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Interpreting International Norms in a Human Rights-based Approach (HRBA) to SSR

The report of the Secretary-General, *Securing Peace and Development: the role of the United Nations in supporting security sector reform* (2008) has established that rule of law and respect for human rights are fundamental elements in SSR.¹ The UN recognised the “*need to develop system-wide guidance that is grounded in international human rights norms and standards, and that assists in the pragmatic implementation of this holistic approach.*”² This implies that the success of SSR is interlinked to the ability of the state actors to assume their obligations and duties under international law to **respect, to protect and to fulfil human rights**.

UN OHCHR describes the duty to **respect** human rights as state actors refraining from interfering with or curtailing the enjoyment of human rights.³ This duty is also known as the negative obligation and has been regarded as inherent in both the European Convention on Human and the Inter-American Convention of Rights since their conception.

The duty to **protect** requires States to protect individuals and groups against human rights abuses. In a similar proactive manner, the duty to **fulfil** means that States must take positive action to facilitate the enjoyment of basic human rights.⁴ Both these duties are considered positive obligations and require State security providers to respond effectively, adequately and impartially when preventing against crimes, and responding to acts when committed by State actors **or by third persons**.

However, in contrast to the negative obligation enshrined in the duty to respect human rights, the positive obligations associated with the duty to protect and fulfil human rights had to evolve overtime in the jurisprudence set by the European Court on Human Rights (ECHR) and Inter-American Court of Human Rights (IACHR). These evolving positive obligation norms were driven primarily by judgements on emblematic cases of gender-based violence committed by third persons and/or state officials, and simultaneously reaffirmed by UN system in form of human rights treaty body communications and in UN Security Council resolutions such as Resolution 1325 which urges all parties to conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, in situations of armed conflict.

In orienting security and justice providers towards compliance with international legal norms such as UN Security Council Resolution 1325, SSR can benefit greatly from drawing guidance from the procedural requirements prescribed in the jurisprudence in reference to the positive and negative human rights obligations. In fact, this information can be considered fundamental for establishing benchmark standards for which security and justice providers should aim for, and be monitored and evaluated against, as these procedural requirements detail the due diligence expected to be exercised by security and justice providers in completion of their functions.

¹ Report of the Secretary-General, *Securing peace and development: the role of the United Nations in supporting security sector reform*, 23 January 2008, (A/62/659-S/2008/39)

² Security Sector Reform Integrated Technical Guidance Notes. UN SSR Task Force 2012.

³ OHCHR “What are Human Rights” <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

⁴ Ibid.



The concept of due diligence can be described as a mechanism setting a standard of duty of care, or a standard of care employed to determine whether a state has effectively complied with its obligations in the arena of domestic and international law. It is the state's responsibility to prevent harm to others, and to provide an effective remedy in accordance with its treaty obligations when harm is conducted.⁵ In 2006, Yakin Ertürk, the Special Rapporteur on violence against women, described the due diligence in human rights as the duty associated to the State to take positive action to prevent and protect women from violence, punish perpetrators of violent acts and compensate victims of violence. He recommended the concept of due diligence as a yardstick to assess whether the State has met its human rights obligations.

A human right-based approach (HRBA) to SSR programming can be the catalyst needed to materialise Yakin Ertürk's recommendation, as its application would seek to guide support to security and justice providers in accordance with due diligence standards inspired from positive and negative human rights obligations. This would also include applying programmatic monitoring and evaluation metrics to reflect evolving norms established in international human rights jurisprudence. Applying this body of jurisprudence to SSR programming would align it with the UN Common Understanding on a HRBA, which prescribes that development cooperation to be guided by human rights standards, norms and principles in all programming phases.⁶

Examples of Human Rights Norms Applicable in a HRBA to SSR

The ECHR has made numerous references in cases of enforced disappearances and arbitrary executions that the State must be in a position to conduct investigations of crimes in a **thorough and effective** manner, leading to the identification and punishment of those responsible (Gul v. Turkey & Bazorkina v. Russia). It must also provide **a systematic and comprehensive approach** to investigating crimes to prevent the omission or loss of vital information (Kaya v. Turkey and Tepe vs. Turkey). The authorities' response must be **impartial**; those investigating the alleged crimes should be independent from the implicated parties/events.⁷ Moreover, the ECHR judgments in cases of gender-based violence, such as Opuz v. Turkey, Bazorkina v. Russia, and Osman v. UK, played a key role in advancing the criteria for State compliance with human rights principle and standards by prescribing the obligation of the national authorities to act **proportionately** when taking the necessary measures to protect vulnerable persons or groups and respond to crimes committed against them.

