundation for achieving cumulative progress. It spells out differentiated yet complementary roles and responsibilities for States and companies, including the element of remedy.

17. Finally, the Special Representative noted that numerous national bodies, regional organizations and other United Nations Special Procedures have invoked the framework in their policy assessments and how this might be a sign that the mandate is heading in the right direction.

III. State duty to protect

A. Domestic policy coherence

Summary of expert presentations

18. Jody Kollapen (former Chairperson of the South African Human Rights Commission) gave an overview of the causes of policy incoherence and proposed ways in which States could overcome it. He started by saying that the State duty to protect requires States to prevent violations of human rights by third parties. According to Mr. Kollapen, policy incoherence is due to a range of factors, including the tendency by Governments to view human rights narrowly; the lack of a human rights focal point at the governmental level; a contradictory regime for national and multinational enterprises and the inability or the unwillingness of States to meet their duty to protect against human rights abuses by third parties such as corporations. He suggested that to achieve policy coherence, States should establish mechanisms to ensure alignment between international human rights obligations and national laws and policies. Moreover, States should intervene in areas such as corporate, contractual and private law, mainstreaming human rights. He suggested that States could impose a fiduciary duty on directors to act with due care and skill to operate with respect for human rights and to include non-financial reporting in the statutory duties of companies. He added that national human rights institutions could play an important role in facilitating discussion among Government, civil society and the private sector. Mr. Kollapen concluded by suggesting that the Human Rights Council should urge Governments to establish national human rights institutions, adequately resourced, with a mandate to work on business and human rights.

19. Hannah Ellis (Coordinator of the Corporate Responsibility Coalition) proposed measures for Governments to improve their domestic policy coherence. Acknowledging

that lack of clarity in legislation and policy is the major obstacle to holding companies accountable for their human rights impacts, a range of human rights principles should be embedded in company law. Precise requirements with regard to transparency, disclosure, monitoring, and auditing requirements can be embodied in regulations governing financial markets to curb corporate misconduct. Governments should also monitor compliance with human rights obligations by corporations located on their territory, for example in relation to their overseas impacts. This could be achieved through the creation of an independent body mandated to undertake the monitoring function. The Corporate Responsibility Coalition proposed a United Kingdom Commission for Business, Human Rights and the Environment, a body mandated to ensure compliance by United Kingdom companies with human rights standards and with the power to investigate, sanction and provide remedy to victims. Furthermore, Governments can influence companies' behaviour by making their support subject to companies' compliance with human rights standards. A rigorous verification of the company's human rights records should be carried out by the Government, especially when public funds are used to support companies, as in the case of export credit agencies.

20. Ed Potter (Director, Global Workplace Rights, The Coca-Cola Company) observed that the precondition for policy coherence is to close the gaps between the application of human rights and respect for the rule of law in theory and in practice. On the basis of an analysis of national corporate law conducted under the Special Representative's mandate, it emerged that most countries are signatories to major human rights instruments but few translate human rights into national law directly applicable to businesses. Mr. Potter suggested that to achieve policy coherence, it is essential that Governments put in place cross-departmental human rights and business strategies. He gave an example of this approach, mentioning the negotiation of bilateral trade agreements by the Government of the United States where trade, State, labour, commerce and other departments worked together. On the matter of States' extraterritorial obligations, he stressed that, on the one hand, home States should guide and inform companies as they invest in places where policies may be less rigorous and engage with companies on the challenges of working in those areas. On the other hand, host States should have clear and comprehensive legal guidelines that are equitably applied and invest in labour inspection and judiciary systems to help ensure a level playing field.

Summary of discussion

21. During the discussion from the floor, participants underlined the causes of domestic policy incoherence and proposed complementary and creative solutions. Representatives from national human rights institutions (NHRIs) noted that, as independent and impartial promoters of the respect for human rights, NHRIs could play an important role in ensuring compliance by the State with its duty to protect, although reform is needed in the legal mandates of some NHRIs to ensure that they are not restricted in their ability to take effective action on corporate-related human rights issues. NHRIs were described as uniquely placed to promote policy coherence and facilitate dialogue. It was also noted that, collectively, NHRIs are building capacity for effective engagement in business and human rights through the establishment of a working group on business and human rights.

