



**Economic and Social
Council**

Distr.
GENERAL

E/CN.4/2006/92
19 December 2005

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sixty-second session
Item 17 of the provisional agenda

PROMOTION AND PROTECTION OF HUMAN RIGHTS

**Report of the United Nations High Commissioner for Human Rights on the
sectoral consultation entitled “Human rights and the extractive industry”,
10-11 November 2005***

Summary

The present report is submitted in response to Commission on Human Rights resolution 2005/69 in which the Commission requested the High Commissioner for Human Rights to convene an annual sectoral consultation of senior company executives and experts. On 10 and 11 November 2005, the High Commissioner convened in Geneva a consultation on “Human rights and the extractive industry”. The consultation considered existing initiatives and standards relevant to the extractive sector, sought to clarify human rights responsibilities of business, and examined ways to strengthen protection of human rights in the extractive sector.

* The annex is circulated in the language of submission only.

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Introduction

1. In its resolution 2005/69, the Commission on Human Rights requested the High Commissioner for Human Rights to convene annually, in cooperation with the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, a meeting with senior executives from companies and experts from a particular sector, such as the pharmaceutical, extractive or chemical industries, to consider, within the mandate of the Special Representative as set out within his mandate (paragraph 1 of resolution 2005/69), the specific human rights issues faced by those sectors, to raise awareness and share best practice, and to report on the outcome of the first meeting to the Commission at its sixty-second session.
2. On 10 and 11 November 2005, the High Commissioner convened in Geneva the first annual sectoral consultation on "Human rights and the extractive industry". The consultation focused on the extractive sector principally for two reasons. First, the activities of the extractive industry and their proximity to areas such as conflict zones have highlighted a series of human rights issues and challenges facing the sector which provided material for consultation and examination. Second, the existence of several initiatives and standards on human rights in the sector indicated a level of experience which the consultation could build upon.
3. The programme of work focused in particular on paragraph (a) of the Special Representative's mandate, which requests him "to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights". Accordingly, the programme of work comprised three sections: the first section reviewed existing initiatives and standards on corporate social responsibility relevant to human rights and the extractive industry; the second section sought to clarify standards of human rights responsibility and to identify gaps in existing initiatives and standards; and the third section considered ways to strengthen the protection of human rights in the sector.
4. In response to the resolution, the High Commissioner invited senior executives of companies and experts from the extractive sector. The annex sets out the list of experts and participants. Ms. Jane Nelson of Harvard University chaired the consultation. Sir Mark Moody Stuart, Chairman of Anglo-American, introduced the consultation. Experts then led each session with presentations which were followed by general discussion with participants. The Office of the United Nations High Commissioner for Human Rights expresses its gratitude to experts and participants for their involvement in the consultation.
5. The present report summarizes the expert presentations and the subsequent discussion.

I. HUMAN RIGHTS AND THE EXTRACTIVE INDUSTRY

6. The oil, gas and mining companies constituting the extractive industry have a significant impact on the enjoyment of human rights. The extractive industry offers potential for job creation and economic growth which are important elements in promoting an environment conducive to the enjoyment of human rights. However, the presence of the extractive industry

can also add stress to human rights, particularly in the context of certain risk situations. The main risk situations - which are often overlapping - can be categorized as follows:*

(a) Situations of conflict. In such cases, companies can be caught up in local conflicts and associated violations of human rights, particularly where the company has to rely on public or private security forces;

(b) Situations of weak governance. Where Governments are unwilling or unable to meet their human rights obligations, corruption or an absence of government might affect business activities and some companies might seek to take advantage of weak governance for short-term profit;

(c) Situations of authoritarian governance. Certain Governments might react aggressively to criticism from local communities in the context of extractive sector activities, threatening human rights through unjustified violence or obstructing freedoms by inappropriately restricting public demonstration and movement;

(d) Situations where local communities have particular cultural and other sensitivities. Many communities have cultural and religious traditions intrinsically linked to the land and the surrounding environment which can be difficult to reconcile with extractive activities. Indigenous communities are particularly vulnerable in this regard;

(e) Situations where local communities rely on the land and water resources for their livelihoods. The activities of the extractive industry can pose certain environmental risks if activities are not properly managed, which can affect the enjoyment of rights.

7. The potential impact of the sector depends significantly on how States and companies operate. Importantly, States have a legal obligation to protect human rights in the context of the activities of the extractive industry. Thus, for example, the failure of a State to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The legal obligations on States to protect human rights are drawn from international customary law, ratified international human rights treaties, constitutions and national legislation.

* See e.g., T. Bekefi, "Human rights policy implementation in the oil and gas sector: Translating policy to practice", a working paper, International Petroleum Industry Environmental Conservation Association, available on the IPIECA website (<http://www.iecea.org>); Human Rights Watch, "The Curse of Gold: Democratic Republic of Congo", HRW, United States of America, 2005; Amnesty International, "Contracting out of Human Rights: The Chad-Cameroon pipeline project", Amnesty International, United Kingdom, September 2005; World Bank, "Striking a better balance - The World Bank Group and Extractive Industries: The final report of the Extractive Industries Review", World Bank Group Management Response, available on the World Bank website (<http://www.worldbank.org>).

8. Business can also play a role in respecting human rights and ensuring that their activities do not abuse human rights, although there are still gaps in understanding the nature and scope of these responsibilities.

II. OPENING STATEMENTS

9. Dzidek Kedzia opened the consultation on behalf of the High Commissioner. Observing the wide range of high-level experience and views in the room, Mr. Kedzia emphasized the importance of respect for diverging views. He noted that the consultation did not seek a consensus on complex issues, but rather to share and record different opinions.