The IACHR also lays down very similar procedural obligations in their judgments. As in the case of ECHR, the IACHR initially developed its jurisprudence on the back of cases of enforced disappearances and arbitrary executions. In this regard, the IACHR prescribes that when responding to crime states must act **in a serious manner using all resources available** with goal of producing

⁵ R. Higgins, Problems and Process, (Clarendon Press, Oxford, 1994.), pp. 153-54, at, p. 153,

⁶ The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies (2003) <http://hrbportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>

⁷ These indicators are further supported by the ECOSO resolution, which outlines detailed procedural mechanism to help states fulfil their positive obligation.



satisfactory results (Velásquez Rodríguez v. Honduras) and the victim's family should be **continually informed** of the process (Bámaca Velásquez v. Honduras). The response must be **timely and detailed** as well as **impartial** and **effective** (Juan Humberto Sánchez v. Honduras, Myrna Mack Chang v. Guatemala and Penal Miguel Castro Castro v. Perú). In cases of alleged human rights by State actors or actors in acquiescence of the State, there must be an **ex officio response** to investigate **without delay** and **using all legal means available** oriented to establish the truth and led to the capture and punishment of the perpetrators (Pueblo Bello v. Colombia).

A case worth highlighting is Maria da Penha Maia Fernandes v. Brazil. This case is regarded as landmark in the international human rights jurisprudence for revealing the systematic pattern of violence against women in Brazil, and advancing the corresponding due diligence criteria for duty bearers. In this case, the Inter-American Commission on Human Rights built on the aforementioned IACHR jurisprudence by adding that the (duty bearers) had a heightened procedural obligation to respond **proportionally** to her vulnerability because of her repeated reporting to the police. This, combined with contextual information on patterns of intimate partner violence the local authorities had at the time of her abuse, placed higher expectations on the State as to compliance to their positive obligation.

Since then, key cases such as Gonzalez et al. v. Mexico, "Cotton Field" applied the due diligence criteria advanced by the Maria da Penha Maia Fernandes v. Brazil judgement. The case reinforced norm that authorities have an obligation to respond in a **thorough and impartial manner**, and the protection of women in contexts of extreme violence should be **proportionate** to the vulnerability produced as a result of societal discrimination (Maria da Penha Maia Fernandes v. Brazil, Ana, Beatriz y Celia González Pérez v. Mexico).

The UN international instruments have also elaborated on the due diligence expected of security and justice provider's for compliance with human rights standards]. For example, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), a founding document for clarifying States' positive and negative obligations to its citizens, clearly highlights the responsibility of States in adopting **appropriate measures** and **means** that move beyond legal frameworks. This denotes that the State, and its security providers, has an obligation to protect against discrimination. These appropriate measures and means are further clarified in CEDAW's General Recommendation 19⁸, through which CEDAW argues that states must ensure **equal** protection, **and** establish **appropriate** protection and support services.

The international jurisprudence put forward by the CEDAW committee supports and elaborates on due diligence indicators that could be utilised for the purpose measuring prevention and investigation mechanisms. For example, the Human Rights Committee outlines that States and their security sectors are obligated to provide **internationally expected coordinated, comprehensive and effective protection** (AT vs Hungary). This would include **effective procedures** and **necessary measures**, a **vigilant and speedy manner** of response as well as coordination amongst law enforcement that allows for a **systematic manner** of gathering information (Fatima vs Austria, AT vs

⁸ General Recommendation 19 looks to specifically address discrimination and violence against women.



Hungary, *Geokce vs Austria*). Additionally, the state security services are obligated to provide **prompt, thorough, impartial and serious** investigation into crimes related to GBV (*AT vs Hungary*). This would include **thorough inquiry** into the GBV crimes, **effective steps** taken to establish how the crimes occurred, and **established facilities and procedures to investigate thoroughly** (*Elcida Arévalo Perez vs Colombia, Arellana vs Colombia, Bleier vs Uruguay*). This indicates that not only are there established procedures for which the state is obligated to provide, but that International framework and jurisprudence has further clarified the requirements for due diligence in relation to the provision of security and justice.

Closing Comments

When applying a HRBA to SSR, it is important to highlight the many multidisciplinary expert opinions that have contributed to the evolution of human rights norms and standards via the regional human rights courts systems and the UN human rights mechanisms and instruments. Expert input into the established human rights norms and standards ranges includes sociologists, criminologists, gender experts, victimologists, psychosocial specialists, and a range of police and forensic investigative professionals. This information improves the application of a HRBA which seeks to strengthen the capacity of the rights holder to claim their rights, and the capacity of the duty bearer (justice and security provider) to comply with their human rights obligation.

Furthermore, by understanding the due diligence procedural elements enshrined in a human rights norm, a SSR advisor can help their counterparts in the justice and security sector bridge the human rights normative framework with their operational, tactical and strategic planning by clarifying the benchmark standards of their obligations. Helping justice and security sector providers demystify the phase “respect human rights” would be vital to the application of a HRBA to SSR.

Authors of this Working Paper: Mirko Daniel Fernandez, Oanh-Mai Chung and Iman Simon

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