



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

**Submission to the consultation on operationalizing the framework
for business and human rights organized by the Office of the High
Commissioner for Human Rights**

5-6 October 2009

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.

www.escr-net.org

The Corporate Accountability Working Group of the International Network for Economic, Social and Cultural Rights (ESCR-Net) welcomes the opportunity provided by the multi-stakeholder consultation organized by the Office of the High Commissioner for Human Rights (OHCHR) from 5-6 October 2009 to engage in discussions on the operationalization of the ‘Protect, Respect, Remedy’ framework of the mandate of the Special Representative of the UN Secretary-General (SRSG). We would like to draw attention to several issues of relevance to our members in this context.

I. Ensuring the participation of affected groups in the operationalization of the ‘Protect, Respect, Remedy’ framework

We appreciate the efforts and flexibility of the OHCHR in allowing for an open, engaged environment for debate. However, we are concerned that the delegation of affected communities who were able to participate—while strong in and of itself—was not sufficient to represent all regions, industry sectors, rights affected or obstacles found in seeking redress. We regret that the OHCHR was not able to secure sufficient funding for the participation of a wide range of affected community representatives and that, as a consequence, only few of them were able to travel to Geneva and participate in the consultation. Given the enormous capacity and resource constraints of local groups, proactive measures should be taken in the future to make available the needed educational and financial resources to cultivate and facilitate their engagement in the business and human rights debate.

Recognizing that only an open and constructive dialogue among all interested parties can lead to appropriate and lasting solutions to the problem at hand, we urge the SRSG to ensure that the views of those directly affected by business abuse and local NGOs from the South will be taken into account in the operationalization of the ‘Protect, Respect, Remedy’ framework and in the elaboration of concrete recommendations regarding its design, implementation and monitoring.

Participation in the decisions which affect a person’s life is a bedrock human rights principle, and ensuring it has constituted one our Working Group’s main missions and activities in the business and human rights debate over the last 5 years. In various public statements, we have urged decision-makers to ensure participation of grassroots and directly affected communities and organizations working at the local level so as to engage them in the process, guarantee a thorough analysis of the problem and identify meaningful solutions looking forward. Ensuring participation can also play an important role in giving greater visibility and strengthening efforts on the ground to hold companies accountable for their human rights harms. If the ‘Protect, Respect and Remedy’ framework is to work for those affected, decisions about how to give it substance must be made in an inclusive, democratic manner in response to the real obstacles and needs of those in most jeopardy.

We have been encouraged by the fact that the SRSG has organized five different regional consultations, and a broad array of “expert” meetings, in accordance with his mandated task “to continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders, including...workers’ organizations, indigenous and other affected communities...” Yet, to date, the SRSG’s direct contact with affected communities, workers and individuals—precisely those people in need of urgent protection—has been limited. This concern has endured throughout the life of his mandate, again articulated in recent civil society declarations arising from recent consultations, including during the OHCHR-organized consultation of 5-6 October.

For this reason, we propose, in accordance with the current SRSG mandate, that a regularly scheduled and systematically documented series of consultations with local communities affected by different human rights abuses and different types of industries in different locations is established in the last years of the mandate. This petition has already been made to the SRSG by a number of Latin American civil society organizations after the Buenos Aires consultation. The mandate clearly does not call for a complaint mechanism, and we are not proposing one. Instead, we are offering to work with the mandate and the OHCHR to create a formal and systematic participation process with affected communities which could greatly improve the uptake of

the mandate by local groups by enhancing the mandate's resonance to issues on the ground. Such consultations with affected groups would provide precisely the evidence-based content the SRSG's team set to base its work on from inception, and would be an excellent way to ground and test the mandate's coming recommendations in relation to the views and perspectives of those directly affected.

Finally, looking ahead, we urge the Human Rights Council to continue to guarantee participation of all stakeholders, especially those directly affected and their representatives, in the design, implementation and monitoring of whatever measures are taken to follow the SRSG's mandate.

II. State Duty to Protect

Under international human rights law, as the SRSG helpfully attests to, 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. Thus, in terms of overall prioritization, we would argue for an enhanced 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.

