JOINT NOTE TO THE SRSG (BUSINESS & HUMAN RIGHTS)

FOLLOW-UP ACTION IN SOUTH-EAST ASIA
INTRODUCTION

1. We note that on Monday, 30 May 2011, you made your final presentation to the UN Human Rights Council (‘Council’) in your capacity as Special Representative of the UN Secretary-General for business and human rights.

2. The Singapore Management University School of Law’s Asian Peace-building & Rule of Law Programme (‘SMU-APRL’),1 the Human Rights Resource Centre for ASEAN (‘HRRC’),2 the University of California Berkeley’s War Crimes Studies Centre (‘WCSC’),3 and Mazars International (‘Mazars’)4 fully support your Guiding Principles on the prevention of, and remedy for, business-related human rights harm (‘GPs’). The culmination of years of extensive empirical research, analysis and consultations, they provide a valuable starting point for sustained global action to address and resolve adverse business impacts on human rights in a practical manner.

3. Over the past six years, your efforts have been remarkably successful in establishing a baseline responsibility of businesses to respect human rights. The GPs are impressive in their coverage of the multi-faceted nexus between States, business enterprises, national/regional institutions and civil society in relation to human rights. Together with the UN ‘Protect, Respect and Remedy’ Framework (‘UN Framework’), the GPs have inspired international organisations such as the OECD and the IOS to endorse this responsibility in their guidelines and performance standards; and have garnered the support of large companies, corporate law firms and institutional investors. It is our hope that the GPs will be positively received by the Council in the days to come.

4. The Council should bear in mind that the GPs’ legacy depends on their effective and uniform

1 SMU-APRL is research collaboration between Access to Justice Asia LLP (‘AJA’) and the Singapore Management University School of Law (‘SMU’). It provides a platform for SMU academics and affiliates to contribute to policy-relevant human rights and governance research in the region. SMU-APRL is in the process of establishing a university-based ASEAN Human Rights & Rule of Law Database, which looks set to be the first of its kind in the region.

2 The HRRC was established in 2010 to support the work of ASEAN bodies by focusing on human rights research and capacity-building. It is an independent and regional institution encompassing a region-wide university-based network, thereby tapping into the rich expertise of South-east Asia’s academic research community. The HRRC has begun work this year on a base-line study on business and human rights, which will seek to identify appropriate approaches to ensure corporate compliance with human rights in South-east Asia.

3 The WCSC was established in 2000 at the University of California, Berkeley. It is a university-based research organization dedicated to promoting the rule of law, accountability, and human rights around the world, particularly in post-conflict societies. The WCSC’s projects include independent trial monitoring, professional consultation, and substantive training workshops for justice sector personnel in post-conflict countries in SEA, such as East Timor, Cambodia and Indonesia.

4 Mazars is an international, integrated and independent organisation, specialising in audit, accountancy, tax, legal and advisory services. It has offices in Indonesia, Philippines, Singapore, Thailand and Vietnam. One of its main consultancy offerings to businesses is sustainability and development consultancy, which involves human rights auditing. Mazars is taking a leading role in exploring the importance of human rights compliance in the business world.
implementation, especially if a multi-lateral treaty is unlikely. For such implementation to take place in South-east Asia (SEA), there needs to be a keen appreciation of developments here, drawing on our multi-disciplinary and regional expertise as policy-makers, academics, human rights lawyers and private sector auditors, this Note comments on the two components of your “Recommendations on Follow-Up to the Mandate” (‘Follow-Up Recommendations’), namely, (i) embedding the GPs and (ii) clarifying international legal standards. We then propose ways in which our efforts may help carry this important initiative forward in South-east Asia (‘SEA’).

HUMAN RIGHTS IN SEA

5. The Association of South East Asian Nations (‘ASEAN’) has long been regarded as a group of sovereign nations operating on the basis of ad hoc understandings and informal procedures. As a multilateral institution, ASEAN has been criticized for failing to adequately promote and protect human rights, due to its long-standing policy of non-interference in members’ internal affairs.

6. But with the adoption of the ASEAN Charter in November 2007, ASEAN has taken significant positive steps forward. In 2009, ASEAN member States designed a ‘Roadmap’, which envisages the creation of a “rules-based Community of shared values and norms” built on three pillars – namely, political-security, economic and socio-cultural, each with its own blueprint and infrastructure for implementation. It is our view that business impacts on human rights in the region pertain to all three pillars and need to be holistically understood and addressed.

7. Efforts are underway in laying the groundwork for an institutional framework to facilitate free flow of information based on each country’s national laws and regulations; preventing and combating corruption; and cooperation to strengthen the rule of law, judiciary systems and legal infrastructure, and good governance. Regardless of their varying stages of development, there appears to be a growing consensus regarding the elements of the rule of law as a principle of good governance which is compatible with promoting and protecting fundamental human rights.

8. An ASEAN Intergovernmental Commission on Human Rights (‘AICHR’) has also been established to develop common approaches and positions on human rights matters of interest to ASEAN. AICHR is currently in the progress of drafting an ASEAN Human Rights Declaration. It has also adopted the terms of reference of its first thematic study, a baseline study relating to business and human rights in ASEAN. Significantly, AICHR’s Singapore representative, Mr. Richard Magnus, has lauded the GPs as useful references for this upcoming study.

9. Also key in the region’s human rights landscape is the emergence of credible civil society

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5 Rodolfo C. Severino, “ASEAN Way and the Rule of Law,” address at the International Law Conference on ASEAN Legal Systems and Regional Integration sponsored by the Asia-Europe Institute and the Faculty of Law, University of Malaya, Kuala Lumpur, 3 September 2001.


