

Business Leaders Initiative on Human Rights: “Session on Partnerships between Business and Government”

SRSG on Business and Human Rights: “Background Note on the State Duty to Protect”

Stockholm, 18 June 2008

Introduction

The State duty to protect is one of the core principles in the policy framework the SRSG recently presented to the Human Rights Council. The Council welcomed the framework and asked the SRSG as part of an extended mandate to move the discussion from the level of general principle to concrete content, providing more specific guidance to all social actors. The other two core principles in the framework concern the corporate responsibility to respect human rights, and the need for greater access by victims to effective remedies. This background note briefly explains the nature and scope of the state duty to protect as understood by the SRSG, describes the SRSG’s work on this issue to date and provides some insights into future directions.

What is the State duty to protect?

States have four main duties under international human rights law – to respect, protect, promote and fulfill rights. In the State context, respecting rights means ensuring that the State itself does not harm human rights either through actions or omissions and that it addresses harm when it occurs. Promoting rights entails awareness-raising to ensure society is informed about the importance of human rights. Fulfilling rights generally means providing resources to assist with the realization of rights, for example establishing functioning schools or courts, and may be subject to the concept of progressive realization.

Under international human rights law, the State duty to **protect** rights is understood as the obligation to protect individuals within the State’s jurisdiction from abuse by non-State actors. Commentary by the UN Human Rights Treaty Bodies, who administer the core UN Human Rights Treaties, suggests that the obligation is one of process rather than result. States will not be considered to have violated their treaty obligations simply because a private actor has abused rights — there must be some act or omission by the State that evidences a failure to exercise due diligence in fulfilling the duty to protect. And exercising due diligence in the State context is generally understood as taking reasonable steps to prevent, punish, investigate and redress abuse by non-State actors.

Nearly all of the UN Human Rights Treaty Bodies have spoken of the State duty to protect including the obligation to protect against abuse by corporations. There is legal uncertainty about the territorial scope of the duty to protect. It is unclear whether the duty applies only to protecting against abuse of individuals within a State’s jurisdiction or rather obliges States to protect against abuse of individuals abroad by corporations based in their jurisdiction – for example, whether State A is legally required to protect against a company based there abusing the rights of persons in State B. Regardless, the SRSG considers that from a policy perspective, **all** States should consider the diverse array of policy domains through which they may fulfill the duty to protect, including how to foster a corporate culture respectful of human rights at home and abroad.

A selection of the SRSG’s work on the duty to protect to date

2005 – 2007

The SRSG conducted a series of studies, 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.

The most up-to-date summary is available at <http://www.reports-and-materials.org/Background-paper-SRSG-treaty-bodies-19-Jun-2007.pdf>. Commentaries from the Treaty Bodies 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. Examples include Treaty Bodies recommending that States take steps to regulate and adjudicate the acts of extractives, logging and property development companies, especially in the context of resource exploitation in the lands and territories of indigenous peoples; or calling on States to increase oversight of the media and communications industry, including Internet service providers, in order to prevent the dissemination of harmful information, combat economic and sexual exploitation and even limit market concentration which could unduly affect the right to freedom of expression. Importantly, there have also been increasing references by the Treaty Bodies about the responsibilities of corporations to respect rights.

The SRSG also carried out a survey of States, asking them to identify policies and practices by which they regulate, adjudicate, and otherwise influence corporate actions in relation to human rights. No robust conclusions could be drawn because of the low response rate. But of those States responding very few reported having policies, programs or tools designed specifically to deal with corporate human rights challenges. A report is available at: http://ap.ohchr.org/Documents/dpage_e.aspx?si=A/HRC/4/35/Add.3.

2007 – 2008

Important questions remained about the nature, scope and content of State duties in the business and human rights area, not just in relation to how international human rights mechanisms view the duty but also how States understand and apply the duty themselves. Accordingly, in November 2007 the SRSG convened a multi-stakeholder consultation to generate key ideas surrounding the legal and policy dimensions of both home and host State duties with respect to business and human rights. The consultation considered issues such as the pros and cons of extraterritorial regulation; the relevance of corporate law tools; investment, trade and human rights; the challenges of incorporating human rights considerations into the support States provide to corporations operating abroad, with a focus on export credit agencies; and domestic and international policy coherence. The report is available at: <http://www.business-humanrights.org/Documents/Ruggie-Copenhagen-8-9-Nov-2007.pdf>.

More in-depth studies on some of these topics were undertaken, including a joint project with the International Finance Corporation on the impact of so called stabilization clauses in host government agreements on the ability or willingness of host States to safeguard rights.

What did the SRSG take away from all of this work? First, that the **State duty to protect** lies at the core of the international human rights regime. Second, 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 for States is that human rights concerns in relation to business need to go beyond their currently narrow institutional confines. His 2008 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.

More information about the issues discussed in this note is available on the SRSG's website: <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.