Special Representative of the United Nations
Secretary-General for business & human rights

Online Forum

From 22 November 2010 through 31 January 2011, John Ruggie, Special Representative of the United Nations Secretary-General for business and human rights, collected feedback on the draft Guiding Principles for the Implementation of the U.N. 'Protect, Respect and Remedy' Framework, to inform his final recommendations to the Human Rights Council.

This document is a record of all feedback submitted to a special, temporary online consultation forum created specifically for that purpose (www.srsgconsultation.org). The forum attracted 3,576 unique visitors from 120 countries and territories, with an average of 88 visits per day.

There has been minimal editing done in order to remain faithful to the forum as it appeared while creating a legible document. The forum enabled registered users to rate others' comments on whether they believed the comment to be relevant and whether they agreed; those ratings are included here as well. For those who posted comments and created public user profiles, those profiles are included at the end of this document.

The online forum enabled targeted feedback for specific parts of the draft Guiding Principles. The Special Representative's web portal (www.business-humanrights.org/SpecialRepPortal/Home) was offered as an alternative, for example for submissions covering all principles; some 90 submissions were received there during the same period. Ruggie also received extensive feedback from governments in an informal session in January 2011 with the Human Rights Council in Geneva.

The Guiding Principles provide practical advice to governments, companies and other stakeholders on how better to protect individuals and communities from adverse human rights impacts of business activities.

The Special Representative's mandate was created in 2005 in order to move beyond what had been a deeply divisive doctrinal debate over the human rights responsibilities of companies. Professor Ruggie's goal was to build shared understanding and consensus among stakeholders by holding consultations around the world and by conducting extensive research. Out of that process came the "Protect, Respect and Remedy" Framework, which was unanimously welcomed by the Human Rights Council in 2008. The Council then asked Ruggie to continue working in the same manner to operationalize the Framework. The Guiding Principles were developed in response to that request.

The online consultation forum was built and maintained on a *pro bono* basis by Daniel Teoh and Sean Doyle, students at The University of Western Ontario. The Special Representative's web portal is hosted by the independent Business & Human Rights Resource Centre. The Special Representative is grateful to both parties for their support.

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Preface

1. Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources, capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights. But recent decades also have witnessed growing institutional misalignments, from local levels to the global, between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. Indeed, the modern corporation itself has evolved at an accelerated pace, and embodies complex forms that challenge conventional understanding and policy designs. As a result of these epochal changes, once stable expectations about the respective roles of government and business in minding and mending the broader social fabric are now less predictable, have frayed or unraveled altogether. No country or region is immune.

2. The business and human rights domain is a microcosm of this transformation. Institutional misalignments create the permissive environment within which blameworthy acts by business enterprises may occur, inadvertently or intentionally, without adequate sanctioning or reparation. The worst corporate-related human rights abuses, including acts that amount to international crimes, take place in areas affected by conflict, or where governments otherwise lack the capacity or will to govern in the public interest. But companies can impact adversely just about all internationally recognized human rights, and in virtually all types of operational contexts. Recognizing these escalating risks, in 2005 the then United Nations Commission on Human Rights requested the Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises, to map the challenges and recommend effective means to address them.

3. The idea of human rights is as simple as it is powerful: treating people with dignity. But the Special Representative soon found that there is no single silver bullet solution to the multi-faceted challenges of business and human rights. A successful strategy must identify the ways whereby all relevant actors can and must learn to do many things differently. This requires operational and cultural changes in and among governments as well as business enterprises—to create more effective combinations of existing competencies as well as devising new ones. The aim must be to shift from institutional misalignments onto a socially sustainable path.

4. The international community is still in the early stages of this journey. In addition to it being a relatively new policy domain, business and human rights differs significantly from the traditional human rights agenda. It is not comparable to States recognizing a particular right, as the General Assembly has now done in the case of access to safe water and sanitation, for example, because business and human rights involves all rights that enterprises can affect. It is not comparable to States recognizing the rights of a particular group, as in the Declaration on the Rights of Indigenous Peoples, because business and human rights includes all rights holders. Moreover, the tools available for dealing with business and human rights differ from those addressing State-based human rights violations, where only public international law can impose binding obligations.

5. The business and human rights domain is considerably more complex. Some of the most serious corporate-related human rights abuses have involved companies in acts committed by official entities, rendering established means for victims to seek redress problematic. Even where that is not a problem, States are under competing pressures when it comes to business, not only because of corporate influence but also because so many other legitimate policy demands come into play, including the need for investment, jobs, as well as access to markets, technology and skills. In addition, in the area of business and human rights States are simultaneously subject to several other bodies of international law, such as investment law and trade law. Of course, none of these factors absolves States of their human rights obligations. But absent any internationally-recognized hierarchy of treaty obligations, States are unlikely to place every single human right they have recognized above their legal obligations in those other areas.

At the same time, business conduct is shaped directly by laws, policies and sources of influence other than human rights law: for example, corporate law, securities regulation, forms of public support such as export credit and investment insurance, pressure from investors, and broader social action. Success in dealing with business and human rights requires that these multiple constraints and opportunities are factored into the equation.

6. But the journey has begun. Most States long ago adopted individual measures relevant to business and human rights, including labor standards, health and safety provisions, and non-discrimination policies. However, States have been slow to address the more systemic challenge of fostering human rights-respecting corporate cultures and conduct. State practices exhibit substantial legal and policy incoherence and gaps. The most common gap is the failure to enforce existing laws, although for vulnerable and marginalized groups, there may be inadequate legal protection in the first place. The most prevalent cause of legal and policy incoherence is that the units of Governments that directly shape business practices—in such areas as corporate law and securities regulation, investment promotion and protection, and commercial policy—typically operate in isolation from, are uninformed by, and at times undermine the effectiveness of their Government's own human rights obligations and agencies.

7. At present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. But nor are they prohibited from doing so provided there is a recognized jurisdictional basis and that the exercise of jurisdiction is reasonable. Nevertheless, within this permissible space, States have chosen to act only in exceptional cases, and unevenly. This is in contrast to the approaches adopted in other areas related to business, such as anti-corruption, money-laundering, some environmental regimes, and child sex tourism, many of which are today the subject of multilateral agreements.

8. There are sound policy rationales for States seeking to ensure that enterprises which are domiciled in their territory and/or jurisdiction respect human rights abroad, especially if the State itself is involved in the business venture, for example, as the owner of the enterprise in question or because it has promoted the particular investment. This enables a "home" State to avoid being associated with possible overseas corporate abuse. It can also provide much-needed support to "host" States that may lack the capacity to implement fully effective regulatory regimes on their own.

9. The business community, too, has devised responses to business and human rights challenges. The number of corporate initiatives has increased in recent years, and their geographical base is expanding. Business associations, multi-stakeholder undertakings and responsible investment funds now address human rights concerns. Business consultancies and corporate law firms are establishing practices to advise clients on the requirements not only of their legal, but also their social, license to operate, which may be as significant to an enterprise's success. However, these developments have not acquired sufficient scale to reach a tipping point of truly shifting markets. Moreover, the standards that business initiatives incorporate are typically self-defined rather than tracking internationally recognized human rights. And accountability mechanisms for ensuring adherence to the standards tend to remain weak and decoupled from firms' own core oversight and control systems.

10. One major reason that past public and private approaches have fallen short of the mark has been the lack of an authoritative focal point around which the expectations and actions of relevant stakeholders could converge. Therefore, when the Special Representative was asked to submit recommendations to the Human Rights Council in 2008 he made only one: that the Council endorse the 'Protect, Respect and Remedy' Framework he had proposed, following three years of extensive research and inclusive consultations on every continent.

11. The Framework rests on three pillars: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the

rights of others and to address adverse impacts that occur; and greater access for victims to effective remedy, judicial and non-judicial. Each pillar is an essential component in supporting what is intended to be a dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; an independent corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.

12. In resolution 8/7 (June 2008), the Council was unanimous in welcoming this policy Framework, and in extending the Special Representative's mandate to 2011 in order for him to "operationalize" and "promote" it. While in itself this endorsement did not resolve all business and human rights challenges, it has enabled the Framework to become a common foundation on which thinking and action by stakeholders can build over time. Thus, the Framework has already influenced policy development by Governments and international institutions, business policies and practices, as well as the analytical and advocacy work of trade unions and civil society organizations. The Guiding Principles that follow constitute the next step, providing the "concrete and practical recommendations" for the Framework's implementation requested by the Council. Like the Framework, the Guiding Principles draw on extensive research and pilot projects carried out in several industry sectors and countries, as well as several rounds of consultations with States, businesses, investors, affected groups and other civil society stakeholders. All told, the mandate will have conducted 47 international consultations from beginning to end.

13. The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved. Each Principle is accompanied by Commentary, further clarifying its meaning and implications.

14. At the same time, the Guiding Principles are not a tool kit, simply to be taken off the shelf and plugged in. While the principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, ten times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises. When it comes to means for implementation, therefore, one size does not fit all.

15. The Special Representative is truly honored to submit these Guiding Principles to the Human Rights Council. In doing so, he wishes to acknowledge the extraordinary contributions of literally hundreds of individuals, groups, and institutions around the world, representing different segments of society and sectors of industry, who gave freely of their time, openly shared their experiences, debated options vigorously, and came to constitute a global movement of sorts in support of a successful mandate—helping to secure the development of universally applicable and yet practical Guiding Principles in order to achieve the more effective prevention of and remedy for corporate-related human rights harm.

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Response from N.A.J. Taylor on 22 Nov 2010

Ratings (Yes/No): Relevance 3 ✔ 0 ✖ Agreement 3 ✔ 0 ✖

Powerful and comprehensive introduction. However, I think two elements might be considered.

First, the role of investment capital, as opposed to merely business activity. The difference between the rights and obligations of both businesses and investors (or even investment services firms such as asset consultants, stockbrokers and investment managers) is important to recognize. For instance, an institutional investor such as a pension (superannuation) fund marshals around $10 billion in capital, diversified across a variety of asset classes such as shares in public and privately- held companies, property, infrastructure, cash, government and corporate bonds etc. However the institutionalized nature

of the investment industry is such that a number of other providers advise and invest that money on behalf of the pension fund. Thus the transactions are performed by actors who don't actually own or control either the asset (e.g. a corporation) or the capital (e.g. the pension fund). The same applies for what are known as sovereign wealth funds such as the Australian Future Fund or some of the Middle Eastern investment corporations.

This compounds the problems you refer to in the preamble because it means that control and ownership decisions are occurring by many more actors than is often acknowledged, and thus the difficulties in addressing the area of business and human rights is further complicated.

Second, the role of both corporate responsibility and risk frameworks in addition to top-down rules and principles. CSR and responsible investment programs, and increasingly risk frameworks, are having a significant impact on the behavior of corporations in conflict-affected and high risk areas for instance. This is relevant in so far as this is largely an industry-led move to improve corporate responsibility and/or risk management practices in relation to human rights and the promotion of peace indicates some acceptance of the special representatives work by a segment of the business community - i.e. not all firms are opposed to clarification and/or improvement of rules and principles relating to their activities and human rights.

At present we that consult and think about business and human rights approach the conversation as if we face opposition such was felt by the norms on transnational corporations earlier in 2005, not as if we have some explicit and some implicit support from the business and investment communities in complementary areas such as risk management and corporate responsibility.

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Response from Anita Kelles-Viitanen on 23 Nov 2010

Ratings (Yes/No): Relevance 3 ✔ 0 ✖ Agreement 3 ✔ 0 ✖

I agree with the previous commentator. This was precisely my point too: to make a difference between real economy businesses serving economic rationals and those that are just serving shareholder interests running from one quarter to the next with the only objective of "producing" higher stockmarket values.

Asthe previous commentator also pointed out, the complex structure of such firms needs to be taken into consideration. In fact, we cannot get out from the significance of the business/ecoonomic model being in use. The present neo-liberal financial economy is not in agreement with human rights principles.

My second point is that we must have binding human rights regulations. Soft laws do not work any more in a situation where trade comes with ironclad sanctions and is written in stone in various bilateral and regional trade agreements.

Third, we need to think of incentives that are given to the industries and firms that abide by human rights. Human rights must make business sense and we need innovative thinking on how to do that.

Finally, harmonisation agenda is not sufficient if other dimensions i.e. environment/climate and social rights are subsumed under economic rationale. We need synergy between equally strong and "independent" dimensions. This synergy too requires innovative thinking but building on sustainable lifestyles with sustainable business already being practiced many parts of the world.

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Response from Patricia Almeida Ashley on 09 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

I agree with both above commentaries.

Especially the paragraph "harmonisation agenda is not sufficient if other dimensions i.e. environment/ climate and social rights are subsumed under economic rationale. We need synergy between equally strong and "independent" dimensions. This synergy too requires innovative thinking but building on sustainable lifestyles with sustainable business already being practiced many parts of the world." I would like to mention the new global consensus of the ISO 26000, after 5 year work in a multistakeholder dialogue of more than 90 countries. ISO 26000 includes and toes beyond human rights, once it is multidimensional when it comes to approach organizational social responsibility (not only business social responsibility).

Another comment which I understand is relevant and I agree is "we must have binding human rights regulations. Soft laws do not work any more in a situation where trade comes with ironclad sanctions and is written in stone in various bilateral and regional trade agreements"

A third comment from above I think is overriding the others and concerns the capital structure and the principal/agent conflit in US/UK stock market rationale, where we find a diffuse ownership: "[...]the role of investment capital, as opposed to merely business activity. The difference between the rights and obligations of both businesses and investors (or even investment services firms such as asset consultants, stockbrokers and investment managers) is important to recognize. [...] control and ownership decisions are occurring by many more actors than is often acknowledged, and thus the difficulties in addressing the area of business and human rights is further complicated." Thus, the conceptual category of "business" is indeed a network of interelated investment and market decisions by many actors, under an institutional layer with no international law for global finance and investment.

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Response from Jose Rafael Unda on 13 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 0 ✔ 3 ✖

I do like the preface, and would like to see a motivitation for companies to respect, based not only on societal expectations, but also on ethics. What I mean is that companies should respect, even if there were no societal expectations on that subject. Perhaps **adding** "**and because it is an ethical imperative**" would be enough, at the end of the current "an independent corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights" at number paragraph #11.

Regards

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Response from Danny Vannucchi on 17 Dec 2010

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Dear all, Please find attached Amnesty International public statement on the draft Guiding Principles. You can access the statement via this link: http://www.amnesty.org/en/library/info/IOR50/002/2010/en

thanks,

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Response from conor anthony gearty on 27 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 2 ✖ Agreement 0 ✔ 0 ✖

I am writing a book on the web, *The Rights' Future*. You can access it at http://www.therightsfuture.com It involves weekly essays on which all those interested can comment.

