

Submission to the United Nations Human Rights Council

Universal Periodic Review Session 9: United States of America

April 2010

Context

In resolution 8/7¹ of 18 June 2008 extending the mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG), the UN Human Rights Council welcomed the SRSG's proposed policy framework for business and human rights based on three overarching principles of the State duty to protect all human rights from abuses by, or involving, transnational corporations and other business enterprises, the corporate responsibility to respect all human rights, and the need for access to effective remedies, including through appropriate judicial or non-judicial mechanisms. In recognising the need to operationalise the framework, the Council resolution calls among other items, for the SRSG to develop concrete and practical recommendations on ways to "strengthen the fulfilment of the duty of the State to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation".

As a means of encouraging constructive dialogue on private sector related issues in the Human Rights Council Universal Periodic Review process, this submission by the Institute for Human Rights and Business (IHRB) addresses select aspects of the United States (US) government's record of protecting against human rights abuses committed by or involving business. The submission offers recommendations for consideration by the US government and members of the Human Rights Council. IHRB welcomes feedback on this submission.

Part I: US human rights and business regulatory framework –

Ratification of UN Human Rights treaties

The US government has ratified the following four UN human rights treaties: the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights ("ICCPR"), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.² Under these treaties, the United States is responsible for protecting persons within its territory and/or jurisdiction from human rights abuse, including human rights abuse committed by or involving business.³

The US has signed, but not ratified, the Convention on the Rights of Persons with Disabilities; the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"); the Convention on the Rights of the Child; and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). The executive branch of the US federal government has made various public statements to the effect that it is committed to working with the legislative branch to consider the possible ratification of UN human rights treaties⁴, including but not limited to CEDAW and ILO Convention 111 Concerning Discrimination in Respect of Employment and Occupation. Despite such statements, to date these treaties have not been ratified.

Alien Tort Claims Act (ATCA)

The US *Alien Tort Claims Act 1789* (“ATCA”) has been used to sue corporations in Federal Courts for actions committed which classify as violations of the “law of nations”. ATCA represents for victims of grave human rights abuses an available forum, although bringing ATCA cases is not convenient, nor easy, and beyond the resources of most litigants. To date, the vast majority of proceedings brought pursuant to ATCA relate to allegations of complicity by companies in rights violations, a concept where some confusion remains between US courts as to the correct standard used. Some of these cases have been settled between the parties prior to final determination. Several relate to activities of US companies operating abroad. However, allegations of corporate complicity under ATCA cases have related to actions involving rights abuses involving foreign governments. This raises questions concerning the extent to which the US government is responsible for the actions of US based companies operating outside of the US, a subject discussed in the next section.

Extraterritorial obligations

As the UN Human Rights Committee observed with respect to the periodic report submitted by the US on 18 December 2006 regarding the US approach to extraterritorial jurisdiction⁵: the US had not integrated into its report information on the implementation of the ICCPR with respect to individuals under its jurisdiction and outside its territory; by relying on grounds of non-applicability of the ICCPR, the US refused to address certain allegations of violations of the rights protected under the ICCPR; there were shortcomings concerning the independence, impartiality and effectiveness of investigations into allegations of torture and cruel, inhuman or degrading treatment or punishment inflicted by United States military personnel and contract employees in detention facilities in Guantanamo Bay, Afghanistan, Iraq, and other overseas locations, along with deaths in custody; and there was insufficient information regarding the prosecutions launched, sentences passed and reparations granted to victims. The Human Rights Committee also implied that the US should facilitate direct actions against private agencies operating in areas inside of US jurisdiction (though outside of the military structure) for reparation for victims of unlawful interrogation techniques. There is no evidence to suggest that the US government has taken such action since the release of that report in 2006.

The Committee on the Elimination of Racial Discrimination in its Concluding Observations on the 2008 US government periodic report under the International Convention on the Elimination of all forms of Racial Discrimination noted with concern “reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside the United States by transnational corporations registered in the State party on the right to land, health, living environment and the way of life of indigenous peoples living in these regions.”⁶ The Committee encouraged the US government to take “appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States” and recommended that the government “explore ways to hold transnational corporations registered in the United States accountable.”

Soft law mechanisms: US encouragement of voluntary efforts

The Voluntary Principles on Security and Human Rights (“VPs”) provide practical guidance to strengthen human rights safeguards in company security arrangements in the extractive sector.⁷ The US Government, with the UK Government, and a few leading companies and non-governmental organisations launched the Principles in 2000, which has now grown to include seven governments, nine NGOs, and 17 companies, including eight headquartered in the United States. With the US Assistant Secretary of State for Bureau of Democracy, Human Rights and Labour taking the chair of the VP Plenary Process and Steering Committee, the US has an important opportunity to provide leadership in completing the initiative’s governance and accountability structure and strengthening

implementation on the ground in closer coordination with other governments. Active US government support for other relevant corporate responsibility initiatives should be encouraged as well including the planned review of the OECD Guidelines for Multinational Enterprises and a planned global code of conduct for private security companies.

