Report on the ICC and OHCHR Side event

Engaging NHRIs in securing the promotion and protection of human rights in business

Held during the Human Rights Council, 11th session, 2 to 18 June 2009

Background

On 5 June 2009, approximately 30 representatives from national human rights institutions (NHRIs), non-governmental organisations (NGOs) and member states met at a side event during the 11th Session of the Human Rights Council. The side event, organized by the International Coordinating Committee of National Institutions (ICC) in collaboration with the OHCHR, aimed to develop a broad understanding of the emerging role of NHRIs on the business and human rights agenda, focusing in particular on the issues canvassed by the UN Special Representative of the Secretary General on Human Rights and Transnational Corporations.

Opening Remarks

The event was moderated by Ms. Claire Methven O’Brien from the Danish Institute for Human Rights. In her opening remarks, Ms. Methven O’Brien noted the growing momentum over the last 30 years on the issue of human rights and business, which has paralleled increasing globalisation. She commented that the current global crisis, and resulting economic exclusion appears set to accentuate this.

Ms. Methven O’Brien gave an overview of the UN’s engagement on human rights and business. This has included greater attention to the issue from the UN treaty bodies; increasing support from OHCHR; a consistent focus from the ILO; and the establishment of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (SRSG) in 2005.

She explained that the SRSG has undertaken a program of research and consultation, which culminated in the development of a policy framework for business and human rights in July 2008. The framework is underpinned by the three key principles, namely: the State’s duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for effective access to remedies. These key principles distil and are consistent with general human rights concepts.

The SRSG has alluded to role of NHRIs, specifically in the implementation of third principle by handling relevant complaints. However, Ms. Methven O’Brien highlighted that the SRSG’s recommendations and findings still leave questions unanswered in relation to NHRI engagement the issue of human rights and business more broadly. For

1 Available at: http://daccessdds.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement
example, the Paris Principles give NHRIs responsibility to engage with advisory work, consider judicial matters, monitor the national human rights situation, cooperate with the UN and regional bodies etc. Thus, there is a vast opportunity to increase corporate compliance with human rights if the issue is mainstreamed into NHRIs’ work programs.

Nevertheless, Ms. Methven O’Brien noted that NHRIs’ ability to address human rights and business issues may be restricted. Technical expertise, approaches to monitoring etc. may currently be lacking. To address these issues, the ICC has established a Working Group on Business and Human Rights. The Working Group is mandated to pursue a program across three areas: strategic planning, to act as platform for regional and international work; capacity building and resource sharing; and agenda setting and outreach. The purpose of convening today’s side event is therefore to enrich policy development and strategy and development of the ICC Working Group.

In concluding, Ms. Methven O’Brien highlighted some of the work of the Danish Institute’s Human Rights and Business Project. Established in 1999, the Project works to improve compliance with human rights in the private sector. It develops tools for companies (that are applied in 200 firms worldwide); provides direct advice and assistance to companies; and undertakes projects with capacity building dimensions geographically or issue based. The Project also convened a Roundtable on Human Rights and Business in July 2008, which was the impetus for the ICC’s Working Group.

Panel Presentations

Ms. Lene Wendland, Office of the High Commissioner for Human Rights, expressed OHCHR’s appreciation for the ongoing dialogue between NHRIs and the international system over the past 18 months on the issue of business and human rights. She discussed the work of the SRSG, in particular his latest report (A/HRC/11/13) presented to the Human Rights Council in its 11th Session.2

Ms. Wendland explained that the SRSG’s 2009 report updates the Council on the work of past year and includes an addendum that clarifies the nature of state obligation to provide access to legal remedies. The report relied on research and consultations, including two major regional consultations (in Deli and Buenos Aires). The SRSG’s presentation to the Council also discussed how the issue of human rights and business fits within the context of the current economic crisis. He highlighted that while some may ask whether now is the right time to deal with the issue, his view was that the timing has never been better. This is because, first, human rights are most at risk at times of crisis. Second, gains made by impinging on human rights are illusory and be the basis of recovery. Third, the same regulatory gaps that led to the crisis also lead to human rights violations, a human rights framework provides an opportunity for more sustainable growth. During the Council’s Session, 19 states took the floor to respond to report. All were overwhelmingly positive – particular for the linkage to the economic crisis. Additional comments were from the African Group, who called for development of legally binding statement, and some

NGOs, who remained critical of the SRSG for not basing his work on the draft norms adopted by Sub-Commission on Human Rights in 2003.

