



22 May 2006

Re: Joint NGO Response to Interim Report

Dear Colleagues,

Many thanks for your thoughtful and constructive letter of 18 May 2006 regarding my interim report and next steps in my mandate. I very much appreciate the willingness of the NGO community to engage in an ongoing dialogue, most recently at a roundtable session hosted, at my request, by Human Rights Watch in New York and by video hookup in Washington, DC, on 10 May 2006.

I am pleased to provide you with my work plan for the remainder of the year as best I know it at this point. But to put it into context, perhaps I should begin by describing briefly my understanding of the mandate itself.

As someone who has spent more than three decades teaching, advising and practicing the evolving subject of global governance, including matters related to international law, human rights, and the private sector, I share your sense of the historic magnitude of the issues addressed by this mandate. The success of any long-term strategy hinges on getting the basics right and then building step-by-step on that foundation. I believe that the Human Rights Commission saw this mandate as a way to do just that.

The choice of verbs in the resolution outlining the mandate indicates that it is intended in the first instance to be a ground-clearing effort. The resolution asks me to “identify” and “clarify,” to “research” and “elaborate,” to “compile” compendia and “develop” materials. Based on such empirical observations and conceptual analyses, the mandate then asks me to make recommendations for consideration by the Human Rights Commission (now Council), in light of its desire to strengthen the promotion and protection of human rights as it relates to business.

Moreover, while legal questions constitute a core element of the mandate, my job description goes well beyond the strictly legal sphere. For example, I am asked to assess policies and best practices by companies and states alike and, indeed, even to devise methodologies for human rights impact assessments. Thus, it is a broadly diversified mandate, and member states are expecting a broad portfolio of observations and recommendations from me.

I appreciate the fact that of all the elements in the mandate, human rights organizations are interested primarily in the issue of standards. Firms also want to know what society expects of them. For my part, I agree that without greater clarity and shared understanding regarding standards progress on the business and human rights front will be limited. But it should be noted that the mandate does include other elements as well. And on the issue of standards itself, the mandate explicitly differentiates between standards of corporate *responsibility* and *accountability*, which I take to mean that the Commission/Council is interested not only in the substance of standards but also in corresponding modalities for holding companies to account for them.

In short, this is a relatively unconventional mandate within the context of UN human rights “special procedures,” which is why the Secretary-General asked me, as a political scientist and policy practitioner who has worked closely with him on these and other out-of-the-box challenges, to take on the assignment.

To which I might add that, apart from two return flights between Boston and Geneva, this also was an entirely unfunded mandate. Convening regional consultations, conducting site visits, putting together a small research team, and reducing my teaching obligations were all at my own initiative and I have had to raise the necessary funding for them, although I am pleased to report that in the current fiscal year the OHCHR is able to support one of the regional consultations from voluntary contributions.

With that by way of preface, let me describe briefly some of the activities I have planned.

Regional Consultations

The purpose of the regional consultations is to learn the views of local stakeholders on (1) the overall mandate and how best to execute it; and (2) a specific set of business and human rights issues that is particularly pronounced in that region.

- Johannesburg (March): the challenges/dilemmas of business operations in zones of conflict.
- Bangkok (June): human rights and supply chain management, drawing on the experience of the footwear and apparel, toys, and consumer electronics industries, among others.
- Colombia (October): “social license to operate” issues in extractives, with a particular focus on indigenous peoples.

Site Visits

These are intended to give me greater first hand exposure to human rights challenges in different industry sectors and countries. I spent some time learning about the mining sector in Peru last January. Thanks to the help of Oxfam, this included meetings with NGOs in Lima and *campesino* groups in Cajamarca.

I plan to visit supplier factories in Thailand in connection with our regional consultation there, and am exploring possible sites in Colombia in connection with that consultation. Other visits may become possible, time and funding permitting.

Legal Workshops

As of now, we are planning three legal workshops. In each case, a host institution will do the actual convening – my small team and I don't have the capacity to organize that many meetings ourselves. The workshops are intended to clarify the current state of law, identify significant gaps, and explore alternative strategies for improving on the status quo. They are *not* consensus building or drafting exercises. Each will involve a small number of legal scholars and expert practitioners from different parts of the world and different legal systems.

The subjects covered include:

- Non-criminal liability issues: convened by Elizabeth Wilmshurst, former deputy legal advisor at the FCO, to be held at Chatham House in June;
- Criminal liability issues: still in funding proposal stage, convened by Olivier de Schutter of FIDH and the Catholic University of Louvain, in partnership with the Free University of Brussels;
- A third, still in exploratory stages, on complicity and spheres of influence.

Research

On the research front, thanks to voluntary contributions from governments, we have managed to recruit some additional short-term staff assistance. In addition, BP is making available Christine Bader to help with the mandate, working out of London. Bader was deeply involved in planning the human rights dimensions of BP's Tangguh project, and more recently drafted their overall corporate human rights guidance note. It is important to have someone on the team who has actually worked in a company. By the same token, I would be delighted if human rights organizations also were able to second an expert to support the mandate.

Ongoing research includes:

- Standards of responsibility and accountability; includes a basic mapping exercise, as indicated in paragraph 70 of the interim report;
- Case law on corporate complicity and spheres of influence;
- State responsibility and the use/adaptation of the existing human rights machinery to implement human rights commitments in relation to business enterprises;

- Best practices on the part of governments: we have just sent out a survey to all member states; it will be supplemented by research on various policy instruments available to governments to promote and protect human rights in relations to business;
- Best practices on the part of firms: finalize GF500 survey results; additional in-depth research of 5 or 6 critical areas – for example, credible accountability mechanisms in supply chains, community engagement frameworks, internal and external reporting systems, revenue transparency systems, etc. The idea here is not only to describe what is out there, but also to recommend improvements by stipulating what might be called “best practice standards”;
- Human rights impact assessments: as indicated in the interim report, constructing a HRIA tool is too big a task for me to undertake at this time, but I will continue to follow and report on existing initiatives.

Sectoral Consultation

The same resolution that established my mandate also requested the OHCHR, in cooperation with the Special Representative, to convene an annual sectoral consultation. We have not yet selected this year’s sector.

In concluding, I also want to express my gratitude to an ever-larger network of scholars and practitioners in an expanding number of countries who are share information and ideas with me through email exchanges.

At the end of the day, in view of the complex nature of this mandate I take it for granted that not everyone will agree with everything my final report may contain. I can assure you that I have no interest in striving for lowest common denominator solutions for the simple reason that they wouldn’t solve anything. But I am doing my utmost to make sure that the process is thorough, balanced, and transparent – and most important, that the product will inform and help shape the actions of companies, governments, and civil society, in the short as well as the longer term.

With best regards,



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