22. Another NHRI representative expressed the view that the real cause of governance gaps is the doctrine which is based on the assumption that States should not intervene in control and supervision of the market or ensure that human rights are observed. States should assume their proper role in providing services and goods in a manner that ensures the observance of fundamental rights. States should monitor what companies are doing with regard to human rights, and human rights instruments should be used to make sure that companies can be held accountable for human rights violations.

23. Some civil society representatives pointed out that States, when entering into trade agreements, should preserve and enforce labour rights, indigenous peoples' and women's rights, but are often unable to do so. It was suggested that, at the international level, there are two parallel and mutually exclusive architectures: one for human rights and one for trade whereby States' capacity is significantly diminished. Therefore States, in an attempt to attract foreign investment, enter into trade or investment agreements that lead them to relax labour laws or fail to implement them. One of the proposals to overcome this impasse was that the United Nations formulate a code of norms, such as the draft Norms on the responsibility of transnational corporations and other business enterprises with regard to human rights, developed by the then Sub-Commission on the Promotion and Protection of Human Rights, directly applicable to business and establish a tribunal to ensure the enforcement of those norms. Other specific proposals included a suggestion that States must proactively seek to avoid support for investments that will breach human rights through their export credit agencies. States should establish a potential client's track record and screen clients based on compliance with the OECD Guidelines for Multinational Enterprises. States should also include human rights standards in investor-State agreements to ensure that these agreements do not impinge on host Governments' ability to regulate the activities of multinational enterprises.

24. It was also suggested by civil society representatives that States should include human rights as an integral part of every activity or role that they undertake with regard to business. This would include all relationships and functions, be it as a partner, a consumer, a public procurer, a shareholder, an investor, an insurer or a risk bearer and a regulator and through trade and investment agreements, export credit agencies, aid funds, public-private partnerships, export credit insurance, subsidies, loans and investments. Moreover, States should proactively seek to prevent any public support or export credit from contributing to or being complicit in human rights abuses. When the State has a role in facilitating or supporting investments by its companies abroad, such as through export credit agencies or providing guarantees for exports or investments, the State should establish a potential beneficiary's human rights and environmental track record and make a screening based on the company's compliance with the OECD Guidelines for Multinational Enterprises, for example. In this way, States and State bodies can use the Guidelines as a preventive measure for averting human rights abuses.

25. Some civil society representatives insisted on the importance of the extraterritorial dimension of the State duty to protect. Home and host States have an obligation to regulate the activities of the companies operating from or within their territory. When the host State is unable to enforce national law on the company then the home State should adjudicate the behaviour of the company and offer a remedy to the victims of corporate abuse. On this point, a business representative said that States should refrain from exercising jurisdiction outside of national borders unless there is a clear, demonstrable and substantive link to the territory.

26. A number of participants also raised the issue of violations of indigenous peoples' rights in cases where they have not consented to the exploitation of resources on their territories. Due to corruption, some Governments fail in their duty to protect indigenous peoples' rights.

27. According to some business representatives, business does not consider human rights an issue for voluntary mechanisms. It requires national law and effective implementations of that law, so the highest priority is to close the gap between what the law sets as a standard and general practices. There is no country where corruption is legal but it exists everywhere and sometimes excessively affects all aspects of human rights. Contrary to what people might think, business needs non-discriminatory application of national law, predictability and stability of the system. It was also noted that bilateral investment treaties

aim at balancing rights and responsibilities, including those of business. Business has fundamental problems with the concept of extraterritoriality and believes that States should refrain from attempts to exercise jurisdiction outside of national borders unless there is a clear, demonstrable and substantive link to the territory.

28. States representatives stressed the primary obligations of States with regard to human rights. It was proposed that human rights treaty bodies should guide States on how to discharge their duty to protect in a comprehensive and coherent manner and that civil society should trigger the monitoring function of the treaty bodies by presenting specific cases. Other stakeholders added that States should report to human rights treaty bodies and the Human Rights Council, through the Universal Periodic Review and regional bodies, such as the African Commission on Human Rights, the measures put in place to protect against business-related human rights abuses.