10. The Special Representative, after welcoming participants, referred to recent media coverage of the extractive industry. While coverage suggested both good and not-so-good news, the latter reflected themes that had recurred for some years, suggesting that this sector still faced deep structural issues that had not yet been wholly resolved. Dealing with these issues required an examination of the very nature of the business itself, namely that it was physically and socially the most intrusive commercial intervention imaginable. So being “neutral” was not an option for companies, because every action or inaction would have significant and differential impacts on local populations. Nor was a licence to operate from the State a sufficient condition for success. Companies needed to pay as much attention to their social relations of production as they did to the physical, and to be as attuned to their social licence to operate from surrounding communities as they were to the legal. This required company policies, management systems and practices, as well as personnel skills that far too few companies possessed in sufficient quantities. Progress had been made in recent years, as individual firms and industry associations had adopted new policies and as voluntary multi-stakeholder initiatives, such as those discussed at the consultation, had been put in place. The Special Representative noted that he wanted to pursue his mandate on the basis of evidence and to produce results that counted for people on the ground, so he would examine these initiatives closely, hoping to identify what worked, what did not and why, and to recommend steps to improve these initiatives as well as to close gaps between them.

11. The Chairperson identified three common starting points for discussion: first, that everyone at the consultation was concerned with promoting all human rights; second, that there was agreement that Governments had the crucial leadership role in relation to human rights; and third, that business, including the extractive industry, could play a crucial role in promoting and protecting human rights by doing no harm to human rights and by taking a proactive role in supporting human rights. On that basis, the Chairperson noted that, even with great diversity in the room, participants could consider the meaning of these three factors in practice as well as the roles of different actors in the extractive industry.

12. Sir Mark Moody Stuart, Chairman of Anglo-American, emphasized the primary role of Governments for human rights. He identified three layers of business responsibility. The core level included clear and prime accountability on the part of companies for the human rights of their employees. The next level included corporate accountability for surrounding communities and customers - to avoid acts that negatively affected their rights. Other support, in a spirit of good neighbourliness, was voluntary. The third layer of responsibility was more remote and included expressing support in various ways for human rights in the face of abuse not connected with company activity. Sir Mark identified human rights challenges for business as: corruption;

the transparent use and equitable distribution by Governments of revenues; employment equity; the security of personnel and neighbouring populations; the implementation of sound policies by Governments in relation to artisanal mining; the resettlement of populations affected by the extractive sector; free trade union activity; and the avoidance of complicity in human rights abuse. Finally, he said that the draft “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human right” (E/CN.4/Sub.2/2003/12/Rev.2) (“the draft Norms”) were a distraction in improving national legislation and building respect for human rights across the world. He said that we did not need more high-level norms, but detailed multi-stakeholder work on how principles could be put into operating practice.

III. REVIEW OF EXISTING INITIATIVES AND STANDARDS

Introduction

13. Participants reviewed a range of existing initiatives and standards that States, business and civil society had developed to strengthen corporate and State responsibility in the sector. The principal initiatives and standards identified for review during the consultation were:

(a) Voluntary Principles on Security and Human Rights (Voluntary Principles) - a set of principles to guide companies in maintaining safety and security of their operations within a framework that ensures respect for human rights;

(b) Kimberley Process Diamond Certification Scheme - an international certification scheme designed to regulate trade in rough diamonds;

(c) Business Leaders’ Initiative on Human Rights - an initiative that brings together 10 companies for a three-year period to explore the ways that human rights standards and principles can inform issues of corporate responsibility and corporate governance;

(d) Extractive Industries Transparency Initiative - an initiative aimed to increase transparency in payments by companies to Governments and Government-linked agencies;

(e) OECD Guidelines on Multinational Enterprises - recommendations to business from 30 member States of the Organization for Economic Cooperation for Development and 8 adhering non-member States that seek to contribute to the improvement of the global economy and the promotion of corporate social responsibility;

(f) The Global Compact - a voluntary corporate citizenship initiative of the United Nations Secretary-General that brings together companies, labour, United Nations agencies and civil society to support 10 principles derived from key international instruments including the Universal Declaration of Human Rights.

Expert presentations

14. Mr. Bennett Freeman (Senior Counsellor, Corporate Social Responsibility, Burson-Marsteller; former United States Deputy Assistant Secretary of State for Democracy, Human Rights and Labour) reviewed the operation of the Voluntary Principles after five years of operation. Noting that it was still too early to measure success in spite of good practice emerging, he highlighted the importance of increasing participation of companies, Governments

and southern non-governmental organizations. The future success of the Voluntary Principles would depend significantly on bolstering their legitimacy by considering ways to improve monitoring, for example, through the identification of methods for information collection and analysis. The move towards company reporting on implementation had been a significant step. Mr. Freeman also suggested that the Voluntary Principles could provide a model for standards in other areas beyond business and security as experience indicated that global standards supported by global processes could succeed. Indeed, the Voluntary Principles were becoming legally binding in some specific project contexts (and criteria in both emerging guidelines of the OECD and the International Finance Corporation (IFC)) put them in a “sparkling gray zone” between the black-and-white voluntary and mandatory approaches that had unnecessarily polarized the broader debate around that false “either/or” choice. Blurring that distinction might be a key to the success of this and other initiatives.