Ms. Wendland highlighted that the main significance of the Council unanimously welcoming the SRSG’s proposed policy framework is that it sets the parameters for the complementary responsibilities of States and business and provides clarity for all stakeholders to design ongoing activities in the area. The framework keeps the rights of alleged victims as a core component and reflects the fact that there are three parties to any issue: the State who fails to protect, a corporation that fails to respect and individual that is entitled to remedy. The SRSG’s policy framework states that access to remedy must include mechanisms to investigate, punish, and redress abuses for affected persons within the State’s jurisdiction. Nevertheless, barriers to judicial remedies persist (although, this issue is not specific to business). Ms. Wendland noted that although remedy is sometimes equated to punishment only, it can also include prevention and early resolution (e.g. grievance mechanisms at the company level). In this regard, she alerted participants to the online wiki Business and Societies Exploring Solutions, which provides a platform for stakeholders to share information on non-judicial mechanisms.

Ms. Wendland indicated that, looking ahead, the focus will be on operationalizing the policy framework. The new mandate of the SRSG is to translate the policy framework into practical guiding principles. The SRSG acknowledges the contribution of NHRI to all three pillars of the framework and has had ongoing consultations with the ICC on how to expand contributions of NHRI. In particular, a letter was sent to NHRI a few months ago encouraging them to engage on how to advance this work. NHRI are also invited to participate in an OHCHR consultation on ways and means to operationalize framework, schedule from 5-6 October 2009 and in an online consultation on the responsibility to respect, which will be launched following the October event.

Ms. Florence Simbri-Jaoko from the Kenya National Commission on Human Rights (KNCHR) discussed the experiences of the Commission in relation to business and human rights. The KNCHR has wide mandate that includes capacity to offer remedies to victims. Its experience with business has been primarily through complaints, especially on employment issues (unemployment, discrimination, workers compensation).

Ms. Simbri-Jaoko explained that although the KNCHR has dealt with labour issues, Kenya also has state mechanisms under its labour laws that include the Industrial Court. Nevertheless, the court’s effectiveness is limited, as it only deals with unionised workers (although others may access regular courts, this is difficult). The KNCHR provided extensive input into reforms of the labour law, which resulted in a wider mandate to magistrate’s courts to deal with labour issues. Nevertheless, the KNCHR continues to receive complaints. It faces challenges in terms of numbers, as the nine commissioners must constitute themselves as panel to deal with labour issues.

Information available at: http://www2.ohchr.org/english/issues/globalization/business/consultation102009.htm
Ms. Simbri-Jaoko also outlined some of the KNCHR’s work in terms of prevention of human rights abuses by business. This has included work in the country’s export processing zones, which generally employ casual labourers, most often women. NGOs had exposed violations in these zones, which are run by international corporations whose products end up in the US-EU market. One question this work highlights is how NHRIs in those markets can hold their companies accountable when operating extra-territorially.

The KNCHR has also held a number of inquiries in relation to the business practices of companies in Kenya. This has included an inquiry into salt mining companies and labour practices in Malindi, where communities as well as employees had complained. Various recommendations from this inquiry are being followed with various government institutions, the business community, the general public and workers. The KNCHR has also worked with paper companies that had similar issues with employment practices and environmental issues. Finally, the KNCHR has worked with an American rice company, where communities felt that their rights to ancestral land had been infringed. The KNCHR found that there was not much understanding between the company and community in terms of expectations.

In terms of the legal mechanisms to ensure corporate social responsibility, Ms. Simbri-Jaoko noted that while the concept of CSR had been embraced by larger companies in Kenya, it is not reflected in corporate laws. Therefore, the companies set their own terms for CSR. Although these initiatives are welcome, sometimes large companies use CSR as a public relations exercise and smaller companies feel they cannot engage in the topic. Common basic standards and proper monitoring mechanisms are therefore needed. Addressing human rights as part of companies’ CSR work is an important opening. At the regional level, the East African Community coming together as a trading bloc presents further opportunities for engagement on the issue of human rights and business (the NHRIs of Uganda, Kenya and Tanzania are part of the community process). Particular issues at the regional level include the free movement of labour, to develop common standards so that workers do not suffer human rights violations.

