

# **SOME PRELIMINARY THOUGHTS ON THE FOLLOW-UP TO THE MANDATE OF THE SRSG FOR BUSINESS AND HUMAN RIGHTS:**

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## **BACKGROUND**

The current Human Rights Council resolution on the issue of business and human rights (HRC resolution 8/7), which contains the mandate of the SRSG on business and human rights, runs until the June session of the Council in 2011.

By the end of his mandate, the SRSG will submit to the Human Rights Council a set of Guiding Principles for the Implementation of the “Protect, Respect, Remedy” Framework. Assuming that the Guiding Principles are well received by the Council, a new substantive phase of work on business and human rights focused on dissemination and implementation will commence.

During the SRSG’s interactive dialogue with the Human Rights Council in 2010, delegations requested him to submit his recommendations for follow-up to his current mandate in 2011 in an options paper. This note outlines some preliminary ideas for what such follow-up could include.

## **STRATEGIC CONSIDERATIONS**

The greatest achievements of the six years of the SRSG’s mandate will be twofold:

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

Preserving both achievements should be the overriding objective for designing follow-up options. The Guiding Principles will be new, at some risk of misinterpretation, in need of mainstreaming into organizations and disseminating globally. The broad consensus will need to be actively preserved in order to prevent a reversion to old divisions, closing off the space for progress and setting the debate back for years.

It is unworkable to expect one individual to take forward this objective and be a global focal point for business and human rights. The SRSG has dedicated vastly more of his time – unpaid – to this mandate than is the norm for special procedures. He has constituted a team of researchers and advisers and coordinated pro bono work from over

20 law firms. He will have held 47 consultations on all continents by the end of his mandate. To make all this possible, he has had to continually raise funds from Governments outside of the normal UN channels.

This is as unsustainable as it is unprecedented. It cannot be the model for the future if the gains to date are to be preserved and built upon. The issue of business and human rights will remain complex and challenging, even with the clarification and operational guidance provided by the Guiding Principles. And as the SRSG has repeatedly highlighted, there is no single silver bullet to address the diverse challenges relating to business and human rights.

In this next phase of broadening and deepening the current consensus, the SRSG has identified 4 key functions that need to be addressed:

1. Embedding and disseminating the Guiding Principles;
2. Sustaining multi-stakeholder dialogue and support;
3. Building the capacity of all relevant actors;
4. Fostering improved conflict management and dispute resolution;

These functions cannot be carried out by one individual in a manner that guarantees the attention and resources they merit. Follow-up to the current mandate therefore needs to reflect this reality.

### **PROPOSED FOLLOW-UP BODY**

In line both with precedents within the UN Human Rights Council and with the particular needs of this mandate for a multi-stakeholder but UN-anchored construct, a High Level Task Force could be constituted by the Human Rights Council with a membership of 15 individuals reflecting both geographical diversity from the five UN regional groups and sectoral diversity from government, business and civil society in each region.

The High Level Task Force (HLTF) would have the overarching role of providing the necessary expertise to make recommendations to the Human Rights Council and other relevant actors on what steps are needed to build on the 'Protect, Respect and Remedy' Framework and Guiding Principles.

Members of the HLTF would be selected based on:

- (a) relevant sectoral background
- (b) expertise on the issue of business and human rights
- (c) interest and readiness to pursue consensus on how to advance the business and human rights agenda through improved practices.

Members would be appointed by the President of the Human Rights Council based on nominations put forward by the Chairs of the Regional Groups, by NGOs with consultative status and by formally constituted national or international business associations.

The HLTF would be chaired by one of its members elected by the group on an annual basis. The HLTF would decide at the start of its work how the election process should work and how many times a Chair may be re-elected. The Chair could act also as Rapporteur.

The HLTF would meet twice a year for one week in Geneva. It would elaborate its own work agenda within the parameters of the four key functions listed above and further described below. It should reach decisions on its recommendations by consensus wherever possible, but at least by a positive vote of two-thirds of members and including at least two representatives of each sectoral group.

The HLTF's meetings and activities would be supported by the Office of the High Commissioner for Human Rights, possibly with external specialized research assistance. Careful consideration should be given to ensure adequate funding for the HLTF.

In order to be able to discuss issues on a well-prepared and in-depth basis at its meetings, the HLTF should be able to outsource specific research and related activities to relevant expert individuals or bodies, with the agreement of the membership. Any such activities should be funded through extra-budgetary support.

The meetings of the HLTF could be closed in part, but in part also open to observation and contribution by Governments, civil society and business (see below on 'sustaining multi-stakeholder dialogue and support'). The HLTF should also be able to invite to its meetings experts, including from relevant UN and other bodies, to present their views on issues under discussion.

The HLTF would produce annual reports on its discussions and recommendations and present them to the Human Rights Council and any other UN or other body that might request them to do so.

## **HLTF FOCAL AREAS**

This section describes the key functions that would set the mandate of the High Level Task Force, and within which it would define its program of work.