This week's essay is on corporate responsibility in the field of human rights: Supping with Mammon. In the essay I am very supportive of what Prof Ruggie is trying to do. I am sending you all the link now

because you might be interested not only (or even mainly) in my text but in the responses it produces. You might also want to comment yourself!

CONOR GEARTY (LSE)

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Response from John H Knox on 17 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

For two reasons, it is problematic to state in paragraph 5 that "absent any internationally-recognized hierarchy of treaty obligations, States are unlikely to place every single human right they have recognized above their legal obligations in . . . other areas." First, there are some internationally recognized hierarchical principles. [E.g., UN Charter, art. 103 (in the event of conflict between the Charter and another agreement, the Charter prevails); Vienna Convention on the Law of Treaties, art. 53 (a treaty is void if it conflicts with a peremptory norm of international law).] Second, and more important, this language could be read as suggesting that states are regularly faced with decisions as to which to follow – human rights obligations or other treaty obligations – and choose to violate the human rights obligations at least some of the time. States often have overlapping obligations under international law, but they try hard to avoid entering into mutually exclusive duties, and as a result they nearly always write treaties with enough flexibility to allow all applicable obligations to be met. Treaty law reflects their desire to read treaties not to conflict with one another if possible. [Vienna Convention on the Law of Treaties, art. 31(3)(c) (treaties shall be interpreted in light of "any [other] relevant rules of international law applicable in the relations between the parties").]

So the problem with potentially overlapping obligations is almost never that one rule must be chosen over another, but rather that states often don't have clear guidance on how to use the flexibility that international law provides them. To focus on that, I would suggest **replacing the sentence beginning "But absent any internationally-recognized hierarchy . . . ." with "But states are sometimes [often?] without clear guidance as to how to reconcile their legal obligations in these areas with their obligations under human rights law."** This language would also tie in better with the point made throughout the report about the importance of bringing greater clarity and coherence to this area.

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Response from John H Knox on 17 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 1 ✖

The extent to which human rights law places extraterritorial obligations on States is controversial. The first sentence in Paragraph 7 takes a stronger stand against the application of such obligations to corporate conduct than I think is clearly warranted. Moreover, it's a position that is likely to draw fire from critics pointing to the absence of jurisdictional limits in the International Covenant on Economic, Social and Cultural Rights, for example, and the ESC Committee's strong statements about extraterritoriality. For both of these reasons, I suggest that the report avoid taking such an explicit position and instead **replace the first sentence with something like: "At present, States do not generally view international human rights law as requiring them to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction."** This language would shift from a controversial characterization of international law to an indisputable description of the absence of generalized State practice, without affecting the broader point of the paragraph. I would suggest also making the equivalent change to the first paragraph of commentary on Principle 2.

John Knox, Wake Forest University

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Response from Ian Higham on 19 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 1 ✖ Agreement 0 ✔ 0 ✖

"The Guiding Principles that follow constitute the next step, providing the "concrete and practical recommendations" for the Framework's implementation requested by the Council."

This defines the purpose of the Guiding Principles as I understand it, which is a good thing. The Principles should be concrete recommendations for the Framework's implementation. However, I have conducted extensive research and numerous interviews on the subject of the corporate response to the framework, and the general consensus regarding a relative lack of uptake (thus far) by corporations is that they are waiting on this draft to be finalized. I ask then, what were the 2009 and 2010 reports to the Human Rights Council intended to accomplish if not, as their titles suggest, to "operationalize" the framework?

It is important to view these Guiding Principles in light of the fact that states and corporations should already have begun to implement components of the Framework, while it was being operationalized for the past two years. When finalizing these Principles, it will be important to bear in mind that they should guide companies along an existing and clearly defined path (**"the next step"**), not start them on a brand new one. Unfortunately without a stronger business response here and with so few corporations adopting human rights policies (the 1st component of due diligence), that my be the perspective of corporations after all.

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Response from BASF Group on 25 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

At first, we like to use the opportunity to express our great appreciation for the work of the SRSG. The process of consultation since 2005 has set the bar for an international, inclusive stakeholder dialogue. It already constitutes a huge success in significantly raising awareness for the nexus of business and human rights among the business community. The UN "Protect, Respect and Remedy" Framework for Business and Human Rights from 2008 represents a balanced approach with a clear division of tasks between states and companies.

Now it is important not to lose momentum. As the world's leading chemical company, we would therefore prefer a structured follow-up process subsequent to the final report on the GP and the expiration of the SRSG's mandate in 2011. At the same time, we find it important that any potential follow-up process takes place on a level which reflects the legitimacy, international scope and balanced stakeholder dialogue that has shaped the work of the SRSG since 2005.

That said we like to provide our experiences as a multinational company as supplemental comments on the draft GP, with special regard to the following passages:

- Fostering Business Respect for Human Rights
- Policy Commitment
- Human Rights Due Diligence
- Issues of Context
- Non-State Based Grievance Mechanisms

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Response from Jose Rafael Unda on 25 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

I am also concerned on the process that will take place after the expiration of the SRSG mandate by mid 2011.

- What options have been considered?
- What advantages and disadvantages are foreseen for each option?
- Which ones are likely to be adopted?

The issue on the future of this process is key for building more and more in a constructive way on the corporate-related human rights arena. Is it possible for those people interested on the future of the process to make respectful suggestions or comment on the options?

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Paragraph 5 of the document states that the lack of a hierarchy among the rules of the international treaties explains why states are faced with conflicting rules, as they cannot place their human rights obligations above their other obligations. However, there is a body of rules in international law which neither states nor other bodies are permitted to break. These are the rules of *jus cogens* and customary law.

Instead of creating the impression that the different bodies of law are mutually exclusive, it would be more useful to call for human rights to be incorporated into international laws, especially those on economic matters, and taken into account in international or bilateral trade or investment agreements.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The document makes use of certain terms and phrasing which are either vague or appear straightforward at first but imply that a standpoint has already been decided, despite the fact that the document is supposed to be working towards a consensus.

As regards vague expressions, the text could elaborate for example on what is meant by the '*institutional misalignments*' referred to in paragraphs 1, 2 and 3 of the report, which present the current state of the public socioeconomic landscape, and could also explain why the Framework and the Guiding Principles are needed. It would be useful to explain the causes and manifestations of these '*misalignments*' at this point and in particular to highlight: a) the absence of an international legal status for transnational enterprises; b) the absence of an international legal framework directly covering the whole of corporate human rights responsibilities and c) the power dynamics between companies and governments which can sometimes be prejudicial to human rights.

In addition, the phrasing used in paragraph 13 of the report is ambiguous where it suggests that the contribution of the Guiding Principles to the regulatory framework does not lie in the production of new regulations, as this could give the impression that there is no need for creating international legal obligations on corporate human rights responsibility. However, so as not to present a cut-and-dried position on the subject, it would be more useful to say that the contribution by the Guiding Principles to the regulatory framework, whilst not entailing new international legal obligations, is at the same time not opposed to the possibility of developing these.

Moreover, some of the terms used appear inadequate in relation to the issues and the legal situation. This is very marked with respect to the application of the Guiding Principles to the state duty to protect and the corporate responsibility to respect human rights.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Greater emphasis should be placed on the fact that businesses have a specific duty to fulfil their international human rights obligations.

In paragraph 11 and in the introduction to the Annex, corporate respect for human rights is referred to as an expectation held by society, not as a legal obligation on businesses. This phrasing appears to deny the fact the corporate responsibility is clearly, albeit incompletely, covered in international human rights law and in certain regional and national laws[1].

[1]Some examples:

1) The Convention on the Elimination of all Forms of Discrimination against Women (Article 2 (e)) stipulates that 'State Parties [...] agree [...] to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'.

2) The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography states (Article 3(4)) that 'Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative'.

3) The Convention on the Rights of Persons with Disabilities (Article 4(1)(e)) requires the State Parties'To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise'.

4) The International Convention on the Elimination of all Forms of Racial Discrimination stipulates (Article 2(1)(d)) that each State Party 'shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization'.

5) The International Convention on the Protection of the Rights of all Migrant Workers and Members of the Families (Article 16(2)) states that 'Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions'.

6) The UN Committee on Economic, Social and Cultural Rights recalled the duty of States to protect their residents against abuses by business enterprises in the following General Comments: No 12 on the right to adequate food (point 27: 'State Parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food'); No 14 on the right to health (Point 42: 'While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. State Parties should therefore provide an environment which facilitates the discharge of these responsibilities'); No 15 on the right to water (point 33: 'Steps should be taken by State Parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries' and point 23: 'The obligation to protect requires State Parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities, as well as agents acting under their authority'); No18 on the right to work (point 25: 'The obligation to protect the right to work includes the responsibility of State Parties to prohibit forced or compulsory labour by non? State actors' and No 19 on the right to social security (point 45: 'The

obligation to protect requires that State Parties prevent third parties from interfering in any way with the enjoyment of the right to social security. Third parties include individuals, groups, corporations and other entities, as well as agents acting under their authority').

7) Other texts which might be cited are those of the Committee on the elimination of racial discrimination (for example: CERD/C/AUS/CO/15-17, 13 September 2010, paragraph 13; CERD/C/USA/CO/6, 8 May 2008, paragraph 30; CERD/C/CAN/CO/18, 25 May 2007, paragraph 17.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The use of the adjective 'independent' when referring to corporate responsibility in paragraph 11 and in the commentary to Guiding Principle 12 implies a gap between the trade, wage and financial relationships which characterise the economic order and the citizen-public authority relationships which characterise the political order. This separation between the two orders suggests a liberal economic vision which should not be brought into this discussion if this text is to maintain the neutrality needed to achieve a consensus. To maintain the document's objectivity, the adjective 'independent' should therefore be removed.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

In its opinion of April 2008, the CNCDH recommended that France's strategy on corporate human rights responsibility should address the fact that 'States have the duty to introduce extraterritorial mechanisms with respect to violations committed by transnational companies, to ensure that victims have access to justice and that perpetrators are brought to justice'. The concept of extraterritorial mechanisms is in fact crucial when the violations are committed by the subsidiaries of large companies based in a state subject to the rule of law and the right to remedy is either non-existent or ineffectual in the state in which they were committed.

This issue is mentioned in paragraph 7 of John Ruggie's report and in the commentary to Guiding Principle 2. The role of states in remedying acts perpetrated in other countries by companies domiciled in their territory or jurisdiction is presented as being hard to plan both in law and in practice. In particular, it is stated that States are under no obligation to regulate the activities conducted by such companies abroad. In the light of all of the above information on recognition of corporate human rights responsibility and the responsibility of states to ensure businesses respect these rights, this assertion is inaccurate[1].

The comments contributed by the French Government also call for some of the report's overly cautious statements to be qualified. These comments state that

'The documents [...] suggest however that a "basis of jurisdiction" and an "overall test of reasonableness" are both required. The latter condition is taken directly from the doctrine and practice of common law, which can sometimes result in judges not exercising their jurisdiction in certain cases (doctrine of forum non conveniens*). Under continental European law however, once a basis of jurisdiction has been established, especially on the basis of a treaty, this automatically satisfies the overall test of reasonableness'*[2].

Therefore in order to reflect the different interpretations and in order to be less categorical concerning the possibilities for extraterritorial action by States, it would be beneficial not only to present the difficulties but also to address the possible avenues for development.

[1]See note 1.

[2]Comments by the French Government on the preparatory documents for the consultation meeting of 6 October 2010(held by the UN Secretary General's Special Representative on Business and Human Rights).

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

It is vital that a credible political process on corporate human rights responsibility be kept alive, and to do this it is essential to create a UN-based mechanism to deal with these issues, in liaison with the relevant international institutions. An independent mechanism of this nature, based on a collegiate expert approach, could for example be attached to the Secretary General of the United Nations and would be tasked with overseeing the implementation of the Conceptual Framework and the Guiding Principles, with the primary aim of preventing them from becoming fragmented as a result of diverging interpretations and of nurturing the process. This mechanism must be able to act as an observatory of both good and bad practices. It must also be able to clarify the Conceptual Framework and the Guiding Principles in particular contexts, such as certain industry sectors or specific situations such as armed conflict or economic crises and must provide an opportunity for collective discussion on the desirable development of international standards governing corporate human rights possibility, whether these be public or private, binding or incentivising. It must also act as a forum for international operational dialogue between all economic and social stakeholders.

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Response from Sonja Knobbe on 27 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

First of all: The Guiding Principles are a good and necessary step into the right direction. However, in some areas they might need improvement:

1. Legal Enforcement?

My main issue, reading the principles, is the lack of providing ways of enforcing them. As Amnesty International [1] and various other commentators have already mentioned, the Special Representative does not urge the actual adherence of the Guiding Principles explicitly enough by "encouraging" and "suggesting to" businesses and governments to follow the guidelines. Therefore, I do not really see the difference to the Global Compact, even though it "provides further operational clarity for the two human rights principles championed by the Global Compact." [2] The Guiding Principles give a more explicit direction and include government duties, but there are no concrete mechanisms of enforcement.

This could possibly be realized by a sort of international and independent business court or independent control mechanisms implemented by the UN. I do not exactly know how far the powers of the UN reach in this context. One could also introduce some sort of tagging to inform consumers, maybe in the form of a logo, like the fair trade logo or the Kimberley Process Certification Scheme. To become an official "UN accredited corporation", one has to fulfill certain requirements like reporting and transparency standards or engaging an independent Human Rights appointee in corporations of a certain size. To establish this successfully, one also must raise a higher level of public awareness to force the corporations to take part in the labeling association. (see comment on Consumer/ Society Perspective)

! **Recommendation**: One must specifically provide certain ways of enforcement to free the Guiding Principles from a voluntary character.

[1] http://www.amnesty.org/en/library/asset/IOR50/002/2010/en/6b5324eb-55ca-4d3c-ba9d-7b15abdf65b2/ior500022010en.pdf

[2] http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/UNGC_SRSGBHR_Note.pdf

2. Competitive Disadvantage?

The guidelines do not include reference to possible problems of realizing/respecting the principles for businesses. No doubt, all businesses must follow them. But in reality, it is also often a question of money. So businesses enforcing human rights often have to face higher costs. This makes them less competitive. Therefore, one needs an incentive system or a way of enforcing the principles. Higher public awareness would help in this context. (see comment on Consumer/ Society Perspective)

! **Recommendation**: Acknowledge difficulties for businesses caused by economic competition and provide guidance to avoid those dilemmas by an incentive system or, again, specific ways of enforcement.

3. Consumer/ Society Perspective?

Talking about business and its relations to society, one cannot leave out completely the society's perspective. The Special Representative does seem to regard the civil population simply as potential victims but not as an active part of the economy in their role as consumers.

With regard to the Global Compact, it has to be seen as an improvement to involve the government, but the society is still missing. In my opinion, the Special Representative should provide ways to raise public awareness. This could happen in form of campaigns about the Guiding Principles, their content, context and importance or in starting a public discussion in the media.

