



UNITED NATIONS

Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises

RECOMMENDATIONS ON FOLLOW-UP TO THE MANDATE

BACKGROUND

The current mandate on business and human rights, established in 2005, expires at the end of June 2011. During the SRSG's interactive dialogue with the Human Rights Council in June 2010 delegations invited him to provide recommendations for a follow-up process, based on his experience over the course of nearly six years. This note responds to that invitation.

The recommendations build on the SRSG's proposed "Guiding Principles for the Implementation of the 'Protect, Respect, Remedy' Framework," which the Council will consider at its June 2011 session. A draft of the Guiding Principles was circulated to all delegations and posted online on 22 November 2010, for public comment prior to 31 January 2011. The SRSG discussed the draft with delegations at an informal Council meeting on 17 January 2011. The online consultation attracted 3,576 unique visitors from 120 countries and territories. This is in addition to a large number of comments sent directly to the Special Representative, including by governments. There clearly is keen interest in the Guiding Principles, and how best to carry the initiative forward.

SUMMARY

Assuming that the Council responds positively to the Guiding Principles, the SRSG recommends that a new follow-up mandate consist of two parts:

1. **Embedding the Guiding Principles.** The magnitude and scope of this task are such that the SRSG recommends that the Council consider a broader mechanism than an individual mandate holder to carry it forward. Embedding the principles should include focused efforts aimed at (i) capacity building at national and local levels; (ii) addressing the challenge posed by the current incomplete and flawed patchwork of non-judicial mechanisms available to handle claims of business-related human rights harms; and (iii) an annual international stock-taking of the GPs functionality. These tasks should be performed within the framework of the Council but include a multi-stakeholder dimension.

2. **Clarifying certain international legal standards.** National jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to international crimes. Such abuses occur most frequently in situations where the human rights regime cannot be expected to function as intended, such as armed conflict. Greater legal clarity is needed for victims and business enterprises alike. The Council could respond to this need by appointing an individual expert or a group of experts to advise it, or through an intergovernmental process.

STRATEGIC CONSIDERATIONS

Two main achievements are widely attributed to the SRSG's mandate:

1. Generating a profound shift in the dynamic of the business and human rights debate, from deep polarization among stakeholder groups in 2005 to a greater shared understanding of business and human rights challenges;
2. Securing wide multi-stakeholder support for the 'Protect, Respect and Remedy' Framework and the Guiding Principles for its implementation as the foundation for better managing those challenges going forward.

Preserving these achievements should be the overriding objective for designing the follow-up processes. The GPs will be new, at some risk of misinterpretation, and in need of mainstreaming into organizations and disseminating globally. This will require capacity building and advisory efforts in order to sustain and fully realize the potential generated by the Framework and the Guiding Principles.

For a variety of fortuitous reasons, the SRSG has been able to constitute a team of ten researchers/advisors, gain the pro bono assistance of more than twenty law firms from around the world, and promote the Framework and GPs with a variety of key actors, including other international institutions. But this was as unique as it is unsustainable. A firm, UN-anchored follow-up is required to build on this momentum.

NEW MANDATE FUNCTIONS AND MODALITIES

1. EMBEDDING THE FRAMEWORK AND GUIDING PRINCIPLES

Three principal tasks lie at the heart of embedding the 'Protect, Respect and Remedy' Framework and the Guiding Principles.

a. Capacity Building

Lack of capacity amongst governments, companies, national human rights institutions and other actors in the area of business and human rights has been identified by a number of governments and other stakeholders as a key challenge in ensuring the embedding of the Framework and Guiding Principles.

The SRSG therefore recommends that the Council give consideration to requesting the High Commissioner (or the Secretary-General) to establish a Voluntary Fund for Business and Human Rights, with the primary purpose of addressing these capacity building needs. The Fund would provide a mechanism for supporting projects developed at local and national levels that would increase the capacity of governments to fulfill their obligations in this area as well as strengthen efforts by business enterprises and associations, trade unions, non-governmental organizations and others seeking to advance implementation of the Guiding Principles. It could also be a means to provide support to small and medium sized enterprises in implementing the Guiding Principles, either directly or through local business associations, national networks of the UN Global Compact, and national human rights institutions. Proposals might be coordinated and submitted through UN Country Teams, which could help monitor their results.

To ensure its relevance and representativeness, the activities of the Fund should be overseen by a multi-stakeholder Steering Committee. Its members could be appointed by the High Commissioner (or Secretary-General), in consultation with the Human Rights Council. They would serve in their personal capacity. The Chair of the Steering Committee would report annually to the Human Rights Council. In the course of overseeing capacity building activities, the Steering Committee could also provide expert advice on the interpretation of the Framework and Guiding Principles, supported by OHCHR.