- **Strengthening the State duty to protect through international cooperation**

The extraterritorial dimensions of the State duty to protect are an essential component to preventing and protecting against business-related abuse. In his 2009 report, the SRSG stated that under his reading of international human rights law and jurisprudence “States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis, and that an overall test of reasonableness is met.”ⁱ

We believe that within the current state of international human rights law, the principle of international cooperation implies an extraterritorial obligation of States to protect against abuse by third parties within their jurisdiction, including private actors. Such an obligation finds a strong legal basis in the United Nations Charter,ⁱⁱ the ICESCR and has been acknowledged by various treaty monitoring bodies.ⁱⁱⁱ

Furthermore, extraterritorial obligations to protect make good policy sense. If discharged in a cooperative fashion, such obligations can serve to enhance the capacity of States to carry out their fundamental function to prevent or constrain adverse intervention by business actors. At the same time, access to justice can be strengthened through facilitating effective remedial mechanisms and adequate compensation in the home State where claims or other grievance mechanisms fail in the host State. In this way, the realization of the right to remedy, a fundamental human right under international law, can also be enhanced.

There are several reasonable and established jurisdictional bases under international law which justify the extension of government regulation or adjudication over acts occurring outside the State's territory, including the principles of active personality, passive personality and universality. In addition, the extension of extraterritorial jurisdiction is already quite developed in practice, in such areas as crimes under international law, financing of terrorism, corruption and bribery, human trafficking, sexual tourism, and other human rights concerns.

Therefore, we would argue that States under international human rights law are obligated to protect against acts by third parties under their jurisdiction who foreseeably impact the commission of conducts occurring inside or outside their territory which affects the enjoyment of human rights. The way in which this obligation is implemented (through judicial, legislative or administrative measures), and how the State respects

jurisdictional bounds may depend on the particular case and national legal system in question. However, the obligation to protect remains. The relevant question then is not if there is an obligation to protect extraterritorially, but instead how best to determine and when necessary divide the precise State obligations in the exertion of jurisdiction over abusive companies.

The logical counterweight to the robust protections granted to private investors under international private law is the requirement of home States to protect against and prevent wherever possible human rights abuses by companies registered in their jurisdiction or under their legal control. We therefore urge the SRSG to uphold the extraterritorial dimension of the State duty to protect as fundamental to the meaning and exercise of international cooperation under international human rights law. Such an interpretation can serve to meaningfully safeguard State autonomy from undue intrusion by business actors and provide a helpful and essential step to ensure legal and policy coherence between States in their efforts to cooperate in the prevention and protection of human rights abuses involving transnational and other private actors.

- **Export credit and investment guarantee agencies**

Many export credit and investment guarantee agencies (ECAs) have been associated with significant human rights violations, including arbitrary arrest, use of paramilitary or 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.^{iv} The SRSG has helpfully stated 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.”^v In this context, we would like to see the SRSG suggest a robust 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, re-asserting the principles of transparency, participation, accountability, and the human right to remedy for abuses facilitated by ECA support.

- **State obligations within 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 in financing or insuring problematic investment projects has not. Considering the enormous financial and political leverage that these institutions (such as the IFC, MIGA and other regional development banks) have on business projects, individual companies and social safeguard standards worldwide, we urge the SRSG to include these institutions within the ‘Respect, Protect, Remedy’ framework. At a minimum, States cannot be allowed to shield themselves from their duty to prevent and protect against human rights abuses of private actors when acting within these inter-governmental institutions, as their international human rights obligations remain applicable.

III. Responsibility to Respect

We would like to further clarify our views on three issues of specific concern regarding the responsibility of business to respect within the current development of the framework.

- **Legal underpinnings of the responsibility to respect**

The SRSG has said that he bases the responsibility of business to respect on evolving social expectations. Yet, several UN bodies, including the ILO and the OHCHR, have earlier stated that this responsibility is derived from the Universal Declaration on Human Rights and existing international law. 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, we would argue, and thus could potentially lead to a weakening of the recognition and applicability of business responsibilities.

- **Due diligence standards and human rights impact assessments**

It is our view 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 to act according to their own bottom-line when carrying out due diligence. We are also unsure about the objective value and impartiality of human rights impact assessments, especially if conducted on the basis of confidentiality by companies themselves or their own hired consultants, and if merely feeding into pre-determined outcomes.

- **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. As proposed by the SRSG, a set of guiding principles on business responsibilities to respect human rights could be useful, so long as they complement, and do not seek to replace, already existing legal safeguards and protection mechanisms, nor trump the future development of universal normative standards on business and human rights. Guidelines on the company responsibility to respect alone, we fear, may 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 must be taken if companies fail to exercise their due diligence requirements in the worst of cases.