Ms. Simbri-Jaoko also highlighted some of the challenges the KNCHR is facing in relation to human rights and business. New labour laws have expanded rights (especially relating to maternity rights, paternity leave) and various laws require that people cannot be treated as casual labourers beyond a certain limit. However, the business community is not happy with the increased expense these laws create for doing business in Kenya.

In concluding, she explored some future opportunities for engagement with the business community. The KNCHR’s Annual Human Rights awards are one example. The Awards recognise all entities that have shown good human rights practice and there is one award specifically targeted to the business community.

A further example of engagement with the business community was during the post-election violence, where the Kenyan business community came together as a strong voice calling for peace and the end of violence and were able to do many things during this time to protect their workers. The fact that business saw itself as sufferer of violence is an
important opening, as it shows them the advantages of discourse with human rights. The Kenyan business community has also been quick to act on drought, food shortages etc. However, they see this action as short-term solution, not as an ongoing dialogue with government. The KNCHR’s aim is to widen this discourse, e.g. to develop minimum standards on how to engage in moments of crisis.

Ms. Myriam Montrat from the Canadian Human Rights Commission (CHRC) discussed the Commission’s work around the ‘Integrated Human Rights Maturity Model’. She began by explaining the CHRC’s legislative framework. In addition to administering the Canadian Human Rights Act, which contains 11 prohibited grounds of discrimination, the CHRC has responsibility for the Employment Equity Act, which is meant to ensure that federally regulated employers provide equal opportunities for employment to the four designated groups (women; Aboriginal peoples; persons with disabilities; and members of visible minorities).

Ms. Montrat noted that while values of equality and respect are an integral part of Canadian culture, there are still many issues in the workplace relating to diversity, access, equity etc. For example in Toronto only 5% of leadership positions are held by visible minorities and the CHRC continues to hear cases about religious discrimination and a lack of equal opportunity for people with a disability. To address these issues, the CHRC has adopted a three-pillar system: resolving disputes, expanding knowledge and preventing discrimination. The CHRC has increasingly focused on the “front end”, to fully integrate human rights into daily business practice, to prevent violations from occurring and ultimately, reduce discrimination.

Ms. Montrat gave an overview of the CHRC’s Integrating Maturity Model; a five-stage roadmap for organizations to implement workforce practices that continuously improve their human rights capacity. The Model defines what human rights competence means for an organisation, in common language and through a shared vision. It supports the coordination of multi-disciplined activities that might be required to successfully develop a human rights competent organization. She explained that the ultimate goal is for organisations to reach level 5 – full integration, where it is second nature to achieve self-sustaining human rights culture. The CHRC is confident that the Model will become the Commission’s ‘stamp of excellence’ to acknowledge the growth of human rights practices in the workplace.

Ms. Montrat explained the process of developing the Model. So far, the Model has gone through initial steps of research, internal and external consultations, focus groups and it is now moving towards implementation with some of the employers covered under the CHRC’s jurisdiction. The initiative is overseen by a steering committee. In the coming months, the CHRC will proceed with a pilot phase, during which the Model will be tested in several organizations. These first practical experiences will give a measurement of its adaptability to organizational needs and inform the next steps towards a more widespread implementation. The CHRC also plans to develop clear indicators so that businesses can measure their progress along the Model’s continuum.
In concluding, Ms. Montrat noted that the challenge for implementing the Model is that it is not easily enforceable. Buy-in therefore becomes critical to ensure the success of the initiative, especially given the diversity of employers from different sectors and industries, with different mandates and each with a diverse employee base. Nevertheless, the CHRC believes that the model will resonate with employers when they discover how it streamlines their administrative reporting, improves their ability to recruit and retain the best employees and provides performance indicators that will assist them in their strategic planning.

Mr. Chris Avery from the Business & Human Rights Resource Centre began with an overview of the Centre, which has researchers based in India, Senegal, South Africa, UK, Ukraine and USA. Its Advisory Network is made up of 80 individuals and chaired by Mary Robinson. The Centre’s website, tracks companies’ human rights impacts around the world. Human rights is read broadly to include discrimination, environmental impacts affecting human health, poverty and development, labour rights, access to medicines, health and safety, security. The website covers over 4500 companies. It includes a free weekly update and a corporate legal accountability portal, including information on lawsuits against companies. Information on the website includes alleged abuses as well as positive initiatives (e.g. Unilever co-authoring with Oxfam the report Exploring the Links between International Business and Poverty Reduction: a Case Study of Unilever in Indonesia). The website also serves as a depository for materials related to the mandate of the SRSG.