People do know about the existing problems. But if they are not confronted with them on a regular basis, it is easy to ignore them. I am especially talking about consumers in the Western World who often prefer lower prices to fair production. A public discussion could lead to a change in consumption habits. This would be a further form of enforcement to business in form of a change in demand. An international label could help in this context to establish a certain level of information and transparency if it is communicated appropriately and widely.

! **Recommendation**: Next to the principles, one must involve society in their role as an economic demand force and urge responsible consumption behaviour.

Submitted by Sonja Knobbe

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Response from The Norwegian Bar Association's Human Rights Committee on 28 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

We refer to the draft Guiding Principles on Business and Human Rights.

The Norwegian Bar Association's Human Rights Committee agrees with the comments that transpire from Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights.

In addition, The Norwegian Bar Association Human Rights Committee highlights the importance of stringent requirements to Protect, Respect and Remedy where states outsources administrative functions i.e through the use of private security companies. In these cases, the same standards and requirements for its activities must apply as would if the states executed the administrative functions themselves.

Regards,

The Norwegian Bar Association's Human Rights Committee

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Response from Gao Wei Wei on 30 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

I agree with use of terminologies of evolution such as " the modern corporation itself has evolved at an accelerated pace" but I think a more radical way of looking at the implication of that is required, and

below is an attempt which may reflect that, this may challenge the substantive content of the entire framework, but a simple question of - to what extant can we respect people by using threat to either ourselves and others for non-comformity of our expectation will reflect the mediocrisy of living a life trying to adapt, cope and solve problems rather than by creation.

- Acceleration of evolution is manifested both in the speed with which information multiplies and the strengths of tension behind the human aspiration of human dignity & sustainability and felt reality of our own participation & self-identification with the historical institutions (economic, social, political) which forms a planetary system based on extraction, manipulation, transportation of natural (and human) resources towards centralized locations for profit maximization and asset consolidation. A model which was conceived based on the presumption of possibility of infinite growth.
- From the point of evolution, such historical institutions are inherently oppressive of human beings' ability to evolve and spontaneously self-express. Most of people growing from developing and developed countries grow up in these institutions based on pursuit of objective, wand as a result, the individual's and the collective's attentions and energy to the pattern of self-objectification.
- This is because humanities have recognized that as long as the individual or collectives' action is driven by objectives, one turns oneself and the other people into an object or means or instrument, and deprives oneself and the other of their inherent dignity, and natural ability to self-heal, self-balance, self-rightness.
- The rule of law therefore must shift from that which is based on conformity, punishment or voluntary codes of conduct or self-regulation to being temporary interaction rules ("rules of transition"), which will last to the degree and extant human beings' attentions follow the instutionalised pattern of self-objectification. The rules would involve, for example, allowing people to come together temporary suspending their identities or self-identification with the historical institutions of state or NGOs or corporations, however noble the objectives, but as human beings exist for their own right. A specific example of this would be dismantling the 'outcome' or 'agenda,' or requesting participants to pay attention to their thinking process, and the awareness of any arising tension in their body (more, see Bohm Dialogue)
- The "rules of transition" are necessary because behind the self-imposed conformity to the objectives of historical institutions , there are powerful neurophysiological or emotional blockages (endorphins build-up based on past habits of award/punishment blocking our ability to sense and feel whole) which will be released as the body is no longer used as an object to achieve whatever objectives, This process of the body self-balancing will be anticipated as experience of discomfort, and or a sense of personal/identity crisis.
- This proposal does not involve any specific 'form' and may seem unpractical because it is not predictable, but any conceivable 'form' is necessarily based on someone's memory of past, which, when projected onto present or future (as a vision), will involve conformity. Any 'concrete' or 'practical' solution, seeing in this light, thus necessities modified continuity, which may in the long time, amplify the systematic conditions of what people experience as problems, and may not keep up with the amount of information emerging as a manifestation of the accelerating speed of evolution towards a world based on, what I personally feel can be called, conscious co-creation.

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Response from Ogereau on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

CIDSE submission to UN SRSG on draft guiding principles

31 January 2011

Dear Professor Ruggie,

Thank you for the opportunity to comment on the draft text of the Guiding Principles. Along with other members of civil society networks, we have already highlighted a number of outstanding concerns regarding aspects of the current draft. As CIDSE members and partners who have followed the progress of your mandate over the last five and a half years, participating in a number of consultations and making three submissions[1], we would like to propose some specific changes which we believe will strengthen the principles and make them more effective as a tool for reducing instances of corporate human rights abuses.

We strongly support the analysis in your reports to the Human Rights Council regarding the existence of "governance gaps" and believe that, having identified the extent of the problem, there is more scope to take this analysis to its logical conclusions in the Guiding Principles. In particular, we believe that the impact of the Protect, Respect and Remedy framework will be much greater if the Guiding Principles relating to the three pillars of the framework are mutually re-enforcing.

In this context, we believe that a priority is to strengthen the wording of the second draft Guiding Principle so that it goes beyond simply "encourage" (p. 6). Given the growth of transnational companies and the governance gaps created by globalisation, a stronger approach is justified and, indeed necessary to prevent human rights violations, for example:

"States should take action to ensure business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their global operations, including those conducted by their subsidiaries and other related legal entities."

Part of states' duty to protect human rights against corporate abuse would include introducing a requirement for enterprises to conduct human rights due diligence. This would ensure that laggard companies have to take note of all the relevant ideas on due diligence developed under the pillar of the corporate responsibility to respect, rather than choosing to opt out of or simply ignore these threshold standards.

Given that the framework and the Guiding Principles will be a point of reference for hundreds of different actors with very different agendas in the years ahead, we believe that it is important to make the language of the final text clearer. For instance, the frequent use of undefined terms such as "where appropriate" and "stakeholders" means that there is a risk that the principles in their current form could be used by unscrupulous operators and officials to defend the status quo rather than drive improvements. It is important that the final text eliminates potential loopholes. Likewise, you have recognised that the issue of business and human rights is profoundly different to other aspects of company risk because it concerns rights holders, therefore we recommend removing language referring to companies' "human rights performance" and replacing this with "impacts on human rights."

The key challenge for the international debate on business and human rights and for the local organisations with whom we work is how to address situations where businesses harm communities but states are unable or unwilling to take action to protect their citizens from corporate abuses. It is important to emphasise that this situation is by no means limited only to conflict-affected areas. Furthermore human rights violations in the context of business operations often occur in situations of low intensity conflict, hidden from public attention and interest. Our Philippine partners have stressed the importance of also addressing low intensity conflict situations. CIDSE's submissions to the SRSG have consistently emphasised the complementary roles which home and host states can take to increase oversight, resources and available information. We believe that this is a pragmatic approach which can deliver real changes in a relatively short time-frame. Therefore it is disappointing that the current draft of the Guiding Principles steps back from recommending even home country reporting requirements for enterprises on their human rights impacts, one example of a very practical measure which could be helpful in all kinds of country contexts.

Business arguments about red tape should not be used to water down appropriate mandatory disclosure which would provide much needed information to affected communities, officials and consumers, as well as ensuring that more companies have at least considered their impacts on human rights. We strongly support the statement in the draft commentary that "some small and medium-sized enterprises can have significant impacts, which will require corresponding measures regardless of their size." Since impact on human rights rather than the size of the business is the central issue, there are clearly ways to design reporting requirements so they are not an unnecessary burden, whilst still providing much needed information on a more comparable, systematic basis.

As part of the corporate responsibility to respect human rights, it is important that guidance to companies on corporate due diligence includes specific reference to vulnerable groups, including women, children, migrant workers, indigenous peoples and human rights defenders. The current draft mentions these groups but would benefit by adding further explicit links to the work and recommendations of other UN Special Procedures, the ILO and the UN Permanent Forum on Indigenous Issues. This is an urgent priority, in light of the high proportion of civil society groups from the South who raised their concerns about the human rights impacts of mining and extractives projects during the course of the mandate.

We would like to see a more explicit and positive recognition of trade unions in the Guiding Principles. We welcome the statement in the commentary that "Operational-level grievance mechanisms should not be used to undermine the role of legitimate trade unions" (p.25) but it is important for the text to go further and explicitly recognise the positive role that independent trade unions can play through mature systems of industrial relations and for example international framework agreements. This includes but certainly goes way beyond mechanisms for dealing with grievances before they escalate. Specific references to this important positive role in the Guiding Principles will help to ensure that more companies respect core rights to freedom of association and collective bargaining and more workers are able to enjoy those rights without reprisal.

The priority for all the local organisations that we have spoken with regarding business impacts on human rights is to stop abuses occurring in the first place. We strongly agree with the intention that the framework supports preventative and remedial measures. By making the changes to the draft Guiding Principles highlighted above, we believe that the preventative aspect would be greatly strengthened in practical ways. We also suggest that it would be helpful to include within the commentary on the third pillar of the framework a reference to the concept of reversing the burden of proof in specific instances, which has been elaborated by our colleagues in the Philippines. Such an approach is entirely feasible, as evidenced by the European Union's Registration, Evalution, Authorisation and Restriction of Chemicals (REACH) regulation, which entered into force in June 2007. Also, in April 2010, the Philippines Supreme Court promulgated new Rules of Procedure for all cases of violation of environmental laws. The new court rules include a provision recognizing the precautionary principle and this shifts the burden of evidence of harm away from those likely to suffer harm, i.e. communities in most cases. It places onto companies against which complaints have been made the burden of proving that they did not cause such harm. The Guiding Principles can build on those existing examples and reference the value of using this concept in the human rights context.

As ever we remain very happy to discuss these ideas further with you and your team. Our aim in participating in the consultation is ensuring that the final Guiding Principles prove an effective and relevant tool for change in order to prevent abuses of human rights by businesses and ensure meaningful redress to communities and individuals when instances of corporate abuses do occur.

Yours sincerely

Bernd Nilles, CIDSE Secretary General

CIDSE members

Anne Lindsay, CAFOD, UK

Aldo Caliari, Center of Concern, USA

Janine de Vries, Cordaid, Netherlands

Daniel Hostettler, Fastenopfer, Switzerland

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[1]1) *Recommendations to reduce the risk of human rights violations and improve access to justice*, submission to the UN Special Representative on Business and Human Rights, February 2008.

2) *Operationalizing the 'Protect, Respect, Remedy' Framework*, CIDSE submission to the UN OHCHR Consultation on Business and Human Rights, October 2009.

3) *Protect, Respect and Remedy- Keys for implementation and follow-up of the mandate*, thirdsubmission to the UN Special Representative on Business and Human Rights, October 2010.

Available at: www.cidse.org/Area_of_work/BusinessAndHumanRights/?id=52.

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Response from Peter Utting on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

UNRISD Submission to the UN SRSG on the "Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework"

Since the 1990s the United Nations Research Institute for Social Development (UNRISD) has carried out extensive research on issues of business regulation, the role of transnational corporations (TNCs) in development, and the potential and limits of corporate social responsibility (CSR). Drawing on this body of research, these comments assess the contribution and limitations of the Protect, Respect and Remedy (PRR) Framework and the Guiding Principles (GPs) with regard to corporate accountability and performance conducive to rights-based development.

1. The PRR Framework and the GPs make a major contribution to thinking and policy in the field of business and human rights by highlighting the respective roles, complementarities and synergies of both broader regulatory approaches involving legalism, voluntarism and active citizenship, as well as more concrete institutional arrangements associated with state capacity, CSR-related due diligence and grievance procedures. Explicitly advocating this mix of institutional conditions represents a major step forward.[1]

2. The Framework and the GPs promote institutional arrangements that potentially address some of the major limitations of mainstream approaches to CSR. These limitations include, for example, the a) tendency for companies to pick and choose among multiple standards, b) the scale of free-riding and inaction, c) the lack of attention to key issues such as core labour rights, living wages, executive pay and fiscal responsibility, e) corporate incentive structures and lobbying practices that contradict or undermine CSR, and f) promotion of self-regulation as a means of sidelining public policy and law.

3. The GPs importantly call attention to some of the blind spots and contentious issues related to international development policy, notably the potentially contradictory impacts of free trade and investment agreements and donor conditionality on policy space and state capacity in developing countries.

4. In relation to the business responsibility pillar of the PRR Framework, the GPs emphasize that companies should adopt a systematic approach to embed human rights principles throughout their structures. Such an approach includes due diligence procedures, including explicit statements of principles, monitoring and reporting practices, human rights impact assessments, supply chain management and self-remediation measures.

5. In relation to regulation and the strengthening or deepening of voluntary approaches to corporate responsibility, a major contribution of the GPs lies in the considerable emphasis on the role of grievance procedures, both judicial and non-judicial.[2]

UNRISD research has raised various concerns that merit inclusion or greater attention in the GPs. These include the following:

6. Avoiding adverse development consequences of standards regimes: The design and application of standards may have distributional consequences that can impact negatively on weaker stakeholders, particularly in developing countries. Two types of potential developmental consequences or contradictions need to be acknowledged. First, the tendency for smaller enterprises or producers to be crowded out of some value chains as global processing or retailing firms come to rely on larger suppliers. Second, the capacity of more powerful stakeholders within value chains to transfers costs and risks onto weaker stakeholders. In the real world context where consumers, shareholders and senior management, respectively, are unwilling to pay for higher standards through higher retail prices, lower shareholder returns and lower remuneration, respectively, the costs of raising standards are often born by small enterprises and workers. Similarly corporate due diligence can mean transferring risks along the supply chain. Reflecting the imbalances in power relations within global value chains and global governance, there may be winners and losers in the quest to raise standards, given the skewed distribution of costs and benefits. It is important to explicitly recognize these risks and contradictions, and particularly their implications for stakeholders in developing countries.

7. Casualization of labour: There is a tendency in the GPs to refer to the types of "vulnerable groups" that are usually identified within mainstream development discourse, for example, indigenous peoples, women and children. Attention should also be given to workers more generally who are affected by the increasingly precarious nature of employment, in particular casualization. This is a major trend within global value chains which has significant human rights implications.

8. Acknowledging the power of global corporations: The GPs pay insufficient attention to the power differentials within the global business community and value chains, and to corporate influence in policy making. The tendency in the GPs to focus on business enterprises in general runs the risk of diverting attention from the crucial issue of corporate power. In this regard, it is important to acknowledge what was one of the original ethical points of departure for the corporate responsibility movement in the 1980s, namely that under globalization and liberalization there had emerged a gross imbalance between corporate rights and corporate obligations, which needed to be corrected.[3] The key issue at hand was, and largely remains, the issue of corporate power and corporate accountability. Furthermore, the seemingly sensible observation in the GPs that attention should be focused on "raising the performance of laggards" (GP 11, commentary)— presumably in contrast to recognized 'leaders'—is problematic. Often it is the large global corporations that talk the talk of CSR and have the resources to take selected initiatives that are categorized as leaders in this field. But recognized leaders often err, and when they do, the scale of their operations means that the consequences can be significant. As large complex

organizations, which are subject to multiple pressures and objectives, they are prone to practices that may have contradictory impacts.