The Steering Committee, in collaboration with OHCHR, would also contribute to disseminating the Guiding Principles more widely, not least to small and medium-sized enterprises that are unable to follow an SRSG's work and HRC resolutions, as well as to national human rights institutions.

To support its capacity building activities and the expert advice function, the Steering Committee should be able to call on external expertise. The Fund would be serviced by a Secretariat, administered by OHCHR. Its work would be financed by contributions to the Fund, which could come from both governmental and private sources.

b. International Support for Early Local Dispute Resolution

The proposed Fund could also address the challenge posed by the inadequate capacity to manage disputes between business enterprises and rights holders. Through extensive research, consultations and pilot projects, the SRSG has explored the most promising ideas for how local capacity for company-community dispute resolution can be enhanced and supported from the international level. The resulting report will be issued by 15 March 2011. The Fund's Steering Committee could consider how to take this forward.

c. Annual Stock-taking

The SRSG's mandate has benefitted enormously from the large number of international consultations with all relevant stakeholders convened by the mandate. Yet only four of the 47 consultations were funded by the UN.

Such extensive multi-stakeholder dialogue and analysis is not sustainable on an ad hoc basis. Yet they are essential in order to maintain and build on the broad consensus achieved to date, and to inform the Council's future deliberations on business and human rights. It is therefore recommended that the Council institutionalize such multi-stakeholder consultations by requesting OHCHR to convene them on an annual basis, within the framework of the Council.

These consultations would be a unique space for annual stock-taking and open and interactive dialogue between States, civil society (including grass-roots organizations), business, national human rights institutions, and intergovernmental organizations on issues linked to business and human rights. They might discuss trends and challenges in the implementation of the Guiding Principles, including in particular sectors, operational environments or in relation to specific rights, as well as identifying good practice. All stakeholders would benefit from the shared learning, and the annual consultation would be a sustainable means for the Council to remain substantively engaged on business and human rights and the implementation of the Guiding Principles. The proposal builds on the highly successful multi-regional and multi-stakeholder consultation convened by OHCHR in October 2009, co-chaired by the Ambassadors of Nigeria and Norway.

The consultative forum would meet in Geneva once a year for two days. Its Chairperson-Rapporteur would provide a summary report of its meetings, together with any recommendations, to the Human Rights Council.

The budgetary implications of this proposal would be conference services for two days and for an annual report to the Human Rights Council. In order to secure the presence of both expert panelists from all relevant stakeholder groups, as well as representatives of communities impacted by corporate activities, it is also recommended that funds be provided to cover costs of inviting up to ten panelists. The Council could periodically review whether the consultative forum should be continued or modified.

2. CLARIFYING CERTAIN LEGAL INTERNATIONAL STANDARDS

The SRSG has noted that national jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes. These typically arise in areas where the human rights regime cannot be expected to function as intended, such as armed conflict or other situations of heightened risk. Such divergence can only lead to increasing uncertainty for victims and business alike.

The SRSG's consultations with all stakeholder groups have indicated a broad recognition that this is an area where greater consistency in legal protection is highly desirable, and that it could best be advanced through a multilateral approach. Any such effort should help clarify standards relating to appropriate investigation, punishment and redress where business enterprises cause or contribute to such abuses, as well as what constitutes effective, proportionate and dissuasive sanctions. It could also address when the extension of jurisdiction abroad may be appropriate, and the acceptable bases for the

exercise of such jurisdiction. It could also foster international cooperation, including in resolving jurisdictional disputes and providing for technical assistance.

Member States might consider establishing either an expert individual mandate or an expert Working Group mandate with cross-regional representation, nominated by governments, to examine the challenge of divergent approaches across different jurisdictions. Such a mandate would aim to provide greater clarity as to what current international standards mean and require and report recommendations back to the Council. Another possibility might be an intergovernmental process of drafting a new international legal instrument to address the specific challenges posed by this protection gap. The UN Convention against Corruption could provide an appropriate precedent and model for such an effort. Yet a third option would be to have an individual or Working Group mandate prepare the ground for an intergovernmental process.

The mandate-holder(s) would report annually to the Human Rights Council. If it were a Working Group, it would meet in Geneva for one week a year.

CONCLUSION

The above recommendations set out a range of functions and related follow-up elements that are needed to protect the substantial achievements realized under the mandate of the SRSG and to advance practical progress on the ground. They are mutually supportive and complementary. And there would be considerable synergy amongst them. Taken together as a comprehensive package, they would most effectively respond to the scale and complexity of the challenges posed by the intersection between business and human rights.

The SRSG appreciates the opportunity afforded him by delegations to submit these recommendations to the Council.

11 February 2011