Institute for
Human Rights and Business

Institute for Human Rights and Business
34b York Way
London N1 9AB, United Kingdom
Tel: +44 203 4114 333
Email: kelly.scott@institutehrb.org
Web: www.institutehrb.org

# SUBMISSION TO THE SPECIAL REPRESENTATIVE OF THE UN SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, JOHN RUGGIE

# CONCERNING THE DRAFT GUIDING PRINCIPLES FOR THE IMPLEMENTATION OF THE UN PROTECT, RESPECT AND REMEDY FRAMEWORK ON BUSINESS AND HUMAN RIGHTS

25 JANUARY 2011

## 1. Background

The mandate of United Nations (UN) Special Representative for business and human rights (the 'Special Representative') was created in 2005 to establish greater clarity concerning the human rights responsibilities of business enterprises. The Institute for Human Rights and Business (the 'Institute') has supported the mandate and work of the Special Representative, Professor John Ruggie, and we welcome the development of the Guiding Principles on the implementation of the UN *Protect, Respect and Remedy* framework.

As currently drafted, the Guiding Principles represent an extremely important step for the international community in addressing the essential relationship between states, business and human rights. The observations made here are based on practical experience of the Institute in testing aspects of the *Protect, Respect and Remedy* framework over the past two years. Recommendations for changes and additions to the current draft are intended to strengthen the final version of the Guiding Principles the Special Representative will submit to governments for consideration. We hope all members of the UN Human Rights Council will endorse the finalised Guiding Principles at the Council's scheduled session in June 2011.

## 2. General Comments

### 2.1 Observations

The draft Guiding Principles flow directly from the UN *Protect, Respect, Remedy* framework welcomed by the Human Rights Council in 2008. By building on the framework, the Guiding Principles are established on a firm foundation. The Special Representative has correctly underscored the primacy of the State's obligation to protect rights while also demonstrating that the corporate responsibility to respect human rights is a direct responsibility of business, and not contingent on the actions or inactions of States.

As a contribution to further clarifying the scope and meaning of the corporate responsibility to respect, in late 2009 the Institute convened an expert meeting[1] which concluded that the corporate

[1] *Setting Boundaries: Clarifying the Scope and Content of the Corporate Responsibility to Respect Human Rights* (Institute for Human Rights and Business, London, 2009) http://www.institutehrb.org/pdf/Setting_Boundaries-Clarifying_Scope_and_Content_of_Corporate_Responsibility_to_Respect_Human_Rights.pdf

responsibility to respect human rights is an appropriate baseline as it extends to all businesses (including all sectors and size of business), is applicable in all parts of the world, and covers all internationally recognized human rights.[2]

The corporate responsibility to respect human rights includes proactive actions by stressing the need for all companies to conduct human rights due diligence, which considers the full range of possible positive and negative impacts of business operations on the human rights of individuals. This is important with respect to all rights and in all contexts, in particular where the State is unwilling or unable to meet its human rights obligations.

We welcome the centrality of the concept of 'impact' used in the draft Guiding Principles in helping to establish the scope of the responsibilities of business. The notion of 'influence' (or 'leverage') remains a valuable second-tier concept in considering actions a company might take in response to a particular human rights challenge, but the concept of corporate "sphere of influence" is inappropriate for assigning responsibility to business enterprises.

2.2 Recommendations

The Institute strongly supports the integrity of the *Protect, Respect and Remedy* framework. It is, however, important to ensure that language used in the Guiding Principles is as precise as possible. For example, the term 'stakeholder' is used a number of times in the draft and can often refer to a range of other actors, including other business enterprises. At several places in the text it may be more appropriate to replace 'stakeholder' with the term 'rights-holder' to clarify that it is the human rights of individuals that are at stake[3].

The Institute has also participated in efforts to address the integration of a gender perspective in the Guiding Principles. Although it is recognised in the draft text that the implementation of the Principles should be undertaken with "due regard to gender considerations", there is a need for greater specificity and we recommend that the Special Representative give careful consideration to proposals which have been made in this context during the consultation process.[4]

## 3. Comments on the State Duty to Protect

3.1 Observations

*Principles 1 to 11* relate to the duties of States and are aligned with many points the Special Representative has made in his annual reports to the UN Human Rights Council.

