



# ADVOCACY GUIDE ON BUSINESS AND HUMAN RIGHTS IN THE UNITED NATIONS

Part I: The Mandate of the  
Special Representative

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International Network for Economic,  
Social and Cultural Rights (ESCR-Net)  
Corporate Accountability Working Group

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The analysis and views presented in this Advocacy Guide are not necessarily shared by all members of the ESCR-Net Corporate Accountability Working Group or ESCR-Net, nor by those individuals or their respective organizations who partook in the process.

ESCR-Net is a global collaborative initiative serving organizations and activists from around the world working to secure economic and social justice through human rights. Its Corporate Accountability Working Group advocates for national and international corporate accountability for human rights abuses, involving support for international human rights standards for business. Throughout, the Working Group seeks to strengthen the voice of communities and grassroots groups who are challenging company abuses of human rights by documenting and highlighting particular cases, and by facilitating broad-based participation in United Nations and other international consultations. The Working Group also seeks to build the capacity of its participants by creating space for the exchange of information and strategies, connecting groups to one another, and providing resources for advocacy.

The Steering Committee members of the Corporate Accountability Working Group are Tricia Feeney (Rights and Accountability in Development-RAID, UK) [Coordinator], Danwood Chirwa (University of Cape Town, South Africa), Daniel Taillant (Center for Human Rights and Environment-CEDHA, Argentina), Joji Cariño (TEBTEBBA Foundation, Philippines/UK), Marco Simmons (EarthRights International—ERI, US/Thailand), María Silvia Emanuelli (Habitat International Coalition-Latin America, Mexico) and Nadia Johnson, Women’s Environment and Development Organization-WEDO, US).

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## *Introduction and objectives*

The objective of this Advocacy Guide on Business and Human Rights (BHR) in the United Nations (UN) is to enable civil society groups worldwide to take a more active part in the debates occurring in the UN around the issue of corporate accountability to human rights.<sup>1</sup> This Part I will inform civil society actors about the history of one important entry point for advocacy within the UN on these issues: the mandate of the UN Special Representative on Business and Human Rights (SRSG), Professor John Ruggie. The Guide will also describe the positions and actions of the Corporate Accountability Working Group and other organizations over the years, and suggest some emerging issues for advocacy within the context of the SRSG's 2008-2011 mandate. Recognizing that the SRSG mandate is only one process of many in the UN, Part II plans to expand upon the first to include other entry points for advocacy within the UN, such as the human rights treaty bodies, Special Rapporteurs and other fora.

We hope this tool is helpful in informing our members and other participants in their interventions in the UN and beyond. We trust that the process will also allow for further networking and mobilization amongst various constituencies, and engagement with ongoing international debates to better address business-related human rights abuses and strengthen corporate accountability.

## *The UN's importance in holding companies accountable to human rights*

The UN system is made up of a number of important bodies which establish developments and precedents in international law and policy which can have lasting effects on the actions of national governments and non-State actors worldwide. While results are not guaranteed and initiatives can take time to come to fruition, engagement by civil society advocates in ongoing UN discussions in business and human rights can contribute to:

- Pushing States to adopt national legal frameworks and corresponding implementation mechanisms to better protect people's human rights and prevent business-related human rights abuses;
- Building awareness of particular cases of business-related abuses;
- Forcing companies to change their behaviour in respect of human rights;
- Pressuring international financial institutions, such as the World Bank and other multilateral banks, to respect human rights in their financing of companies and governments;
- Seeking out justice and remedy for business abuse; and
- Developing international human rights standards to strengthen corporate accountability.

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<sup>1</sup> A number of participants of ESCR-Net's Corporate Accountability Working Group discussed the usefulness of producing a guide of this type at the International Strategy Meeting on Economic, Social and Cultural Rights and ESCR-Net General Assembly in December, 2008 in Nairobi, Kenya. See also ESCR-Net, *International Strategy Meeting on Economic, Social and Cultural Rights and ESCR-Net General Assembly*, 2008 at [http://www.escr-net.org/usr\\_doc/Summary\\_Report\\_-\\_ISM\\_Kenya.pdf](http://www.escr-net.org/usr_doc/Summary_Report_-_ISM_Kenya.pdf).

While the UN is an important platform to strengthen corporate accountability to human rights at the international level, it should be noted from the outset that it is only one institution. Civil society groups worldwide will attest to the power and need to act in various spaces at the local, national and international levels in shaping the possibilities for progress on BHR issues at home and globally. Documentation of business-related abuses and inadequacy of current measures, direct campaigning and strategic litigation against abusive companies, organizations of ethical tribunals, engagement of governments, legal analysis and public awareness-raising are all especially essential activities. Coordination, joint strategizing and coalition-building with environment, gender, indigenous, development, trade union and humanitarian assistance actors are also key to building the political will and coordinated voice necessary to counter opposition to meaningful systems that ensure accountability for business abuse.

### *Brief history of the BHR debate in the UN (1970s to 2003)<sup>2</sup>*

Concerns about the impact of powerful commercial interests on the lives of people, their governments, human rights and the environment are nothing new. Neither are calls for international rules to curb and restrain powerful economic actors. As early as the 1970s, there were a number of international developments in response to the growing public unease about the role of companies in relation to the environment and human rights. The UN, as the only truly international body with the specific role of protecting and promoting human rights, became a natural focus for efforts to strengthen the accountability of business actors. The UN Commission on Transnational Corporations was established in 1973 to investigate the effects of transnational corporations (TNCs) and strengthen the negotiating capacity of countries in which they operate (“host countries”). The resulting draft [UN Code of Conduct on TNCs](#)<sup>3</sup> was the first attempt to provide global social and environmental guidelines for transnational corporations.<sup>4</sup> This process, however, faced stiff resistance from governments, where many TNCs had headquarters (“home countries”). Despite support from many governments in the global South, the UN Code of Conduct project was over time derailed.

In 1977, the [International Labour Organisation \(ILO\)](#) adopted the [Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy](#)<sup>5</sup>. Though not legally binding, and focused

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<sup>2</sup> Elements of this description were helpfully provided by the Strategy and Assessment Paper prepared by Tricia Feeney (RAID, UK) for the International Strategy Meeting on Economic, Social and Cultural Rights and ESCR-Net General Assembly in December, 2008 in Nairobi, Kenya.

<sup>3</sup> See *Draft United Nations Code of Conduct on Transnational Corporations*, 1983 version at <http://www.unctad.org/sections/dite/ia/docs/Compendium/en/13%20volume%201.pdf>

<sup>4</sup> While the UN Code of Conduct was never intended to be a human rights instrument per se, it did make clear reference to the responsibility of business to respect human rights in para. 13: “Transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations should/shall conform to government policies designed to extend equality of opportunity and treatment.”

<sup>5</sup> See International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 1977 at <http://www.ilo.org/public/english/employment/multi/download/english.pdf>

specifically on workers' rights, the Declaration calls for corporations to respect the Universal Declaration of Human Rights and the corresponding international human rights covenants.