9. Shared responsibility and corporate policy coherence: To address these development and governance contradictions, it is important to emphasize two principles: 'shared responsibility' and 'corporate policy coherence'. The notion of shared responsibility calls attention to corporate irresponsibility of transferring costs onto weaker stakeholders and also 'cutting and running', i.e. abandoning suppliers that have difficulties in meeting standards rather than working with them to improve conditions. As noted in the GPs, the principle of "policy coherence", generally applied to states to ensure that their policies towards developing countries are not contradictory, can also apply to business. The principle of "corporate policy coherence" could draw attention to the need to deal with tensions between a) pricing and procurement practices, and incentive structures, that contradict policies and practices associated with social responsibility, and b) 'irresponsible lobbying' i.e. corporate advocacy for public policies or 'de-regulation' that can have perverse social, environmental and human rights consequences. [4]

10. Effective participation and bargaining: The GPs pay considerable attention to the importance of stakeholder dialogue. Past practice reveals that dialogue and consultation facilitated by powerful institutions is often superficial and does more to legitimize a process rather than afford disadvantaged stakeholders effective voice and influence. The GPs should point out the need to safeguard against cosmetic dialogue, and the importance of effective participation and collective bargaining. If the developmental contradictions of new or strengthened public and private standards regimes are to be minimized, it is crucial to address the issue of the participation of southern stakeholders in processes associated with design, implementation and oversight of such standards. More effective forms of participation might also contribute to overcoming the tendency for processes associated with standards-setting, and the corporate responsibility agenda more generally, to be largely Northern-driven.

11. Reconfiguring power relations: Effective or equitable participation of disadvantaged stakeholders requires reconfiguring power relations. A fundamental institutional misalignment underpinning business irresponsibility for human rights and lack of action and redress in this field relates to gross imbalances in resources and influence among states, companies and citizens, as well as the powerful coalition of interests that often exists between states and corporations. Correcting such an imbalance requires far more than technical adjustments such as enhanced consultation or "improved access to information, advice and expertise" (GP 29.d). It requires political adjustments under which watch-dog, advocacy and other types of civil society organizations can carry more weight, and that involve building coalitions that connect NGOs and trade unions, activists North and South, and civil society organizations or movements and programmatic political parties. It also requires effective background conditions and laws associated with freedom of association, press freedom and right to information laws.

12. An enhanced role for global institutions: The Preface of the GPs usefully begins by pointing to the need to correct the institutional misalignments that have emerged in recent decades under globalization and liberalization (paragraphs 1 & 2). In addition to the roles of national states, business self-regulation and active citizenship, relatively little attention is paid to the fourth institutional pillar of good governance, namely global institutions and regulation. The role specified for multilateral institutions is quite restrictive in the GPs (GP 11). It is essentially limited to the issue of safeguarding policy coherence in relation to state policy and promoting good practice. The role of international institutions in relation to binding regulation, oversight, remediation and critical inquiry need to be considered more fully. Guidance in relation to these roles is essential and should not be sidelined because they may be politically sensitive or because the field of business and human rights is complex. Overcoming the institutional deficit that is a feature of globalization also means it is essential to go beyond an examination of "existing standards and practices" (Preface, paragraph 13). The importance of considering the role of new institutions should also be acknowledged, including the crucial question of follow-up and oversight related to the PRR

Framework and the GPs, and the ongoing need for a global focal point in this field. The GPs rightly state that a fundamental reason why the process orchestrated by the Secretary-General's Special Representative was able to advance related to the fact that for the first time there was an explicit focal point, which operated at the global level. This begs the question what global institutional arrangement can ensure that such a focal point continues to exist. It is to be hoped and expected that the GPs, as operational guidelines, would address this key aspect related to follow-up and oversight.

13. The global crisis and new regulatory imperatives: Regulatory dynamics in the United Nations system reflects the political and ideational context of the time. The PRR Framework and the GPs are a product of the mid 2000s. This was a time when there was growing international recognition that free-market ideology had gone too far and that it was necessary to rebalance the roles of the market and the state. This is precisely what the GPs attempt to do. With the global financial and economic crisis, the political economic context has now changed.[5]The crisis has put into sharp relief not only the limits of self-regulation but also the need for global solutions for global problems.[6] Today's solutions must go beyond issues of national state capacity and voluntary initiatives, however, meaningful. The cautious approach that pervades the PRR Framework and the GPs made sense in order to craft the type of consensus needed to advance the normative process related to business and human rights. But having effectively consolidated its legitimacy, and given the new global context, the time appears right to push the regulatory envelope and institutional imagination.

[1]See UNRISD, 2010. *Combating Poverty and Inequality: Structural Change, Social Policy and Politics*, in particular Chapter 9, "Business, Power and Poverty Reduction", UNRISD, Geneva

[2] See UNNGLS/UNRISD, 2002. *Voluntary Approaches to Corporate Responsibility*, in particular Chapter 2, "Regulating Business via Multistakeholder Initiatives", NGLS/UNRISD, Geneva.

[3] See UNRISD, *State of Disarray: The Social Effects of Globalization*, UNRISD/Earthscan.

[4] See Utting P. 2010, "CSR and Policy Incoherence", in Macdonald K. and S. Marshall (eds.), *Fair Trade, Corporate Accountability and Beyond: Experiments* in Global Justice, Ashgate.

[5]See UNRISD 2010, *Social and Political Dimensions of the Global Crisis: Implications for Developing Countries*, UNRISD Conference News.

[6] See United Nations, *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System*, 2009.

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Response from James Harrison on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

A Response to the Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework Dr James Harrison, Co-Director of the Centre for Human Rights in Practice, School of Law, University of Warwick

31 January 2011

Dear Professor Ruggie

The Centre for Human Rights in Practice at the University of Warwick welcomes the Guiding Principles. They provide much needed detail for the Framework in terms of setting out what the State's duty to protect, the corporate duty to respect and the nature of effective remedies entail. We also welcome the rich debate which has ensued around the content of guidelines. We very much hope that consensus can be achieved on key issues raised by all the actors who are engaged in trying to improve the human rights conduct of corporate actors. We are sure that this will enhance and enrich the final draft.

This brief submission attempts to add to the debate by focusing specifically on two issues which relate directly to the work of our Centre over the last few years.

1. Due Diligence - Human Rights Impact Assessments

The first issue concerns enhancing understanding of the potential human rights violations that can be caused by corporate actors. The Guiding Principles rightly put a great deal of emphasis on the 'due diligence' measures that corporate actors should undertake (Principles 15-19). Due diligence is necessary in order to identify (potential) human rights violations that might occur and then 'prevent or mitigate any adverse human rights impacts'.

Much recent work in this field has focused on 'human rights impact assessments' (HRIAs) in order to fulfil this obligation. The human rights impacts of a company's policies or practices are complex and multifaceted. Therefore companies must undertake thorough and robust 'research' in order to fully identify the nature and extent of potential impacts and the requisite responses. We agree that a properly constructed HRIA process can have great benefits for the protection and promotion of human rights. Our Centre has worked extensively on methodologies for human rights impact assessments (see http://www2.warwick.ac.uk/fac/soc/law/chrp/projectss/humanrightsimpactassessments/)

Our research suggests that current approaches to HRIAs are extremely variable in quality. The Guiding Principles would therefore benefit, at the very least, from referencing a more detailed set of guidance about what constitutes a valid and legitimate HRIA process. There is also a need for mechanisms to differentiate good from bad practice in the conduct of HRIAs by corporate actors (we return to this latter issue below).

We would also argue that the State has a strong role to play when it comes to 'due diligence' and that this does not currently feature in the Guiding Principles. In some areas, it will be clear what the State should be doing to promote human rights (e.g. a new corporate manslaughter law – principle 5). But in other areas, the State will have to undertake or commission research in order to understand the potential human rights impacts of corporate actions and policies. For instance, when States sign up to international trade law or investment law obligations, there are a variety of potential human rights impacts caused by corporate actors (e.g. agricultural liberalisation on domestic farmers, intellectual property protection on access to medicines). But the precise impact of any actual agreement on any particular State requires detailed analysis. There is increasing activity by UN actors, non-governmental organisations and States themselves to create methodologies for assessing such impacts. This would be reinforced by the Special Representative making recommendations that States should undertake such 'due diligence'.

2. Differentiating good from bad practice in 'soft' human rights mechanisms

The second issue goes to the heart of the purpose of the Framework. Put simply - getting more corporate actors to take their human rights responsibilities more seriously.We would agree with your conclusion that this cannot be done through the creation of a new, single legally enforceable framework. Rather, your Framework can most usefully contribute by working to enhance the existing patchwork of initiatives, standards and practices that already operate in this field globally. In a number of respects, the Principles make important contribution in this respect – e.g. in relation to 'remedies', they set out a series of standards to which grievance mechanisms must adhere if they are to be considered legitimate.

But the Principles are currently less helpful when it comes to the soft law initiatives and voluntary mechanisms which litter the landscape of corporate human rights conduct (including the HRIAs discussed above). You have previously identified the problem with many of these initiatives – there is no way of properly differentiating good from bad practice, laggards from leaders. Our own research leads us to the same conclusions Very rarely does evaluation and differentiation happen effectively – often because those monitoring performance are also attempting to encourage participation in such mechanisms. If 'soft'

mechanisms are ever to be part of the solution to corporate human rights conduct, then effectively differentiating performance must be tackled.

The Principles themselves cannot be expected to differentiate conduct. This will come from an evaluation of the individual human rights performance of particular companies – but they can lay the ground work. They can address the systemic problem that there is a dearth of actors effectively attempting such a differentiation. For instance the principles could push for the establishment of demonstrably independent and effective bodies to monitor the respective human rights performance of MNCs in respect of soft law mechanisms and to report openly and robustly on performance.

We wish you every success in drafting the final version of the Principles and look forward to seeing the results of your labour.

Yours sincerely

James Harrison

Co-Director of the Centre for Human Rights in Practice, School of Law, University of Warwick

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Response from Initiativ for etisk handel on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Comments from Ethical Trading Initiative-Norway on the Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy" Framework

ETI-Norway highly welcomes the guiding principles, not to mention the public review process. ETI-Norway supports the framework of the State duty to protect and the business duty to respect human rights.However, for the Guiding Principles to lead to the development of more operational tools and resources, certain clarifications are necessary.

In the comments ETI-Norway will focus on our core "business"; responsible supply chain management.

Ethical trade means to promote decent work and sound environmental conditions throughout global supply chains, based on internationally recognized ILO and UN standards as well as national legislation. ETI-Norway is a non-profit multi stakeholder initiative, established in 2000 by the Norwegian Confederation of Trade Unions, the Norwegian Federation of Commercial and Service Enterprises, the Norwegian Church Aid and Coop Norway. We are a member-based organization made up by companies, trade unions, NGOs and public sector entities. Out of 120 members, 3 of 4 are companies. Members commit to adopt a minimum set of principles as their ethical guidelines, to regular and transparent reporting as well as the willingness to consider the impact of own business practice when it comes to supplier relationships.

Comments from ETI-Norway

ETI-Norway supports the framework of the State duty to protect and the business duty to respect human rights. The ETI-Norway Declaration of Principles from 2000 endorses the same framework, underlining that "in instances where the national authorities are incapable or unwilling to fulfil their mandate to protect, business and organizations must refrain from abusing the situation in their business practice".

ETI-Norway also supports the Guiding Principles as an important step towards operationalizing businesses', states' and other organizations' promotion and implementation of the corporate responsibility to respect human rights and avoid infringing on other actors' human rights.

However, for the Guiding Principles to lead to the development of more operational tools and resources, certain clarifications are necessary.

To strengthen the Guiding Principles, ETI-Norway calls for:

1. Clarification of the state's role to foster business respect, referring to the state responsibility to ensure and promote responsible business and act accordingly i.e. through public procurement.

The Guidelines should encourage governments to include ethical criteria in their public procurement laws and regulations. The public sector is a significant buyer in many countries, and can play an important role in promoting decent working and environmental conditions in the supply chain by setting ethical requirements in tenders (ethical requirements understood as (at least) ILO core conventions and additional requirements related to working hours, wages, OHS and regular employment conditions)[1].

2. Clarification of human rights due diligence in the supply chain

2.1. Avoid code à la carte.The Guiding Principles rightfully refers to the International Bill of Human Rights and the eight core conventions of the International Labour Organization as a basis for the corporate responsibility to respect human rights (12 a). These standards do cover the main principles business should respect. However, ETI Norway considers that the Guiding Principles should include a recommended set of minimum principles for businesses to include in their code of conducts. Not merely for practical means for businesses, their suppliers and stakeholders, but also for the sake of standardization and definition of corporate responsibility to respect human rights. As of today, multi stakeholder initiatives such as ETI-Norway and our network of likeminded organizations in other countries[2]basically use a similar code with the following principles with regards to

1. **Conditions at the workplace[3]**
2. Freely Chosen Employment(ILO Conventions Nos. 29 and 105)
3. Freedom of Association and the Right to Collective Bargaining (ILO Conventions Nos. 87, 98, 135 and 154)
4. Child labour (UN Convention on the Rights of the Child, ILO Conventions
5. Discrimination (ILO Conventions Nos. 100 and 111 and the UN
6. Convention on Discrimination Against Women)
7. Safe and Hygienic Working Conditions (ILO Convention No. 155 and ILO Recommendation No. 164)
8. Adequate Wages/Living Wage (ILO Convention No. 131)
9. No Excessive Working Hours (ILO Convention No. 1 and 14)
10. Providing Regular Employment

- **Conditions outside the workplace (ETI-Norway and Danish ETI)**
- Consideration of marginalized population(ILO Convention 169)
- Environment (external)

A standardized code with a minimum set of principles does not imply that all aspects of every principle are expected to be covered in every enterprise's practical work. Nor is it a comprehensive list of issues a company should address in a given context. For all practical purposes and for most businesses, it will be impossible to conduct human rights due diligence with regard to all suppliers and to follow up on all risks related to all principles at a given time. However, we believe that the Guiding principles should clearly recommend that companies include a minimum set of principles in their human rights impact assessment in order to minimize the risk of companies to overlook, not address and to contribute to human rights violations– and sufferings to continue.

Moreover, a standardized code should be used to embed and communicate values in the enterprises' Policy Commitments (14) and as a tool to track risks, and identify and prioritize improvement measures when necessary (15).

In addition to such minimum recommendations each company must include other relevant issues based on the nature of its operations, such as sector and location of production.

2.2. Clarify policy recommendations and human rights due diligence in the supply chain (i.e. Guiding Principles 12, 13, 15 and 16)

Global production is characterized by global production networks[4]. Outsourcing, numerous sub-suppliers and subcontracting is common.Not just goods, but also workers, increasingly cross boarders in our global economy. For most of us the supply chain is increasingly more fragmented and translucent.