15. Mr. Alex Yearsley (Global Witness) provided an overview of the Kimberley Process Certification Scheme. The scheme had largely stopped the illegal trade in rough diamonds and it had provided a means by which Governments, companies and civil society could work together to regulate the illegal trade in diamonds that had led to human rights abuses in the past. However, the scheme also had limitations. For example, not all countries involved in the rough diamond trade were members, the scheme could not eradicate illegal trade altogether and the scheme did not deal with the problem of corruption. Further, the scheme did not deal with the social, environmental and land rights issues behind the illegal trade. In relation to accountability, Mr. Yearsley stated that, while being voluntary, failure to take part in the scheme could severely restrict a company’s market access, and countries could be expelled from the scheme in situations of non-compliance. Finally, the scheme could be improved through the establishment of a permanent secretariat, criteria (including respect for human rights) for countries to become chair of the process, as well as greater scrutiny of company and government participants.

16. Mr. Arne Seglem (Statoil) presented experience from the Business Leaders’ Initiative on Human Rights from the perspective of an oil company. Statoil had used standards and norms, including the content of the draft Norms, in practical work in Venezuela and had developed a matrix of human rights responsibilities. Key responsibilities included the protection of the life and health of employees; the guarantee that suppliers respected national human rights laws; and respect for the rights of indigenous communities. Key human rights challenges concerned ensuring that managers focused on human rights as part of the business strategy, undertaking human rights training and ensuring due diligence and country analysis to understand human rights risks. The matrix further identified the “sphere of influence” of the company, identifying layers of responsibility within the company, within the value chain and within society. Mr. Seglem stated that the draft Norms were operational at a practical level.

17. Mr. Daniel Graymore (United Kingdom Department for International Development) examined the implementation of the United Kingdom Government’s Extractive Industry Transparency Initiative (EITI). Mr. Graymore explained that the objective of the initiative was to address and avoid poor governance as well as to capture and present in an intelligible form the use Governments made of revenue from the extractive industry. EITI sought regular publication and auditing of payments from the sector (State-owned enterprises, local companies and transnational companies). Currently, 10 countries were implementing EITI and 11 others had endorsed it. A further seven countries had expressed interest in taking part. While voluntary, participating countries had to meet accountability criteria. Home-country Governments and

international financial institutions had a role in providing technical assistance. Key challenges for EITI included the establishment of an effective validation mechanism - including participation of Governments, companies and non-governmental organizations - to assess country implementation. Another challenge was broadening government participation - both home and host Government - and increasing financial support for the initiative.

18. Ms. Kitty Gordon (OECD Secretariat) reviewed the human rights content and accountability mechanisms of the OECD. While the Guidelines included a recommendation on human rights in the 2001 review, the recommendation was only general, although it was complemented by related recommendations on labour standards. Consequently, the human rights content of the Guidelines required elaboration and had been identified as a possible focus of future revisions of the Guidelines. Ms. Gordon outlined the dispute settlement procedure of the Guidelines. This relied on National Contact Points located in each of the 39 adhering OECD States to facilitate conciliation and mediation between companies and other interested parties on alleged non-observance of the Guidelines. Since the facility was created in June 2002, it had been used 72 times and many of the cases had addressed the issue of business and human rights. The effectiveness of the process had been improving, but it still produced mixed results. Ms. Gordon outlined an OECD project on weak governance zones. Significantly, a draft risk management tool had been drafted that proposed a series of questions for business, drawing on international standards, including the Voluntary Principles. The draft tool also asked companies to consider how they should manage political relationships in weak governance zones while maintaining integrity, including how to manage speaking out to avoid complicity in wrongdoing.

19. Ms. Ursula Wyndhoven (Global Compact Office) presented an overview of the Global Compact. Of the 2,300 companies involved in the Global Compact, 60 were from the oil and gas sector and 62 from mining and metals. The Global Compact had published a business guide to conflict zones which had emphasized the importance of commitment from top management in the area of human rights protection. Individual extractive companies had also collaborated with the Global Compact to provide case studies of dilemma situations. The Global Compact had also disseminated information to global audiences on the Voluntary Principles and other initiatives relating to the extractive sector.

Discussion

How successful have existing initiatives and standards been?

20. Many participants emphasized that it was too early to assess with sufficient accuracy the effectiveness of particular initiatives and standards. Nonetheless, participants did indicate various successes. For example, participants noted that the Kimberley Process had significantly reduced the illegal trade in rough diamonds by up to 70 per cent. Similarly, while not a fix-all solution, EITI had helped to improve transparency in government revenue and so reduce corruption levels in participating countries. Initiatives and standards, in particular the Voluntary Principles, had clarified the steps that stakeholders should take to respect human rights. Participants also noted the potential for the National Contact Points established in the OECD Guidelines as a means of promoting greater accountability for human rights in the sector, although participants also suggested that experiences of the system had been mixed. Participants particularly emphasized the crucial importance of multi-stakeholder dialogue between Governments, companies and civil society.

In what ways could existing initiatives and standards be strengthened?

21. Discussion focused in particular on widening and deepening existing initiatives and standards. While widening initiatives and standards involved adapting successful strategies to other sectors or subsectors, deepening concerned the involvement of more actors within the existing initiative or standard in order to increase its reach. However, several participants warned against the proliferation of initiatives and suggested that a single initiative on human rights might be more appropriate. Strategies for widening and deepening initiatives and standards included:

(a) *Involving more Governments* - increasing the participation of home and host Governments was crucial step as some of the most directly affected countries were not always involved in key initiatives. For example, while the Voluntary Principles had attracted home country interest, participants emphasized the importance of greater host country involvement. On the other hand, stronger home country involvement in the Kimberley Process would help balance the existing strong host country involvement in the scheme. Participants suggested that the involvement of countries not directly implicated in the extractive sector could add credibility and effectiveness to initiatives (possibly through the European Union or the Group of Eight (G-8)). Some participants considered that the involvement of home and host countries in civil society initiatives such as Publish What You Pay could increase their reach and effectiveness. Finally, Governments already involved in initiatives could deepen their engagement, transforming their role from being managers of initiatives to leaders;

