

Transnational Corporate Human Rights Abuses: Delivering Access to Justice

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Transcript of Session 3: Barriers to Justice & Recommendations for Change- Part 3: Michael Addo, Chair, UN Working Group on Business and Human Rights: The Role of the Working Group in Enhancing Access to Remedy

I must make some preliminary remarks to CORE and the BHRRC for organizing this event but more importantly for inviting the Working Group to participate, because for us events like these are learning exercises in terms of things that are happening on the ground. Also, when I read the programme and saw that I was the last person and saw the other people who were listed, I thought that I didn't need to write anything because everything would already be said. But I realized that I misjudged that because one or two people mentioned the Working Group and that creates an interesting fact, that we, the body that is mandated to implement the Guiding Principles, somehow are not making the right impact in the right places. I suspected that the Working Group would be registered in a lot of what was said before me, and that really creates the importance of the invitation; it was critical that I attend and say some of these things.

There may be some very good reasons why this is so. It seems like the work of the Working Group is not sufficiently transparent. It may be because of the way that the United Nations works, because a lot of our sessions are private; perhaps it is about time that we opened them up and made them public. I am not quite sure that we have the power to do that but it is an interesting lesson to pick up that not many people know what the Working Group does.

It also relates to what happened prior to this meeting, which is the criticism that the Working Group has received from civil society groups, particularly that the Working Group is not doing enough on access to remedy, which may of course be a legitimate criticism, but I think it is also because most civil society groups are not entirely sure what it is that we do, which is different than not doing enough. Again, another reason why attending the session is quite important so I can say one or two things about it. So that is the first general remark.

Another general remark I should make is about how we perceive pillar 3. I have heard here and in previous conferences that there is concern that pillar 3 is not important. That may be because there is always a campaign – there may be three pillars but there is only one set of Guiding Principles, and pillar 3 is part of one central, holistic set of Guiding Principles. It seems rather uncomfortable to isolate pillar 3 and then deal with it on its own. I think in the Working Group we recognize the importance of pillar 3 and we actually endorse the idea of isolating the pillars and dealing with them in this manner and so a conference like this that focuses on pillar 3 is very important so we can actually figure out what the problems are that we have with pillar 3. So let's talk about pillar 3, because it really is a problem child and we must understand it.

But there is also another structural part of pillar 3 which makes it very difficult to address. It is not only because it is third, and usually in a sequential order we think pillar 1 is very important, and pillar 2 is important, and pillar 3 follows; it just works in our mind that way. Above everything else, we tend to see the entire Guiding Principles as prospective, so when people interpret (and I have heard this being taught on a postgraduate course) that the Guiding Principles require companies to do due diligence and they must implement the Guiding Principles in a certain way, and when everything else fails and they have done everything humanly possible and then there are problems, then they should set up a remedy system; this is an unfortunate way of perceiving pillar 3.

Because actually I would reverse it and make pillar 3 the problem of now. In that sense, it is a case of addressing these sorts of problems that you are facing currently and while you are addressing them, you can think about what you will do in the future to stop these problems from occurring. If you reverse pillar 3 into pillar 1, or if we see pillar 3 as the problem that we have now, we will begin to deal with it as more important. In that way, we will begin to understand the place of pillar 3.

Those are my rumblings and reflections on why I think we are having some of these problems. On the part of the Working Group, certainly I think we will try to find ways of being a little more transparent. If for no other reason than so that at conferences such as this, we will have people who know what to say about the Working Group.

It is back to the question of what the Working Group is doing about pillar 3. To understand what the Working Group is doing about pillar 3, we need to go back to the mandates that we were given in Resolution 17(4) of 2011. The text is very clear; the language is unequivocal. We were not given a command and control mandate; we have not been given the mandate to require governments to do things; we have not been given the mandate to push companies to do anything. Instead, we have been given a mandate to promote implementation; we have been given a mandate to support capacity building; we have been given a mandate to identify and exchange evidence of good practice. We know, and I think any lawyer who reads the text of the mandate realizes this, that the mandate is weak. But we have to be able to implement something out of it. That is usually one of the difficult starting points.

With this kind of mandate, the understanding is that the premier role lies with states, businesses and civil society, and our job is to promote and to support. If you are only promoting and supporting, there is no express mandate for example to deal with complaints, if you wanted to read it in its natural sense. Over the last three years we have tried to interpret words like 'support' and 'promote' in slightly more imaginative ways to make pillar 3 slightly more effective. For example, although we are not specifically given a mandate to deal with communications, we have a policy on communications, and I will come to that in a minute.

In the meantime, one of the things we have done is to take advantage of existing access to remedy mechanisms and try to push our interpretation of the Guiding Principles through them. The OECD National Contact Points, for example, have become a key part of our understanding. And the ILO communication mechanisms – we have tried to use them as much as we can. And for the treaty bodies that already exist that receive communications, we have been encouraging them to receive communications concerning businesses.