The Institute welcomes the call for greater policy coherence (*Principle 3*) and how this might be mediated through the full range of State policies that interact with and condition the business environment (*Principles 4-9*). The focus on specific State duties in relation to conflict-affected areas (*Principle 10*) and the role of 'home' States in addressing the actions of businesses registered under their jurisdiction but operating overseas is also to be welcomed. There is clearly a need for further

[2] It is important to stress that *respect* as understood in the Special Representative's framework is different from *respect* as understood in relation to state duty. In the latter case, *respect* is the building block of the "Respect-Protect-Fulfil" continuum, under which respect implies non-infringement, or doing no harm.

[3] We are aware that the term rights-holder implies a corresponding duty-bearer, viz. the State. We do not think using the term causes any confusion, however, because even though the State, and not the corporation (as a non-state actor) is the duty-bearer from the perspective of the human rights law, the status of the rights-holder does not change.

[4] Please refer to the submission to the Special Representative: "Comments on the draft 'Guiding Principles' for the implementation of the 'Protect, Respect and Remedy' framework: Integrating a gender perspective" by Kathryn Dovey, Jane Gronow, Kate Grosser, Deanna Kemp and Bonita Meyersfeld.

work in this area, in particular clarification of the direct liability of business enterprises under international law.

There has been unnecessary confusion about the role of the State with regard to provision of specific services in cases involving contracts with private actors. *Principle 7* reminds States that they cannot abdicate or relinquish their human rights obligations when they have contracted businesses to provide specific services. This is particularly relevant when considering issues such as the role of private actors in the provision of healthcare, education, and water and sanitation services[5]. The need to clarify what is expected of the private sector with respect to human rights in all relevant enabling legislation and public-private contracts is another challenge requiring further joint action.[6]

The importance of multilateral institutions in supporting enhanced policy coherence (*Principle 11*) is also noteworthy as can be seen in how the *Protect, Respect, Remedy* framework has already been invoked within processes such as the OECD updating of its Guidelines for Multinational Enterprises, as well as by the International Finance Corporation and the European Union; so too we hope in ECOWAS and ASEAN in the months and years ahead.

## 3.2 Recommendations

As the Special Representative states in the commentary to *Principle 5*, a "smart mix" of measures in needed by the State, both mandatory and voluntary. For non-State owned business enterprises operating or domiciled in their territory (*Principle 5*), it should be noted that several States have already identified specific contexts where mandatory approaches to some aspects of human rights due diligence are required. Human rights due diligence should be required before businesses qualify for finance from the State, or benefit from trade and other incentives the State offers. The State should also require securities exchanges to make it mandatory for listed companies that operate in conflict areas or other high-risk zones to conduct human rights due diligence and satisfy investors that they have taken adequate precautions to ensure that they would not contribute to human rights abuses.

With respect to State-owned enterprises, States should 'require' in all cases (and not only 'encourage' and require 'as appropriate' as currently worded in *Principle 6*) that businesses undertake human rights due diligence. State-owned enterprises are different from purely private businesses, in that they have greater proximity with the State and its legal responsibilities.

In relation to *Principle 7*, the Institute's own work on issues such as water use, water management and land appropriation indicates not only that States should incorporate concern for human rights in all relevant public-private contracts (which is rarely the case at the moment), but also that all potential impacts of such agreements should be thoroughly assessed before they are entered into, and findings adequately disclosed. Therefore, *Principle 7* should recommend that all States require business enterprises to undertake human rights due diligence before bidding for any public-private tender. For reasons of consistency, States should also make similar requirements on State-owned enterprises and local authority providers where they do not already exist.

Given the role of the State in facilitating some types of business transactions, through export credit agencies or overseas investments, *Principle 8* should specifically indicate that 'appropriate steps' in fact means compulsory human rights due diligence. This Principle should also recommend penalties by

---

[5] See the work of the UN Independent Expert on the right to water and sanitation, Catarina de Albuquerque (http://www2.ohchr.org/english/issues/water/iexpert/), and the resolutions at the UN General Assembly and the Human Rights Council in 2010, declaring access to water to be a human right.