(b) *Involving more companies* - some participants highlighted that the voluntary nature of some initiatives risked reducing their coverage. Greater effort was needed to broaden the engagement of transnational corporations as well as local industry and State-owned enterprises. One expert participant highlighted the fact that some of the companies responsible for human rights problems were not part of these initiatives. In this regard, one business participant suggested that it was important not to overlook the fact that, in the case of the Voluntary Principles, several companies were using the principles without formally being participants, so coverage might be greater than it seemed on paper;

(c) *Involving more civil society organizations* - in particular, several participants highlighted the need to involve southern non-governmental organizations in initiatives. This should extend not only to increasing formal participation, but also to investing in capacity-building of these organizations to ensure quality participation;

(d) *Involving other actors* - participants suggested that intergovernmental organizations also had a role in initiatives and standards. One participant suggested that the International Committee of the Red Cross could become involved in training public security forces in order to support the implementation of the Voluntary Principles. Another participant suggested that a resolution of the General Assembly or the Security Council could help boost the standing of EITI;

(e) *Widening initiatives to other fields* - participants suggested several ways to widen initiatives to cover other sectors. For example, the Kimberley Process could be extended to other sectors such as illegal trade in gold or timber. The Voluntary Principles could extend to protect human rights in relationships beyond those between companies and public and private security.

The Voluntary Principles could also be directed to private security companies themselves, rather than at only the extractive sector companies. Similarly, EITI could go beyond transparency in government revenues to cover transparency in the distribution of revenue as well as transparency of the revenues of local authorities. EITI could also extend to cover transparency in corporate revenues gained from extractive operations. Finally, EITI could also be extended to promote transparency in revenues from other sectors, not only the extractive industry;

(f) *Strengthening accountability or validation mechanisms* - several participants emphasized the need to improve validation and credibility mechanisms of existing initiatives and standards through a range of measures such as: the use of criteria for government and company engagement in and deselection from an initiative; the development of reporting requirements for participants, including reporting on risk assessments; the “legalization” of voluntary initiatives through inclusion in contractual relationships, for example procurement contracts; mechanisms to encourage corporate disclosure of revenues, including listing requirements on stock exchanges; the improvement of OECD National Contact Points, knowledge of human rights issues; reduction in the time taken for OECD National Contact Points to react to allegations of human rights violations. Other participants stated a preference for strengthening national legislation. Participants also discussed the establishment of expert panels with appropriate credentials to investigate allegations of human rights violations.

IV. CLARIFYING STANDARDS OF CORPORATE SOCIAL RESPONSIBILITY FOR HUMAN RIGHTS

Expert presentations

22. Mr. Salil Tripathi (Amnesty International) noted that the existing initiatives and standards relevant to the extractive industry did little to clarify the human rights responsibilities of business; few had monitoring mechanisms and they applied only to participating companies, doing little to alleviate negative impacts on human rights by non-participating companies. The draft Norms, on the other hand, did provide a comprehensive list of business responsibilities with regard to human rights that were particularly relevant to companies operating in countries that were unwilling or unable to protect human rights. Mr. Tripathi stressed that in their spheres of influence companies should respect the following principles: avoidance of complicity in human rights abuse; protection of the right to life, non-discrimination, workers’ rights, including freedom from forced labour, freedom of assembly and association, the right to an adequate standard of living, the right to health and the right to property; compensation for land use and destruction of property; avoidance of undermining human rights; respect for procedural rights, including adequate consultation, freedom of expression and the right to take part in the conduct of public affairs; and the protection of indigenous peoples’ rights.

23. Ms. Christine Bader (BP) discussed the practicalities of a company respecting human rights. Specifically, Ms. Bader shared the experience of commissioning a human rights impact assessment, with the related challenges of procurement, facilitating consultations, and determining the level of disclosure of the final report. Ms. Bader also discussed the application of the Voluntary Principles within various projects, including the creation of a community-based security programme, the drafting of detailed operational guidelines, and the incorporation of the Voluntary Principles into legal documents. Ms. Bader asserted that such voluntary standards

were useful for prioritizing issues and providing a framework for analysis; for convening dialogue with other parties such as NGOs and security forces; and in helping raise standards in an industry. Ms. Bader discussed the increasing pressure on companies to speak out about human rights abuses remote from their immediate area of operation. In this regard, she emphasized the importance of private diplomacy; of multisector dialogue, including with organizations in other sectors that operated in difficult environments; and the primary role of Governments in relation to human rights.

Discussion

What are the main challenges to human rights in the context of the activities of the extractive industry?

24. Participants highlighted a range of challenges to the enjoyment of human rights arising in the context of the extractive industry, including: corruption and a lack of transparency in revenue payments and distribution; the conduct of public and private security forces; the breakdown in the rule of law in some situations; a lack of human rights legislation; a disregard for the human rights of indigenous and local communities as well as artisanal miners; and a lack of sufficient protection of human rights in the workplace. A lack of clarity in the steps that stakeholders should take to respect human rights in the sector could compound these challenges.

What are the responsibilities of the State in the context of the activities of the extractive industry?

