

Background Note

Introduction

On 3 June 2008, the Special Representative of the 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. 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

At its 8th session, the Human Rights Council welcomed the SRSG's identification of the proposed framework and extended his mandate for a further 3 years. In brief, Resolution L.8 requests the SRSG to further elaborate on the principles within the framework, as well as to continue to consult with all stakeholders in reaching his views and recommendations. Of particular relevance to the Human Rights Treaty Bodies, the Resolution also requests the SRSG to work in close coordination with United Nations institutions in this regard and explicitly encourages the Treaty Bodies, amongst other parties, to cooperate fully with the SRSG in the fulfillment of his mandate, "inter alia through the submission of comments and suggestions on the issues related to his mandate." (OP5).

The framework has also been supported by a variety of non-government organizations and business associations, including the International Chamber of Commerce and the International Organization of Employers, as well as by a broad segment of the socially responsible investment community.

This Background Note aims to briefly explain the nature of the framework presented by the SRSG and to highlight the ways in which it might prove relevant to the work of the Human Rights Treaty Bodies.

The SRSG thanks the Inter-Committee Meeting for the opportunity to address its participants for a second consecutive year and hopes to continue to build on this productive relationship in the future.

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).

The Framework

The SRSG found one common theme emanating from all stakeholders throughout the first three years of his mandate - the urgent need for a common framework of understanding, a foundation on which thinking and action could build in a cumulative fashion.

Accordingly, the SRSG proposed a strategic policy framework to the Human Rights Council, organized around three foundational 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. The SRSG's report explains that "the three principles form a complementary whole in that each supports the others in achieving sustainable progress."

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 in relation to the role of States 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-based 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, where they also seek to promote human rights, not only respect them.² But the responsibility to respect is the baseline expectation for all companies in all situations. And once again, in line with human rights discourse, "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

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>.

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.

Finally, accepting that even the most concerted efforts cannot prevent all abuse, the framework's third component is **access to remedy**. The report notes that access to formal judicial systems 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.

The important role played by the Treaty Bodies

The SRSG has always considered it important to understand the ways in which the core UN Human Rights Treaties deal with the issue of business and human rights, particularly with respect to the State duty to protect. It is for this reason that he conducted comprehensive research in 2006-2007, together with the Office of the 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 The learnings from this series have provided a significant contribution to the SRSG's analysis of the nature and scope of the State duty to protect.

The SRSG outlined the series' main trends at the 6th Inter-Committee Meeting. They were, in brief:

- 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 States' effective control. This role is generally considered as part of the State duty to protect against abuse by third parties.
- No Treaty Body has dedicated General Comments or Recommendations specifically to State duties vis-à-vis corporate activities. However, General Comments and Recommendations, Concluding Observations, Opinions and Decisions from the past decade indicate increasing pressure on States to fulfill the duty to protect in relation to corporate activities, regardless of whether the relevant entities are State-owned.
- According to the Treaty Bodies, while States ultimately have discretion in relation to implementation, they should take a variety of measures to effectively regulate and adjudicate corporate activities. States must generally monitor compliance by third parties and in most cases introduce legislative measures to prohibit abuse and proscribe certain behavior. Further, they should establish administrative and judicial mechanisms to effectively and impartially investigate all complaints, bring perpetrators to justice and remediate victims.
- The reports focused on the State duty to protect vis-à-vis business activities rather than any direct obligations for business enterprises under international law. Nevertheless, some Treaty Bodies have said that while they consider that only States Parties are ultimately accountable

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 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>.

under the respective Treaties, other actors, including business enterprises, have "*responsibilities*" in relation to respecting and ensuring rights. They have stressed that business enterprises have, at a minimum, an important *role* to play in relation to human rights.

- Several Treaty Bodies, have expressed concerns about the lack of accountability which could result from the privatization of certain governmental functions, when the State delegates them to private companies.
- The Treaty Bodies have interpreted the Treaties to apply both to individuals within a State Party's national territory as well as those outside the State's national territory but within its effective control. It does not appear that any of the Treaty Bodies have explicitly addressed the situation where a corporation acts on the State's behalf (exercising elements of governmental authority or acting under the instructions, direction or control of the State) outside the national territory, and exercises a degree of control over individuals such that, were such control to be exercised by State agents, the State's treaty obligations would apply.
- The situation described above differs from scenarios in which corporate actors affect the rights of individuals outside the State's territory or effective control where the State is able to influence the actions of those corporations – otherwise termed extraterritorial regulation. The Treaty Bodies have only had limited discussion of regulation with extraterritorial effect and when they have done so, their discussions have been varied. Therefore, it does not appear that any of them have firmly expressed that States Parties are required to regulate and adjudicate the acts of corporations affecting individuals outside their effective control, even if such corporations are based in their jurisdiction. However, there are also no indications that the Treaty Bodies oppose such regulation. Indeed some Treaty Bodies seem to encourage action to prevent companies from abusing rights overseas.