[6] See the Institute for Human Rights and Business draft Position Paper on Business, Human Rights, Water and Sanitation (January 2011).

the State (such as the end of commercial or financial relationships) to be imposed on business enterprises that have abused human rights or have been complicit in abuses perpetrated by others, in addition to any legal measures that might be appropriate.[7]

*Principle 9* should specifically recommend that only companies that have conducted adequate human rights due diligence should qualify to bid for contracts with the State.[8]

*Principle 11* should include specific reference to mainstreaming business-related issues in State-to-State accountability mechanisms, peer review processes and other frameworks within the United Nations itself, such as State reporting under the Universal Periodic Review Mechanism of the Human Rights Council[9], and in reports to UN Treaty Bodies.

**4. Comments on the Corporate Responsibility to Respect Human Rights**

4.1 Observations

*Principles 12-22* address the second pillar of the Framework – the corporate responsibility to respect human rights – based on an understanding of actual and potential impacts as identified through due diligence processes. In 2010 the Institute studied early efforts by 23 multinational companies[10] drawn from three continents to apply this approach to a wide range of business contexts. Our findings indicated that human rights due diligence as put forward by the Special Representative does indeed represent an achievable methodology in business.

We welcome the call for greater precision in 'assessing' human rights impacts (*Principle 16*), which allows for more creativity in the integration of assessments into existing systems, as opposed to focusing solely on the idea of a 'Human Rights Impact Assessment' – a tool that has yet to be clearly defined in relation to its integration into pre-existing environmental and social impact tools. However, there are circumstances – particularly in business sectors and geographies of high human rights risk – where bespoke human rights tools are essential and indeed should be a mandatory requirement (see Section 3 above). As yet, there are few proven methodologies in place that can show the most appropriate way to conduct human rights impact assessment. Such an exercise varies according to business size and the human rights context in which they operate. There is a need for much greater sharing of methodologies, benchmarking and scrutiny within specific business sectors to develop the appropriate and expected standards of due diligence.

---

[7] Actions a State can take form a continuum, from *advising and informing* companies that operate in high-risk zones; *collaborating with them* to improve human rights standards; *promoting* good conduct through awards and recognition for companies, and working with other States; *incentivising* good behaviour through concessionary finance or white-listing firms; *warning* companies operating in conflict zones through advisories; *preventing* companies from operating in such zones by imposing specific sanctions or black-listing firms; and *prosecuting* conduct that requires legal action. For the full range of actions the State can take, see "Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards" by Salil Tripathi in *Politorbis 50:3 (*Published by the Swiss Ministry of Foreign Affairs, Bern, 2010). Disclosure: Tripathi is Director of Policy at the Institute.
[8] The State can consider a "white-list" process, where it includes companies that meet the criteria, permitting only those companies to bid for contracts. In order to address potential questions from competition regulators, including the World Trade Organisation, the State should specify its requirements by drawing on its obligation to maintain international peace and security, as has been done in the case of the Kimberley Process Certification Scheme, which regulates trade in rough diamonds from conflict zones.
[9] The Institute for Human Rights and Business has made civil society submissions under the UPR procedure to assist States in this regard. Two pilot reports on Liberia and the USA were issued in 2010. See: http://www.institutehrb.org/news/2010/ihrb_submission_to_hrc_on_us.html
[10] *The State of Play of Human Rights Due Diligence: Anticipating the Next Five Years* (Institute for Human Rights and Business, London, 2010) http://www.institutehrb.org/pdf/The_State_of_Play_of_Human_Rights_Due_Diligence.pdf

*Principle 15* states that a business should include all third parties in its human rights due diligence, 'including business partners, suppliers, and other non-State and State entities that are associated with the enterprise's activities'. For some business enterprises this represents many thousands of third parties, a process requiring prioritization which is perhaps assisted by *Principle 22* which calls on business enterprises to seek to prevent and mitigate those human rights impacts that are 'most severe or where delayed would make them irremediable'. Nevertheless the process of prioritization, which must be a transparent one, will be one of the greatest challenges for business enterprises in the time ahead.