### ***1. EMBEDDING AND DISSEMINATING THE GUIDING PRINCIPLES***

The 'Protect, Respect and Remedy' Framework has already seen considerable uptake by business, government, international organizations and civil society. In this process, the SRSG has liaised extensively with those actors to help them understand the Framework's implications and avoid misinterpretations. Many businesses and organizations are already preparing for the Guiding Principles and how they will align with them, and additional guidance will be required going forward. The Principles will also need to be disseminated more widely, not least to national, small and medium-sized enterprises that have not had the capacity to follow the SRSG's work and HRC resolutions.

In this regard, the HLTF would prepare views on how the Framework and Guiding Principles apply in particular situations, whether in response to enquiries or on its own initiative. This could include certain operating environments such as conflict-affected areas; certain types of size of business; or other circumstances.

## ***2. SUSTAINING MULTI-STAKEHOLDER DIALOGUE AND SUPPORT***

As noted above, much of the success of the work of the SRSG has depended on consultation with all stakeholder groups across all regions of the world. Maintaining and building on the resulting broad support for the Framework and Guiding Principles is essential in order to advance the practice of business respect for human rights.

Therefore, once a year a meeting of the High Level Task Force should be open to attendance, perhaps for two days, to States, business representatives and NGOs with consultative status, as well as to international organizations. This would provide an opportunity for the HLTF to maintain multi-stakeholder dialogue and understanding for its work; to solicit views and inputs on its work in advance of reaching recommendations; and to disseminate and explain the product of its work.

The open part of the HLTF's meeting could run consecutively with a meeting of the Human Rights Council to avoid additional costs for attendance.

## ***3. BUILDING THE CAPACITY OF ALL RELEVANT ACTORS***

Lack of capacity among governments, companies (particularly small and medium-sized enterprises), national human rights institutions and other actors in the area of business and human rights will be a key challenge in ensuring uptake of the "Protect, Respect, Remedy" Framework and the implementation of the Guiding Principles following their presentation in June 2011.

The HLTF would be well-placed to review models for extending capacity-building assistance to the local and national level – both governments and business (in particular small and medium-sized enterprises) with regard to implementation of the Guiding Principles, and to present recommendations to the Human Rights Council as to how this might be achieved in a sustainable manner.

## ***4. FOSTERING IMPROVED CONFLICT MANAGEMENT AND DISPUTE RESOLUTION***

The SRSG has noted in his reports to the Council that the patchwork of judicial and non-judicial mechanisms available to handle claims of business-related human rights harms is incomplete and flawed. Yet he has also underlined that the scale and complexity of most complaints about these issues that rise to the international level are such that no single individual can identify all the issues in play and provide for fair processes and sustainable solutions. Through extensive research based on broad consultations, he has explored the most promising ideas for how local capacity for company-community dispute resolution

can be enhanced and supported from the international level. The resulting report will be issued in early 2011.

The HLTF could take up the product of this research, reach a view on how it can best be taken forward in practice, and make recommendations to the Human Rights Council and any other appropriate body, accordingly.

### **CLOSING A KEY PROTECTION GAP**

The SRSG has identified that perhaps the most challenging protection gap in the business and human rights domain occurs in those situations involving gross human rights abuses, potentially amounting to the level of international crimes. These typically arise in areas where the human rights regime cannot be expected to function as intended, such as conflict or other situations of heightened risk.

There is a general lack of clarity about the appropriate steps States should take to prevent business enterprises from causing or contributing to the commission of such gross human rights abuses in their overseas operations. Divergence in national practice can only lead to increasing uncertainty for victims and business alike.

The SRSG's consultations with all stakeholder groups have indicated a broad recognition both that this is an area where greater legal protection would be warranted, and that such protection could best be advanced through a multilateral approach. Any such effort could help clarify standards relating to appropriate investigation, punishment and redress where business enterprises cause or contribute to such abuses, as well as what constitutes effective, proportionate and dissuasive sanctions. It could also address when the extension of jurisdiction abroad may be appropriate, and the acceptable bases for the exercise of such jurisdiction. It could also foster international cooperation, including in resolving jurisdictional disputes and providing for technical assistance and other capacity-building support.

One option might be for Member States to consider establishing an inter-governmental process to explore the possibility of drafting a new international legal instrument to address these and other challenges posed by this protection gap. The UN Convention against Corruption could provide an appropriate precedent and model for such an effort.

### **CONCLUSION**

The above sets out a proposal to create a new cross-regional and multi-stakeholder High Level Task Force to take forward the business and human rights mandate, building on the spirit and substance of the last six years of work. It identifies four functions that are needed to protect the substantial achievements realized under the mandate of the SRSG and to advance practical progress on the ground, and which such a Task Force would be well-placed to address. They are mutually supportive and complementary and there should be considerable synergy amongst them. The proposal includes provision for two days per year of discussion between the HLTF and States, business and civil society more

widely, to maintain dialogue and provide the broadest input to the Task Force's work. In addition, the SRSG proposes consideration of a targeted process to consider a new international legal instrument specifically for situations where businesses are allegedly involved in gross human rights abuses potentially amounting to the level of international crimes.

The SRSG looks forward to discussing these thoughts with States and other stakeholders.