



Transnational Corporations and Environmental Harm

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Statement

Side Event on Human Rights and Transnational Corporations
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Thank you very much for the opportunity to speak at this important side-event.

The report I presented this morning to the Council states that there is no longer any doubt that environmental harm can adversely affect the enjoyment of human rights. There is also no doubt that such harm can and does occur as a result of the activities of transnational corporations.

Sometimes, the infringement of human rights is the direct result of the environmental pollution.

- o This year will mark the 20th anniversary of the Union Carbide gas leak at its pesticide plant in Bhopal, India, which exposed half a million people to dangerous gases, and killed thousands of them. The plant was owned by a subsidiary of a U.S. corporation.
- o In the infamous Trafigura case, a Dutch-based ship registered in Panama, which was chartered by a Dutch shipping company, offloaded toxic waste in Cote d'Ivoire, which was then dumped by a local contractor at as many as 12 sites in and around the city of Abidjan in August 2006, causing at least 17 deaths and thousands of illnesses.
- o And we are familiar with the environmental harm caused by oil operations of Texaco (Chevron) in Ecuador, which became the subject of an 18 billion dollar judgment three years ago (in February 2011).

Sometimes, the exploitation of natural resources not only causes human rights abuses directly resulting from environmental harm, but also leads to other human rights violations.

- o Royal Dutch Shell’s operations in Ogoniland in Nigeria caused massive environmental damage. (A 2011 UNEP report concluded that it could take 30 years to clean up the damage, and called for a billion-dollar fund to get started.) In addition, protests by the Ogoni led to harsh crack-downs by the then authoritarian Nigerian government, including the execution of nine Ogoni leaders in 1995.
- o During the operation of a copper mine on Bougainville by Rio Tinto, a British-Australian company, between 1972 and 1988, it dumped millions of tons of waste into the Jaba river. The dispute over the effects of the mine also led to a prolonged civil war in which Rio Tinto was accused of committing human rights abuses together with the government of Papua New Guinea.
- o There are many other examples. James Anaya, the special rapporteur on the rights of “the implementation of natural resource extraction and other development projects on or near indigenous territories has become one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights”.

In 2008, John Ruggie, the Special Representative of the Secretary-General on human rights and business, reviewed 320 cases of alleged corporate-related human rights abuses and found that nearly one third of the cases alleged environmental harm that affected human rights, including the rights to life, health, food and housing. Most of the cases of direct harm to communities involved environmental impacts

The Guiding Principles on Business and Human Rights that Ruggie drafted and that the Council endorsed in 2011 make clear that corporations have the responsibility to respect human rights, including rights whose enjoyment is threatened by environmental harm. The Guiding Principles also make clear that States have legal obligations to protect against such harm from corporate activities.

The report I prepared this year for the Council elaborates on those obligations. On the basis of an extensive review of relevant sources of human rights law, we found that

- a. States’ procedural obligations include duties to provide for impact assessment, public participation in environmental decision-making, and access to effective remedies.
- b. States’ substantive obligations include duties to establish legal and institutional frameworks to protect against environmental harm to human rights.
- c. States also have heightened duties with respect to groups in vulnerable situations, such as women, children, and indigenous peoples.

These obligations should inform both States’ duty to regulate corporations to protect against human rights abuses, and also corporations responsibility to respect human rights.

It is clear that States have this duty with respect to corporate conduct within their territorial jurisdiction, at least. But what about with respect to corporations acting outside their territory?

There may be difficulties in relying on States to enforce human rights obligations on corporations within their territory. The corporations may be complicit with the States in human rights violations. Or the corporations may no longer have a presence in the State.

To be clear, States may regulate the activities of corporations outside their territory, as long as they have some accepted basis for jurisdiction, such as nationality. It is also clear that States have jurisdiction to regulate corporate conduct within their territorial and/or national jurisdiction, and that they have the obligation to regulate such conduct within their territorial jurisdiction in order to fulfill the above duties with respect to environmental harm.

It is less clear whether States are obligated to regulate corporate conduct outside their territorial jurisdiction. Experts disagree on this point. Certainly there is support for the idea that States have extraterritorial obligations under human rights law, but the scope and content of those obligations is contested, and some States do not recognize the obligations at all.

Clarifying the extent of extraterritorial obligations would be very useful. At the same time, we must be careful not to try to do so much that we end up doing nothing, or even taking a step backwards. In thinking about what a treaty on human rights and corporations, we should recognize that States that do not acknowledge extraterritorial obligations now will not automatically change their position in a treaty negotiation! And the effort to obtain a treaty could cast a shadow over the ongoing implementation of the Guiding Principles.

I agree with John Ruggie that a treaty would be most valuable if it were targeted. He suggests tackling the worst abuses first – that is, corporate involvement in widespread or egregious human rights abuses. Often these abuses take place in connection with massive resource exploitation, in countries with weak governments. It would be very useful to clarify obligations of the home States of the corporations involved to protect against the harm and to provide redress.

It also is worth considering an agreement that creates a special court with jurisdiction to hear cases against corporations. One of the major problems in this area is finding a forum even when it is clear that violations of human rights norms have occurred. Often the courts of the location of the harm are unavailable. Sometimes the courts of the home country of the corporation are available, but not always. In the United States, for example, courts regularly reject claims arising from foreign conduct, even when the defendant is headquartered in the United States.

Claims that do not otherwise have a home might be best suited for decision by an international arbitral tribunal. Of course, it would be important to carefully craft the terms of reference of the tribunal. But in principle, it could be based on models from the international law of investment, which allows investors to sue States for expropriation and discrimination, among

other bases. The difference would be that here, the State, or other actors, could sue the corporation.

Neither of these approaches would solve all problems related to environmental human rights abuses by corporations. But if we wait for an agreement that solves all of those problems, I think we will be waiting a very long time!

Again, thank you for inviting me to participate, and I look forward to your comments and questions.