4.2 <u>Recommendations</u>

*Principle 12* refers to the need for business enterprises to 'address' adverse human rights impacts they may cause or contribute to through their own actions. To ensure clarity it would be preferable to stress in this key Principle that companies must avoid actions that cause or contribute to harm. The commentary to *Principle 12,* in referring to core internationally recognised human rights states that: "*While these instruments do not impose direct legal obligations on business enterprises, enterprises can infringe on the rights these instruments recognize."* It should, however, be noted that some governments and legal experts continue to debate this fundamental issue. It would therefore be important to clarify in the commentary that although these instruments are generally interpreted as described, whether such texts can today or in the future create direct obligations on non-state actors remains open to debate.

*Principles 12-22*, though of critical importance, are essentially procedural in nature. While fundamentally important, they do not (on their own) necessarily provide sufficient basis for ensuring that the due diligence an enterprise conducts is legitimate and effective in human rights terms. Failure to move beyond procedural steps risks encouraging a 'box ticking' exercise or reinforcing a purely compliance-driven mentality in some businesses and may make evaluating the substance of due diligence approaches more difficult. The Institute stresses in this context the need to develop rights-based criteria analogous to those presented in 2008 by the Special Representative[11] under the 'Remedy' pillar (see our comments to *Principle 29* below).

It is essential that the United Nations defines 'effectiveness criteria' to ensure human rights due diligence methodologies are legitimate and fit for purpose, or risk the marketplace, individual governments or regional inter-governmental organizations making such definitions in isolation over the months and years ahead. If it is not possible to define such criteria within the Special Representative's mandate, then the need for further work in this area should be signalled as an essential component of any follow-up process.

Illustrative examples of such criteria are provided in the *Appendix* to this submission. Any process aimed at developing criteria of this kind should be open and consultative. The full set of criteria should apply to the entire due diligence process but some criteria will be more relevant than others when considering specific due diligence steps. Other processes such as ISO 26000 and the Global Reporting Initiative's work on human rights reporting indicators are also relevant in this context. The criteria illustrated in the Appendix draw on the rights-based approach to development methodologies promoted by a large number of states, civil society organisations and the United Nations itself.[12]

---

[11] A rights-compatible grievance-mechanism includes the following principles: that it is legitimate and trusted; publicised and accessible; transparent; based on engagement and dialogue; predictable in terms of process; fair and empowering; and a source of continuous learning. (Source: Rights-Compatible Grievance Mechanisms. Harvard Kennedy School, Cambridge, Mass. 2007.) http://www.reports-and-materials.org/Grievance-mechanisms-principles-Jan-2008.pdf.

[12] For example: "The Human Rights Based Approach to Development Cooperation – Towards a Common Understanding Among the UN Agencies", The Second Interagency Workshop on Implementing a Human Rights-based Approach in the Context of UN Reform, Stamford, CT, USA, 5-7 May 2003.

Once in place, such 'effectiveness criteria' would enable the United Nations, national governments and others, to express views about the legitimacy and appropriateness of specific business approaches to human rights due diligence. This is not to argue for a single rigid template for undertaking human rights due diligence. It is recognised that much depends on company size and the context in which business activity takes place. The creativity of business itself should be engaged in developing appropriate tools to more clearly define what are and what are not appropriate methodologies.

## 5. Comments in relation to Access to Remedies

### 5.1 Observations

Guiding *Principles 23-29* provide direction with regard to *access to remedies* - legal or not, within or outside the business entity, at the local, national or international level. This approach is consistent with the Special Representative's 2008 report[13] and has created significant awareness of existing grievance mechanisms. Such alternative dispute settlement mechanisms should be rights-based in their operation. Provided the non-judicial mechanisms do not undermine access to legal remedies in the context of grave human rights abuses, nor sidestep official court systems, non-judicial mechanisms are desirable and can offer a local resolution to a dispute between a company and a community before the grievance escalates.

It is important to note, however, that significant accountability gaps at the national and international level remain. The Guiding Principles are not intended to solve the problem posed by States that fail to meet their obligations – either because of the lack of clarity under international law, or due to an absence of political will to enforce existing law. The political support for the Guiding Principles can, it is hoped, translate into similar energy to address additional accountability and governance gaps – in particular in relation to extra-territorial jurisdiction and the direct liability of business enterprises for the worst forms of human rights abuse.