B. Guidance from international mechanisms

Summary of expert presentations

29. Luis Gallegos (Ambassador of Ecuador to the United States of America and member of the Committee against Torture) described the type of guidance international mechanisms provide to States. He started by noting that a treaty body is a mechanism to assess and monitor how a State complies with the obligations undertaken by ratifying the treaty. He highlighted that the treaty bodies have spelled out clearly what the State's duty to protect entails: States are responsible for ensuring adherence to the Convention by third parties. Therefore, if a violation has occurred, the State has to provide remedy and reparation for the victims. He added that the most recent human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities refer directly to the issue of remedy. Mr. Gallegos concluded by suggesting that treaty bodies should have in place procedures to evaluate and assess the performance of both States and companies in relation to the rights protected by the Conventions.

30. Julie Cavanaugh-Bill (Western Shoshone Defense Project) outlined how the Western Shoshone, an indigenous people living in the United States, have used the international mechanisms to protect their ancestral land against the United States Government, which claimed their territory as public property. Ms. Cavanaugh-Bill explained that numerous mechanisms were employed, ranging from the Inter-American Commission on Human Rights, the Working Group on the Indigenous Populations, the Sub-Commission on the Promotion and Protection of Human Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the offices of several of the United Nations Special Rapporteurs. She particularly mentioned the decision of the Committee on the Elimination of Racial Discrimination, which had issued an Urgent Action recommending the State party to "freeze, desist and stop" all harmful activities against the Western Shoshone and their lands until a good faith resolution of the dispute was achieved. However, the State did not comply with the Committee's decision and granted some important, spiritual and cultural areas to be mined by a gold mining company. She concluded by pointing out that the human rights bodies provided adequate guidance to the State but the State failed to incorporate that guidance domestically. To increase effectiveness and implementation of this guidance, she suggested that the United Nations and regional human rights bodies should conduct site visits that would allow for outreach and education to impacted communities on the role of these mechanisms and an exchange of information. Finally, States and companies should operate on the basis of the free, prior and informed consent of indigenous people.

31. Victor Ricco (Strategic Advisor to the Executive Director of the Centre for Human Rights and the Environment) presented and discussed the weaknesses of the international mechanisms. He referred to the lack of integrated strategy for communication between different United Nations agencies and other international bodies, such as the Inter-American Human Rights Commission and the Ombudsman of the International Finance Corporation, and how this gives rise to fragmented and contradictory guidance from the international mechanisms. He called for the revision of the OECD Guidelines for Multinational Enterprises to include elements to verify and strengthen guidelines for companies with regard to human rights. Moreover Mr. Ricco pointed out the structural problems States face in complying with their duty to protect. In Latin America, for example, many States have ratified the major human rights treaties but then there is a lack of implementation of those obligations at the domestic level. He called for better access to information from United Nations and regional human rights bodies in order to better facilitate input and participation from civil society in corporate-related human rights cases.

Summary of discussion

32. Participants outlined the main obstacles for States to comply with their duty to protect and mentioned, in particular, the stabilization clauses in investment agreements and the fact that not all States have ratified all the United Nations international human rights treaties. It was also suggested that United Nations treaty bodies should consider all human rights issues linked to business and provide better guidance to States. In this context, some civil society representatives reiterated the importance of creating a binding human rights treaty for companies and a mechanism that would both follow up and monitor companies' compliance with the treaty and also provide remedy and reparation to victims. It was also pointed out that the accountability mechanism of the OECD Guidelines for Multinational Enterprises — the National Contact Points (NCPs) — is less used than in the past and that this might be an indicator of the lack of effectiveness of this mechanism. A way to improve it could be to provide NCPs with the necessary tools to comply efficiently with their function.

33. State representatives pointed to the difficulty arising from the fact that not all treaties are ratified by all countries. This limits the possibility of corporate-related complaints reaching the relevant treaty bodies. This in turn enhances the importance of regional procedures. They also pointed to the fact that with the changing global economic landscape, many transnational corporations are now from continents other than Europe and North America and that there is a need to consider how to better engage these companies as well as their countries of origin in the discussion about business and human rights. French-speaking countries have engaged in dialogue on improving governance and corporate social responsibility, which is a matter to which both States and other parties should give high priority. Reference was also made to the issue of stabilization provisions in host Government agreements in limiting a State's ability to meet its human rights obligations.