Mr. Avery explained that through case tracking, the Centre had seen how polarised business and human rights issues are all around the world (i.e. government, business, civil society not talking to each other). He stressed that NHRIs can be the link to overcome this. For example, NHRIs can encourage direct engagement where it has not happened before to resolve disputes. As highlighted in the 2008 report of the SRSG, the potential of NHRIs cannot be overstated. They can hold business accountable, by providing processes that are culturally appropriate, accessible and expeditious. Even where NHRIs cannot themselves provide recourse, they can support individuals to seek effective remedies.

Mr. Avery had attended the Copenhagen Roundtable in 2008; he was struck by how keen all the NHRI participants at that conference (representing almost 20 NRHS) were to give more attention to private sector issues, even where they had not done so in the past. He congratulated the ICC on the establishment of the Working Group and expressed the Centre’s willingness to develop a new section of its website to highlight the work of NHRIs.

Mr. Avery noted the challenge NHRIs face to fulfil their potential in relation to business and human rights, given that often limited resources are already stretched addressing government issues. However, he stressed that even with limited resources, each hearing and complaint will send important preventative signals.
He explained how the Equality and Human Rights Commission in Great Britain has worked to prevent racial discrimination in the workplace (through informal resolution and more formal mechanisms). The new Scottish Commission is expected to be active on business & human rights issues, given the Chair’s history in this field.

The South African Human Rights Commission, having only one staff member dedicated to business issues, adopts a strategic approach. They began handling complaints, looking at legislation that came before parliament, commenting on the Companies Act, etc. The Commission began to push the argument that human rights are important to business, need not be seen as a threat to business, and in fact make good business sense. At the Resource Centre’s Annual Speaker Series, the Chair of the South African Commission explained that the Commission had given attention to business, first, because the Constitution does not exclude business; second, because the connection between business and human rights is inescapable; and third because when people experience an injustice they make no distinction about whether the perpetrator is a state or non-state actor. Examples of issues addressed by the Commission have included a complaint against a South African recruiting agency whose Dutch client wanted only white managers; an investigation on the impact of a mining operation on a local community that was relocated (Report on Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine); and an appearance before the Competition Commission to comment on a case involving price-fixing by a bread company (in connection with the right to food). The Commission’s Chair also stressed the positive role of business in relation to HIV/AIDS. The Commission sits on the National HIV/AIDS Council and has observed that many companies have done a good job in meeting mandatory non-discrimination standards, and many firms have gone beyond those requirements to provide drugs and counseling to their HIV-positive employees.

Discussion

The representative from a non-governmental organization enquired how the issue of under-resourcing was being considered at the international level. In other words, are governments putting their money where their mouth is? Ms. Wendland noted that the latest SRSG report on an international mechanism highlights need for financing, which can be a serious limiting factor. Mr. Avery agreed that funding is going to be the big question. While the South Africa Commission, has only one staff member dedicated to business & human rights, that is more than most NHRI at this stage. Ms. Methven-O’Brien noted that funding would be one of the first questions facing the Working Group. She also commented that the funding issue ties into the question of mandate; if there is no explicit legal mandate to work on business, securing funding can be even more difficult. Ms. Simbir-Jaoko was not sure that NHRI would need a specific mandate to deal with business, given that it already fits neatly into work done with government, business and civil society in relation to economic, cultural and social rights. The choice of whether to engage business directly is a choice of the institution – if we ignore business, cannot deliver on wide mandate. NHRI have to be innovative. NHRI with specific mandates (e.g. for discrimination) can leverage and involve business in work the commissions are mandated to do (e.g. including members on advisory councils).
A representative of a non-governmental organization asked about the relationship between complaints procedures at the national level (e.g. OECD national contact points, complaints procedures by labour associations and other multi-stakeholder organisations). The panellists indicated that there was not much coordination yet, but that this was hoped for in the future.

