

Business & Human Rights:

Presentation of the work of the Special Representative of the UN Secretary-General on Business and Human Rights to the Inter-American Commission on Human Rights

Washington D.C., 17 October 2008

On 17 October 2008, the SRSG attended a working meeting with the Inter-American Commission on Human Rights. This Note was distributed to participants—it briefly explains the policy framework welcomed by the Human Rights Council in June; describes work submitted to the SRSG regarding the Inter-American system to date; and provides some suggestions on how the framework may relate to the work of the Inter-American Commission moving forward. The SRSG is grateful for the opportunity to address the Commissioners and hopes to build on this relationship in the future.

In a similar vein, the SRSG has now twice addressed the annual Inter-Committee Meeting of the UN Human Rights Treaty Bodies; he has presented two statements to the UN Commission on International Trade Law; and he delivered the keynote address at the 2008 annual meeting of the National Contact Points under the OECD Guidelines on Multinational Enterprises. These exchanges are of mutual benefit in facilitating the sharing of challenges and best practices in relation to business and human rights.

Introduction

In June 2008, the Special Representative of the UN Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie, presented his final report to the Human Rights Council under his initial mandate. The report, entitled “Protect, Respect and Remedy: a Framework for Business and Human Rights” (A/HRC/8/5) presented “a conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors.” The framework comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.¹

The Human Rights Council was unanimous in welcoming the framework and extended the SRSG’s mandate for a further 3 years. In brief, Resolution A/HRC/RES/8/7 requests the SRSG to “operationalize” the framework in order to provide concrete guidance to States and businesses, as well as to continue to consult with all stakeholders in reaching his views and recommendations. Of particular relevance to the Inter-American Commission on Human Rights (IACHR), the Resolution also requests the SRSG to consult with regional organizations and invites such organizations to seek his views when formulating or developing relevant policies and instruments.

The framework has also been endorsed by the major international business associations and by leading international human rights organizations. A new consensus advancing the business and human rights agenda has formed.

¹ The report was accompanied by two addenda (A/HRC/8/5 Add.1 and 2), as well as a companion report dealing with the concepts of “sphere of influence” and “complicity” (A/HRC/8/16).

To take the agenda forward, the SRSG has convened a Global Leadership Group comprising eminent individuals from different sectors and regions of the world, to provide strategic and substantive advice on the overall direction of the mandate. The list of its members is attached. In addition, the SRSG will continue his inclusive and evidence-based approach, including regional consultations and expert workshops.

This Note briefly explains the nature of the framework presented by the SRSG and highlights the ways in which it might prove relevant to the IACHR's work.

The Framework

The SRSG considers that the **State duty to protect** lies at the core of the international human rights regime. Yet his research and consultations indicated that most governments take a narrow approach to managing the business and human rights agenda. He found that it is often segregated within its own conceptual and (typically weak) institutional box – kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, securities regulation, and corporate governance. This inadequate domestic policy coherence is often replicated internationally.

Thus the SRSG's main recommendation is that human rights concerns in relation to business need to go beyond their currently narrow institutional confines. His report emphasizes the need for Governments to ensure that human rights compliance becomes part of defining corporate cultures respectful of rights, and to consider human rights impacts when they sign trade agreements, investment treaties, and host government agreements. He also speaks of the importance of a rights-compliant approach to the provision of export credit or investment guarantees for overseas projects in contexts where the risk of human rights challenges is known to be high.

The second principle, the **corporate responsibility to respect**, represents the basic expectation society has of business. In line with international human rights discourse, it means, essentially, to do no harm. The SRSG found that it is recognized by most voluntary initiatives and is stipulated in several soft law instruments. There are situations in which companies may have additional responsibilities – for example, where they perform certain public functions, or as in the United Nations' Global Compact, a voluntary initiative that also seeks to promote human rights.² But the responsibility to respect is the baseline expectation for all companies in all situations. Moreover, "doing no harm" is not merely a passive responsibility for firms but may entail positive steps – for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programs.

The SRSG's report recognizes that relatively few companies have systems in place to support claims that they respect rights. Accordingly, the report outlines a due diligence process for companies to manage the risk of human rights harm with a view to avoiding it – a process on which the SRSG plans to elaborate in the next phase of his mandate.

² Under the First Principle in the United Nations' Global Compact, companies undertake to "support and respect the protection of internationally proclaimed human rights." See <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html>.

Finally, acknowledging that not even the most concerted efforts can prevent all abuse, the framework's third component is **access to remedy**. The report notes that access to formal judicial mechanisms is often most difficult where the need is greatest, despite some recent promising developments. And it emphasizes that non-judicial mechanisms are seriously underdeveloped – from the company level up through national and international spheres. It thus identifies criteria of effectiveness for these mechanisms, and draws on them to suggest ways of strengthening the current system.