IV. Corporate responsibility to respect

A. Human rights due diligence

Summary of expert presentations

34. Marietta Paragas (Chief Executive Officer, Shontoug Foundation, the Philippines) discussed the relation between due diligence mechanisms in the mining sector and the importance of free, prior and informed consent (FPIC) of indigenous people. She outlined how large-scale mining has impacted civil, political, economic, social and cultural rights of

indigenous peoples without contributing to the wealth and development of the country as a whole. She also stressed that while the Constitution of the Philippines recognizes the rights of indigenous peoples and FPIC is required under national law, the Indigenous Peoples Rights Act, those norms are neither respected nor enforced. While human rights due diligence is a good concept, it is her experience that it is not being applied in the context of mining activities in areas with indigenous peoples. She recommended that companies, exercising their due diligence, should take more time to consult with and understand indigenous peoples and their customs, written and unwritten; respect their ancestral domains; ensure transparency; and conduct the FPIC processes in local languages. She called on the Special Representative to elaborate on the concept of FPIC and recommended that the United Nations establish a mechanism to hold corporations accountable at the international level, where national mechanisms are insufficient.

35. Adam Greene (Vice-President, Labour Affairs and Corporate Responsibility, United States Council for International Business) highlighted the characteristics and the limitations of the due diligence process. Firstly, he pointed out that it is an effective approach because it builds on existing business processes and helps integrate human rights into company operations. Secondly, he stressed that it assists companies in meeting the responsibility to respect human rights by proactively looking at issues and managing factors, including internal governance systems, risks from third parties, political, financial, operational and ethical risks. The due diligence process has to be dynamic to allow examination of new issues as they arise. While due diligence can make companies understand their human rights risks, it cannot change the broader context or resolve underlying human rights issues in the countries of operation. He noted that legal compliance is not voluntary for companies, but that there is often a huge gap between legal standards and practice. He stressed that compliance with the law is necessary even when the laws are not enforced. Mr. Greene concluded by noting that the due diligence process can only work as part of the broader framework of the State duty to protect and provide access to remedies and that there is a need for continued collaboration between stakeholders to address the root causes of human rights abuses.

Summary of discussion

36. Participants raised the issue of due diligence in relation to corporate complicity in human rights violations. It was suggested that corporate complicity is based on causation, knowledge and proximity. It was noted that the closer the company is in geographical terms to the abuser, the more likely a company will be found to be complicit and therefore the greater is its due diligence obligation. Other participants found assigning responsibility on the basis of proximity to be problematic, especially in light of the technological advances of society where a corporation may act and influence activities far beyond its physical presence. It was recommended that the due diligence process to avoid complicity should involve considering the track record of potential business partners, examining publicly available information to gain an understanding of human rights risks and obtaining expert advice. Once a company becomes aware that it risks being complicit in human rights abuses, the risk should be mitigated.

37. One participant pointed to the human rights due diligence process of the financial sector, which is often not well developed but can play an important role in preventing corporate human rights abuse. The effort by the Special Representative to clarify the role of investors and other financial institutions was welcomed.

38. Participants raised the challenge of ensuring due diligence in the context of supply chains. It was pointed out that there is often a gap between the corporate responsibility policies of headquarters and actual practices along the supply chain. It was noted that human rights violations are often found far down the supply chain and that there is a need

for a transparent and thorough overview of supply chains, an issue which could be addressed at the upcoming OECD Guidelines review. Some participants noted that labour standards along the supply chain are particularly relevant in sectors such as toys, electronics, agriculture and cotton and that supply chain management is a way to deal with the issue but it is unable to resolve the lack of national institutions and processes on basic labour inspections.

39. Other participants raised the issue of how to conduct consultations as part of due diligence. Companies often choose the consultants who perform the consultations and also decide on the aspects of the consultations that may not correspond to the needs of the community. It was recommended that the Special Representative encourage companies to ensure that they are talking with the right people and about the right issues when undertaking community engagement and consultation.

40. Some participants stressed the need for the free, prior and informed consent (FPIC) of indigenous peoples, as a precondition for business operations, especially in the mining sector. It was emphasized that companies should consult with indigenous people and start to operate only once they have their FPIC.