25. States had the primary obligation to respect, protect and fulfil human rights. In general human rights law required States to: refrain from interfering with the enjoyment of human rights; prevent violations of human rights by third parties; and take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of human rights. While the consultation did not focus specifically on an elaboration of State obligations in the context of the extractive industry, participants did highlight certain State obligations in the course of discussions, although the list was not comprehensive. These included:

(a) *Enacting labour laws* - participants identified the importance of the State recognizing and protecting through legislation and regulations core labour standards as identified in ILO treaties and human rights treaties. Business participants in particular highlighted the difficulties faced in ensuring minimum labour standards when national laws were not clear;

(b) *Protecting artisanal miners* - participants noted that mining by individuals and small groups - artisanal mining - was often a major source of employment, but miners endured poor working conditions and poor environmental and safety standards. Unregulated, the sector could also help fund militias and therefore fuel conflict, and artisanal mining had also led to conflicts with local and indigenous communities. Addressing inadequate regulation had resulted in the formalizing of artisanal mines, sometimes to the benefit of powerful elites;

(c) *Ensuring fair relocation processes with adequate compensation* - given the reliance of the extractive sector on land use, the relocation of communities had been necessary in some cases. The State had a critical role in ensuring that relocations respected due process and human rights;

(d) *Combating corruption and promoting transparency* - many participants emphasized the importance of government transparency with regard to revenues derived from the extractive sector, but also to the distribution of these revenues. This could help to ensure the allocation of the maximum available resources towards the fulfilment of human rights;

(e) *Providing a remedy* - several participants underlined that Governments had a responsibility to regulate the extractive industry, including through ensuring adequate remedies were available to victims of human rights abuses suffered in the context of the sector's operations;

(f) *Providing international cooperation and capacity-building* - participants highlighted the importance of home-country Governments and donor Governments being involved in initiatives relating to the extractive industry. Further, participants identified a role for these Governments in building capacity of stakeholders - host Governments, national civil society, as well as local and indigenous communities - so that local partners were better equipped to protect human rights. Participants also suggested that the international community could bring pressure to bear on national Governments in situations where the Government had insufficient legislation or where it was not acting to protect human rights.

What are the responsibilities of business with regard to human rights?

26. Participants identified a range of responsibilities of business in the extractive sector, focusing on “doing no harm” to human rights, avoiding complicity in human rights violations and undertaking certain acts to support human rights in companies’ “spheres of influence”. The following section identifies the various responsibilities that participants identified, although it is important to note that this list is illustrative and does not indicate any consensus among participants. Responsibilities included:

(a) *Respecting human rights in the workplace* - several participants identified responsibilities of business in relation to respecting and supporting freedom of association, freedom of expression, the right to collective bargaining, freedom from discrimination on the basis of sex, religion, race and other grounds, freedom of religion, the right to an adequate standard of living, the right to social security, and the right to health, particularly in relation to occupational health and safety. Some participants identified a role for business in supporting the right to health of employees through the introduction of HIV treatment programmes;

(b) *Respecting human rights in community relations* - importantly, business had a responsibility to consult with local communities on issues that affected them, highlighting responsibilities of business in relation to procedural rights, including: the right to seek, receive and impart information and the right to take part in the conduct of public affairs. Second, business sometimes came under pressure to support social projects, which could suggest some responsibility in relation to supporting social rights;

(c) *Respecting human rights of local and indigenous communities* - the extractive industry's close link to the land sometimes required the relocation and resettlement of local communities. This carried with it responsibilities for business in relation to the right to property,

the right to adequate housing, and the right to privacy. Similarly, local communities, particularly indigenous communities, had specific cultural and spiritual links to the land, highlighting responsibilities of business to respect the right to take part in cultural life and to operate on the basis of free, prior and informed consent of communities;

(d) *Ensuring transparency in revenue payments* - some participants suggested that companies should respect the right to seek, receive and impart information through ensuring transparency in revenue payments to the Government;

(e) *Promoting human rights in relations with suppliers* - a business participant suggested that companies had responsibilities for conditions of work in suppliers and contractors and that a company could work with suppliers and contractors to ensure that standards were respected. However, the participant also underlined that accountability for meeting those standards should rest with the contractor or supplier;

(f) *Respecting human rights in relations with public and private security forces* - in many situations, the nature of the extractive industry required reliance on security forces to maintain order and stability and to protect employees and infrastructure. However, in situations of conflict, for example, the risk of human rights abuse increased and companies could become complicit in violations. Consequently, business had certain responsibilities to minimize such risks; a failure to do so could lead to abuses of the rights to life, liberty and security of the person, and to be free from torture and cruel, inhumane and degrading treatment. Participants gave examples of responsible actions such as giving human rights training to security forces, hiring security officers from local communities, supporting dialogue between security forces and local communities, and developing a human rights response procedure in case of incidents. Similarly, business could respect and support human rights by including human rights protections in their contractual relations with security firms;

(g) *Undertaking human rights impact assessments* - business had the responsibility to avoid to the extent possible risks to human rights in future operations by first undertaking an impact assessment. Human rights impact assessments could consider several levels of impact, including country risk assessment (examining legislation in place and the situation in the country) as well as human rights compliance assessment (examining company policies and practices). Companies could use country risk assessments and compliance assessments as the basis for country action plans, which in turn could be subject to assessment. By undertaking human rights impact assessments, a business had the opportunity not only to avoid future risks, but to strengthen the positive impacts that business activities offered for the enjoyment of human rights;

(h) *Acting on human rights abuses* - a particularly complex and controversial area of responsibility concerned reporting and condemning human rights abuses. Participants highlighted two situations. The first concerned acting on or condemning human rights abuses that occurred within the context of the operations of a particular business. The second situation referred to the increasingly frequent situation where companies were being called upon to act on or condemn human rights abuses occurring outside their operations, on the basis of the powerful position the particular company had in the country concerned;

(i) *Withdrawing operations to avoid complicity in human rights abuses* - another controversial responsibility of business concerned the withdrawal of a business from certain regions or countries where the prevailing human rights situation was so bad that the mere fact of continuing operations could amount to complicity in human rights abuses.