Relevance to the IACHR

The SRSG has always considered it important to understand the ways in which international and regional human rights bodies deal with the issue of business and human rights, particularly with respect to the State duty to protect. In 2006-2007, he conducted comprehensive research together with the Office of the UN High Commissioner for Human Rights, exploring the ways in which the core UN Human Rights Treaties and their associated Treaty Bodies consider States Parties' roles in regulating and adjudicating corporate activities with respect to human rights.³

This series contributed to the SRSG's analysis of the nature and scope of the State duty to protect. It showed that the Treaties, as interpreted by the Treaty Bodies, require States to play a key role in regulating and adjudicating corporate activities regarding rights capable of abuse by private parties, at least concerning activities affecting individuals within a State's effective control. This role is generally considered as part of the State duty to protect against abuse by third parties.

Earlier this year, the SRSG was fortunate to receive an independent submission (Inter-American Submission) on trends in this area relating to the American Convention on Human Rights (Convention).⁴ The Inter-American Submission highlights that both the IACHR and the Inter-American Court of Human Rights (Court) have explored the State's role in preventing corporate-related abuse in a range of industries and in relation to a variety of rights.

The Inter-American Submission also identifies the important role played by the Inter-American system in fleshing out the meaning of the concept of "due diligence" with respect to the State duty to protect, which many commentators attribute to the Court's *Velásquez-Rodríguez* decision (*Velásquez*).⁵ The case confirmed that States could be held responsible for private acts where they fail to act with "due diligence" to prevent or respond to violations. It concerned violations by State sponsored forces but the opinion also noted that States have similar obligations to prevent or respond to private acts not directly attributable to the State.

Other international institutions have since referred to the "due diligence" concept in discussing State duties to protect against abuse by business. For instance, General Comment 31 from the UN Human Rights Committee provides that "there may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties permitting or failing to take appropriate measures or to exercise

³ A summary of the preliminary findings of the series is available in addendum 1 to the SRSG's 2007 report (A/HRC/4/35/Add.1). An updated and abridged version was also included in the Background Paper prepared for the SRSG's address to the Treaty Bodies' 6th Inter-Committee Meeting, available at: <http://www.reports-and-materials.org/Background-paper-SRSG-treaty-bodies-19-Jun-2007.pdf>. Individual treaty reports in the series are available at: <http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers>.

⁴ Cecilia Anicama, "State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System: Report on the American Convention on Human Rights" (April 2008) available at: <http://www.reports-and-materials.org/State-Responsibilities-under-Inter-American-System-Apr-2008.pdf>.

⁵ Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), see in particular paras 166 – 175.

due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”⁶ (Emphasis added)

The Inter-American Submission notes several examples of the IACHR and the Court building on the guidance in *Velásquez* to apply the “due diligence” concept to the business and human rights space. It also shows that the IACHR and the Court have recommended various State measures in the context of protecting against corporate-related abuse.

For instance, in relation to a petition from the Community San Mateo de Huanchor regarding Peru’s alleged failure to protect against environmental pollution caused by an open-air mine operated by a privately owned company, the IACHR called for precautionary measures such as an environmental impact study by the State and further activities to minimize any harm.⁷ Further, the petition was declared admissible in relation to a wide range of rights, including the rights of the child and the right to life – the merits remain under consideration. Notably, precautionary measures in claims relating to land use have often included requests for the State to suspend extraction and other licenses until resolution of the claims. And the IACHR’s country reports not only refer to implementation of such measures but also separately discuss State obligations vis-à-vis corporate activities, particularly regarding natural resource projects.⁸

In relation to the Court, one example is *Saramaka People v Suriname*, which involved allegations against Suriname for allowing abuse of property rights in relation to the issuing of logging and mining concessions. Among the Court’s orders were that the State should ensure the “effective participation” of the community, “in conformity with their customs and traditions” regarding development, investment, exploration or extraction plans; the community should receive a “reasonable benefit” from any extraction of natural resources within indigenous territories; and that no concessions should be issued before “independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment (ESIA)”⁹ to ensure that concessions will not cause major damage.

In a follow-up interpretation of the judgment in August 2008, the Court reiterated that the State had a duty to actively consult with the community to comply with several of its orders and that it was the community, not the State, which should decide who should be involved in those consultations.¹⁰ In relation to a request for clarification from the State as to the required nature of ESIA’s, the Court said that ESIA’s “must conform to the relevant international standards and best practices, and must respect the Saramaka people’s traditions and culture.”¹¹ They must also be completed prior to concessions being granted so that the community can be properly informed. And they should address cumulative impacts to allow for “a more accurate assessment on whether the individual and cumulative effects of existing and future activities could jeopardize the survival of the indigenous or tribal people.”