41. It was suggested that the notion of stakeholder dialogue should be changed to that of rights-holder dialogue. This is an important distinction, since stakeholders are often powerful groups whereas rights-holders are often the most vulnerable.

B. Conceptual issues and challenges

Summary of expert presentations

42. Ebele Okobi-Harris (Director, Business and Human Rights Program, Yahoo! Inc.) presented the operational challenges companies may face when confronted with potential conflicts between national laws and international human rights norms and how her company has addressed those challenges. She noted that Internet communications and technology companies are powerful platforms that play a critical role in promoting and protecting the freedom of expression and privacy and, as a result, certain States try to control the dissemination of information. Companies therefore face a challenge because they, like citizens, are subject to domestic law. In response to this challenge, Yahoo! participated in the creation of the Global Network Initiative (GNI), which is a multi-stakeholder dialogue in collaboration with industry counterparts, NGOs, socially responsible investment firms, academics and other interested stakeholders. The initiative created an accountability and public reporting framework that included collaborative and multi-stakeholder approaches to solving business and human rights issues, tools and guidance for companies on how to engage with communities, guidance for NGOs that wish to collaborate with companies, and guidance for companies on how to overcome conflicts between domestic law and international human rights norms. Ms. Okobi-Harris concluded by stressing that the option of just “leave the country” that is sometimes proposed to companies when they operate in situations where there is a conflict between national law and international human rights norms is not necessarily shared by citizens who depend on the services provided by IT companies, and it overlooks the challenges faced by national companies operating in those circumstances.

43. Mads Holst Jensen (Adviser, Danish Institute for Human Rights) discussed the different approaches a company may take in promoting human rights when there is a conflict between national laws and international laws. He suggested that a company should consider whether the rights at stake are fundamental, e.g. threatening physical security. If that is the case and if there are no national mechanisms to address the situation, the company should consider disinvesting if it cannot avoid being connected to a possible

violation. However, outside of such situations he recommended that companies seek to commit themselves to fostering change. He outlined a combination of two basic approaches: a top-down approach whereby companies engage in a critical dialogue at the national, international and multi-stakeholder level, and a bottom-up approach whereby in their operations companies proactively build awareness and capacity to respect the human rights principle behind the standards conflicting with national law. Mr. Jensen concluded by stressing the importance of engaging with stakeholders, especially national Governments, to resolve the conflict between national and international law.

44. Auret van Heerden (President and Chief Executive Officer, Fair Labor Association) discussed ways in which companies can challenge national laws that violate fundamental human rights as the "art of the possible". He described companies' practices that were contrary to national laws but upheld international principles in South Africa's former apartheid regime. He observed that the private sector had created a post-apartheid system in the workplace while on a national level apartheid continued. He stressed that, for example, the conventions of the International Labour Organization are legal instruments with which companies should comply. He concluded with a provocative question asking what country would ever sue a multinational corporation for abiding by international conventions.

Summary of discussion

45. Some participants emphasized that companies should respect human rights, even if States do not.

46. Participants discussed various strategies for applying the framework for business and human rights when facing the dilemma of conflict between national law and international human rights norms. Some participants suggested that companies should: assess whether their current policies and activities are in line with the framework, exchange information on due diligence mechanisms and access to remedy, and develop good human rights practices. It was stressed that transparency, accountability, and multi-stakeholder dialogues are critical factors in the corporate responsibility to respect human rights. It was suggested that in the event of conflict between national and international law, companies should be creative and respect the principles of international human rights law.

47. Business representatives underlined that the business objectives of companies should be recognized. It was stressed that companies would have to comply with the core labour standards of the International Labour Organization but that companies should not be charged with public functions that pertain to other institutions and that an important goal for companies is to remain competitive.

V. Access to remedies

A. Judicial remedies

Summary of expert presentations

48. Audrey Gaughran (Head of Business and Human Rights, Amnesty International) presented the findings of an Amnesty International research project on effective remedy in cases of corporate-related human rights abuses and proposed some recommendations. The first obstacle to effective remedy appeared to be the significant influence companies exert in defining the legal framework for action in their favour. The second systemic obstacle is the lack of access to information on, for example, the social and environmental impacts of corporate activity or the exact cause of those impacts. She stressed that companies frequently, given their extensive technical knowledge, provide misleading data that

obscures the real source of the negative impacts. Lastly, the State may have a conflict of interest in some contexts, for example when it is a partner in the industry, or may abandon people to deal with and seek remedy from the company failing to comply with its duty to protect. Ms. Gaughran proposed that the Special Representative give detailed guidance to States and companies to address the systemic obstacles to effective remedies by tackling the issue of access to information and by recommending that some elements of human rights due diligence should be required by law.