Lack of attention to UN supported Protect, Respect, Remedy policy framework for business and human rights

While a number of states are utilising the UN Human Rights Council-supported Protect, Respect, Remedy framework in conducting their own policy initiatives, the US government has not yet provided signals that it is doing so. A key aspect of the state duty to protect is that governments should foster corporate cultures respectful of rights both at home and abroad, through all available avenues. Companies registered in the United States that are embracing the Protect, Respect, Remedy framework are doing so voluntarily, seemingly with limited encouragement from the United States government. To its credit, the US government is participating in initiatives currently being undertaken by the SRSG such as a process to identify possible approaches and tools for home and host states of transnational corporations, as well as states bordering on conflict zones, to reduce the risk of corporate-related human rights abuses occurring in such contexts.⁸

Part II - implementation of the regulatory framework

Labour in the United States

Migrant labour

Migrant workers employed by business in the US are most likely the holders of H-2B guest worker visas.⁹ Migrants who are granted these visas are frequently subject to exploitation by their employers, in large part due to a lack of government enforcement and their ineligibility for federally funded legal services.¹⁰ For example, according to evidence provided to a 2008 US Senate Committee hearing on Health, Education, Labour, and Pensions on Ending Abuses and Improving Working Conditions for Tomato Workers,¹¹ migrant worker pay has not changed in a decade, with workers logging up to 12-hours a day, 7 days a week with no overtime pay. Only a few US registered companies have adopted codes of conduct and agreed to have a third-party monitor whether the workers are, in fact, receiving higher wages in adequate working conditions.

Child Labour in US Agriculture

Child farm labour is endemic in the US yet children involved are largely exempt from the legal protections granted to all other working children in the US, allowing children to work at younger ages, for longer hours, and under more hazardous conditions than children in other employment. This was acknowledged in 2009 by the US government in response to the ILO Committee of Experts 2008 Observations on the Application of Conventions and Recommendations.¹² State child labour laws also vary in strength and enforcement. As a result, child farm workers often work for poor pay for up to 14-hour days. The present practice of child farm labour, including both that which occurs legally and that which results from the failure to enforce existing law, in many cases also constitutes a "worst form of child labour," prohibited by International Labour Organisation (ILO) Convention No. 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention), ratified by the US in 1999. To its credit, the US government does support a range of international initiatives to promote labour rights globally such as the Fair Labour Association and Social Accountability International's SA 8000.

Freedom of speech

The US government has publicly condemned the censorship laws of the People's Republic of China and senior US officials have stated¹³ that the US government stands for a single internet where all of humanity has equal access to knowledge and ideas, that business needs government support to fight repressive censorship and surveillance practices that threaten internet freedom, and has acknowledged the work of the Global Network Initiative as a tool for addressing these concerns. However, there is no US law that safeguards freedom to access information on the internet or any law that holds US registered corporations accountable for breaching domestic freedom of speech laws abroad, which may be particularly helpful in incentivising companies to respect freedom of expression in circumstances where those companies are conducting business in states where there is heavy censorship and surveillance, where material is censored and deleted in order to meet the domestic regulations, and/or where governments define crime broadly to include political dissent. Clearly there are significant challenges facing companies in such situations which require more active government support and agreement.

Private Military Companies

Several private military companies are registered in and operate from the United States, and their use has increased in recent years. These companies operate legally, and the US Department of Defence has relied on them for logistical support, back-end operations, and in some instances, in actual combat. Their role in the conflict in Iraq and Afghanistan has been particularly controversial, because of credible criticism suggesting that employees of private military companies acted without restraints while conducting interrogations, and that they may have used disproportionate force¹⁴ in dealing with insurgency in Iraq. It should also be noted, however, that the industry association of private military companies, International Peace Operations Association, recognises aspects of international humanitarian law (in particular the additional protocols of the Geneva Conventions) that the US Government has not ratified.