7 Ibid, para. 15.

8 2011 Chair’s Statement of the 18th ASEAN Summit, issued by the Chair of ASEAN in Jakarta, Indonesia on 8 May 2011.

9 Press Release of the Fifth ASEAN Intergovernmental Commission on Human Rights, Jakarta, 25-29 April 2011, available at <http://www.asean.org/26208.htm>. The said terms of reference do not appear to have been published as at the date of this Note.
organizations (‘CSOs’) which share knowledge, experience and training. CSOs have been increasingly concerted in their efforts to document business-related human rights abuses and influence policy-making. 11

10. In short, the time is ripe for regional stakeholders to embed the GPs into ASEAN’s shared norms and values.

**Embed the Guiding Principles in SEA**

11. There is, however, a dearth of systematic research and analysis needed to properly inform and support initiatives by AICHR or CSOs. 12 Further, with few exceptions, 13 there has been little express acknowledgment by the region’s businesses of the relationship between their operations and human rights. Many still continue to address the social impact of their practices through voluntary corporate social responsibility (‘CSR’) programmes. The GPs require companies to respect human rights law; they do not permit them to deal with only those issues with which they feel comfortable.

12. The proposed Voluntary Fund for Business and Human Rights aims to facilitate State adherence to the UN Framework and the GPs, and strengthen efforts of CSOs and other stakeholders to advance their implementation. While this initiative has merit, we hope that it will be augmented by continued engagement with regional stock exchange regulators, 14 State-owned enterprises, sovereign wealth funds, banks and financial institutions, multi-nationals (including natural resource extraction and contract manufacturing companies) and other leading public and private sector entities so that the GPs can be firmly embedded into SEA’s corporate psyche.

13. To this end, we are committed to entrenching and operationalizing the UN Framework and the GPs in SEA with our context-specific academic and professional expertise in the following ways:

(i) conduct sustained legal and empirical research which identifies and assesses the potential and actual adverse human rights impacts of business activities in SEA, and tracks the efficacy of remediation efforts;

(ii) contribute to annual stock-taking exercises of the functionality and reach of the GPs in practice;

(iii) conduct business and human rights training courses, informed by our academic research and professional expertise, for human rights practitioners and CSOs in the region;

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10 For example, the Solidarity for Asian People’s Advocacy network comprises more than 100 national and regional NGOs with the objective of enhancing engagement with intergovernmental bodies.
12 AICHR faces constraints in executing its wide-ranging functions. AICHR representatives have highlighted the difficulties faced in terms of the capacity of AICHR members and its limited budget. They have indicated that assistance is needed in, *inter alia*, capacity building for AICHR members and staff and AICHR’s thematic studies. See UNDP Asia Pacific Regional Centre and OHCHR Regional Office for South-east Asia, Report on “Regional Dialogue on UN Engagement with the ASEAN Human Rights System”, Bangkok, 6 September 2010.
14 We note the significant contribution stock exchange regulators can make to further the business and human rights agenda. For example, the Hong Kong Stock Exchange has established disclosure rules requiring mineral companies to provide material information on social and environmental risks and remediation practices.
(iv) engage with business enterprises in the provision of consulting and due diligence auditing services which integrate our research findings and impact assessments, and propose best practices (see below) to ensure corporate compliance with the UN Framework and GPs;

(v) analyze State protection against business-related human rights abuses and access to effective remedy for victims of such abuses in SEA, and aim to report on these matters at the UN Human Right Council’s Universal Periodic Review in our capacity as stakeholders; and

(vi) develop courses and co-organize seminars at the Singapore Management University and other regional universities to raise awareness and build expertise on how to prevent and regulate adverse business impacts on human rights and sustainable development in SEA.

CLARIFY INTERNATIONAL LEGAL STANDARDS IN SEA

International Best Practices for Business-Enterprises in Heightened -Risk Situations

14. It is crucial for businesses that there be more certainty in relation to applicable legal protection against business-related human rights abuses in conflict-affected, post-conflict, and fragile States where human rights enforcement may be weak or non-existent. SEA’s history of conflict and evolving transition towards respect for the rule of law and human rights has many lessons to offer in this regard. We believe that through comparative study, these lessons will contribute to the formulation of international best practices for business conduct in heightened-risk situations. Absent a binding legal treaty, best practices will lend much-needed clarity and certainty to these businesses, and enable them to conduct effective human rights due diligence. Given our experience in transitional justice processes in SEA and conducting human rights training for justice sector professionals in the aftermath of conflict, this is an area we can take the lead on.

Harmonizing International Legal Standards

15. There is much work to be done in harmonizing international legal standards in SEA. In our view, one of the first steps to doing so is building upon common notions of the concept of the rule of law. Accordingly, the HRRC’s first project was a study on regional conceptions of ‘rule of law and good governance’ and how it relates to respect for and protection of human rights. The multi-site study, named the Rule of Law for Human Rights in the ASEAN Region: A Baseline Study (“Rule of Law Study”) is the first study of its kind in SEA. The Rule of Law Study is being actively disseminated to key human rights actors in the region. This early-phase baseline study has been described as a useful point of reference for further in-depth empirical studies, and will help to pave the way for the harmonization of human rights standards in SEA.

CONCLUSION

16. You ended your speech to the Council on 30 May 2011 by reminding them that “human rights are at stake—and so, too, is the social sustainability of enterprises and markets as we know them”. We couldn’t agree more. We hope that the Council – and governments and businesses in SEA – will heed this timely refrain and honor the GPs. We stand ready to participate in and contribute to any multi-stakeholder steering committees, working groups or consultative bodies that are established by the Council or others pursuant to your Follow-Up

15 See supra notes 1 and 3 above.

Recommendations.

Yours faithfully,

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