Similarly, on our own, we have received quite a few direct communications to us concerning corporate activities. Bearing in mind the text of the treaty does not specifically empower us, and we know, for example, that in certain special procedure mandates like the ones on disappearances they have been given express authority to receive, judge and address communications, while we haven't. Nevertheless, we get these communications and interpret it in the light of the mandate that asks us to identify and explore evidence of good practice. To be able to identify evidence of good practice, you need to be able to understand what bad practice is. To get a full understanding of what the bad practice is, you go back to the person against whom the complaint has been labelled and you say: "Listen we are exploring and looking for evidence of good practice. Meanwhile, we have had this suggestion that you have flooded the community's farming land. Could you please explain to us exactly what is going on, and do you realize that this could be contrary to your responsibilities to respect human rights?" We write that to the subsidiary company, the parent company, the host company and the home company. Now, this is all being done not under the heading of dealing with a communication but we are dealing with sorting out evidence of good practice.

Over the last three years, we have had some responses and explanations, and we have had some clear indications where companies have gone back to try to rectify issues of consultation or damage to land. This has to be done under the radar, otherwise there are members of the United Nations who will think that we have exceeded the mandate and they would not hesitate to shut us down.

However, it turns out that the work that we have been doing on communications has indeed come to the attention of states, it just turned out that they ignored us and we are quite happy to be ignored. The consequence of the recent negotiations of Ecuador and South Africa turned out to be one of the indications that the Working Group has indeed been dealing with communications – is to propose to Ecuador that that particular mandate be strengthened. If you read paragraph 12 of our resolution, we have been asked now to continue the good work that we do in the consideration of communications. As from now, we have an express mandate to receive and deal with communications.

Suddenly, we now can in a very open manner write to Amnesty International and ask for your thoughts on a particular communication and we let the companies know that. We think that things are evolving but we had to be a bit more imaginative in the first place before we came this far. How we now carry it forward will depend on what communications we receive.

By the way, we talk about lots of issues and we know about instances of violations – we know where they are – but for some reason we don't receive a trigger communication. For a very short period, we started receiving a lot of communications from the Latin American region and that is where most of the activity is. In the last three years, we have received one – and I mean one single – communication from the entire African continent. I don't believe there are no corporate violations of human rights in Africa. So the responsibility has to be shared. We would like to think that if we are going to be really doing anything on access to remedy, then we need to be triggered, and the civil society groups can help on that.

Then we come under the heading of promotion. For promotion, we have to interpret it in such a way as to strengthen and support institutions and mechanisms that already handle disputes, so national judicial systems, national human rights institutions, and corporate grievance mechanisms. The best way that we have tried to put this together is under the wider umbrella of National Action Plans.

Under that very nebulous label, we have been able to put everything, including state activities, corporate activities, civil society activities, and national human rights institutions. It under this heading that we expect that states will identify and remove the barriers that were mentioned this morning. This is the same heading under which we expect states to help develop capacity within the judicial system, the legal professions, and within educational institutions about the Guiding Principles and access to remedy. This is also the same heading under which we expect them to explore areas of cooperation with other states. For those of you have not captured the language of the Working Group, when we refer to state cooperation, we are referring to extraterritorial jurisdiction, and we think they ought to be talking about that under their National Action Plans.

We also imagine this is the point where they should be supporting and incentivizing corporations, if necessary, to have robust grievance mechanisms. I will give you a very simple example. Sierra Leone has developed a policy on sustainable agriculture that has three incentivized models : (1) access to land, so that if you consult in the appropriate way you receive points, and if you satisfy a number of requirements before you access the land you will receive 5% of your tax payment; (2) if you do due diligence and incorporate the requirements of the Guiding Principles into your policy mandate and if you connect with the parent company or the parent company agrees to take some responsibility for the activities on the ground, you will get up to 10% of your tax. Suddenly we see companies asking “how can we incorporate the Guiding Principles into our policies and how do we do due diligence?”

All of this comes under the wider heading of National Action Plans. So through these same National Action Plans, we encourage states to have incentivization processes. You could strengthen national human rights institutions powers, you could even strengthen corporate grievance mechanisms, but all of this comes under the wider heading of ‘promoting’.

Finally, I suspect everyone expects me to make a comment about what the Working Group thinks about the new Open-Ended Intergovernmental Working Group. I read a statement to the UN Human Rights Council, which is more or less the official statement on that. It says, amongst other things, that we think that if the responsibility for further normative development rests with states and if states develop an Intergovernmental Working Group, we are delighted to work with it. Since the Intergovernmental Working Group has now been passed, we welcome the Working Group because we think it offers us an opportunity to strengthen our mandate and do the sorts of things that we couldn’t do before, and it provides an opportunity for complementarity, to work together.

We think in the light of our new resolution concerning communications and its endorsement of National Action Plans, which we are of course working on, plus the possibility of cooperating with Intergovernmental Working Group, we may see a little bit more activity in the Working Group concerning pillar 3. In the hope that the next time that the BHRRC & CORE call this meeting, there will be no need for me to attend because everyone else will be talking about almost nothing else but the work of the Working Group. Thank you.