49. Martyn Day (Senior Partner, Leigh Day Solicitors) gave an overview of the main obstacles communities face when looking for redress. He pointed out that the lack of local legal representation pushes the communities to seek remedy internationally through lawyers from the home State. Mr. Day stressed that there should be a system whereby justice can be brought forth simply and quickly. He added that another obstacle, in the case of multinationals, is the unclear relationship between parent company and subsidiaries. In order to facilitate access to remedy, the parent company should be considered liable for the activities of its subsidiaries. Finally, Mr. Day suggested that companies should be proactive and solve conflicts as they arise to avoid legal action and a lengthy court battle.

50. Salvador Quishpe (Saraguro Community, Ecuador) presented the difficulties that the indigenous people whom he represents face in Ecuador in seeking redress for corporate abuses. He stressed that defending the land is an integral part of defending indigenous peoples' rights and identity. Mr. Quishpe stressed that in cases involving extraction of natural resources, communities have had to approach the companies involved directly and ask them to respect human rights and engage with the community. He noted that companies often have greater political influence with the State than the State's own citizens. This was evident when the community asked the State for protection but the State agreed to open the dialogue only when, during demonstrations, a death occurred. He concluded by saying that free, prior and informed consent should be a condition for companies' operations.

51. Jan Eijsbouts (Former General Counsel of multinational Akzo Nobel, International Mediator) submitted that litigation (particularly extraterritorial) is an unsatisfactory tool for conflict resolution and that mediation, being mutual-interests based, is the best way forward. He pointed out that proactive conflict-management policies, including mediation, are an essential risk-management tool for responsible corporate governance, also where (potential) human rights issues are at stake. He supported the Special Representative's stated view that companies should offer stakeholders a consensual, de-escalating and neutrally led professional conflict resolution method.

Summary of discussion

52. Some participants stated that negotiating human rights is not possible, given their very nature, and that mediation might not always be the best way forward. Others stressed that international cooperation should support rule of law, good governance and the development of lawyers in host States who could legally represent victims and seek redress on their behalf.

53. One participant brought to the general attention an example of aerial spraying of banana plantations in the Philippines as a case where the access to judicial remedy was particularly difficult. In this case, the plantation workers were provided with protection while the residents in nearby communities have been left unshielded. The legal and procedural barriers were enormous and communities could not afford the necessary legal and technical support to bring their case. Moreover, civil society participants stressed that compensation does not prevent further harm to communities and that a study on preventive measures should be conducted.

54. Business representatives stated that transparency is important but cannot be absolute since companies are also bound to commercial confidentiality. They also suggested that to determine a parent company's liability, it is necessary to check whether the parent company is in control of the subsidiary.

55. Some participants suggested that the International Monetary Fund and the World Bank could play a role in protecting human rights. It was pointed out that the two institutions tend to use external debt to force poorer countries to open up their markets and embrace policies that can be harmful to human rights. They called for a human rights treaty which would be binding on companies and an international court to which victims of corporate-related abuses can bring their claims.

B. Non-judicial remedies

Summary of expert presentations

The Tintaya Copper Mine case

56. Rocio Avila (Extractive Industries Program Officer, Oxfam America, South America Regional Office, Peru) presented the case of the Tintaya Copper Mine in Peru, in which the company Xstrata and the local communities had initiated a dialogue to resolve a long-standing conflict. The dialogue process brought about communication and trust between the community and the company. She also emphasized that the involvement and legal and technical advice of non-governmental organizations and local grass-roots networks were key factors that contributed to the success of the process. International NGOs also played a key role at the outset by raising concerns with top officials at the company headquarters. Ms. Avila stated that the dialogue process took a considerable amount of time before a consensus could be reached among NGOs, the mining company and the communities. It was pointed out that the Peruvian Government was not involved in the dialogue because there was distrust amongst the local communities towards the Government. Ms. Avila concluded by saying that the overall result of the dialogue was that it led to agreements and company policies that addressed the needs of local communities and fostered better relations between the company and the communities.