Throughout the 1980s and 1990s, suspicion grew that the interest of global business was being promoted in various inter-governmental bodies over and above the rights of everyday citizens. Public awareness about sweatshop labor conditions prompted picketing outside some retail stores. In 1995, human rights activist Ken Saro-Wiwa and eight others were executed following an unfair trial brought in retaliation for their protests against Shell Oil in Nigeria. The late 1990s witnessed widespread protests, epitomized in 1999 in Seattle by a march of 100,000 people demonstrating against the World Trade Organization (WTO) Conference—a key international body supporting the increased mobility and power of business globally. This was all against a backdrop of a surge in domestic litigation, especially in courts in the United States and Europe, against companies accused of directly committing human rights harms or being complicit in human rights violations committed by host States.

It was within this broader context that the then UN Secretary-General Kofi Annan launched the [UN Global Compact](#) in 1999, a voluntary learning initiative aiming to align business operations with ten principles in the area of human rights, labour, environment and anti-corruption. If applied, these principles could undoubtedly engage business in reducing their involvement in human rights abuses. Yet, the Global Compact was not mandated to enforce its own principles, and thus like many other voluntary initiatives, critics argued, it was insufficient on its own in preventing abuses. Some go further, arguing that the UN Global Compact's actual effect—regardless of its intentions—is to endow companies with the prestige of the UN, “blue-washing” what are in effect irresponsible and illegal business activities.<sup>6</sup> In any event, by 2000, after almost thirty years attempting to close the protection gap permitting company abuses of human rights, the UN system had still not found an adequate solution. Pressure grew to establish an international framework within the UN, based on universally-recognized human rights law, to strengthen corporate accountability.

## ***Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights***

In 2003, after four years of discussion and consultations with unions, business and NGOs, the Sub-Commission on the Promotion and Protection of Human Rights, an expert advisory body to the UN Commission on Human Rights, approved a draft instrument, the [Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights](#)<sup>7</sup> (UN Norms). While recognizing the primary role of States<sup>8</sup> in guaranteeing human rights, the UN Norms

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<sup>6</sup> See, for example, Teitelbaum, A. “United Nations and Transnational Corporations: a deadly association,” April 2007 at [http://www.tni.org/detail\\_page.phtml?act\\_id=16610](http://www.tni.org/detail_page.phtml?act_id=16610)

<sup>7</sup> See *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, E/CN.4/Sub.2/2003/12/Rev.2, 2003 at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En). For a comparison with the draft UN Code of Conduct on TNCs, see <http://www1.umn.edu/humanrts/ataglance/compdfun.html>.

<sup>8</sup> The terms “State” and “government” here refer to the federal or national government.

drew on various sources to identify a list of key human rights responsibilities of companies. The UN Norms were global in scope, encompassed all sectors and many rights, addressed governments as well as business, and envisioned international accountability mechanisms in the future for enforcement. At its heart, the Norms embodied and articulated four key general principles:

- Businesses themselves have responsibilities under international human rights law.
- These responsibilities apply universally and cover a broad range of rights.
- National governments must take action to protect people from abuses by companies.
- The transnational nature of the problem requires that there be monitoring of company behaviour and enforcement mechanisms beyond national boundaries to ensure that companies comply with the Norms and relevant national and international law when operating outside their borders.

### *Responses to the UN Norms*

In general, civil society strongly endorsed the UN Norms. The Corporate Accountability Working Group and other human rights organizations believed they represented a major step towards establishing a common, minimum standard under which company behaviour and related government obligations could be monitored and judged worldwide. While recognizing that the UN Norms were in draft form and not legally binding, many NGOs and other social movements began to invoke the document as the most authoritative interpretation of human rights law as it applied in the realm of business activity. ESCR-Net's Corporate Accountability Working Group created and widely distributed the [UN Human Rights Norms for Business Briefing Kit](#)<sup>9</sup> to empower affected communities to assert their rights when facing business-related abuses; to advocate for the UN Norms to be accepted as an international soft-law instrument with authoritative guidance that could serve to educate governments as they drafted national law and policy; and to guide companies and their financial backers as they prepared their own codes of conduct and contemplated how to approach potentially problematic projects. The longer-term aim of the Working Group and many others was that the core ideas of the UN Norms would take root, and eventually form the basis for the development of binding international law.

In addition to civil society, other actors also began to draw on the UN Norms as a useful framework to provide a measure of clarity on the issues. The Business Leaders Initiative on Human Rights, a business-led programme chaired by former UN High Commissioner for Human Rights Mary Robinson, began "road-testing" the Norms.<sup>10</sup> Socially responsible investors also invoked the Norms in

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<sup>9</sup> See ESCR-Net, *UN Human Rights Norms for Briefing Kit*, January 2005 at [http://www.escr-net.org/usr\\_doc/Briefing\\_Kit.pdf](http://www.escr-net.org/usr_doc/Briefing_Kit.pdf).

<sup>10</sup> The term "road-testing," used here, draws from BLIHR's description of its work from 2003 up to 2006. See, for example, BLIHR, Submission to the Office of the UN High Commissioner for Human Rights relating to the "Responsibilities of transnational corporations and related business enterprises with regard to human rights," September 2004 at [www2.ohchr.org/english/issues/globalization/business/docs/blihhr.doc](http://www2.ohchr.org/english/issues/globalization/business/docs/blihhr.doc); *BLIHR Report 2: Work in Progress*, 2004 at <http://www.blihr.org/>, especially the chapter titled "An Overview of the BLIHR 'Road-Testing' of the Norms"; and BLIHR, *Report 3: Towards a 'Common Framework' on Business and Human Rights: Identifying Components*, 2006 at [www.realizingrights.org/pdf/BLIHR3Report.pdf](http://www.realizingrights.org/pdf/BLIHR3Report.pdf), especially the section titled "Learning from the content of the draft Norms."

their work, and some individual companies initiated pilot attempts to implement the Norms as well.

### *Backlash against the Norms*

The general reaction of business, however, was not very positive. The UN Norms quickly became a lightning rod for counter-lobbying. Along with opposition by many business associations, many governments were also deeply uncomfortable with the document. The key substantive criticisms put forward by opponents of the UN Norms follow.

- The Norms did not clearly distinguish between the human rights obligations of States and the responsibilities of companies, instead applying State obligations to companies.
- International human rights law could only be directly applicable to States, and by that logic the UN Norms attempted to erroneously extend this body of law to include companies. While companies have obligations under domestic and international laws, international human rights law itself does not apply direct obligations to them.
- The Norms challenged the authority and obligations of governments by asserting that businesses have human rights duties.
- Although the Norms document was prepared as a draft for further consideration by governments, many critics overreacted to the fact that it was drafted in treaty-type language.

In 2004, the Commission for Human Rights noted in its resolution on the issue that the Norms “contained useful elements and ideas for consideration” and asked the Office of the High Commissioner for Human Rights (OHCHR) to consult widely in the elaboration of a report examining their scope and legal status. At the same time, this 2004 resolution affirmed that the UN Norms had not been requested by the Commission and, as a draft proposal, had no legal standing.<sup>11</sup> Despite various submissions, UN consultations and strong lobbying by the Corporate Accountability Working Group and others for further development of the UN Norms to strengthen corporate accountability for human rights—along with the identification of the Norms in the OHCHR’s 2005 report as a possible way forward<sup>12</sup>—the [2005 resolution of the Commission on Human Rights](#) failed to explicitly mention the UN Norms.<sup>13</sup> Rather, the central highlight of the resolution was its request for the appointment of a Special Representative on the issue of business and human rights.