Companies must be aware that the risk of severe human rights violations is higher the further down the supply chain you get. To investigate risks beyond the first tier suppliers will thus be increasingly necessary.

When it comes to supply chain management, the experience of ETI-Norway and our members indicates the following good practice indicators of responsible supply chain management.

To promote and prevent. Implementation of supply chain responsibility seldom implies a top-down approach, simply because the enterprise trying to implement supply chain responsibility rarely owns the factories or production sites where the value creation of their goods and services takes place. Hence, supply chain responsibility means to promote compliance with and to prevent human rights violations in the supply chain, to identify risks *and* improvement measures in collaboration with selected suppliers.

Continuous improvement - recognizing the compliance gap between goals and realities. Production sites and raw-material extraction in many countries and areas are far below even "minimum" standards of international conventions, and hence all practical work should be based on the principles of 1) continuous improvement and 2) collaboration with suppliers, as opposed to a "comply or die"-regime

Policy (14)

The policy commitment should be:

Based on a set of foundational principles (see 2.1 above), explicitly refer to supply chain responsibility, and reflect a willingness to contribute to improvements on the basis of international human rights standards in collaboration with selected suppliers Approved by the board and/or the top administration Communicated to the employees

Human rights due diligence in the supply chain (15 c)

ETI-Norway supports use of the concept of *Human rights* due diligence. However, for the term to be meaningful in the perspective of human rights risk assessment and improvements, there is a need for a more detailed outline of what a HR due diligence process should entail, especially with regards to the supply chain.

ETI-Norway recommends that a HR due diligence, based on experience from multinational companies as well as SMEs, entails the following:

- **Regular risk assessment** of potential and actual risk with regards to existing as well as new business relations.
- **Mapping the company's supply chain**. Companies must be aware that the risk of severe human rights violations is higher the further down the supply chain you get. Without knowing where goods or services are produced, it is impossible to assess the potential and actual risk of HR breaches in the supply chain.

- **Get an overview of the company's risk** related to geography, type of product and industry-specific risk. This initial risk assessment is necessary to prioritize which suppliers to select for further assessment
- **Gather information from and start dialogue with selected suppliers**
- **Perform risk assessments of selected suppliers' factories with the purpose of identifying improvement measures.** Social audits are often performed in manners that hinder the development of a trustful relation between customer and factory management, and that thus fail to identify real challenges or viable solutions. In order to go beyond today's "comply or die" and consequential audit fraud-tendencies in social auditing in global supply chains, ETI Norway recommends that such audits or assessments are based on a general obligation to identify and address **root causes** of poor human rights performance, that the actors conducting such assessments are perceived as credible to the rights-holders at stake and that the assessor(s) are able and willing to provide improvement guidance. [5].
- **Regular reporting on key performance indicators**to track and identify challenges, and to measure performance. Key performance indicators for supply chain responsibility are still at an early stage, not to mention key impact indicators. ETI Norway has developed a set of indicators in our reporting scheme, based on the Global Reporting Initiative and investor criteria (Gradient Index) as well as indicators from our sister organization Ethical Trading Initiative. ETI-Norway also participates in a Global Repporting Initiative working group, set to further develop supply chain reporting indicators.
- **Communication** of methodology, key findings and challenges i.e. in annual reports, CSR reports, on website, social media and in print material.
- ***Assessment of a company's purchasing strategies and practices should be included in HR due diligence for the supply chain.*** ETI-Norway is pleased to observe the increased focus on how companies purchasing strategies and practices impact on human rights.ETI-Norway recommends that purchasing strategies and practices are included in companies' policies, due diligence and reports. Supply chain risk assessment and improvement measures must be linked to a company's business practice.How suppliers are selected, the length of trade relationship , lead times for orders, price paid for goods and services, buyers' incentive schemes and the types of relationship and contract terms the company has with the supplier affect human rights and labour conditions in the supply chain - for better or for worse[6][7].

Closing remark

ETI Norway recognizes that the Guiding Principles are not formulated as a tool kit for governments, companies or organizations. However, in their current form and especially with regards to supply chain responsibility, the principles are too vague to serve as useful guidelines for responsible enterprises trying to develop their policies and implementation processes.

We welcome any comments or questions regarding our comments,

Per N. Bondevik, Managing Director

Gunelie Winum, Project manager

Mari Bangstad, Information Adviser

[1]Swedish regional governments have set ethical requirements as contractual conditions since 2007. The Dutch government has implemented a plan for sustainable procurement policy which includes ethical criteria in all purchases at central level. Local and regional level seems to follow. Late 2007, Ethical Trading Initiative – Norway (ETI-Norway) was commissioned by the government to develop guidance on the issue. The guidance was launched in January 2009. Members of ETI-Norway set ethical criteria in risk purchases. ETI-Norway supports them in the follow-up of suppliers.

[2]For example Ethical Trading Initiative (UK), Danish Ethical Trading Initiative, Fairwear Foundation, Fair Labour Association, Social Accountability International

[3]Please note that the reference list below is not extensive, but refers to core UN and ILO conventions, declarations and recommendations

[4]Capturing the Gaines

[5]ETI-Norway is one of the founding members of Local Resources Network (LRN). LRN is a database over local improvement advisors which companies and their suppliers can get assistance from in their improvement work www.localresoursnetwork.net

[6]We read that the Guidelines also point out that a company's own activities might have adverse human rights impact, and recommend that they should take action to address this (Guiding Principles 13, 14e, 15, 16 & 17). However, we believe clearer formulations will enhance the intuitive understanding and thus increase the leverage. In this regard, we refer to the UN Special Representative's discussion paper "The Corporate Responsibility to respect human rights in supply chains" (points 5-9), submitted to the 10th OECD Roundtable on Corporate Responsibility (30th June 2010).

[7]**ETI-Norway** tools and resources:http://www.etiskhandel.no/Artikler/4191.html; Code of Conduct template; reporting template; training curriculum for buyers ; training curriculum for suppliers; survey amongst Chinese suppliers

ETI UK: http://www.ethicaltrade.org/in-action/projects/purchasing-practices-project.

Traidcraft and **Charted Institute of Purchasing & Supply's** joint report: "Taking the lead"

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Response from Michael Eastman on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Comments of the U.S. Chamber of Commerce: January 31, 2011 Dear Special Representative Ruggie:

We are pleased to submit these comments on behalf of the U.S. Chamber of Commerce (Chamber) on the draft Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework on Business and Human Rights. The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees.

Although primary responsibility for participation in the consultations surrounding these draft Guiding Principles has been with our colleagues at the U.S. Council for International Business and various international employer associations, we have closely monitored the process since you first received your mandate to create them. In general, we applaud your efforts to forge a consensus among the many interested stakeholders in this debate. More importantly, we have been comforted by what we see to be your willingness to actively engage the business community in your consultations and consider our point of view. Ultimately, in order for the Guiding Principles to have sufficient credibility within the business community and therefore to be of any use, the business community must have significant input into their development. It is, after all, a goal of your mandate to create an instrument that will be supported by the business community.

To that end, we have carefully studied the combined comments submitted by the International Organization of Employers, the Business and Industry Advisory Council and the International Chamber of Commerce. They point out critical aspects of the draft Guiding Principles that warrant attention and in some cases modification. As a general statement, we endorse and support their comments, and ask you to consider incorporating their suggestions into the final Guiding Principles.

Like these employer groups, we believe the Guiding Principles can become an important tool to guide business and governments in their activities worldwide, and we support the principle that underlies the entire endeavor which is to "do no harm." We would, however, like to emphasize one comments made in the joint IOE-BIAC-ICC comments and offer some further comments that we ask you to consider.

We wish to emphasize their comments with respect to draft Guiding Principle 12. These comments emphasize the distinction between the ILO Declaration on the Fundamental Principles and Rights at Work and specific ILO Conventions. This distinction is an important one as the detailed ILO Conventions apply to governments, not to businesses or any other entity. The Guiding Principles should refer solely to the principles articulated in the 1998 Declaration and not the specific Conventions.

We also have four areas of additional comments. First, because the Guiding Principles speak to further empowerment of governments to address human rights, they encourage an enhanced regulatory scheme at the national level. While we accept the fact that a certain amount of regulation of business by governments is a reality, we also believe that an appropriate balance should be struck between regulation by governments, and permitting business to operate independently. We do not support a premise that business will not respect human rights without a comprehensive regulatory scheme to force them to do so. The very purpose that underlies the Guiding Principles is to give business certain tools to achieve the common goal to "do no harm" in a manner that best suits the individual enterprise. Before considering further regulation in this area, as suggested by the draft Guiding Principles, governments should consider their effect without it.

Second, while we acknowledge the value of the Guiding Principles as a tool for business, we are deeply concerned about how they may be used or abused by labor unions and other advocacy organizations once they have been finalized. It is this concern that will have the greatest impact on our ultimate decision to recognize them for use by the business community we serve. Indeed, we are already seeing these groups use the concept of "human rights" as a means to further their institutional interests against employers. We are concerned that once the Guiding Principles become final, it will only be a matter of time before every aspect of labor management relations, no matter how trivial, will be transformed into a dispute over human rights. Indeed, the risk that these organizations will attempt to define the parameters of what constitutes acceptable behavior by business with respect to human rights is deeply troublesome. While we applaud your repeated statements that "no one size fits all" with respect to this, we fear those statements will fall on deaf ears, and may be lost by misuse of the Guiding Principles in this way.

Third, we are concerned that the Guiding Principles do not make any mention of how they might apply to labor unions. Business is not the only sector capable of failing to respect human rights. Labor unions can similarly fail to respect them. Labor unions often place their institutional interests before those of the workers they seek to represent, by denying workers access to information that would enable them make an informed decision about representation, or seeking to enter into agreements with employers that accord one union favorable treatment over others irrespective of the wishes of the employees themselves. We regularly see employers subjected to disparaging, brutal and well-funded corporate campaigns orchestrated by labor unions that are designed to pressure an employer into silence and accord one labor union favorable treatment over others. Such conduct, which adversely impacts the employer and thus indirectly, the very workers the union claims it seeks to help, is the antithesis of the premise of the Guiding Principles to "do no harm."

Fourth, we note that the combined employers organizations did not comment on the draft principle related to the Effective Criteria for Non-Judicial Grievance Mechanisms. We believe, however, that the framework established by this principle lends itself too easily to be construed as support for the use of the International Framework Agreement between labor unions and employers, and we would hope that the final text makes it clear that there are many ways to achieve this end.

As you are no doubt aware, many companies already have mechanisms that enable interested parties to raise issues with the corporation internally in accordance with codes of conduct or social responsibility. Businesses dedicate extensive resources to ensuring internal and external compliance with these codes. They are effective and have done a tremendous amount to further the principle of "do no harm." Curiously, labor unions and global union federations have long opposed unilateral corporate social responsibility initiatives by employers. They have done this, in our opinion, not because these initiatives are wrong—who can argue with such efforts—but rather, they have opposed them because they deny these groups a seat at the table. In short, we believe their opposition stems from the fact that such practices make these organizations less relevant.

We do not believe that a grievance mechanism established by an employer without involvement of an outside organization is inherently problematic or unfair. In fact, we believe, consistent with your statements regarding there being no one size that fits all, that employers should be permitted to establish such mechanisms that best suit their individual situation to the extent they wish to do so.

We hope you give our comments due consideration when finalizing the Guiding Principles, and we wish to thank you for your efforts in this project.

Sincerely,

Randel K. Johnson, Senior Vice President, Labor, Immigration, and Employee Benefits

Michael J. Eastman, Executive Dirctor, Labor Law Policy

Of Counsel: Stefan J. Marculewicz, Shareholder, Littler Mendelson, PC (Washington, DC)

Introduction to the Guiding Principles

These Guiding Principles are grounded in recognition of:

a. States' primary role in promoting and protecting all human rights and fundamental freedoms, including with regard to the operations of business enterprises;

b. The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and meet the societal expectation to not infringe on the human rights of others;

c. The reality that rights and obligations have little meaning unless they are matched to appropriate and effective remedies when breached.

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and to support the social sustainability of business enterprises and markets.

Nothing in these Guiding Principles limits or undermines any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.

These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, and challenges faced by, vulnerable and marginalized groups, and with due regard to gender considerations.

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Response from lescuyer on 25 Nov 2010

Ratings (Yes/No): Relevance 2 ✔ 1 ✖ Agreement 1 ✔ 1 ✖

Dear Sirs,

I would like to know to what extent do the Guidind Principles go further than Global Compact ? Shouldn't this point be clarified, even for non jurists, in the introduction ? (in other words and simple words, were is the progress relatively to Global Compact ?)

Furthermore, I would like to have the specialists' point of view regarding the intersections and relations between ISO 26 000 and the Guiding Principles.

Looking forward to reading your analysis on those two issues,

Thibault

PS : je vous remercie d'excuser mes fautes de grammaire en anglais

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Response from Lauren Gula on 30 Nov 2010

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Hello,

The SRSG's work is relevant to the UN Global Compact on many levels. In particular, the SRSG's elaboration of the corporate responsibility to "respect" human rights as a baseline responsibility and of "complicity" (part of the responsibility to respect), which are some of the main concepts in UN Global Compact Principles 1 and 2.

For more information on the relationship between the UN Global Compact and the work of the SRSG you may wish to visit:

http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html

Further, last May the UN Global Compact Office and the SRSG developed an explanatory note about the interconnectivity of these initiatives. See:

http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/UNGC_SRSGBHR_Note.pdf

Kind regards,

Lauren

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Response from Jose Rafael Unda on 13 Dec 2010

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 1 ✔ 2 ✖

As in my comment to the preface of the GP, I would like to see a motivation for companies to respect, based not only on societal expectations, but also on ethics. What I mean is that companies should respect, even if there were no societal expectations on that subject. Perhaps **adding** "**and ethical behavior**" would be enough, between the end of the current "...applicable laws and meet the societal expectation" and "to not infringe on the human rights of others" at "INTRODUCTION" - "b."

Regards

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Response from N.A.J. Taylor on 14 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 1 ✖ Agreement 0 ✔ 1 ✖

Section (b) in the Introduction is problematic to me:

First, it is a fragmented sentence: "...specialized functions, [are] required...";

Second, might best refer to laws and norms, since it may be reasonably argued that having agency, business enterprises are often required to adhere to principles and obligations beyond the law - as is indeed then indicated by the phrase "...the societal expectations...";

Third, the relevance of business enterprises might be best presented from the viewpoint of the market/state/civil society spheres of society, and in addition, the erosion of state soveriegnty, and thus the transfer of responsibilities and obligations (whether legal or moral) to market actors such as businesses;

Fourth, and lastly, the phrase "business enterprises" might be best clarified here - I feel it grossly naive to focus on corporations to the exclusion of institutional investors such and pension and sovereign wealth funds (apologies, point made in an earlier post under 'Preface'.