57. Enrique Velarde (Xstrata Peru) discussed Xstrata's experience during the Tintaya dialogue and consultation process, specifically the operational mechanisms that were implemented, the non-participation of the State and the challenge of establishing trust between the parties. Mr. Velarde specified that, in order to address various issues, such as the expropriation of land, a consultation period was established in order to create solutions that were acceptable to all stakeholders. He pointed to the role of an independent ombudsman and stressed that it was determined by consensus that there should not be any State intervention. He described how the dialogue process created separate commissions for each issue, such as land, the environment, human rights and sustainable development. Mr. Velarde concluded by saying that the major challenge at the outset of the dialogue process was the mistrust among the parties and the major success was that this mistrust was finally overcome.

Renegotiation of a Memorandum of Understanding between Chevron and Surrounding Communities in the Niger Delta

58. Silvia Garrigo (Manager, Global Issues and Policy, Chevron Corporation) presented the objects and purposes of the Global Memorandum of Understanding (GMOU) between Chevron and the surrounding communities in the Niger Delta as an example of how a non-judicial mechanism can be applied to address situations of conflict between a company and surrounding communities. The GMOU's systematic focus on participatory partnerships,

transparency and accountability, conflict mediation, a grievance and claims process, and a monitoring mechanism across 425 communities is instrumental in helping communities which were historically in conflict with industry and themselves work together for socio-economic progress. Ms. Garrigo explained that Chevron's objective was that development in the region should be achieved *with* the people, rather than *for* the people.

59. Austin Onuoha (Executive Director, Africa Centre for Corporate Responsibility (ACCR), Nigeria) highlighted some of the aspects of Chevron's current Global Memorandum of Understanding (GMOU) in Nigeria from a civil society perspective. He emphasized that the GMOU has focused on qualitative factors, such as community responsibility, inclusiveness and development. He stated that the GMOU process began in 2004, involved 5 States of the Niger Delta (425 communities) and had a strong governance structure and participatory partnerships. He noted that what had made the GMOU process successful was that it had been a flexible process that had been inclusive, sustainable and principles-driven. Elements to look out for in similar processes included whether there is explicit provision for non-judicial remedies; whether the people are aware of the mechanism; whether it has actually been constituted; whether the parties are using it; and whether the personnel have been trained in using it and had their performance evaluated.

Summary of discussion

60. Participants discussed the effectiveness of non-judicial mechanisms, such as dialogues between stakeholders. It was noted that dialogue processes are democratic processes able to bring together stakeholders with different interests. Participants expressed their concern over certain business practices, such as tax evasion, that occur in spite of the non-judicial mechanisms and dialogues in general. It was pointed out that even though non-judicial mechanisms have been effective in many ways, there is still much to be done. It was also recognized that certain dialogue processes have succeeded in attaining stability in areas where basic infrastructure has been lacking.

61. Participants expressed the view that while non-judicial mechanisms are important, they are not substitutes for judicial mechanisms. It was stressed that both judicial and non-judicial mechanisms are needed and they should be solid, independent and effective at the national and international level. Some participants emphasized that the scope of the right to remedy hinged on the State's obligation to provide access to remedy. Similarly, it was suggested that there should be international redress and accountability mechanisms, since an international mechanism would ensure that individuals and communities could seek remedies, even if their home State does not provide such a mechanism.

VI. Closing remarks by the Special Representative

62. In his closing remarks, the Special Representative expressed his gratitude to the outstanding set of panellists who had all made invaluable contributions to the discussion.

63. While much progress has been achieved in developing shared meanings and shared understandings, the process is still fragile and fluid, with even what he considered the most solidly based principle of the framework — the State duty to protect — being questioned by some Governments. This illustrates how difficult the situation is and how continued progress is not a given but an objective.