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<sup>11</sup> See *Responsibilities of transnational corporations and related business enterprises with regard to human rights*, E/CN.4/DEC/2004/116 at [http://ap.ohchr.org/documents/E/CHR/decisions/E-CN\\_4-DEC-2004-116.doc](http://ap.ohchr.org/documents/E/CHR/decisions/E-CN_4-DEC-2004-116.doc)

<sup>12</sup> See *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, E/CN.4/2005/91 at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=10900](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=10900) ; See in particular para. 22: “While views on the document are divided, it is relevant to note that the draft Norms, having the status of a draft proposal, could be subject to review and consideration by the Commission.”

<sup>13</sup> See *Human rights and transnational corporations and other business enterprises*, E/CN.4/RES/2005/69 at [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2005-69.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc). The resolution instead more generically called on the SRSG to “take into account” the 2005 OHCHR report that addressed the Norms in some depth as well “existing initiatives, standards and good practices.” (at para. 2). See also *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, E/CN.4/2005/91 at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=10900](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=10900)



Even with the strong support of civil society alongside some friendly governments and companies, there was just not enough political weight in 2005 to get real momentum behind a global effort for recognition, advancement and ultimately formal adoption of the core principles contained in the UN Norms. The debate became polarized. Many civil society actors called for internationally binding legal standards based in part on the Norms, while many from the business and governmental sectors argued for the scrapping of the approach altogether in favour of more research into existing standards.

### *The Legacy of the UN Norms*

Despite these obstacles, the UN Norms helped to set in motion an important trajectory. As one commentator noted:

Whether or not the Norms develop..., the stage has been set for the development of a normative framework that sets out the meaning of human rights obligations of corporations. Any such exercise will have to not only revisit the terrain covered by the Norms, but also consider how the international legal order has developed beyond an exclusive concern with state actors.<sup>14</sup>

Indeed, despite controversies over the Norms' precise content and legal standing, the initiative served an important purpose towards the increasingly shared recognition that companies have responsibilities to all human rights everywhere, that governments have an obligation to act to protect people from abuses by companies, as well as that national and extra-territorial or global monitoring and enforcement mechanisms are needed. In this sense, the development and promotion of the UN Norms laid the ground-work for future steps to meaningfully prevent human rights violations involving business and to hold those responsible to account.

### *The Special Representative Process and Civil Society Responses*

In 2005, the UN Commission on Human Rights requested the UN Secretary-General to appoint a Special Representative on Business and Human Rights (SRSG). Professor John Ruggie of Harvard University, previously involved in the creation of the UN Global Compact and the Millennium Declaration as Kofi Annan's adviser, was appointed by the Commission. [The SRSG's 2005 mandate](#)<sup>15</sup> was to identify and clarify human rights standards of corporate responsibility and accountability for business, elaborate on the role of States in regulating and adjudicating business, clarify the implications of concepts such as "complicity" and "sphere of influence" for business, develop methodologies for undertaking human rights impact assessments of business, and compile a compendium of best practices of States and business.

The mandate was weaker than what most civil society groups fought for, in part because it did not ask the SRSG to examine ongoing situations of business-related abuse. Unlike other UN Special Procedures

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<sup>14</sup> See Clapham, A. *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006.

<sup>15</sup> See *Human rights and transnational corporations and other business enterprises*, E/CN.4/RES/2005/69 at [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2005-69.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc)

mandates which often require country visits and engagement with directly-affected people, this mandate was specifically designed as a “desk-study,” which did not strictly require this type of direct engagement. This caused much confusion amongst civil society about why so little attention was paid at the outset to the experiences and expertise of communities affected by business abuse. Beginning then in 2005, the Corporate Accountability Working Group and others encouraged the SRSG to travel to affected areas to consult directly with adversely affected people and local NGOs, stressing the wide scope of the problem and the range of rights affected, and offered to assist the SRSG in organizing such opportunities. The Working Group and others also submitted in 2005 a [Joint NGO Report to a UN Consultation on Human Rights and the Extractive Industry](#).<sup>16</sup> Acutely aware of the insufficiency of voluntary initiatives and attempts to bring companies to account at the national level, the report concluded that the need remained for a common, international set of ultimately enforceable standards articulating the human rights responsibilities of business.

### [\*The First SRSG Report – “Principled Pragmatism”\*](#)

In 2006, the SRSG released his first report.<sup>17</sup> While stating that the UN Norms contained useful elements, the SRSG made clear his decision to discard the UN Norms as a basis for his work. Instead of building on years of prior work and acknowledging the UN Norms as a useful if limited step forward, the SRSG preferred to undo the process altogether, choosing in general to turn away from a global approach rooted in legal principles towards a preference for voluntary frameworks and “pragmatic” policy solutions.

Civil society responded vigorously with joint advocacy statements, coordinated reports, participation in consultations and collective lobbying. The Corporate Accountability Working Group and over 100 organizations and individuals issued a [Joint NGO response](#)<sup>18</sup> which requested the SRSG to build awareness of and support for meaningful international human rights standards for business that would move beyond existing frameworks and the *status quo*, and avoid the pitfall of reaching agreements that merely reflect the lowest common denominator. Organizations also critiqued the report for failing to appreciate the inadequacy of voluntary standards and mechanisms, and for representing a narrow reading of the legal and other issues at stake. The report’s other key pitfall, groups asserted, was that it lacked engagement with affected communities and local NGOs, did not reflect their perspectives, and seemed to be more concerned with “human rights challenges” facing business rather than human rights abuses faced by victims.

Despite these concerns with the mandate at the time, Working Group members and other civil society groups chose to keep dialogue open with the SRSG, encouraging and actively participating in three

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<sup>16</sup> See ESCR-Net Corporate Accountability Working Group, *Joint NGO Submission: Consultation on Human Rights and the Extractive Industry*, November 2005 at [http://www.escr-net.org/usr\\_doc/ESCR-Net\\_on\\_HR\\_and\\_Extractive\\_Industry.pdf](http://www.escr-net.org/usr_doc/ESCR-Net_on_HR_and_Extractive_Industry.pdf)

<sup>17</sup> See *Interim Report of the Secretary-General’s Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, E/CN.4/2006/97, 22 February 2006 at <http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.97.pdf>

<sup>18</sup> See *Joint NGO Letter in response to the interim report of the UN Special Representative on Human Rights and Business*, 18 May 2006 at [http://www.escr-net.org/usr\\_doc/NGO\\_Endorsements\\_-\\_NGO\\_Joint\\_NGO\\_Response.pdf](http://www.escr-net.org/usr_doc/NGO_Endorsements_-_NGO_Joint_NGO_Response.pdf)

regional consultations between 2006 and 2007 convened by the SRSG in South Africa, Thailand, and Colombia, as well as taking part in meetings in Geneva, New York City and London. The [Asia Civil Society Statement](#) focused on the need for greater accountability for human rights violations in the extractive industry, particularly with regard to its disproportionate impact on indigenous peoples and its role in funding military dictatorships.<sup>19</sup> The [Latin American Civil Society Declaration](#) similarly called upon the SRSG to promote adequate and effective access to judicial recourses and protections for victims, and to promote participation by those directly affected in future discussions.<sup>20</sup> Groups also continued to contribute by carrying forward efforts to document human rights abuses involving companies and advocate for the rights of those affected.