IV. Access to Remedy

- **The Scope of the Right to Remedy**

After years advocating for improved and effective avenues for access to justice of those affected by business-related human rights abuses, we express appreciation for the attention the SRSG has paid to this dimension by including access to remedy in the ‘Protect, Respect, Remedy’ framework. We believe that the centrality of the fundamental human right to a remedy, including the right to judicial remedy—as provided in all major human rights treaties—is vital to addressing the existing gaps in effective redress and reparation for those suffering abuse. Other types of mechanisms could be complementary but as long as solid, independent and effective remedies, including judicial remedies at the national level, are not ensured, little will be achieved by other avenues.

In his 2009 addendum report, the SRSG argues that it is “unclear how far the individual right to remedy extends to non-State abuses.” While we welcome the SRSG’s attention to the right to remedy, we feel compelled to respectfully state our view that this preliminarily interpretation of the scope of the right to effective remedy is unjustifiably limited. International law guarantees the right to an effective remedy for any person who alleges a violation of human rights—gross violation or otherwise—committed either by a State and by a third party and thus, the State has the obligation to take all necessary measures to ensure the realization of this right. Some treaties, for instance the American Convention on Human Rights, explicitly states the right to a judicial remedy when human rights recognized in the laws of the State or in the Convention are affected (cf. Articles 8 and 25).

As a consequence, the right to a remedy is not and could not be narrower in scope than the State obligation to provide for this right, as the SRSG suggests. In fact, the right to a remedy and the State obligation to provide access to remedy are two sides of the same coin, viewed from different standpoints. There is nothing in the text of the human rights treaties or in the jurisprudence of the relevant bodies that can justify a restricted hermeneutics of the right to a remedy. Moreover, the work of the SRSG contains no reference to any specific norm included in the human rights instruments or case law that can validate this interpretation.

Treaty bodies have generally affirmed the right to a remedy for all types of human rights' violations irrespective of who has committed the act.^{vi}

The only justification that the SRSG offers for this suggested limitation are the 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. It is our view that the Basic Principles support a different interpretation than the one advanced by the SRSG. Namely, the right to a remedy—and even the right to access to justice—is applicable in this document to all human rights or humanitarian law violations, irrespective of who is the responsible for the abuse, and not just to gross and serious violations. Sections II.3.c and d of the Principles, respectively, specifically stipulate that States should “provide those who claim to be victims of a human rights and humanitarian law violation with equal and effective **access to justice...irrespective of who may ultimately be the bearer of responsibility for the violation**” and “**provide effective remedies to victims, including reparation.**” Thus, the Basic Principles, as clarification and restatement of existing State obligations, assert that States have the duty to provide effective remedies and even more, to provide judicial remedies to those who claim to be victims of a human rights and humanitarian law violation, regardless of who the perpetrator may be. In any case, these Basic Principles as soft law cannot place a limitation on the right to a remedy as suggested by the SRSG, where all major international human rights treaties do not.

Therefore, we look forward to the SRSG's reconsideration of his preliminary interpretation, which considerably restricts the right to remedy and specifically, the right to a judicial remedy. We expect that the SRSG will uphold the fact that international law guarantees the right to an effective remedy, including judicial remedies, for any person or group who alleges a violation of human rights of any type committed by either a State or a third party. In accordance with this right to remedy, the State has the obligation to take all necessary procedural and substantive measures—individually and in cooperation with other States—to ensure that all those negatively affected by business-related abuses enjoy meaningful mechanisms to access and receive justice.

- **Need for a Global Protection Mechanism**

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.

- **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 overwhelming power imbalances between companies and affected communities, we would argue, is a 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, and are likely to remain, prone to interference and manipulation without solid, independent and effective remedies, especially judicial remedies to deter and when necessary punish abusive behavior.

V. Towards international standards on business and human rights

Finally, the Working Group and various human rights organizations continue to keep open the possibility to move toward an intergovernmental process for the adoption of global standards on business and human rights. If necessary and conditions are appropriate, this could begin through an intergovernmental 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 common, global standards—ultimately enforceable—would provide a clear, rule-based framework for international cooperation and a normative anchor for the establishment of meaningful mechanisms to uphold the responsibility of the international community to give meaning and effect to the human right to remedy so needed by the communities and grassroots groups on the ground who continue to challenge business involvement in human rights abuses.

ⁱ See *Business and human rights: Towards operationalizing the “protect, respect and remedy” framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/11/13, 22 April 2009 (para. 15).

ⁱⁱ Art.56 of the UN Charter imposes on UN member states the obligation to ‘take joint and separate action in co-operation with the Organization’ for the achievement of ‘universal respect for, and observance of, human rights and fundamental freedoms for all’.

ⁱⁱⁱ Treaty bodies 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.”

^{iv} 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

^v See *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008, (para. 40)

^{vi} See, for example, Human Rights Committee General Comment 31, para. 8.