Part III: Recommendations

The US government should:

1. Consider the development of a national CSR strategy and/or Business and Human Rights Policy framework which would clearly set out government expectations regarding implementation of the UN endorsed Protect, Respect, Remedy framework as well as other basic expectations of companies operating domestically and internationally. The US President's recent announcement of a comprehensive investigation of mine disasters and review of mining industry safety and enforcement of laws¹⁵ is an opportunity for reflection on the relevance of the Protect, Respect, Remedy framework.
2. To address the weaknesses in the current domestic law, ratify the Convention on the Rights of Persons With Disabilities and align its domestic legislation with its obligations under the Convention as well as ratify the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.
3. Pass legislation that specifically provides an avenue for individuals to seek redress under US law for human rights abuses involving US registered companies at home and abroad. There is scope for the expansion and development of US domestic law to extend criminal responsibility for international human rights violations committed abroad. This could be done by business being held accountable in domestic courts for international crimes, rather than being confined to civil litigation under ATCA.¹⁶

4. Take immediate steps to fully enforce existing labour laws, ensuring that US labour standards that are based on International Conventions ratified by the US are implemented and monitored. This includes amending the Fair Labour Standards Act so as not to exempt farm worker youth from minimum labour standards.

5. Ensure that US produced technology products are not used to violate rights to privacy and freedom of expression of internet users at home and abroad. Legislative measures could be taken to ensure adequate respect for human rights by companies that fail to take voluntary action.

6. Promote the development and dissemination of technology that will circumvent internet censorship and strengthen user privacy in repressive countries, through policies and targeted funding while actively supporting companies seeking to address conflict of law dilemmas in this area including through actively encouraging internet companies to join the Global Network Initiative.

7. Dedicate further resources and leadership in promoting the Voluntary Principles on Security and Human Rights (VPs) in key countries and with the private sector and strengthen compliance with the VPs through effective human rights risk assessment, public reporting and accountability mechanisms.

8. Increase the oversight and regulation of private military companies when they operate abroad, whether for the US Government, or other governments or private actors through tighter license requirements and more effective monitoring and accountability mechanisms as currently being pursued through a Swiss led initiative to develop a code of conduct for private security companies.¹⁷

9. For US registered companies about to commence operations abroad, provide increased advice to business about the country in which they are about to invest, help familiarise companies with international law as well as other expectations on business in relation to respecting human rights, and provide information about local partners with whom business can collaborate to foster a human rights based environment.

END NOTES

¹ http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf

² <http://www.unhcr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=188%20-%20188>

³ See for example UN Human Rights Committee General Comment 31 concerning the Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004). Paragraph 8 refers to States Parties' obligations concerning acts committed by private persons or entities, including appropriate measures to exercise due diligence to prevent, punish, investigate or redress harm caused by private persons or entities.

⁴ US Human Rights Commitments and Pledges Fact Sheet dated 16 April 2009, <http://www.state.gov/documents/organization/122476.pdf>

⁵ <http://www.state.gov/documents/organization/133837.pdf>; see also extracts in <http://www.reports-and-materials.org/Ruggie-ICCPR-Jun-2007.pdf>

⁶ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/419/82/PDF/G0841982.pdf?OpenElement>, paragraph 30.

⁷ <http://www.voluntaryprinciples.org>; <http://www.state.gov/g/drl/lbr/vp/index.htm>

⁸ <http://www.reports-and-materials.org/Ruggie-conflict-project-note-Oct-2009.pdf>

⁹ http://www.fwjjustice.org/Immigration_Labor/H-2B.htm

¹⁰ Testimony made on behalf of the Southern Poverty Law Centre before the US House of Representatives, April 2008: <http://www.splcenter.org/news/item.jsp?aid=309> ; see also the testimony of the National

Employment Law Project to the Domestic Policy Subcommittee, US House of Representatives in April 2009: http://nelp.3cdn.net/be77370eae92a01f22_bom6bnlx6.pdf and the report of the SPLC entitled "Close to Slavery" dated March 2007: <http://www.splcenter.org/pdf/static/SPLCguestworker.pdf> . It is alleged that conditions have not improved since the publication of that report: *Out of the Shadows: a call to end the exploitation of non-agricultural migrant workers by reforming the US H-2B guest worker program* 15 Sw. J. Int'l L. 361 (2008-2009).

¹¹ <http://help.senate.gov/hearings/hearing/?id=0d03081e-0186-dc43-8fdf-0d68cfc2fc80> ; http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=41-881

¹² http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_103484.pdf at page 347.

¹³ Speech of Secretary of State dated 21 January 2010: <http://www.state.gov.secretary/rm/2010/01/135519.htm>

¹⁴ *Private Security Contractors At War: Ending the Impunity* Human Rights First, 2007. Available at: http://www.humanrightsfirst.org/us_law/pmc/index.asp

¹⁵ <http://www.whitehouse.gov/the-press-office/remarks-president-mine-safety>

¹⁶ For more information on this subject see *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law*, International Peace Academy and Fafo, 2004: http://www.ipinst.org/media/pdf/publications/businessand_intcrime.pdf

¹⁷ <http://www.dcaf.ch/privatisation-security/index.cfm>