***[The Second SRSG Report](#) – “Mapping international standards of responsibility and accountability for corporate acts”***

In 2007, the SRSG presented his second report,<sup>21</sup> an exercise to map existing international standards, instruments and treaty body guidance in the field of corporate responsibility and accountability. The report recognized that the expansion of markets and the transnational reach of corporations had not been matched with sufficient protection for the people and communities suffering corporate human rights abuses. Importantly, the report also agreed that States—partly due to the influence of business—are not always able or willing to protect against abuse involving companies.

Yet, many civil society groups expressed concern with what they perceived as an over-reliance by the SRSG on self-regulatory solutions. The Corporate Accountability Working Group and others released a [Joint NGO Intervention to the Human Rights Council](#)<sup>22</sup>, insisting upon the inappropriateness and insufficiency of voluntary approaches alone in safeguarding the human rights of victims of corporations many times more wealthy than many States. In a follow-up [2007 Joint Open Letter to the SRSG](#)<sup>23</sup>, the Working Group and more than 230 organizations and individuals further called on the SRSG to turn his focus to the perspective of victims, consult more widely with them, and appropriately reflect the results of meetings with affected groups in his reports. The SRSG was also urged to analyze the reasons States often fail to discharge their duty to protect against corporate abuse, and to spread awareness of the compelling need for global standards on business and human rights to strengthen the protection of human rights and provide a common framework to address business conduct.

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<sup>19</sup> See *Asia Civil Society Statement to U.N. Special Representative on Transnational Business and Human Rights*, 27 June 2006 at [http://www.escr-net.org/usr\\_doc/Asian\\_Civil\\_Society\\_Statement- Bangkok\\_Consultation.pdf](http://www.escr-net.org/usr_doc/Asian_Civil_Society_Statement- Bangkok_Consultation.pdf)

<sup>20</sup> See *Latin American Civil Society Declaration to UN Special Representative on Human Rights and Business*, January 2007 at [http://www.escr-net.org/usr\\_doc/SocialDeclaration\\_UNSRSG.pdf](http://www.escr-net.org/usr_doc/SocialDeclaration_UNSRSG.pdf)

<sup>21</sup> See *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/4/035, 9 February 2007 at <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>

<sup>22</sup> See *Joint NGO Intervention at UN Human Rights Council: Response to the Special Representative to the Secretary General on the issue on human rights and business*, March 2007 at [http://www.escr-net.org/actions\\_more/actions\\_more\\_show.htm?doc\\_id=471732](http://www.escr-net.org/actions_more/actions_more_show.htm?doc_id=471732)

<sup>23</sup> See *Joint Open Letter to the UN Special Representative on Business and Human Rights*, 10 October 2007 at [http://www.escr-net.org/actions\\_more/actions\\_more\\_show.htm?doc\\_id=548976](http://www.escr-net.org/actions_more/actions_more_show.htm?doc_id=548976)

[The Third SRSG Report – “Protect, Respect, Remedy”](#)

In his 2008 report, “Protect, Respect and Remedy: A Framework for Business and Human Rights,”<sup>24</sup> submitted to the Human Rights Council in June 2008, the SRSG outlined a three-part conceptual framework:

- (i) States have the *duty to protect* against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;
- (ii) Companies have the *responsibility to respect* human rights, which the SRSG defines as in essence not infringing upon human rights; and
- (iii) Greater access by victims to *effective remedies* is needed.

This broad framework was welcomed by many business associations, governments and various civil society groups. The framework encapsulated a set of basic human rights principles which had long usage by human rights advocates, institutions and academics. For example, the report recognized the scope of the problem, with potential negative impacts on all countries, on all human rights and in all business sectors. Importantly, the framework holds at its core that companies have responsibilities to respect human rights everywhere, reinforcing a view already embodied in the ILO’s Tripartite Declaration, the UN Norms, and previous work of the UN’s Office of the High Commissioner for Human Rights (OHCHR).<sup>25</sup> Thus, many civil society groups observed that the “Protect, Respect, Remedy” framework marked an evolution in the SRSG’s thinking.

So, civil society groups have generally agreed on the broad principles set out in the SRSG’s framework, with some important caveats discussed below. When translating the broad principles of the framework into concrete legal and policy measures, the Working Group and others have expressed some agreement with the SRAG’s approach, but have also emphasized some different priorities for analysis and action within the framework, which are highlighted below.

*A New SRSG Mandate, 2008-2011*

It was not entirely clear in the lead-up to the June 2008 Human Rights Council (HRC) session that the SRSG’s mandate would be extended, or to what end. While many governments appreciated the SRSG’s work, they did not see eye-to-eye on what would be the most appropriate next step, or even how to interpret the framework he proposed. NGOs and social movements for their part engaged in intense lobbying, and organized a side-event entitled [“Voices from the Ground: The Human Face of Human Rights and Business.”](#) This event brought together southern experts and community members directly

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<sup>24</sup> See *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008 at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>. Various other related reports of 2008 can be found at <http://www.business-humanrights.org/Documents/RuggieHRC2008>.

<sup>25</sup> See for some early examples *Globalization: The growth in the size and power of corporations* at <http://www.unhcr.ch/development/globalization-04.html>

affected by business human rights abuses from India, Côte d'Ivoire, the United States, the Philippines, Mexico and Iraq to present their views, perspectives and recommendations to deepen the understanding of HRC member States of the actual situations and concrete drivers of human rights violations involving companies. Various civil society initiatives were also presented, including the [2008 Joint HRC Submission on Business & Human Rights](#)<sup>26</sup> supported by various human rights, development, environmental and socially responsible investment organizations. The [Collective Report on Business and Human Rights](#) prepared by ESCR-Net Corporate Accountability Working Group, was also presented to the HRC.<sup>27</sup>

While there were undoubted merits in the framework, many groups expressed concern during this time that the work of the mandate had paid relatively little attention to the ways which groups can hold companies to account and the challenges they face. A continuing weakness in the SRSG's work to date, groups argued, remained: it had not adequately benefited from—nor reflected—the views and experiences of those affected by business-related abuses, and thus would likely not be able to determine adequate and priority responses.

The Working Group and others thus called for a new mandate to include an explicit capacity to examine situations of business abuse, both to better ground future efforts as well as to provide a sorely-needed avenue at the global level for victims to voice their grievances and obtain redress for the harms suffered. Some governments at the HRC raised related points and sought to put forward more progressive views, in opposition to other governments who attempted to approach the issues more conservatively.