What is the nature and scope of business responsibilities with regard to human rights?

27. The nature and scope of responsibilities of business varied according to the companies' "sphere of influence". Simply put, if a business had less influence to affect human rights, the responsibility of the business might be of a lesser degree. Much depended on the extent to which the business had political, contractual, economic and geographic proximity to individuals. In order to illustrate the varying degrees of business responsibility, participants identified three levels of responsibility, using the analogy of the layers of an onion comprised of a core, middle and outer layers. Participants described the nature of each layer of responsibility as what a company "must" do, "could" do and "should" do; or, alternatively, as the responsibilities that were "essential", "expected" or "desired" of a business. While there was no conclusion as to which responsibilities corresponded to which layer, some participants described responsibilities as follows:

(a) *Level one* - respecting human rights in the workplace was illustrative of the first level of responsibility. Thus, first-level responsibilities would typically include health and safety at work, equality and freedom from discrimination, fair remuneration, freedom of association, freedom of expression, the right to privacy and freedom of religion;

(b) *Level two* - respecting the human rights of local and indigenous communities as well as ensuring respect for human rights in relations with suppliers were important second-level responsibilities;

(c) *Level three* - a responsibility that would fall within the third layer was the responsibility to use influence to avoid human rights abuses by others, for example, to encourage the release of imprisoned trade union officials, to promote the protection of human rights in the relocation of communities, to lower restrictions on movement - in many cases, the intervention could be through private diplomacy.

28. In this regard, it is important not to be categorical in apportioning specific responsibilities within each layer; the nature of the responsibility corresponded to the level of influence of a business and the causal relationship between the business and the potential human rights abuse.

To what extent do existing initiatives and standards identify and clarify these responsibilities?

29. Existing initiatives and standards gave guidance to companies, Governments and civil society in relation to some responsibilities of business, but it became evident in the discussion that the identification and clarification of responsibilities were not comprehensive. For example, the Voluntary Principles identified comprehensively responsibilities on business, but only in relation to security. The OECD Guidelines and the Global Compact identified broad responsibilities, but several participants highlighted the need to elaborate the content of these responsibilities. The draft Norms provided the most comprehensive identification of the

responsibilities of business with regard to human rights; however, discussions revealed quite divergent views on the draft Norms, with many business participants objecting to them while NGO participants were supportive. The other initiatives and standards focused on establishing conditions of trade and good governance crucial to promoting the enjoyment of human rights, but they did not identify human rights responsibilities as such.

What areas of business responsibility are in need of clarification?

30. Participants highlighted several areas where greater clarification of business responsibility was needed. These included:

(a) The responsibilities of business towards indigenous and local communities. Several participants underlined the significant impact of the operations of the extractive industries on indigenous and local communities, but emphasized the relative lack of initiatives in this regard. In particular, one NGO participant underlined the need to explore the responsibility of business to ensure free, prior and informed consent when extractive sector operations affected local and indigenous communities. Participants also underlined gaps in understanding of responsibilities towards these communities' cultural rights and their right to property;

(b) The nature of business responsibilities in situations where the Government had not recognized particular human rights standards in national legislation or through ratification of the relevant human rights treaty. Some business and other participants recognized a responsibility to respect international standards when national standards were lacking, particularly in the area of labour standards. However, participants also acknowledged that this could lead to friction with the national authorities, which required balancing human rights responsibilities with the need to maintain a relationship with the Government. Other participants maintained that business responsibility was limited to respecting national legislation;

(c) The extent to which business had a responsibility to speak out about real or potential human rights abuse. There were varying levels of acknowledgment of the existence of such a responsibility. One business participant noted that it was contrary to democratic principles to expect a company to enforce international human rights standards locally in this way. A business representative noted that business had to balance competing responsibilities, first to meet a responsibility to use its influence to speak out on human rights issues and second, its responsibility to protect its own employees and operations where these could be threatened as a result of speaking out. Several participants highlighted the importance of quiet diplomacy over public condemnation;

(d) The relative value of a business withdrawing its operations in situations of grave or systematic human rights abuse. Participants highlighted the difficulties in assessing when mere presence would amount to complicity in abuse as well as the difficulty in withdrawing, particularly given the fixed nature of infrastructure in the industry. One participant also questioned the effectiveness of withdrawing, particularly given negative impacts on local employees and the economy. One business participant noted that it had withdrawn its activities from a country due to the prevailing human rights situation; however, it was unclear from the discussion the extent to which this had affected the enjoyment of human rights, either positively or otherwise, in that country;

(e) The extent to which business had a responsibility to support human rights, for example through investing in community health or education schemes. Particularly in situations of poverty, companies came under pressure to provide particular social rights to communities. However, this could confuse the relationship with the Government as well as lead to friction with other communities that did not benefit from such support;

(f) The extent to which business had responsibilities to be transparent in relation to revenues. Some participants identified the importance of promoting greater company disclosure of revenues and profits.

31. Discussion focused in particular on the need to clarify the responsibility to speak out about human rights abuse. Participants identified two broad situations: first, where the real or potential abuse took place within the context of the company's operations - the company's sphere of influence; second, where the abuse was not directly related to the company's operations - in other words, outside the sphere of influence of the company.

32. In the first situation, the potential of the company to achieve change would be greater and the responsibility to speak out clearer. In the second situation, the responsibility was considerably less, and some participants stated that the individual company had no responsibility to speak out. Nonetheless, participants also noted that, even in the second situation, business experienced pressure to condemn human rights abuses. The question arose as to how a company could resolve these various responsibilities and pressures.