### 5.2 Recommendations

*Principle 25* raises the importance of State-based non-judicial mechanisms to augment legal systems. The Principle states that these mechanisms can be either mediation-based or adjudicative. *Principle 25* should specifically call on States to have both such mechanisms even if they need to operate separately. The Commentary to the Principle should be strengthened to state that when adjudicative measures determine responsibility for the abuse of human rights, this could lead to consequences for the business enterprise, or other actor, concerned: such as the suspension or ending of commercial relations between the State and the business enterprise (see also comments to *Principle 8* above).

Some States outside of the OECD are promoting entities similar to 'National Contact Points' (NCPs), for example within the context of bilateral trade negotiations. These developments are welcome if they result in substantive remedial mechanisms. The commentary to *Principle 25* could define the essential characteristics of such mechanisms from the perspective of the United Nations, drawing directly on the effectiveness criteria set out in *Principle 29*. The role of national human rights institutions should be strongly flagged in this regard as well.

The requirement for Multi-Stakeholder Initiatives to embody an effective grievance mechanism, *Principle 28*, could be more strongly stated by clarifying that the legitimacy of such initiatives is put at risk if they do not develop such mechanisms. It should be noted in this context that the new code of conduct for Private Military Companies has included the need for a grievance mechanism and that

---

[13] *Protect, Respect and Remedy: A Framework for Business and Human Rights,* United Nations, Geneva (A/HRC/8/5 April 2008).

others, such as the Fair Labour Association and the Voluntary Principles on Security and Human Rights have learned much from attempting to include such mechanisms as part of their governing structures.

## 6. Conclusion

The UN *Protect, Respect and Remedy* Framework and the proposed Guiding Principles are a once in a generation achievement. Undoubtedly many issues addressed will require further deliberation and action, including clarifying the responsibilities of business in zones of conflict, the possibility of direct corporate liability under international law, as well as the extraterritorial obligations of States. Building on the momentum the Special Representative has generated over the course of his mandate and continuing to address these issues in a constructive manner will not be a simple task. But the work of the past five years has provided a solid foundation and road map, which should be embraced and taken forward by all actors in the time ahead.

**Appendix: Illustrative examples of 'effectiveness criteria' in relation to human rights due diligence**

Please note that these examples are only illustrative and are drawn from and inspired by a number of sources. They are intended to reinforce the point that such criteria are needed and to put forward initial thoughts on what they might include. The process of agreeing such criteria would need to be led by the United Nations and undertaken in a consultative manner over an adequate period of time.

It should be noted, in addition, that whilst all criteria are equally relevant to the full due diligence process (as set out in *Draft Guiding Principles 15-19*) some will be more relevant than others to specific Principles. The criteria do not prescribe what the substance of any due diligence process should include, as this will vary according to the context of business operations and geographic location. However, criteria such as these do seek to provide a means for applying human rights due diligence to concrete situations whilst ensuring compatibility with a rights-based approach.

Human rights due diligence should be:

- **Comprehensive and Inclusive**: incorporating all internationally recognised human rights as well as the indivisibility and inter-relatedness of these rights;

- **Participative**: involving all those upon whom there is an impact in a meaningful way and seeing all persons and members of communities as rights-holders;

- **Focused on the greatest need**: prioritising business functions and geographies in terms of human rights risk and impact and not for other unrelated considerations;

- **Non-discriminatory**: not excluding or prejudicing any individual or community and taking proactive measures to be gender-sensitive and fully inclusive of all minority views, perspectives and the specific needs of vulnerable and marginalized groups;

- **Accountable**: being accessible to rights-holders and including adequate remedies should grievances arise at any stage;

- **Transparent**: ensuring effective access to information for all rights-holders and that evidence of impacts, either real or anticipated, is shared with all those affected unless there is a publicly stated, overriding rationale for not doing so, (i.e. the safety and security of the rights-holders themselves);

- **Affirmative in responsibility**: implying action as a result of knowledge about human rights risks and impacts; action that is appropriate to the actual leverage of the business and its relationship to those affected or third parties;

- **Cumulative in understanding**: understanding risks and impacts in relation to all previous human rights due diligence conducted; integrating such knowledge fully into the business enterprise allowing future human rights risks to be better anticipated, avoided or adequately remediated.