Ultimately, after extensive negotiation and vigorous lobbying efforts, government members of the HRC decided to extend the SRSG's mandate for another 3 years, asking him to “operationalize” the framework by providing on the one hand recommendations to States on how to strengthen the fulfilment of the duty of the State to protect against business-related abuses, and on the other hand concrete guidance on the scope and content of the corporate responsibility to respect all human rights. The HRC also tasked the SRSG with making recommendations on how best to enhance access to effective remedies available to those affected by business activities.<sup>28</sup>

Though civil society did not achieve a monitoring and reporting mandate as requested, numerous improvements to the resolution were arguably secured through this advocacy process, including:

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<sup>26</sup> See *Joint HRC Submission on Business and Human Rights*, 20 May 2008 at [http://www.escr-net.org/actions\\_more/actions\\_more\\_show.htm?doc\\_id=686620&parent\\_id=430908](http://www.escr-net.org/actions_more/actions_more_show.htm?doc_id=686620&parent_id=430908) supported by Amnesty International, Friends of the Earth International, International Federation for Human Rights, Human Rights Watch, International Commission of Jurists, Oxfam International, and Rights & Accountability in Development amongst others.

<sup>27</sup> See ESCR-Net Corporate Accountability Working Group, *Collective Report on Human Rights: Submission to the 8<sup>th</sup> Session of the United Nations Human Rights Council*, June 2008 at [http://www.escr-net.org/usr\\_doc/BHRCCollectiveReport\\_ESCR-Net.pdf](http://www.escr-net.org/usr_doc/BHRCCollectiveReport_ESCR-Net.pdf).

<sup>28</sup> See *Mandate on the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises HRC Resolution 8/7*, 18 June 2008 at [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_8\\_7.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf)

- Recognition of the need to consolidate standards, with a view to possibly developing a comprehensive international framework in the future;
- Inclusion of the consideration to strengthen the fulfilment of the duty of the State to protect “through international cooperation”;
- Acknowledgment of the need for legal mechanisms to regulate companies and provide remedies to victims;
- Clear recognition that companies must avoid complicity, not simply refrain from committing abuses themselves directly;
- Inclusion of a two-day consultation organized by the OHCHR with victims; and
- An explicit requirement to integrate a gender perspective into the work, and to consider vulnerable groups in general.

***The Fourth SRSG Report – “Towards operationalizing the protect, respect and remedy framework”***

In his fourth and most recent report, “Business and Human Rights: Towards operationalizing the protect, respect and remedy framework,”<sup>29</sup> the SRSG reiterates the three-pillar framework, and describes the specific type of work he aims to embark on in the last two years of the mandate.

The SRSG’s priorities for operationalizing this framework were stated in his 2008 and 2009 reports and the 2008-2011 preliminary workplan,<sup>30</sup> and provide concrete entry points for civil society to engage with the mandate. Corresponding to the SRSG’s three-part conceptual framework then, these key lines of work are highlighted below as “Emerging Issues for Advocacy within the SRSG Mandate.” Each issue is followed by specific areas in which some civil society groups differ with the SRSG, or would like to see more emphasis. Attention to these issues by civil society at large, particularly directly affected communities, could help inform his thinking as the SRSG begins to draft his recommendations in the years to come.

***Emerging Issues for Advocacy within the SRSG Mandate***

The SRSG has made clear that his final concrete recommendations will not be made until 2011, at the close of the 2008-2011 mandate. These recommendations have the potential to impact how the UN approaches corporate accountability issues for years to come. While much valuable corporate accountability work may best be pursued outside the scope of this mandate, the current environment opens an important space for groups to identify and prioritize issues for deeper debate and further

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<sup>29</sup> See *Business and Human Rights: Towards operationalizing the protect, respect and remedy framework*, A/HRC/11/13, 22 April 2009 at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

<sup>30</sup> See *Preliminary Work Plan: Mandate of the Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises 1 September 2008 - 30 June 2011*, 10 October 2008 at <http://www.reports-and-materials.org/Ruggie-preliminary-work-plan-2008-2011.pdf>.

action, offer suggestions where they think the SRSG's work could lead to meaningful results, and offer critiques where they are concerned by the direction the SRSG may be taking.

### *I. State Duty to Protect*

The SRSG in his 2008 report notes that fulfilling the duty to protect human rights against business-related abuses should be an urgent policy priority for governments, including through “foster[ing] a corporate culture respectful of human rights at home and abroad.”<sup>31</sup> The 2009 report reviews similar arguments, and reiterates the problem of legal and policy incoherence within governments nationally, and at the international level, describing two general types of incoherency. First, States often fail to adopt policies and regulations to implement their international human rights obligations, and, second, government and international agencies shaping business practices are unaware of their human rights obligations and operate in isolation from those other public agencies tasked with promoting and protecting these rights.<sup>32</sup>

There is no doubt that under international law, States have the duty to take measures to prevent, investigate, and punish human rights abuses, including those by private actors, and provide a means to redress harm for those adversely affected. Due to limited capacity or lack of political will, governments often fail in these regards – a fact that is widely recognized, particularly by civil society groups working at the local level. In many cases, States fail to protect as a result of considerable impediments inherent in today's global economy, in which governments are constrained from taking measures against companies which might put their international standing or national economies at a disadvantage. So, in terms of overall prioritization, civil society groups have argued for more focus on a stronger, clearer and more efficient regulatory framework and accountability infrastructure as necessary so as to place a positive duty on companies and their directors to respect human rights in the context of their activities. The extraterritorial and/or global dimensions of the State duty to protect are also argued to be an essential component to protecting against business-related abuse.

Under the State duty to protect, the SRSG has highlighted six sets of issues to prioritize in the coming years:

1. Access to remedy

The obstacles groups face to bring claims against companies in national courts has been highlighted as particularly troublesome, and the SRSG has pointed out the need to learn more about obstacles and explore possible legal and policy tools. This area is addressed more in detail below under the section on “Access to Remedy.”

2. Host government agreements/Trade and investment treaties and bodies

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<sup>31</sup> See *Protect, Respect and Remedy: A Framework for Business and Human Rights*, (para. 27)

<sup>32</sup> See *Business and human rights: Towards operationalizing the “protect, respect and remedy” framework*.

The SRSG's recent report and public statements have helpfully echoed civil society concerns that certain trade and investment treaties between governments, and host government agreements made between companies and host governments, constrain the ability of host governments to adopt policies consistent with their human rights obligations, sometimes out of fear of being brought to international arbitration panels or facing other repercussions. The SRSG has pointed to the lack of transparency and public participation in the negotiations of these agreements, and in the different mechanisms used to enforce them, noting in particular the lack of negotiating power of many governments in the South. The SRSG has further stated that his team will explore model human rights clauses and contracts, as well as best practices in this area.

Nonetheless, the SRSG has not yet called for strong action, merely stating that "States, companies, the institutions supporting investments, and those designing arbitration procedures should work towards developing better means to balance investors' interests and the need of host States to discharge their human rights obligations."<sup>33</sup> Various organizations disagree that there should be a balance between human rights law and investor interests. Instead, many argue that, if any model agreement is drafted, the primacy of human rights law must be ensured when such agreements hinder a government's ability to protect its people against business abuses. Where there is conflict, groups suggest, human rights law, not trade or investment law, should be applied, or at the very least, investment law should be interpreted in a way consistent with the States' human rights obligations. Many groups also argue that arbitration panels such as the International Centre for the Settlement of Investment Disputes (ICSID) of the World Bank should not impede governments from protecting human rights, and the public must be permitted access to information about all agreements and the related enforcement bodies to allow governments and civil society—especially at the local level—to monitor developments within such arbitrations.