The representative from the Confederation of Commerce and Service in Portugal commented that there were three big associations in the country addressing CSR issues, but nothing compared with discussions here. Moreover, human rights organisations tended to be occupied with immigrants, police issues etc. He reported that last year entrepreneurs put emphasis of citizenship for companies and people, which is helping to advance the issue and that Confederation has built code of ethics, calls on internal practices etc.

The participant from the Geneva Graduate Institute asked about the sub-regional initiatives pioneered by Canada and the Danish Institute. He asked whether these institutions were planning regional or international technical cooperation initiatives. Ms. Methven O’Brien noted that Danish Institution has engaged in initiatives in the Balkan region to develop a modified tool; likewise in South Africa, but that coordination for this type of work is needed. The ICC Working Group will be perfect platform for this. She also commented that development funding to support bilateral engagement with ombudsmen, has not to date integrated business and human rights into those projects

The representative from the International Service for Human Rights (ISHR) noted that in the panellists’ presentations, there had been no mention of the work of the Asia Pacific Forum of National Institutions (APF). In particular the APF’s Advisory Council of Jurists produced a reference on business and human rights and the ISHR enquired whether this had informed the work of the SRSG. Ms. Wendland confirmed that a member of the SRSG’s team had addressed the APF’s Forum Councillors and that there were plans for follow up through the SRSG’s representative based in Australia. Ms. Methven O’Brien also confirmed that the APF was actively engaged with the Working Group, with two representatives coming from the region.

In a statement, the Australian Human Rights Commission commented that it while it has worked with business on human rights issues for over 20 years (e.g. through developing best practice guidelines, addressing policy issues involving the corporate sector, and conciliating complaints against companies), more recently it had commenced some more systematic research to understand what business is doing about human rights. The AHRC found that while virtually all of the top 100 Australian companies had a CSR program, almost none took a comprehensive approach to incorporating human rights into business practices. In May 2009 the AHRC published four short fact sheets to start the process of education, translation and integration of human rights into everyday business practices. Drawing on the SRSG’s framework, the first fact sheet explains how human rights are relevant to Australian companies and the business case for integrating human rights. The
other three focus on specific human rights issues and practical tools relevant to the Australian finance, mining and resources and retail and manufacturing sectors.

The Chair of the Human Rights Commission of the Philippines commented that her institution had had limited engagement on the issue so far, for various reasons, including limited funding. But, the Commission was interested to consider how to tie the principles to respect, protect, and fulfil the dialogue on CSR. The Commission would like to increase its focus on alternative dispute resolution (ADR) and monitoring indicators and asked what training models would be available in this regard. Ms. Montrat indicated that the Canadian Commission would be happy to provide information on ADR and to share lessons learned from Canadian experience as it has evolved. Ms. Wendland also commented that more experience on ADR will be available in the next year or so as part of SRSG’s work, including guidance on ADR models that would be considered compliant with international principles.

The representative from the non-governmental organization Earth Justice noted the importance of the international dimension of this issue (e.g. trade, limits of state protection etc.). He asked whether these questions would be considered in the work of the ICC Working Group, in terms of preventative measures, how different trade agreements are negotiated. As the impact of these agreements on human rights can be enormous, it is important to consider how NHRI can deal with this dimension. Ms. Simbiri-Jaoko noted that in Kenya an EPS is currently being negotiated with the EU and that civil society has been trying to increase transparency and to emphasise its human impact. Mr. Avery also commented that this will be an emerging area. The business and human rights debate has come along way in last 10 years, as have NHRI, with just a few having done serious work in this area.

**Concluding Remarks**

Ms. Methven O’Brien concluded by summarising some of the challenges and opportunities for NHRI in relation to business and human rights that had been raised during the discussions. General challenges in the area included: engaging small and medium sized enterprises that do not have same resources and are less reputation-focused; the limited legal basis for CSR issues, which makes leverage to take on companies difficult; the polarization of civil society and business; the transnational dimension and the jurisdictional questions this raises. Challenges facing NHRI specifically included under-resourcing, which will have to be creatively considered; diversity of mandates; and a need to balance diverse approaches, with the need to be coordinated.

Nevertheless, a number of opportunities for NHRI engagement on the issue of business and human rights also emerged, these included: the particular ADR skills of NHRI; the innovative and specific capacities of the business community and the ability of NHRI to harness these capabilities; the interest in prevention; and finally, wide possibilities for strategic collaboration and coordination for regional and sub-regional action.