Is there a need for a universal standard on human rights and business?

33. While NGO participants identified the need for a universal human rights standard in the area of business and human rights, employer groups and business participants emphasized the need for enforcement of appropriate national legislation accompanied by practical action on the ground in support of human rights. Some participants suggested that both were necessary. A participant from an employer group argued that human rights treaties existed and Governments had ratified them; the challenge was for Governments to implement them. However, an NGO participant, while agreeing that there were standards and that the Government had to apply them, noted problems of application in weak government zones and involvement of companies in extraterritorial crimes. In such cases, the NGO participant stated that global soft law agreements could be critical in defining responsibilities and clarifying laws in home jurisdictions where gaps existed in the host country. One expert participant suggested that further information had to be gathered on the ground; this evidence could then form the basis for the drafting of an international standard. One NGO participant suggested that a universal standard would avoid the situation of a company claiming it was not aware of its responsibilities because it was not part of a voluntary initiative. Some participants discussed the need for the formulation of common definitions for terms such as "conflict commodities". Participants discussed a range of approaches to corporate accountability for human rights, ranging from purely voluntary approaches to binding standards.

V. STRENGTHENING PROTECTION OF HUMAN RIGHTS

Expert presentations

34. Mr. Andrew Clapham (Graduate Institute of International Studies) indicated specific areas to strengthen protection of human rights. First, he highlighted the need to improve the OECD dispute settlement process (National Contact Points) as it related to human rights, in particular through clarifying the human rights content of the Guidelines and involving embassies in the information gathering. Second, Mr. Clapham, noting that it was sometimes difficult to translate principles into practice, suggested that seminars be organized on particular issues such as how to balance particular rights and objectives. Third, he underscored the need for the Special Representative to demystify rather than define the concept of “complicity”, drawing on criminal law. Fourth, Mr. Clapham proposed further exploration of the area between the extremes of voluntary and mandatory initiatives, such as the inclusion of admission and exclusion procedures in sectoral initiatives and the addition of more home- and host-country Governments and companies in such initiatives. Finally, further study was needed to explain the nature of the “outer layer” of responsibilities - use of quiet diplomacy and behind-the-scenes advocacy - emphasizing that failure to engage publicly did not necessarily point to a violation of international standards; on the other hand, evidence of human rights engagement could be good for business.

35. Ms. Kathryn McPhail (International Council of Mining and Metals) presented the Council’s Sustainable Development Framework. The framework was designed to improve industry performance and comprised mandatory principles; reporting “in accordance with” the Global Reporting Initiative; and third-party assurance, currently under development. The framework included human rights: labour standards, non-discrimination, human rights security training, involuntary settlement, indigenous peoples and local communities. The Council’s work programme was similarly aligned: the resource endowment initiative was developing practical tools with partners, including intergovernmental organizations, to assist companies, Governments and local communities to enhance the mining sector’s contribution to poverty reduction at national, regional and local levels. Two multi-stakeholder workshops tested and revised the methods and findings. Ms. McPhail proposed that the Special Representative could provide guidance on how to take the process forward, and to assist with gathering donor and civil society support.

36. Mr. Vegard Bye (Chief, OHCHR office in Angola) noted that the extractive industry had a crucial role in Angola, where diamonds comprised over 90 per cent of exports. He highlighted the negative impact of corruption on human rights; a lack of transparency that affected the right to receive, seek and impart information; and corruption in government revenues that took essential resources away from social rights. In terms of a way forward, Mr. Bye emphasized the importance of universal norms or principles. For industry, this would mean that all companies would have to conform to the standards being set by the limited number of companies currently involved in voluntary initiatives. Universal principles would also help States identify a common standard in an era of pressure to decrease regulation. This was particularly relevant in some developing countries where national legislation was often developed in response to international

standards. Thus, universal principles could provide the basis for national legislation, and then implementation. In this regard, the United Nations had a role in gathering information from the country level as a way of testing the effectiveness of various principles. This experience could then form the basis for universal principles.

Discussion

37. At the final session, participants identified a list of recommendations for strengthening the protection of human rights. It is important to emphasize that the recommendations were not agreed by the meeting, and the following list is indicative of the range of views expressed in the final session.

38. First, in relation to the clarification of human rights standards, some participants called for a universal standard on business and human rights which could then lead to practical initiatives on the ground. Others suggested that, if high-level norms were to be articulated, it would be important to ensure that they remained aspirational and not compliance-driven. Several participants identified the importance of explaining different rights and the accompanying responsibilities in practical terms that business could understand. One NGO participant suggested that home Governments could clarify the applicability of domestic regulatory environments to actions taken by their companies abroad.

39. Second, several participants suggested that more stakeholders should become involved in discussions on human rights and business. Suggestions included the inclusion of representatives of indigenous communities, southern non-governmental organizations, local business, and State-owned enterprises. Participants also identified a need to increase the role of home countries, noting that these Governments had the capacity to raise human rights issues with host countries. Donor countries could also get involved in capacity-building, particularly for host-country Governments, and security training. Countries without a significant extractive industry presence could also become more involved in initiatives and standards in the area. Finally, human rights treaty monitoring bodies and special procedures of the Commission on Human Rights could also consider the human rights dimensions of business activities within their mandates, through holding days of general discussion and considering business responsibilities within their monitoring functions.