On the basis of the research and the findings published in seven separate reports, as well as the summary report submitted to the Human Rights Council in 2007, the SRSG noted several areas in which further elaboration from the Treaty Bodies might assist States Parties, corporations and individuals to better understand their rights and obligations. Those areas included: (1) the scope and content of the State duty to protect vis-à-vis corporate activities; (2) whether States should regulate the acts of natural persons within offending enterprises or the enterprise itself; (3) whether the Treaties require States to regulate the overseas acts of "their" corporations; (4) the nature of States' obligations regarding State owned or controlled companies; and (5) the nature and origin of corporate responsibilities under the Treaties.

The SRSG notes with great interest that since the 6th Inter-Committee Meeting there have been a number of important developments in this area in the work of the Treaty Bodies and that they continue to emphasize the role of States Parties in protecting against corporate-related abuse. For instance, in recent Concluding Observations the Committee on the Elimination of Racial Discrimination has encouraged States Parties to take appropriate legislative or administrative measures to prevent "adverse impacts" on the rights of indigenous peoples in other countries from the activities of corporations registered in the State Party.⁴ It has also recommended that State Parties explore ways to hold such transnational corporations "accountable." Furthermore, in line with its recommendations in General Comment 15 on the Right to Water,⁵ the Committee on Economic, Social and Cultural Rights in its recent General Comment 19 on the Right to Social

⁴ See for example Concluding Observations for Canada, UN Doc. CERD/C/CAN/CO/18, at para. 17 (May 2007); and Concluding Observations for the United States, UN Doc. CERD/C/USA/CO/6, at para. 30 (February 2008).

⁵ E/C.12/2002/11, at para. 33.

Security said that “States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries.”⁶

The SRSG’s 2008 report recognizes that effective guidance and support at the international level would help States achieve greater policy coherence. He views the Treaty Bodies as playing an important role in this regard, specifically in making recommendations to States Parties on implementing their obligations to protect rights vis-à-vis corporate activities.

Accordingly, in addition to the tools the Treaty Bodies are already utilizing for such recommendations, the SRSG offers the following preliminary ideas for consideration by the Treaty Bodies as they decide their priorities and preferred course of action with respect to the issue of business and human rights:

- The possibility of devoting General Comments or Recommendations or Discussion Days to the topic of business and human rights or related issues;
- The option of amending Reporting Guidelines to encourage States Parties to report on the measures they have taken to protect against business related abuse at home and abroad; and
- Along a similar line, including more questions relating to such measures in Lists of Issues and formal dialogue with States Parties about periodic reports.

Using the Framework

While the first principle in the framework, the State duty to protect, has obvious relevance for the Treaty Bodies, the SRSG asks that they do not discount the importance of the remaining two principles: the corporate responsibility to respect and access to remedies. For instance, the Treaty Bodies may find it helpful to consider the corporate responsibility to respect when elaborating on the possible scope of business responsibilities under the Treaties. The responsibility to respect could also be relevant when Treaty Bodies are 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 effectively part of both the State duty to protect and the corporate responsibility to respect, and the Treaty Bodies 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 the Treaty Bodies on this issue in the future.

As noted above, access to remedies involves accessing both judicial and non-judicial grievance mechanisms. Treaty Bodies, particularly those with the ability to hear individual communications, are a form of the latter. Accordingly, the Treaty Bodies may find it useful to consider the principles of effectiveness outlined by the SRSG in assessing their own “complaints” procedures.

The SRSG considers the framework to be a crucial step in advancing the dialogue on business and human rights. He thus looks forward to hearing the Treaty Bodies’ views on ways to operationalize the framework as well as what further work they would find most useful in pursuing their own mandates.

⁶ See E/C.12/GC/19, at para. 54.