Go well,

N.A.J. Taylor

Principal, Taylor McKellar http://taylormckellar.com

Twitter http://najtaylor.com

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Response from Steven Oates on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

"... and with due regard to gender considerations". With all due respect, this is almost damning with faint praise. It is certainly a good thing to refer to discrimination, equality and the particular universality of the gender dimension at this introductory point, but the Guiding Principles unfortunately take us nowhere on

this. And despite the specfic consultation which the SR undertook. Nor does the commentary help. I would suggest a sentence or two here to say that gender analysis of the human rights issues confronting businesses may expose both hidden challenges and possible remedies. These could be elaborated below, if not in the main text than at least in the commentary.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

The problem we note is the fact that the English text of the Guiding Principles has not been translated into the other official languages of the United Nations, notably French, despite the fact that French is one of the UN's working languages. In addition to being a matter of principle which applies to all reports presented to the Human Rights Council, this problem is exacerbated by the fact that the document uses some ambiguous terms, meaning that 'official' translation is vital in order to fully grasp their legal implications. In the first instance, the fact that the English is the only version restricts the degree to which other legal systems are taken into consideration, as well as imposing a dominant viewpoint, even though globalisation is in crisis. It also restricts the scope of the consultations, especially within the French-speaking world, thus working against the document's own stated aim. In the second instance, this adds to the uncertainty over the fundamental legal concepts relating to 'international responsibility'.

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Response from Robert Grabosch on 28 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

This forum is a consultation of the global North, mainly. Most peoples in the global South are excluded from this forum and have no access to the Draft, because they do not speak English.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Greater emphasis should be placed on the fact that businesses have a specific duty to fulfil their international human rights obligations.

In paragraph 11 and in the introduction to the Annex, corporate respect for human rights is referred to as an expectation held by society, not as a legal obligation on businesses. This phrasing appears to deny the fact the corporate responsibility is clearly, albeit incompletely, covered in international human rights law and in certain regional and national laws[1].

[1]Someexamples:

1) The Convention on the Elimination of all Forms of Discrimination against Women (Article 2 (e)) stipulates that 'State Parties [...] agree [...] to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'.

2) The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography states (Article 3(4)) that 'Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative'.

3) The Convention on the Rights of Persons with Disabilities (Article 4(1)(e)) requires the State Parties'To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise'.

4) The International Convention on the Elimination of all Forms of Racial Discrimination stipulates (Article 2(1)(d)) that each State Party 'shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization'.

5) The International Convention on the Protection of the Rights of all Migrant Workers and Members of the Families (Article 16(2)) states that 'Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions'.

6) The UN Committee on Economic, Social and Cultural Rights recalled the duty of States to protect their residents against abuses by business enterprises in the following General Comments: No 12 on the right to adequate food (point 27: 'State Parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food'); No 14 on the right to health (Point 42: 'While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. State Parties should therefore provide an environment which facilitates the discharge of these responsibilities'); No 15 on the right to water (point 33: 'Steps should be taken by State Parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries'and point 23: 'The obligation to protect requires State Parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities, as well as agents acting under their authority'); No18 on the right to work (point 25: 'The obligation to protect the right to work includes the responsibility of State Parties to prohibit forced or compulsory labour by non? State actors'and No 19 on the right to social security (point 45: 'The obligation to protect requires that State Parties prevent third parties from interfering in any way with the enjoyment of the right to social security. Third parties include individuals, groups, corporations and other entities, as well as agents acting under their authority').

7) Other texts which might be cited are those of the Committee on the elimination of racial discrimination (for example: CERD/C/AUS/CO/15-17, 13 September 2010, paragraph 13; CERD/C/USA/CO/6, 8 May 2008, paragraph 30; CERD/C/CAN/CO/18, 25 May 2007, paragraph 17.

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

The report has some positive elements, emphasizing the necessity that business respects human rights and mentioning the possibility of extraterritorial jurisdiction. However, it does not go far enough: it does not sufficiently address the issue of how to hold companies accountable, which operate in countries where the government is weak or corrupt, it relies too much on voluntary initiatives from enterprises and it pays too much attention to non-judicial remedies and too little to judicial ones.

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Response from David Berdish on 28 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 1 ✖ Agreement 0 ✔ 0 ✖

Ford Motor Company welcomes the opportunity to comment on the guiding principles for the implementation of the "protect, respect and remedy" framework. Ford Motor Company congratulates the Special Representative and his staff for this comprehensive work and in general we are supportive of this clearly defined framework. Ford is eager to implement many of these recommendations and is using the

principles to benchmark its own strategies. However, some areas of the proposed guiding principles raise significant questions and need clarification, while others may not be practicable.

For example, the principles call on firms to evaluate their human rights impact with credible metrics. However, human rights are not easy to measure. Do we measure progress or outcomes? Do we measure whether we are good at protecting and respecting, but what about fulfilling and remedying human rights? Are these metrics really valid, meaningful, and reliable? Should citizens/stakeholders be surveyed or should we rely on expert perceptions? Will perceptions be different from human rights realities? Given these problems, we suggest that the UN Special Representative convene a discussion on human rights metrics and best practices.

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Response from Robert Grabosch on 28 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

From the position paper of the European Center for Constitutional and Human Rights:

———————————————————————————————

The dichotomy of legitimate policy goals is insufficiently dealt with.

Although SRSG Ruggie in his Draft Report points at the importance of the dichotomy of legitimate policy goals, the DGPs suggest only institutional and procedural changes, but lack *substantive* guidance on how economic/ developmental policy goals and human rights policy goals should be balanced, related, or put in hierarchical order.

An issue running through all parts of the 'protect, respect, and remedy framework' is that of legitimate policy demands which conflict with legitimate human rights demands. As SRSG Ruggie points out in ¶ 5 of his Draft Report, **the protection of human rights is complicated by other legitimate policy demands coming into play, including the need for investment, jobs, as well as access to markets, technology and skills**. Indeed, to give an example, defendants and several governments involved in the Khulumani/Ntsebeza litigation against corporations that reportedly aided and abetted with the former South African apartheid regime argued that US courts would impede international investment and trade if they allowed South African apartheid victims to seek redress before US courts. Similarly, opponents of forceful dislocations in the course of hydropower infrastructure projects are often accused of being against development. And governments may often refrain from protecting human rights in fear of diminishing jobs and loosing foreign direct investment. The conflict between human rights and economic development?both of which imply legitimate demands?is at the heart of the business and human rights debate.

Even though SRSG Ruggie acknowledges the importance of the dichotomy of legitimate policy demands and sets forth provisions for policy coherence, the DGPs and the respective Commentary lack a vision of how these policy demands can be conciliated. To the contrary: the frequent use of the undefined terms "appropriate and effective", "adequate" and "discretion" throughout the Principles and Commentary, as well as the remark that "the Guiding Principles are not a toolkit ... one size does not fit all" (¶ 14 of the Draft Report) facilitate the entering of legitimate economic policy demands into the human rights discussion. **DGP 3 does well in calling for *institutional* and *procedural* changes that are indeed necessary for achieving policy coherence. But the problem runs deeper and remains untouched: *material* guidance is needed on how conflicting policy demands inter-relate, how they should be either balanced or put in a hierarchical order.**

Perhaps, the most convincing way to conciliate the two opposing sets of legitimate demands is based on the 'principles of justice' of legal philosopher John Rawles: Policy demands in the interest of society as a whole *can* justify individual detriments, but not if the result is an infringement of a basic set of liberties and rights shared equally by all mankind. In other words: the goal of economic development cannot trump

individuals' human rights, but can well come into play as long as human rights are protected, respected, and remedied.

SRSG Ruggie apparently shares this view where he states briefly in ¶ 5 of his Draft Report: "Of course, none of these factors absolves States of their human rights obligations." Strikingly, however, this important cognition of SRSG Ruggie reflects nowhere in the DGPs. It is therefore advisable that a paragraph as follows is included in the Introduction of the Guiding Principles:

Where there are signs of business enterprises' involvement in human rights violations, legitimate economic objectives, including the need for investment, jobs, as well as access to markets, technology and skills, shall not be used by States or business enterprises as a reason for refraining from or postponing adequate measures to realize their respective human rights duties and responsibilities.

The inclusion of this paragraph by the Human Rights Council should be viable, as it is, structurally, a copy of the 'precautionary principle', which addresses a comparable dichotomy of legitimate environmental and developmental policy demands. The precautionary principle is widely-spread in many domestic environmental laws, and since the 1992 Rio Declaration on Environment and Development1 has played an important role in many areas of international environmental law.2

As a result of the implication of this principle in the human rights context, States and business enterprises would be expected to take adequate, speedy steps to avert the violation. Alternatively, they would have the chance to demonstrate that the circumstances which are perceived as signs of business enterprises' involvement in human rights, are erroneously perceived so.

1 See, for instance, Art. 15 of the 1992 Rio Declaration on Environment and Development: "Where there are threats of serious irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

2 Scott LaFranchi, *Surveying the Precautionary Principle's Ongoing Global Development: The Evolution of an Emergent Environmental Management Tool*, 32 Boston College Environmental Affairs Law Review (2005) 679-720.

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Response from Chamber of labour austria on 31 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

The Austrian Federal Chamber of Labour represents the interests of 3.2 million employees and consumers in Austria. All employees, apprentices, persons on maternity (paternity) leave, as well as the unemployed are subject to compulsory membership to our organisation. One of the main tasks of the Chamber of Labour is participation in and control of legislation. In performing this task, we evaluated the Draft Guiding Principles for the implementation of the United Nations "Protect, Respect and Remedy" Framework. In preparation of drafting our legal statement, we held an expert consultation with trade unionsts, labour representatives and human rights academics.

From our point of view, the current draft of the Guiding Principles does not provide sufficient guidance to States and businesses to close the governance gaps. The Guiding Principles give no clear instruction how international law and international human rights obligations are to be implemented. On the contrary, in some areas the formulations fall back even behind States' current obligations regarding human rights on different operational levels and existing recommendations to the corporate accountability. The language of the current draft also appears to be weaker than the corresponding passages of the Framework presented in the SRSG's prior reports, where a clear language is used and concrete responsibilities are identified.

Please find more detailed information on our legal opinion, which included the findings from our comprehensive discussion on http://wien.arbeiterkammer.at/eu/globalisierung.htm.

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Response from Maplecroft on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Maplecroft commends the Special Representative to the UN Secretary-General on business and human rights, Professor John Ruggie, and his team on the preparation of the Draft Guiding Principles, and supports the implementation of the "Protect, Respect and Remedy" Framework. Through their work, Professor Ruggie and his team have succeeded in building a broad-based business and human rights coalition involving companies, civil society groups, trade unions, governments and other stakeholders. We welcome the inclusive and consultative approach taken and thank the Special Representative for the opportunity to provide commentary on the principles.

General observations:

The Universal Declaration on Human Rights states in its preamble that all "organs" of society should strive "to promote respect for...rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance." The United Nations "Protect, Respect, Remedy" Framework for business and human rights has helped companies to understand better their human rights responsibilities as responsible organs of society. We believe the process has been as important as the outcome. We expect that the Framework will serve as a practical guideline which can be scaled to diverse company, industry and country scenarios where business has an impact on human rights or where human rights risks impact business. The adoption of the Guiding Principles will be a crucial step towards operationalising this Framework so that it can be used to formulate and shape companies' policies towards human rights.

With respect to the whole of the Framework, Maplecroft would like to emphasize the importance of positive initiatives taken by companies in their role as responsible organs of society and corporate citizens within and beyond the current Framework, particularly where those initiatives address gross human rights violations in high risk environments.

Maplecroft is a risk advisory and mapping company, with a special focus on human rights across human security, labour protections, civil and political rights and access to remedy. Our research focuses not only on the risk landscape in respect of human rights, but also business dilemmas, challenges and performance in respect of their management of their human rights responsibilities. Together with the United Nations Global Compact, we have explored various human rights and business dilemmas faced by responsible companies when they operate in, source products and materials from or distribute to emerging economies and countries with weak governance. It is in these capacities that we provide the following comments on the Draft Guiding Principles seeking clarification on how specific parts of the Framework are to be operationalised in practice.

Facilitating positive initiatives by companies:

Maplecroft believes that it is important for companies to contribute to programmes aimed at addressing the worst types of human rights violations even where companies are not implicated in the violation or when it is out of their control. This is part of their roles as responsible organs of society and can be an extension of the responsibility to respect human rights as businesses will often need to take positive steps to ensure that they are respecting human rights in their operations and supply chains.

The proactive and positive initiatives companies take as corporate citizens and responsible organs of society towards the improvement of social conditions on the ground which go beyond the operationalising of the "Protect, Respect and Remedy" Framework as currently formulated, are vital to the protection and

promotion of human rights. For example, philanthropic and other types of social investment initiatives by businesses include disaster relief programmes, initiatives to address gross human rights violations such as sexual violence against women and girls in the DRC, programmes to promote and protect the development of teenage girls' rights including the prevention of trafficking for sexual exploitation, support to eradicate HIV/AIDS, amongst others.

Maplecroft would like to take this opportunity to underline that the value and importance of those initiatives by businesses should not be understated and would welcome further reference as part of the Guiding Principles, where these involve efforts to contribute to the protection of human rights, particularly in extreme situations. We would welcome additional comments on whether and the extent to which the UN Framework facilitates, promotes, or otherwise encourages positive social initiatives by companies and business organisations as part of their roles as responsible organs of society.

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Response from Randini Wanduragala on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

It is disappointing that the Report and Guidelines makes no reference to the UN Convention on the Rights of the Child (CRC) and the UN Convention on the Elimination of Discrimination Against Women (CEDAW). Both these Human Rights Conventions contain Articles that have direct relevance for Business and Human Rights which are not adequately covered by the Human Rights Conventions that form the "UN Bill of Rights". In my view this is a grave omission and leaves girls, boys and women will continue to be unprotected when it comes to how businesses apply human rights standards.

Randini Wanduragala

Consultant

The State Duty to Protect

Foundational Principles (GP1)

GUIDING PRINCIPLE 1: States must protect against business-related human rights abuse within their territory and/or jurisdiction by taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, regulation, and adjudication.

Commentary

The State duty to protect against business-related human rights abuse has both legal and policy dimensions. The legal foundation of the State duty to protect against business-related human rights abuse is grounded in international human rights law. The specific language in the main United Nations human rights treaties varies, but all include two sets of obligations for States Parties: first, to refrain, themselves, from violating the enumerated rights of persons within their territory and/or jurisdiction, generally known as the State duty to respect human rights; second, to "ensure" (or some functionally equivalent verb) the enjoyment or realization of those rights. Where private actors, including business enterprises, are capable of impairing human rights, "ensuring" the enjoyment of those rights includes States protecting against such abuse. This is without prejudice to other State duties usually associated with human rights, such as the duties to promote and fulfill.