### 3. Export credit and investment guarantee agencies

Export credit and investment guarantee agencies (ECAs) are generally public institutions which use public money to provide loans, guarantees, and insurance to companies operating abroad. ECAs have minimal transparency, accountability, and safeguards related to human rights, corruption, or the environment. Many ECA-supported projects have been associated with significant human rights violations, including arbitrary arrest, use of paramilitary 'security' forces, forced resettlement, inadequate consultation and compensation, violations of the right to a healthy environment, loss of livelihood, and destruction of spiritual and cultural sites.<sup>34</sup> The SRSG has articulated similar views, stating that ECAs "should require clients to perform adequate due diligence on their potential human rights impacts. This would enable ECAs to flag up where serious human rights concerns would require greater oversight – and possibly indicate where State support should not proceed or continue."<sup>35</sup>

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<sup>33</sup> See *Protect, Respect and Remedy: A Framework for Business and Human Rights*, (para. 38)

<sup>34</sup> See Can, O and Seck, S. prepared for ECA-Watch, Halifax Initiative and ESCR-Net, *The Legal Obligations with Respect to Human Rights and Export Credit Agencies*, July 2006 at <http://www.halifaxinitiative.org/updir/ECAHRlegalFINAL.pdf>; and Keenan, K., Halifax Initiative Coalition, *Export Credit Agencies and the International Law of Human Rights*, January 2008 at [http://www.halifaxinitiative.org/updir/ECAs\\_and\\_HR\\_law.pdf](http://www.halifaxinitiative.org/updir/ECAs_and_HR_law.pdf)

<sup>35</sup> See *Protect, Respect and Remedy: A Framework for Business and Human Rights*, (para. 40)



Although precise recommendations by the SRSG have not yet been issued, many groups would like to see the SRSG suggesting a strong and human rights compliant set of guidelines for ECAs, substantially departing from the set of performance standards developed by the International Finance Corporation (IFC), the private financing wing of the World Bank, which the SRSG has described before as the most effective to date.

#### 4. International cooperation and extraterritorial obligations

In 2008, the Human Rights Council asked the SRSG to provide concrete recommendations on how to strengthen the State duty to protect against corporate abuse through “international cooperation,” which can suggest some form of transnational, or extraterritorial nature of this duty.<sup>36</sup> The SRSG in his 2009 report interprets international cooperation to mean “awareness-building, capacity-building and joint problem-solving,” pointing in particular to the lack of understanding and use by governments of existing international bodies and programmes.

Indeed, there is much to explore and build knowledge about in this area. Yet, various organizations and individuals have pointed to the fact that the lack of use, and frailty, of existing international fora for building capacity and problem-solving is in fact more a reflection of a failure of political will and uneven power relationships between States than of a shortage of awareness about them.

Furthermore, it is yet unclear in the SRSG’s interpretation how international cooperation relates to specific duties under human rights treaties relating to the extraterritorial nature of the State duty to protect against wrongs committed overseas by their national companies. The SRSG has stated that under his reading of international human rights law, States are not required nor prohibited from exercising jurisdiction outside their borders to protect against business abuse. Civil society organizations have for years argued that there are strong legal and policy bases for the extension of extraterritorial jurisdiction of States to protect which do not infringe upon, but in many cases can strengthen the sovereignty of all States in limiting adverse interventions of business actors.<sup>37</sup> Various civil society organizations continue then to urge the SRSG to recognize and develop the extraterritorial dimension of the obligation to protect in making recommendations regarding international

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<sup>36</sup> See HRC Resolution 8/7, 18 June 2008 at 4(a).

<sup>37</sup> Some bases of the extraterritorial obligation can be found in De Schutter, O., *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*, November 2006 at <http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf> and a recent report by the ETO Consortium, made up of FIAN, Human Rights Watch, Habitat International Coalition, Misereor, ESCR-Net and others, *Report of the 2nd Conference of the Consortium on Extraterritorial States’ Obligations*, 2008 at <http://www.fian.org/resources/documents/others/report-of-the-2nd-conference-of-the-eto-consortium/pdf>. Treaty bodies themselves are increasingly recognizing extraterritorial obligations in relation to the meaning of international cooperation under international law. See for example, GC 19 of the CESCR at para. 54: “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. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.”

cooperation, giving further support to the strengthening of national judicial and non-judicial complaints procedures, particularly by home States in fulfilling their obligation to protect.

#### 5. Corporate law

The potential of utilizing corporate law to instill a corporate respect for human rights is being studied by the SRSG and partner law firms, specifically focusing on how companies consider human rights in laws related to incorporation and corporate governance, and in related regulation and jurisprudence.

Many groups feel that there is enormous potential for corporate law to be used in a way that establishes clear obligations on corporate directors or managers to take into account human rights impacts of their businesses as part of their duties. Some also believe that corporate law should be used to establish clear and mandatory duties to periodically and publicly report on the companies' social and environmental performance. Several initiatives have begun, but have not yet garnered enough political support. This work is in an incipient phase, and deserves attention moving ahead. In particular, the publication and dissemination of studies and initiatives in this area would be greatly welcomed by civil society. The SRSG's work could be equally useful if it were able to develop clear suggestions on ways to use the body of corporate law to support human rights and accountability for companies and companies' directors.

#### 6. Business in conflict zones

The SRSG is also dedicating efforts to studying the role of business activity in conflict areas, seeing his role in providing guidance for companies and governments on how to prevent negative impacts. The Human Rights Council has explicitly requested the SRSG to visit the Democratic Republic of the Congo. Many believe that this visit and report thereof could greatly benefit the understanding of the economic factors that make possible and perpetuate the conflict, but little is known however about the specific approach he will take.

Civil society organizations for their part think that the following core issue under the State duty to protect should also be prioritized by the SRSG:

#### 7. Human rights and international financial institutions

While ECAs have been given much attention by the SRSG for their role in financially and politically supporting projects with disastrous human rights impacts, the equally troubling role of international financial institutions (IFIs), such as the World Bank or other regional multilateral development banks has not been mentioned. Considering the enormous financial and political leverage such institutions have on business projects, individual companies and social safeguard standards worldwide, organizations have called on the SRSG to take this area more seriously. Organizations argue that the States which make up and control these IFIs remain bound by their human rights obligations when acting within such institutions. At a minimum, then, these States thus cannot shield themselves from their duty to respect, protect and fulfil human rights when acting within IFIs.

## II. Corporate Responsibility to Respect

In ensuring greater responsibility to human rights by companies, the SRSG stresses that the baseline expectation is that companies respect, or “do no harm” to human rights. Doing no harm, according to the SRSG, requires positive steps by companies, banks or other project financiers to conduct “due diligence” measures to become aware of, prevent and address human rights abuses. The SRSG argues in his 2008 and 2009 report that due diligence requires a company to adopt and integrate a human rights policy throughout its operations, carry out human rights impact assessments, and monitor compliance with its policy. He goes on to support a long-standing civil society argument that business actors may have more extensive human rights responsibilities, such as to protect or fulfil human rights, in specific instances when they carry out public functions.<sup>38</sup>

As mentioned above, the SRSG defines this company responsibility as based on evolving social expectations. Yet, UN bodies and others have earlier stated that this responsibility is derived from the Universal Declaration on Human Rights and existing international law.<sup>39</sup> The SRSG’s formulation may be intended as a pragmatic approach to bypass debates over the emergence, evolution and applicability of human rights principles, but it deemphasizes the relevance of human rights instruments, some groups argue, and thus could potentially lead to a weakening of the recognition and applicability of business responsibilities.