The Inter-American Submission makes recommendations as to how the IACHR and the Court might further assist States Parties, corporations and individuals to better understand their rights and obligations in this area. In a similar fashion, the SRSG has made several suggestions to the

⁶ UN Human Rights Committee General Comment No. 31, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,’ adopted 29 March 2004 (80th Session), at para. 8.

⁷ Report 69/04, case 504/03, admissibility, October 15, 2004, paragraph 12. IACHR, Annual Report 2004, chapter 3.

⁸ See Inter-American Submission, pp. 23 – 27.

⁹ Preliminary objection, merits, reparations and costs, Judgment of November 28, 2007, Series C Number 172, para. 129.

¹⁰ Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, paras. 15 - 22.

¹¹ *Ibid.*, at para. 41.

UN Treaty bodies in this regard, including for them to elaborate where possible on: (1) the scope and content of the State duty to protect vis-à-vis corporate activities, including the nature of required “due diligence”; (2) whether the Treaties require States to regulate the overseas acts of corporations registered in their jurisdiction; (3) the nature of States’ obligations regarding State owned or controlled companies; and (4) the nature and origin of corporate responsibilities under the Treaties.

The SRSG’s 2008 report recognizes that continued guidance and support at the international level would help States achieve greater policy coherence. He views regional human rights institutions, including the IACHR and the Court, as playing an important role in this regard.

Using the “Protect, Respect, and Remedy” Framework

It is not only the State duty to protect which is relevant to the IACHR’s work – the SRSG invites the IACHR to consider all three framework principles in its activities. For instance, the IACHR may consider the corporate responsibility to respect when discussing any business responsibilities under the Convention. The responsibility to respect could also be relevant when the IACHR is recommending how States should promote corporate cultures respectful of rights, not only in relation to regulation but also regarding awareness-raising activities and the facilitation and encouragement of voluntary codes of conduct.

Access to remedies is part of the State duty to protect and the corporate responsibility to respect, and the Inter-American Submission notes that both the IACHR and the Court have already expressed their willingness to discuss how States Parties could and should ensure effective access to remedies for victims of corporate abuse. The SRSG encourages such consideration and looks forward to more guidance from both institutions on this issue in the future.

The SRSG considers the framework to be an important step in advancing the dialogue on business and human rights, establishing a common platform on which to build going forward. Thus, he looks forward to working with the IACHR’s on ways to operationalize the framework as well as on related work that they would find most useful.

Global Leadership Group Advising the Mandate

- Kofi Annan** (Ghana), former Secretary-General of the United Nations
- Souhayr Belhassen** (Tunisia), President, Fédération Internationale des Ligues des Droits de l'Homme
- John Browne** (UK), Managing Director of Riverstone Holdings LLC; former Group Chief Executive of BP plc
- Maria Livanos Cattai** (Switzerland), member of the Board of Directors, Petroplus Holdings AG; former Secretary General of the International Chamber of Commerce
- Stuart Eizenstat** (USA), Partner, Covington & Burling LLP; former U.S. Deputy Secretary of the Treasury, Under Secretary of State, Under Secretary of Commerce, Ambassador to the European Union
- Luis Gallegos** (Ecuador), Ambassador of Ecuador to the United States; former Vice-Chair, UN Commission on Human Rights; Member of the UN Committee against Torture
- Neville Isdell** (USA), Chairman of the Board of Directors, The Coca-Cola Company (will join the panel in April 2009)
- Hina Jilani** (Pakistan), Member of the Council, Pakistan Human Rights Commission; former UN Secretary-General's Special Representative on Human Rights Defenders
- Kishore Mahbubani** (Singapore), Dean, Lee Kuan Yew School of Public Policy, National University of Singapore; former Ambassador of Singapore to the United Nations
- Narayana Murthy** (India), Chairman, Infosys Technologies Limited
- Sonia Picado** (Costa Rica), Chair, Inter-American Institute of Human Rights; former Judge and Vice-Chair of the Inter-American Court of Human Rights
- Cyril Ramaphosa** (South Africa), Executive Chairman, Shanduka Group; former Secretary General of the African National Congress
- Mary Robinson** (Ireland), Chair, Realizing Rights: The Ethical Globalization Initiative; former President of Ireland and United Nations High Commissioner for Human Rights
- Guy Ryder** (UK), General Secretary of the International Trade Union Confederation
- Marjorie Yang** (China), Chairman of Esquel Group.