40. Third, participants identified roles for intergovernmental agencies, funds and programmes. For example, one participant, noting that there was a serious need for ongoing security sector reform, suggested that OHCHR and ICRC could undertake human rights training of security forces as a complement to the Voluntary Principles. Another participant emphasized the importance of the Global Compact as a forum for discussion on challenging issues facing the sector. A participant also suggested that UNDP could assist in the implementation of EITI. The United Nations could collate best practices and make them publicly accessible, giving the example of the creation by a university of a website with key agreements between indigenous and mining companies. A business participant suggested that the High Commissioner or OHCHR could become more involved in putting pressure on Governments to strengthen human rights protection where, for example, a national human rights commission had issued a report with relevant recommendations in the area.

41. Fourth, an NGO participant highlighted the need to clarify appropriate accountability mechanisms and to encourage wider agreement on the necessity of such mechanisms. Another NGO participant suggested that discussions on accountability need not emphasize only monetary compensation, but also preventive action and restitution, including apologies in certain cases. Another NGO participant suggested that the Oxfam Mining Ombudsman might provide a model for improved monitoring of respect for human rights in the sector. A business participant highlighted the importance of non-governmental organizations using their “naming and shaming” role prudently, as the spreading of unfounded allegations could lead to negative reactions with undesirable results. In this regard, another participant noted that the accountability of non-governmental organizations was also on the agenda in other forums.

42. The Chairperson summarized the two days of discussion, noting that there was still disagreement between stakeholders on the way forward, but that there had also been genuine cooperation between Government, business and civil society in various initiatives. In this regard, the Chairperson emphasized the need to learn from existing initiatives, to focus learning on reviewing good practices in the sector, and to strengthen accountability mechanisms. Referring to international frameworks of responsibilities, the Chairperson stated that dialogue was still necessary. While it was clearly imperative to base strategies on practical action on the ground, universal standards were also critical. Capacity-building, particularly of local civil society, was another area needing further attention and the Chairperson underlined that there was a role for donors in this regard.

43. The Special Representative stated that the discussion had been extremely useful, stressing that while there seemed to be areas of agreement, fundamental disagreement on some issues remained. The Special Representative recalled that his mandate called for him to identify and clarify standards of responsibility and accountability of business with regard to human rights, and that he was beginning to grapple with how to do so. Several companies had approached him since his appointment to explain their human rights responsibilities in clearer terms. The challenge was to provide guidance to business without being dogmatic. Existing initiatives and standards had had their successes, but they also had weaknesses and there were still gaps. The Special Representative challenged the companies at the consultation by pointing out that, although they had incorporated high performance standards in their operations, there were other companies not present that were not susceptible to the same social pressures or aspired to the same standards. The Special Representative raised the issue of whether there was value in “locking in” some of these high standards so that respecting human rights did not effectively reduce the competitive edge of responsible firms.

Annex

List of participants

Experts

Christine Bader (British Petroleum); Vegard Bye (OHCHR, Angola); Andrew Clapham (Graduate Institute for International Studies); Bennett Freeman (Burson-Marsteller); Kathryn Gordon (OECD); Daniel Graymore (DFID); Kathryn McPhail (International Council on Mining and Metals); Mark Moody-Stuart (Anglo-American); Jane Nelson (Harvard University); John Ruggie (Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises); Arne Seglem Larson (Statoil); Salil Tripathi (Amnesty International); Ursula Wynhoven (Global Compact Office); Alex Yearsley (Global Witness).

Business participants

Chris Anderson (Newmont Mining); Vincenzo Boffi (ENI); James Cooney (Placer Dome); Brian Fall (Rio Tinto); Jeffrey Flood (Nexen); Robert Godsell (Anglogold Ashanti); Paul Hollesen (Anglogold Ashanti); Jean-Pierre Labbe (Total); Richard Lanaud (Total); Steven Lenahan (Anglogold Ashanti); André Madec (Exxon Mobil); Helen MacDonald (Newmont Mining); Rajiv Manhas (Talisman Energy); Rory More O'Ferrall (De Beers Group); Craig Munro (Anvil Mining); José Perez-Garrido (Repsol); Maria Pica (Chevron); Alessandro Profili (Alcoa); David Rice (British Petroleum); Odd Henrik Robberstad (Norsk Hydro); Helen Sullivan (Shell); Patrick Timbart (Total); William Turner (Anvil Mining); Yaabari Uebari (Shell); Robert la Valliere (Anvil Mining).

Business groups

Gary Campkin (Confederation of British Industry); Adam Greene (US Council for International Business).

Non-governmental organizations and employee groups

Lucy Amis (International Business Leaders' Forum); Tina Anderson (International Commission of Jurists); Jessica Banfield (International Alert); Ralph Doggett (Geneva Social Observatory); Ana Sofia Goinhas (Global Witness); Reg Green (International Federation of Chemical, Energy, Mine and General Workers' Union); Patricia Feeney (Rights and Accountability in Development/ESCR-net); Kathryn Hagen (Geneva Social Observatory); Gavin Hayman (Global Witness); Nick Howen (International Commission of Jurists); Kirsten Hund (Netherlands Institute for Southern Africa); Scott Jerbi (Ethical Globalization Initiative); Lisa Misol (Human Rights Watch); Graham Minter (International Business Leaders' Forum);

John Morrisson (Business Leaders Initiative on Human Rights); David Murray (Transparency International); Jocelyn Nettleton (Tebtebba Foundation); Mark Taylor (Fafo); Jean-Pierre Voet (WCL); Geir Westgaard (Business for Social Responsibility); Luke Wilde (Twenty).

Intergovernmental and governmental organizations, national human rights institutions and academics

Hilde Jervan (Norwegian Government Petroleum Fund); Margaret Jungk (Danish Institute for Human Rights); Margaret Wachenfeld (IFC).