It has been argued that “due diligence” standards—while potentially unearthing valuable information—are not sufficient in the absence of effective deterrents, especially laws, judicial bodies and other accountability mechanisms which clearly prohibit and punish gross misconduct. Without independent mechanisms to monitor compliance with human rights standards, companies will naturally continue, many argue, to act according to their own profit-seeking interests when carrying out due diligence. The objective value and impartiality of human rights impact assessments—especially

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<sup>38</sup> While the definition of a public function depends somewhat on the context and is not established globally, examples of private actors carrying out public functions include private security companies, privately-administered prisons, private management of water, sewage, electric and other public utilities. This argument that business actors may have more extensive human rights duties is based partly on article 5 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, which states that “[T]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance”.

<sup>39</sup> This interpretation that businesses’ responsibility for human rights emanates from the UDHR has been widely endorsed. To cite some examples: The ILO Declaration mentioned above clearly states that “[a]ll the parties concerned by this Declaration [which includes business]...should respect the Universal Declaration of Human Rights and the corresponding International Covenants [among other instruments].” The OHCHR states that “[B]usiness, like all actors in society, has to operate in a responsible manner, including through respecting human rights. This can be drawn from the Universal Declaration of Human Rights,” see E/CN.4/2005/91. The commentary to the OECD Guidelines references the UDHR as being “of particular relevance” at <http://www.oalis.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime-wpg%282000%2915-final>. The Global Compact says its human rights principles for business are “derived from” the UDHR at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>

if conducted on the basis of confidentiality by companies themselves or their own hired consultants, and if merely feeding into pre-determined outcomes—is also an ongoing debate.

1. Guiding principles on the corporate responsibility to respect

Asked to provide concrete guidance to companies, the SRSG has proposed to develop a set of guiding principles, or guidelines, on the corporate responsibility to respect and related accountability measures, which will likely incorporate his recommendations on the scope and nature of the corporate “due diligence” standard.<sup>40</sup>

The specific content of these guidelines has not yet been developed. A set of guidelines on business responsibilities could be useful for many civil society groups, so long as they complement, and not seek to replace, a set of global standards based upon international law. Guidelines on the company responsibility to respect alone, many fear, would offer little or no accountability for the worst offenders, or remedy for affected groups. While identifying “good practices” in this area could be helpful, the SRSG could also assist in clarifying what action should be taken if companies fail to exercise their due diligence requirements in the worst of cases.

*III. Access to Remedy*

In his 2008 report, the SRSG states that the “patchwork of mechanisms” which exists today to ensure that people and communities affected by business-related abuses access remedies to address the wrongs done is “incomplete and flawed.”<sup>41</sup> In his 2009 report, he reiterates the State duty to “investigate, punish and redress” such abuses “within their territory and/or jurisdiction,” and focuses on the interplay between judicial and non-judicial mechanisms of remedy.<sup>42</sup> The SRSG’s team has also begun consulting on the development of a more detailed workplan on access to remedy.

After years advocating for stronger mechanisms for victims to seek justice, civil society groups have expressed appreciation for the attention the SRSG pays to this dimension, and for addressing the legal obligation of States in this complex area.

1. The scope of the right to an effective remedy

Yet, in his work to date he has distinguished the State obligation to provide access to remedy on the one hand, from the right of affected people to remedy on the other. Furthermore, the SRSG argues that it is “unclear how far the individual right to remedy extends to non-State abuses.”<sup>43</sup> Basing his

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<sup>40</sup> See *Preliminary Work Plan: Mandate of the Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* 1 September 2008 - 30 June 2011.

<sup>41</sup> See *Protect, Respect and Remedy: A Framework for Business and Human Rights*, para. 87.

<sup>42</sup> See *Business and human rights: Towards operationalizing the “protect, respect and remedy” framework*, para. 87.

<sup>43</sup> See *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/11/13/Add.1, 15 May 2009 at <http://www.business-humanrights.org/Documents/RuggieHRC2009>

assessment on the 2005 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the SRSG implies that substantial limitations exist in the scope of the right to remedy such that they only apply to gross abuses, such as war crimes, crimes against humanity and slavery.

Yet, based on a number of different sources, general international law requires States to provide an effective remedy for any person who alleges a violation of human rights (gross violation or otherwise).<sup>44</sup> The obligation to provide access to a remedy is not distinct from the individual right to a remedy in the treaties, but it is part and parcel of the obligations arising under them. The Basic Principles referred to did not in any way intend to limit the right to remedy to certain violations, but to give this right more substance in relation to a certain set of rights.

In any event, the State obligation and the victims' right are two sides of the same coin, and the distinction the SRSG makes between the two does not provide a suitable explanation *per se* of the serious limitation suggested. Rights will not be protected if there is no effective remedy available when they are violated. The majority of the international human rights treaties the SRSG cites provide for an individual right to an effective remedy, irrespective of who commits the abuse. It is the obligation of the State to provide for such a right. Furthermore, the UN Basic Principles referred to, as soft law, cannot place a limitation—and certainly not such an important one—where the major international human rights treaties do not.

## 2. Obstacles to accessing judicial remedy

The SRSG has begun exploring ways to overcome the legal and practical obstacles to accessing judicial remedy at the national level, flagging a number of these barriers in his 2009 report. By insisting on the importance of strengthening national judicial remedies, he concurs with the Corporate Accountability Working Group's Collective Report on Business and Human Rights,<sup>45</sup> which argues that States must

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<sup>44</sup> See, for example, Human Rights Committee General Comment 31, para. 8: "[t]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3." The Committee also noted that "Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, ... is not discharged." (para. 16). The Committee draws no distinction on whether the rights have been violated by a private or a State actor.

<sup>45</sup> In its *Collective Report on Business and Human Rights*, the Working Group found a number of obstacles to the right of victims to access justice at the national level, leaving domestic systems of justice susceptible to pressure by those very companies whose actions they are meant to judge. For instance, States fail to respect this right due to lack of institutional capacity, lack of political will, corruption, lack of an independent judiciary, and company complicity in human rights violations. Companies, for their part, were found to directly or indirectly obstruct the ability of victims to seek effective remedies for harms suffered through their: influence over domestic judicial proceedings; intimidation and prosecution of claimants; refusal to respect and

put in place more robust mechanisms to give effect to their courts' judicial orders and judgments, for example to ensure that corporations compensate victims.

Approaches at the domestic level are crucial indeed to fortifying access to justice and judicial protections. Yet, given the clear lack of political will and capacity on the part of many States, as well as financial and political constraints, they are alone insufficient, many groups would argue.

The SRSG has not yet made final recommendations on the need for, or the nature of, a transnational or global mechanism to give effect to the right to an effective remedy when claims are frustrated in domestic courts or other grievance mechanisms. So far, the SRSG has taken note of four proposals in his 2009 report: a clearing-house to guide victims to an appropriate existing mechanism; a capacity-building body to assist parties in the use of existing mechanisms; an "expert" body to analyze outcomes; and a global grievance mechanism for when other national or international grievance mechanisms fail. Regarding the latter, the SRSG sees an adjudicative body as infeasible, and seems more convinced at this time of the usefulness of a mediation and technical assistance body.

