



# HARVARD Kennedy School

JOHN F. KENNEDY SCHOOL OF GOVERNMENT

## **SRSG Response to “Submission to the UN Special Representative of the Secretary-General from the Civil Society Groups across Asia”**

I am extremely grateful for the thoughtful submission by civil society groups that participated in our New Delhi consultation for the Asia/Pacific region on February 5-6, 2009. It was, as the submission notes, an excellent discussion. Moreover, those of you who have read my most recent report to the Human Rights Council will note that many of the issues you raise in your submission are already reflected in that report (A/HRC/11/13, 22 April 2009). I listened closely to, and learned a great deal from, our Delhi dialogue.

Rather than repeat what we agree upon let me identify a few areas where further help from civil society organizations is needed, and add some clarifications.

1. Either I or a member of my team has met with the UN Treaty Bodies each year to discuss common concerns. Each year we are told that one reason they have not focused more extensively on business and human rights is that they receive little information from civil society actors on this issue. Much the same is true of many National Human Rights Institutions. NGOs might consider making this more of a priority because it would help widen and deepen understanding of the challenges and possible solutions.
2. Your submission makes reference to the need to take into account small- and medium-sized enterprises. I could not agree more and address the issue briefly in my most recent report. Already in Delhi I stressed that I would welcome guidance on what sorts of due diligence processes make sense for SMEs, recognizing that they lack the capacity of large multinationals.
3. Your submission makes reference to the need to raise the bar above the baseline corporate responsibility to respect. I would offer two thoughts in reply. First, for companies to get this baseline right is a non-trivial challenge, requiring human rights due diligence processes and mechanisms at the operational level to which affected individuals and communities can bring grievances concerning company-related impacts. It is far easier for a company simply to write a check for social investment projects of one sort or another, which is what “raising the bar” often means. Second, both in last year’s report and the most recent I indicate that there

may be situations in which companies have greater responsibilities, as when they perform public functions. But we don't understand those situations fully yet, nor do we understand fully the relationship between the responsibility of companies and the state duty to protect in such instances. These are extremely difficult conceptual and legal issues with enormous practical consequences, and they need to be resolved before we can speak sensibly about raising bars.

4. I think there may be an inherent tension in your advocacy of a universal complaints mechanism at the UN level (by implication adjudicative) and the need for more prompt and local access to remedy. There is clearly a need for speedier access to judicial remedy at the local level. But a UN complaints procedure almost certainly is not the answer – it would not be local, is unlikely to be prompt, and would be limited to a small handful of cases per year. Other approaches to international-level mechanisms will have to be explored.

5. On company-level grievance mechanisms, already in my 2008 report I state that “[these] mechanisms should not negatively impact opportunities for complainants to seek recourse through State-based mechanisms, including the courts” (paragraph 95). However, without effective company-level mechanisms far too many complaints and grievances are left unaddressed and escalate into worse situations and engender greater impacts on human rights as a result. Simply waiting until there is an impact that breaches domestic legal provisions is counter to the interest of victims in speedy redress and counter to the interest of companies in avoiding more serious impacts on human rights. Remember, the crisis in Ogoniland did not begin with the tragic and illegitimate execution of Ken Saro-Wiwa in 1995; it had been building for two decades or more. The fact that Shell now finds itself in U.S. courts charged with complicity is little solace for all those who suffered so grievously and for so many years.

6. Finally, on your point of having more and wider consultations: these are always desirable but I can state without fear of contradiction that we have had more than any comparable mandate – ever. I believe we are up to of 17 by now, and I am off to Buenos Aires this weekend for number 18. Bear in mind that these were not called for in my original mandate and are entirely unfunded. I have to seek voluntary contributions from governments for them, and the same sources fund the meager salaries of my research team. Besides, I have a full-time day job at Harvard; the UN post is entirely pro bono and allegedly part-time. I am not asking for sympathy here, but I do hope for understanding of what it is humanly possible to do in light of these constraints, especially when what we do already exceeds any comparable effort.

8 May 2009