The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. But States may breach their

treaty obligations where they fail to take appropriate steps to prevent, investigate, punish and redress such abuse. While States have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, regulation and adjudication.

This chapter focuses on preventative measures while Chapter IV [Access to Remedy] explores remedial measures.

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Response from Robert Grabosch on 14 Dec 2010

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 2 ✔ 0 ✖

GPs 1 - 11 are missing out **the responsibility of "market States"** (neither home nor host State) to encourage respect for human rights. Example: South Africa (market State) should encourage, at least verbally, the business Total from France (home State) to only sell fuel to customers in South

Africa that does not originate from oppressed Burma (host State). This approach does not cause tension with the principle of **non-intervention**, because the third State only exercises jurisdiction as regards the produce that are being dealt with on its territory. Tension with **int'l economic law** should adequately be dealt with under GP 11.

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Response from N.A.J. Taylor on 14 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 1 ✖ Agreement 0 ✔ 1 ✖

This is where numbered paragraphs might help!

Paragraph beginning: "The State duty to protect...", Sentence beginning "But States may breach their treaty obligations..." might be amended to read: "But States may [be deemed to have] breach[ed] their treaty obligations..."

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Response from Emily Howie on 11 Jan 2011

Ratings (Yes/No): Relevance 4 ✔ 0 ✖ Agreement 3 ✔ 0 ✖

The Human Rights Law Resource Centre argues that the State duty to protect should be extra-territorial.

One of the key duties of the Special Representative is to provide 'views and 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*...' [Emphasis added].[1] As a matter of logic, the regulation of *transnational* business will require *transnational* responses. The Special Representative in fact acknowledges the need for transnational solutions in his 2008 Report, where he discusses the need to overcome 'governance gaps' created by globalisation.[2]

The draft Guiding Principles should require States to regulate the human rights impact of corporations that are registered in the State's jurisdiction, including those corporations' human rights impact overseas. Instead, the draft Guiding Principles use the weaker language of states 'encouraging' business enterprises to respect human rights in their global operations and states that there is neither a requirement nor prohibition on states regulating corporations overseas.[3]

In our view, the Guiding Principles should provide that States are required to regulate the extraterritorial human rights impact of their corporations for at least five key reasons.

- First, States already have the power to regulate extra-territorially. The draft Guiding Principles acknowledge this, stating that States are not prohibited from developing this form of regulation.[4]
- Second, there may in fact be an obligation for States to develop such regulation. A number of expert treaty bodies have already stated that there is a requirement in international law for States to regulate the human rights impact of domestic corporations overseas.[5]
- Third, extra-territorial regulation of human rights is not a new concept; existing treaties already impose obligations on states to regulate conduct outside of their territories.[6] Fourth, States have already demonstrated their willingness to pass laws that have extra-territorial effect, including laws that regulate business conduct overseas.[7]
- Fifth, imposing a requirement on states to regulate extra-territorial conduct is an effective means of addressing the governance gaps identified in the Special Representative's 2008 Report.
- Overall, the draft Guiding Principles would provide much better practical and concrete recommendations and better fulfil the purpose of norm creation if they required regulation of international conduct.

Recommendation 1:

The Guiding Principles should recognise and provide that States are required to regulate, including through legislation, the extra-territorial human rights impacts of corporations domiciled within their territory or subject to their jurisdiction.

[1]Human Rights Council, Resolution 8/7, adopted 28th meeting, 18 June 2008, [4(a)].

[2]Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-

General on the issue of human rights and transnational corporations and other business enterprises', April 2008, A/HRC/8/5, [3].

[3]United Nations, Draft Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy Framework, p 6.

[4]Draft Guiding Principles, p 6.

[5]See for example the CERD Committee's observations on USA (*Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc CERD/C/USA/CO/6 (8 May 2008) paragraph [30]); Australia (*Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17, paragraph [13]. See also Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant,* UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [8] and [10], which provides that 'States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party'. See further discussion of the positive duty on the state to protect human rights in paragraph 9 below.

[6]For example the *Convention Against Torture* 1465 UNTS 85 requires states to take action when the offender is a national (see article 4(1) and article 5(1)(b) and see also the examples city in Amnesty International, "Comments in response to the UN Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises' *Guiding Principles – Proposed Outline*", 12 October 2010, 5.

[7]For example, the misleading and deceptive conduct provisions of the *Trade Practices Act 1974* (Cth) regulate conduct engaged in by Australian corporations outside of Australia (ss 5 and s 52). Australia's *Criminal Code* 1995 (Cth) also extends jurisdiction for certain offences to territories outside of Australia. For example Division 272 of the Criminal Code sets out extra-territorial child sex offences for Australians, including corporations, outside Australia, and Division 273 sets out extra-territorial offences involving child pornography or child abuse material outside Australia. The Criminal Code also extends the reach of the genocide, war crimes and crimes against humanity provisions outside of Australia (see Division 268, in particular 268.117). Corporations are also subject to these provisions in Australia (see section 12).

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Response from John H Knox on 17 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

In general, the principle and its commentary summarize very well the respect/protect distinction. However, the commentary's emphasis on states' discretion, in the last sentence of the second paragraph (the one beginning "States have discretion in deciding upon these steps . . . .") does not take into account the fact that some treaties actually do specify the obligations states have vis-à-vis private actors. In those cases, states don't have unlimited discretion, because the treaty spells out what they're required to do. **For that reason, I suggest that you insert the word "generally," so that the last sentence would read "While States generally have discretion in deciding upon these steps, ..."**

John H. Knox, Wake Forest University

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Response from Jack MOSS on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

State duties

The current draft is structured with chapter I on *the State duty to protect human rights* and chapter II on *the Corporate responsibility to respect human rights*

As currently drafted, the State duty that is described in Guiding Principle 1 [GP1] does not include all duties of the States with respect to Human Rights that are relevant to activities of business enterprises. Some key State obligations provided by the Covenant on Economic, Social and Cultural Rights are to 'respect', 'protect' and 'fulfill' these rights. This is explicitly stated in the General Comment 15 to this Covenant. These 3 obligations apply to the core business of our member companies when they supply public water services as mandated by governments.

The Guiding Principle 1 should not omit these obligations and should be amended by including the verbs "respect" and "fulfill". We suggest: "*States must respect and fulfill human rights, and protect against abuses by third parties, including business, in their territory and/or jurisdiction by taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, regulation and adjudication*."

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Response from Maplecroft on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The Guiding Principles should recognise and provide that States are required to regulate, including through legislation, the extra-territorial human rights impacts of corporations domiciled within their territory or subject to their jurisdiction.

Guiding Principles 1-11: The state duty to protect human rights and the state-business nexus

Maplecroft welcomes the reiteration of the state duty to protect human rights. Bearing in mind that the responsibility of businesses to respect human rights is a responsibility independent of the state's duty to protect, it is an important precondition for businesses to enable the full realisation of their responsibility to respect human rights. In our daily work we encounter dilemmas businesses face with respect to the lack of regulation or enforcement of state duties.

Moreover, we note the challenges for business in addressing some of the root causes of human rights violations as well as their impacts. It is clear that business alone cannot be responsible for improving social conditions. It is an immense task that requires dialogue among a variety of actors to reduce poverty and increase governance in many emerging economies and developing countries.

In this respect we would welcome more business-government dialogue, particularly in the follow-up of the mandate of the Special Representative, to support state organisations in their duties. We consider that the UN will play a facilitating role as the Special Representative has done to date, to bring business and governments together to seek solutions, share good practice and provide mutual support.

Foundational Principles (GP2)

GUIDING PRINCIPLE 2: States should encourage business enterprises domiciled in their territory and/or jurisdiction to respect human rights throughout their global operations, including those conducted by their subsidiaries and other related legal entities.

Commentary

The role that States should play to ensure that business enterprises domiciled in their territory and/or jurisdiction do not commit or contribute to human rights abuses abroad is a complex and sensitive issue. States are not at present generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis, and that the exercise of jurisdiction is reasonable. Various factors may contribute to perceived and actual reasonableness of States' actions, including whether they are grounded in multilateral agreement.

Furthermore, the exercise of extraterritorial jurisdiction is not a binary matter but comprises a range of measures, not all equally controversial under all circumstances. The permissible options which may be available range from domestic measures with extraterritorial implications, such as requirements on "parent" companies to report on their operations at home and abroad, to direct extraterritorial jurisdiction such as criminal regimes which rely on the nationality of the perpetrator no matter where the offense occurs. Indeed, strong policy reasons exist for home States to encourage businesses domiciled in their territory and/or jurisdiction to respect human rights abroad, especially if the State is involved in the business venture.

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Response from N.A.J. Taylor on 14 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

This is a particularly necessary, as well as especially complex foundational principle.

One consideration not mentioned is the appropriateness of human rights standards (perhaps widely-held in home states) and programs (executed by corporations in-house) for foreign markets. That is, corporations must be sensitive when implementing human rights programs developed in the US to operation in Iraq. This could be explicitly acknowledged in an additional sentence following the first sentence of the first paragraph of the commentary.

Also, the last sentence in the first commentary paragraph is lacking precision: "Various factors may contribute to..."

Go well,

N.A.J. Taylor

Principal, Taylor McKellar http://taylormckellar.com

Twitter http://najtaylor.com

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Response from Emily Howie on 11 Jan 2011

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 2 ✔ 0 ✖

The Human Rights Law Resource Centre argues that the State duty to protect should be extra-territorial.

One of the key duties of the Special Representative is to provide 'views and 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*...' [Emphasis added].[1] As a matter of logic, the

regulation of *transnational* business will require *transnational* responses. The Special Representative in fact acknowledges the need for transnational solutions in his 2008 Report, where he discusses the need to overcome 'governance gaps' created by globalisation.[2]

The draft Guiding Principles should require States to regulate the human rights impact of corporations that are registered in the State's jurisdiction, including those corporations' human rights impact overseas. Instead, the draft Guiding Principles use the weaker language of states 'encouraging' business enterprises to respect human rights in their global operations and states that there is neither a requirement nor prohibition on states regulating corporations overseas.[3]

In our view, the Guiding Principles should provide that States are required to regulate the extraterritorial human rights impact of their corporations for at least five key reasons.

- First, States already have the power to regulate extra-territorially. The draft Guiding Principles acknowledge this, stating that States are not prohibited from developing this form of regulation.[4]
- Second, there may in fact be an obligation for States to develop such regulation. A number of expert treaty bodies have already stated that there is a requirement in international law for States to regulate the human rights impact of domestic corporations overseas.[5]
- Third, extra-territorial regulation of human rights is not a new concept; existing treaties already impose obligations on states to regulate conduct outside of their territories.[6]
- Fourth, States have already demonstrated their willingness to pass laws that have extra-territorial effect, including laws that regulate business conduct overseas.[7]
- Fifth, imposing a requirement on states to regulate extra-territorial conduct is an effective means of addressing the governance gaps identified in the Special Representative's 2008 Report.
- Overall, the draft Guiding Principles would provide much better practical and concrete recommendations and better fulfil the purpose of norm creation if they required regulation of international conduct.

Recommendation:

The Guiding Principles should recognise and provide that States are required to regulate, including through legislation, the extra-territorial human rights impacts of corporations domiciled within their territory or subject to their jurisdiction.

[1]Human Rights Council, Resolution 8/7, adopted 28th meeting, 18 June 2008, [4(a)].

[2]Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', April 2008, A/HRC/8/5, [3].

[3]United Nations, Draft Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy Framework, p 6.

[4]Draft Guiding Principles, p 6.

[5]See for example the CERD Committee's observations on USA (*Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc CERD/C/USA/CO/6 (8 May 2008) paragraph [30]); Australia (*Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17, paragraph [13]. See also Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant,* UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [8] and [10], which provides that 'States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This

means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party'. See further discussion of the positive duty on the state to protect human rights in paragraph 9 below.

[6]For example the *Convention Against Torture* 1465 UNTS 85 requires states to take action when the offender is a national (see article 4(1) and article 5(1)(b) and see also the examples city in Amnesty International, "Comments in response to the UN Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises' *Guiding Principles – Proposed Outline*", 12 October 2010, 5.

[7]For example, the misleading and deceptive conduct provisions of the *Trade Practices Act 1974* (Cth) regulate conduct engaged in by Australian corporations outside of Australia (ss 5 and s 52). Australia's *Criminal Code* 1995 (Cth) also extends jurisdiction for certain offences to territories outside of Australia. For example Division 272 of the Criminal Code sets out extra-territorial child sex offences for Australians, including corporations, outside Australia, and Division 273 sets out extra-territorial offences involving child pornography or child abuse material outside Australia. The Criminal Code also extends the reach of the genocide, war crimes and crimes against humanity provisions outside of Australia (see Division 268, in particular 268.117). Corporations are also subject to these provisions in Australia (see section 12).

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Response from Emily Howie on 11 Jan 2011

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 2 ✔ 0 ✖

The Human Rights Law Resource Centre argues that States should require corporations to undertake human rights due diligence in their operations, including operations overseas. This arises from the state duty to protect as well as the responsibility to respect.

First, the state duty to protect human rights includes a positive duty to adopt legislative, judicial, administrative and other measures to protect people against harm from third party actors.[1] States must ensure human rights, including through systems to prevent harm by third parties such as corporations:

There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to **exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities**.[2]

Currently, the draft Guiding Principles only require States to 'provide guidance' to corporations on due diligence. Amnesty has stated that this 'effectively makes corporate human rights due diligence a voluntary tool for business.'[3] This is insufficient to discharge the State duty to protect.

Separately, under the corporate responsibility to respect, the draft Guiding Principles suggest that businesses have a responsibility to undertake due diligence. They state that businesses 'should have in place policies and processes appropriate to their size and circumstances that enable them to identify, prevent, mitigate and remediate any adverse human rights impacts they cause or contribute to through their activities and relationships, and to account for their human rights performance.'[4] The commentary suggests human rights due diligence is a necessary part of this process.

The draft Guiding Principles would read much more consistently internally, and better reflect international human rights principles and standards, if States were asked to require human rights due diligence of businesses.

Recommendation:

The Guiding Principles would read much more consistently internally, and better reflect international human rights principles and standards, if States were asked to require human rights due diligence of businesses, including through legislation.

[1]ICCPR, article 2. The Human Rights Committee states that '[t]he obligations will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities': Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, [8].

[2]Ibid.

[3]Amnesty International, 'Comments on the United Nations Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises' Draft Guiding Principles and on post-mandate arrangements', December 2010.

[4]Draft Guiding Principles, [13].