64. The Special Representative went on to outline his plans for what he wishes to achieve in the final phase of his mandate:

(a) Present to the HRC a set of guiding principles in relation to all three pillars of the framework for States and companies;

(b) Clarify some of the key dilemmas, such as how to respect human rights in situations where national law conflicts with international human rights norms;

(c) Make recommendations about how to continue the work on business and human rights, building on the framework that has already been accepted by the Human Rights Council.

65. Continued progress requires a clear understanding of the context within which the business and human rights debate is taking place coupled with a clear strategic vision.

66. In relation to context, the Special Representative said it is important to note that we are no longer at the crest of the latest wave of globalization. We have gone beyond it and a backlash has set in. Emerging powers have different views about the relationships between markets and authority, and they have their own traditions and policy preferences. Populism has re-emerged, in developed and developing countries, on the political right and left. It is necessary to take such factors into account when moving forward because the process needs the support of all Governments.

67. In relation to strategic vision, the Special Representative noted that change agents currently in the business and human rights domain may have various different strategic visions. They may all aspire to the same ultimate goal but involve different strategies to reach it. For example, some participants in this debate have as their main objective to advance the long-term promotion of international human rights law, no matter how long it takes. This is not necessarily the same vision held by those who wish to vindicate the rights of specific individuals here and now with any mechanisms available. The first category includes human rights organizations, law professors et al. The second includes grass-roots organizations and plaintiff lawyers. The Special Representative's vision falls into yet a third category, which aims to reduce corporate-related abuses to the maximum extent possible in the shortest possible period of time. To cite but one difference among them concerning interim steps: effective alternative dispute resolution mechanisms play a significant role in the second and third visions, but they may not necessarily help — and may actually reduce the need for — the long-term evolution of some aspects of human rights law. It is necessary to be sensitive to these differences. They have nothing to do with favouring either voluntary or mandatory approaches, or with being bold or not; they are simply different.

68. Many views expressed during the consultation draw on different strategic concepts, but one needs to realize that they are not identical. For example, alternative dispute resolution does not necessarily help long-term evolution of human rights law. One needs to be sensitive to the idea of vision and strategic mission being different while in the long run they all have the same aim. This has nothing to do with favouring either voluntary or mandatory approaches, or with not being bold; it is just different.

69. The nature of the framework reflects the Special Representative's strategic vision. There is no single silver bullet solution to the question of business and human rights. It is too complex and requires all of us to learn to do many things differently. This is a complex systems design challenge: developing the components of an interrelated, dynamic system and structuring them in such a way that they interact in a cumulative process to induce progress.

70. The Special Representative expressed his firm commitment to making this task work. The challenge is huge; time is short but the cause is just and the word impossible has no meaning.

Annex

List of organizations and individuals who made written submissions to inform the consultation on business and human rights of the Office of the High Commissioner for Human Rights

All the submissions are available for download on www.businessconsultation.ohchr.org.:

- AquaFed
- BankTrack
- Bi-regional Europe-Latin America and Caribbean Enlazando Alternativas Network
- Corporate Accountability International
- CRED
- El Instituto Mexicano para el Desarrollo Comunitario
- FIDH
- Human Rights Advocates
- International Baby Food Action Network (IBFAN)
- International Indian Treaty Council (IITC)
- OECD Watch
- SOMO
- Ms. Joëlle Hivonnet – European Commission
- CIDSE
- Human Rights Advocates and CETIM
- Sr. Jesús Carrión Rabasco
- International Commission of Jurists
- Cathal Doyle, University of Middlesex and Irish Centre for Human Rights
- Eileen Kaufman, Social Accountability International
- Indigenous Peoples and Nations Coalition, International Council for Human Rights and Indian Council of South America
- David Vermijs
- Professor Sarah Joseph, Castan Centre for Human Rights Law
- Barr. Chima Williams, Head of Legal Resources/Democracy Outreach, Environmental Rights Action/Friends of the Earth Nigeria
- EarthRights International submission to SRSG on knowledge standard for aiding and abetting liability
- Asia Indigenous Peoples' Pact

- Respuesta desde FOCO-INPADE al Llamado para participar en Consulta Empresas y DDHH
- ClientEarth submission to the OHCHR consultation on business and human rights
- Submission from Bretton Woods Project and Center for International Environmental Law
- ESCR-Net follow-up contribution to the October consultation on business and human rights
- Maplecroft