There remains a strong need, however, to provide clear, rule-based recommendations on how to give teeth to redress and accountability mechanisms at the international level to guarantee that individuals and communities have a genuine opportunity to defend their rights when turned away from justice at home. Besides bringing those responsible to account, a protection mechanism at the global level based on the rule of law and accountability for wrongs done, of course, would also serve to deter potential wrongdoers, reassert social values and ultimately reaffirm the rights violated.

### 3. Accessing non-judicial grievance mechanisms

To date, the SRSG has placed emphasis on improving non-judicial grievance mechanisms for seeking justice, which he has suggested can be accomplished either by strengthening what exists (for example, revising the mechanism set up by the OECD Guidelines on Multinational Companies), or by creating new institutions. Alternative dispute resolutions or other grievance mechanisms at the company level are stressed in particular. The SRSG has pointed to six key elements of effective grievance mechanisms at the company, national and international levels: they must be legitimate, accessible, equitable, human rights-compatible, transparent, and predictable in terms of their processes. To date, the SRSG has focused concretely on enhancing information about existing non-judicial mechanisms by building a website, [Business and Society Exploring Solutions](#)<sup>46</sup> (BASES). Supported by the International Bar Association and the International Financial Corporation of the World Bank, it aims to share information

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abide by domestic judgments; refusal to provide compensation and by undermining the right to effective remedy through negotiation of special host government agreements. Other national level obstacles pointed out include: inequality of power between corporations and victims; prohibitive legal costs; lack of standing; long delay of proceedings; the high burden of proof and causality placed on victims; "corporate veil" which shields parent companies for liability for activities of their subsidiaries. See also The International Council on Human Rights, *Beyond Voluntarism: human rights and the developing international legal obligations of companies*, February 2002, pp. 77-82 at [http://www.reliefweb.int/rw/lib.nsf/db900sid/ASIN-7DBQ7F/\\$file/ICHRP\\_Beyond%20Voluntarism.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/ASIN-7DBQ7F/$file/ICHRP_Beyond%20Voluntarism.pdf?openelement).

<sup>46</sup> See the Business and Society Exploring Solutions website at <http://baseswiki.org/En>

amongst stakeholders about such mechanisms.

Civil society groups have previously pointed to the overwhelming power imbalances between companies and affected communities as one serious complicating factor in these non-judicial grievance mechanisms, especially at the company level. In theory, formulas might be imagined to ensure impartiality and equality between those affected and those business or governmental actors responsible. Yet, on the ground, these sort of non-judicial grievance mechanisms have been prone to interference and manipulation by the most powerful.

### *Gender perspective and attention to vulnerable groups*

The SRSG's 2008 mandate explicitly requests the incorporation of a gender perspective, as well as particular attention to vulnerable groups. This area merits close attention as discussions progress within the mandate.

### *Participation of affected communities and other local-level organizations*

The SRSG over the past years has organized a large number of consultations, seeking advice and feed-in from various stakeholders. The great majority of these consultations have been “expert consultations” with academics, NGOs and business leaders based largely in the North. Five regional consultations have been held in the four years of the mandate in which those challenging business-related abuses at the community and national level were able—within the limits of the format and agenda of the meetings—to present their issues and insights. The SRSG has participated in a side-event led by leaders of affected communities at the UN, for example, and has begun reaching out to the UN Permanent Forum on Indigenous Issues. However, the SRSG's direct contact with affected communities, workers and individuals has been limited. This concern has endured throughout the life of his mandate, again articulated in recent civil society declarations arising from recent consultations, first in [India](#) and, more forcefully, in [Argentina](#), in which participants proposed that the mandate in its final years establish a formal and systematic consultation mechanism with affected persons and communities.<sup>47</sup> The SRSG responded negatively to this proposal.<sup>48</sup>

In this context, ESCR-Net's Corporate Accountability Working Group and others from civil society continue to fight hard to ensure participation of grassroots and directly affected communities and organizations working at the local level so that greater visibility is given to those whose rights are negatively affected by business, so as to guarantee a thorough analysis of the problem, identify meaningful solutions looking forward, and strengthen efforts on the ground to hold companies

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<sup>47</sup> See both (i) in India, *Submission to the UN Special Representative of the Secretary-General from the Civil Society Groups across Asia*, New Delhi, India, 5-6 Feb 2009 at <http://www.reports-and-materials.org/Asian-NGOs-submission-to-Ruggie-2009.pdf> and (ii) in Argentina, *Statement of Non Governmental Organizations and Organizations Representing Affected Communities by Enterprises*, Buenos Aires, Argentina, May 14 and 15 2009 at <http://www.business-humanrights.org/Documents/NGO-statement-after-John-Ruggie-Buenos-Aires-consultation-May-2009.doc>

<sup>48</sup> See the SRSG's response to the 2009 Latin American statement at <http://www.reports-and-materials.org/Ruggie-response-to-Buenos-Aires-NGO-statement-11-Jun-2009.pdf>

accountable for their human rights harms.

### *Towards International Standards on Business and Human Rights*

ESCR-Net's Corporate Accountability Working Group is dedicated to continuing its efforts to spread awareness about the scope and nature of business-related abuse of human rights, to support local human rights defenders challenging these abuses, and to build documentation, research, monitoring and advocacy capacity amongst civil society through mutual-learning and the production of relevant information and resources.

The Working Group and various human rights organizations also continue to keep open the possibility to move toward an inter-governmental process for the adoption of global standards on business and human rights.<sup>49</sup> If necessary and conditions are appropriate, this could begin through an inter-governmental process to negotiate and adopt an international declaration on business and human rights, or other similar instrument, which would help lay the conceptual and political groundwork for the future development of binding international law. In so doing, such a common, global standard—ultimately enforceable—would serve as an anchor for the establishment of meaningful mechanisms for redress and accountability so needed by the communities and grassroots groups on the ground who continue to confront business involvement in human rights abuses.

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<sup>49</sup> For more information, see the Corporate Accountability Working Group's *Collective Report on Business and Human Rights* and its *Campaign for International Corporate Accountability* at [http://www.escr-net.org/actions/actions\\_show.htm?doc\\_id=430908](http://www.escr-net.org/actions/actions_show.htm?doc_id=430908)





ESCR-Net is a global collaborative initiative serving organizations and activists from around the world working to secure economic and social justice through human rights. Its Corporate Accountability Working Group advocates for national and international corporate accountability for human rights abuses, involving support for international human rights standards for business. Throughout, the Working Group seeks to strengthen the voice of communities and grassroots groups who are challenging company abuses of human rights by documenting and highlighting particular cases, and by facilitating broad-based participation in United Nations and other international consultations. The Working Group also seeks to build the capacity of its participants by creating space for the exchange of information and strategies, connecting groups to one another, and providing resources for advocacy.



International Network for Economic, Social and Cultural Rights  
Corporate Accountability Working Group  
[www.escr-net.org](http://www.escr-net.org)