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Response from Cathie Guthrie on 12 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

I believe the state has a role in preparing corporations for their international missions by supporting their acquisition of a human rights lens to guide their business life cycle. Without a standardized framework and the opportunity to appreciate the complexity and interdependence of the different rights instruments, businesses are sure to fail by someone's measurement. Might it also be appropriate for voluntary, standardized testing on a human rights framework to be available to relevant employees of a company and administered by a centralized body? This would demonstrate to society, a business's commitment to respect human rights across its operations. Further, I think it is incumbent upon the state to play a role in monitoring corporate efforts to respect human rights and through the Human Rights Council to be held accountable for the behaviours of their corporations through some periodic review process.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Greater clarity is needed in setting out the duty of the state to protect against human rights abuses by businesses.

For example, Guiding Principle 2, which calls on states to '*encourage businesses domiciled in their territory and/or jurisdiction to respect human rights*', is weak. This does not mean that encouragement should be ruled out, but it cannot be the only option advocated. The phrase 'encourage and/or oversee' would be more open, whilst not ordering states to use either avenue.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

In its opinion of April 2008, the CNCDH recommended that France's strategy on corporate human rights responsibility should address the fact that 'States have the duty to introduce extraterritorial mechanisms with respect to violations committed by transnational companies, to ensure that victims have access to justice and that perpetrators are brought to justice'. The concept of extraterritorial mechanisms is in fact crucial when the violations are committed by the subsidiaries of large companies based in a state subject

to the rule of law and the right to remedy is either non-existent or ineffectual in the state in which they were committed.

This issue is mentioned in paragraph 7 of John Ruggie's report and in the commentary to Guiding Principle 2. The role of states in remedying acts perpetrated in other countries by companies domiciled in their territory or jurisdiction is presented as being hard to plan both in law and in practice. In particular, it is stated that States are under no obligation to regulate the activities conducted by such companies abroad. In the light of all of the above information on recognition of corporate human rights responsibility and the responsibility of states to ensure businesses respect these rights, this assertion is inaccurate.

The comments contributed by the French Government also call for some of the report's overly cautious statements to be qualified. These comments state that

'The documents [...] suggest however that a "basis of jurisdiction" and an "overall test of reasonableness" are both required. The latter condition is taken directly from the doctrine and practice of common law, which can sometimes result in judges not exercising their jurisdiction in certain cases (doctrine of forum non conveniens*). Under continental European law however, once a basis of jurisdiction has been established, especially on the basis of a treaty, this automatically satisfies the overall test of reasonableness'*[2].

Therefore in order to reflect the different interpretations and in order to be less categorical concerning the possibilities for extraterritorial action by States, it would be beneficial not only to present the difficulties but also to address the possible avenues for development.

[2]Comments by the French Government on the preparatory documents for the consultation meeting of 6 October 2010(held by the UN Secretary General's Special Representative on Business and Human Rights).

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Just to say that states should encourage enterprises to respect human rights throughout their global operations is too weak. Experience shows that guidelines and voluntary initiatives have limited effectiveness and corporate abuse continues. What is really needed is direct extraterritorial jurisdiction, to hold enterprises legally accountable.

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Response from Robert Grabosch on 28 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

From the position paper of the European Center for Constitutional and Human Rights:

This Foundational Principle is entirely vague and abets home State inertia. In particular, the respective Commentary is rudimentary, over-emphasizes obstacles which could in practice hardly become relevant, and leaves the reader with the overall impression that the approach of home State responsibility is not viable.

The home State responsibility is one of the most important approaches to business respect for human rights, because the State in which a corporation is domiciled can influence its conduct significantly, by regulation, criminal or civil adjudication or mere public statements. DGP 2, however, induces hardly any expectations of home States encouraging business enterprises' respect for human rights abroad, in particular because the Commentary over-emphasizes international law constraints which would in practice hardly become relevant. DGPs 3-11 contribute no meaningful specifications to DGP 2, except for the rare event that the home State itself is involved in the business enterprise.

Most notably, all that DGP 2 provides is that home states **"should encourage"** companies to respect human rights abroad. While the term "should" already indicates a small degree of expectation, "encourage" does not necessarily imply more than a few soft words. This guiding principle does not reflect the state of international law. In particular regarding the International Covenant on Economic, Social and Cultural Rights, the State duty to protect does not carry a restriction based on territory or jurisdiction. 1 If jurisdictional aspects are to be considered this has to be done with a view to the purpose of human rights treaties, namely the protection of human rights. This means that extraterritorial human rights jurisdiction is only limited by the rights of other States under the purpose of the Covenant, i.e. home States acting extra-territorially to protect human rights must not interfere with the host State's implementation of its obligation to protect its citizens.

The Commentary weakens DGP 2 even further:

Firstly, the Commentary addresses with no word the most common way to encourage, namely to verbally draw attention and suggest change. It must be stressed that **States face no constraints under international law when "encouraging" anybody in the literal, merely verbal way**, certainly not when they publically "encourage" corporations domiciled within their jurisdiction, and very certainly not when this verbal encouraging aims at respect for rights that are backed by international consent. This is a simple and crucial point to note. Instead, the Commentary emphasizes that there is nothing easy about the role of the business enterprise's home State.

Secondly, the Commentary depicts the role of the home State as a most confused issue, so **"complex and sensitive"** [sic] that it appears hardly viable: According to the Commentary, States are **"not generally"** prohibited from regulating extraterritorial activity, i.e. they can do so provided there is a **"recognized jurisdictional basis"**, and that the exercise of jurisdiction is **"reasonable"**. 2 The only clarification that the Commentary then provides is that **"various factors** contribute to perceived and actual reasonableness", elaborating exactly one of these various factors, namely a requirement of **"multilateral consent"**. The reader is left with the **wrong idea that hardly anything can be expected of the home State.**

In particular, the Commentary and Draft Report are **not drawing a distinction which SRSG Ruggie himself has recently deemed to be "critical" and "usually obscured"** 3, namely the distinction **between direct regulation on actors or activities abroad** (i.e. regulation which assumes an extra-territorial effect) **and regulation that merely attaches to activities abroad** (and is intended to be applied within the home state). The distinction is critical, because the former kind of regulation can cause tension at international law with the principle of state sovereignty, while the latter does not. For instance, regulation requiring a business enterprise to not take over possession of a plot of land until the previous inhabitants are adequately compensated for their loss could violate the host State's sovereignty, if the home state sought to enforce its regulation on host State territory. Albeit currently, such wide-reaching home State action is politically hardly viable. For a more realistic example, regulation requiring the compensation of damages caused abroad relies on the firm basis of the home State's own sovereignty, in particular on its territorial jurisdiction, exercised within the home State. Several directives of the European Council already demand that corporations headquartered in the European Union report on the economic condition of their subsidiaries registered on non-EU territory. 4 Territorial legislation attaching to extraterritorial activity raises no concerns on the level of international law, and is hence a feasible approach. The Commentary fails entirely to even mention this important aspect.

One would think that SRSG Ruggie is aware of all this, since he himself reported on two international expert workshops convened on his behalf in Brussels and New York on the issue of extraterritorial jurisdiction. 5 The experts of the workshop in Brussels **agreed that a nationality link supports jurisdiction** of States where universal jurisdiction (for a limited number of international crimes) is not applicable. 6 Meaning, as regards DGP 2 and the responsibility of the home State: International law grants a home State jurisdiction, because of the business enterprise's domicile in the home State. This simple rule really only appears complex, if one phrases it like the Commentary does: "...nor are [home States] generally prohibited from[regulating extraterritorial activities] provided there is a recognized jurisdictional basis...." 7 Furthermore, the limiting requirement of"reasonableness" attaches to the

exercise of extraterritorial jurisdiction and demands respect for another State's sovereignty, i.e. the non-intervention in foreign internal affairs. 8 The Brussels workshop clearly could not agree that the principle of non-intervention in internal affairs is concerned at all where States seek to protect internationally recognized human rights abroad from "their" corporations.9 Simply put: corporate violations of international human rights might be not so much an internal affair of the host State, but an affair that also concerns the home State. The participants of the New York workshop had a quite clear view on the issue, as SRSG Ruggie reported:

> [T]here was broad agreement that neither the treaty regime nor customary international law currently impose an obligation on States to regulate, as opposed to allowing States the freedom to do so (which they clearly have under the doctrine of "active personality"). **This provides that a State is entitled to exercise extraterritorial jurisdiction to regulate the activities of its nationals abroad.**10

SRSG Ruggie has also previously analyzed the position of several UN treaty bodies on the exercise of extraterritorial jurisdiction in the business and human rights context and concluded that they do not oppose such action but in some situations have encouraged it.11 He noted that generally extraterritorial jurisdiction must meet a reasonableness test, in particular the non-intervention in another State's internal affairs, but could not find any source of law according to which non-forceful extra-territorial protection of human rights can constitute an intervention into the internal affairs of another State, and hence violate international law.12

In contrast thereto, SRSG Ruggie's Commentary sets forth that a business enterprise's home State must act with not just "perceived" but "actual reasonableness", which involves "various factors", such as "multilateral agreement". These requirements may become relevant in the unlikely event of a military intervention of the home State. But realistically, they have little to do with home State encouragement of business respect for human rights abroad. Possibly, a home State would simply make public statements, or as DGPs 5 c and 10 would suggest, a home State might send a consultant abroad to advise or investigate one of "its" business enterprises on alleged human rights violations. Would these measures constitute an intervention in the sovereign host State's internal affairs, in the sense that they violate international law?

One looks in vain at the DGPs for guidance, faces obscure requirements such as "various factors" and is eventually left with the impression of a hardly viable undertaking.

The result is devastating: DGP 2 and its Commentary abet home State inertia by providing States with new bases for refraining from encouraging business respect for human rights abroad, and by not providing any guidance on when home States should become active. The Commentary to DGP 2 can hardly be regarded as a clear, "guiding" re-statement, and certainly not one of existing international law. It is puzzling that guiding principles which are built on the "primary role of States"13 contain a Foundational Principle on home States that lacks clarity, consistency with previous views of their author and consistency with current international law.

1 AS the UN Committee on Economic, Social and Cultural Rights points out:

"To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law."

UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health, E/C.12/2000/4 (11 August 2000) ¶ 39. Also see General Comment 15.33 (and similarly General Comments 12.36 and 19.54), stating that States should "take steps to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries."

2 The same cautious statement can be found in the Draft Report at ¶ 7.

3 SRSG Ruggie's Report to the Human Rights Council of 9 April 2010, at ¶ 48.

4 Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts of companies with limited liability; Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis; Directive 98/78/EC of the European Parliament and of the Council of 27 October 1998 on the supplementary supervision of insurance undertakings in an insurance group.

5 SRSG Ruggie, Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops (15 February 2007), A/HRC/4/35/Add.2.

6 Ibid, ¶ 42.

7 DGP 2, Commentary, second sentence.

8 Supra fn.6, SRSG Ruggie, Summary of legal workshops (15 February 2007), at ¶ 42.

9 Ibid, ¶ 43.

10 Ibid, ¶¶ 27-28, emphasis added.

11 John Gerhard Ruggie, Business and Human Rights: The Evolving International Agenda, 101 American Journal of International Law (2007), 819, at 829.

12 Ibid, at 830.

13 See Ruggie's Introduction to the DGPs, para. 1 lit. a.

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Response from Michelle de Cordova on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

FROM NEI INVESTMENTS SUBMISSION:

We would agree that there are strong policy reasons for home States to encourage businesses domiciled in their territory to respect human rights abroad. Where one company from a home State has developed a negative reputation in a host State for human rights performance, this can create reputational problems and barriers for other companies domiciled in that State. Both home States, and home State industry associations, could play a role in mitigating this risk.

Ensuring policy coherence (GP3)

GUIDING PRINCIPLE 3: States should ensure that governmental departments, agencies and other State-based institutions that shape business practices, at both the national and sub-national levels, are aware of and observe the State's human rights obligations in fulfilling their respective mandates, including by providing them with relevant information, training and support.

Commentary

Governments have to make the difficult balancing decisions to reconcile different societal needs. But to ensure the appropriate balance, States need to take a broad approach to managing the business and human rights agenda aimed at ensuring both vertical and horizontal domestic policy coherence.

Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights obligations. Horizontal policy coherence means supporting and equipping departments and agencies that shape business practices – including corporate law and securities regulation, investment, export credit and insurance, and trade - to be informed of and act in a manner compatible with their governments' own human rights obligations.

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Response from Matt Crossman on 12 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

There definitely needs to be more coherence between state duties and their role in shaping business practice; a key area is in the general atmosphere of corporate compliance, promoting a general culture of HR respect without specific detailed regulation in all areas, as this would be burdensome to business.

Secondly, it is worth bearing in mind the role of stock markets in shaping business practice, particularly in the area of governance. Listing rules and their content may be heavily influenced by governments, but they remain a series of private countracts between the stock exchange and a company.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The CNCDH wishes to draw attention to the fact that the latest international conference of the NHRI international coordinating committee (ICC), devoted to the subject of 'Business and human rights: the role of NHRIs", concluded with the adoption of a declaration in the form of an action plan. This sets out in detail the potential role of NHRIs in this area, whilst taking into consideration the diversity of the different institutions' mandates. Nonetheless, since the core mandate of NHRIs is to study legislation, the commentary on Guiding Principle 3 could emphasise the special role NHRIs have to play nationally in the close examination of existing public policies and legislative frameworks, in order to highlight any deficiencies and make recommendations for both legislative and administrative improvements.

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Response from Michelle de Cordova on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

FROM NEI INVESTMENTS SUBMISSION:

We would strongly agree with the observation that one of the challenges to be addressed is that policy-makers and officials who are charged with the most direct responsibility for trade and economic matters, and have the most direct impact on business practice, may lack awareness when it comes to human rights obligations. In our experience, glossing over the "S" in ESG – including the human rights aspect - is a

pervasive problem. A recent example in Canada was the decision that, following a motion on ESG disclosure in the provincial legislature, the Ontario Securities Commission would address environmental and governance disclosure, but not social disclosure, in its 2010 policy agenda[1]. Drawing attention in the Guiding Principles to these human rights knowledge gaps is helpful to responsible investors seeking to address these weaknesses through corporate and policy engagement.

[1]**Ontario Securities Commission.** OSC Notice 51-717 Corporate Governance and Environmental Disclosure. [Online] 2009. http://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20091218_51-717_corp-gov-enviro-disclosure.htm

Ensuring policy coherence (GP4 - domestic policy space)

GUIDING PRINCIPLE 4: States should maintain adequate domestic policy space to meet their international human rights obligations when pursuing business-related policy objectives with other States or business enterprises, particularly when they enter into investment treaties or contracts.

Commentary

Economic agreements concluded by States, either with other States or with business enterprises, such as bilateral investment treaties, free-trade agreements or contracts for private investment projects, by definition affect the domestic policy space of governments. When entering into such agreements, therefore, States should ensure that they retain their policy and regulatory ability to protect human rights while providing the necessary investor protection.

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Response from Jose Rafael Unda on 13 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 2 ✖ Agreement 0 ✔ 2 ✖

I do agree with this GP, fully. But, at the same time, I miss a reference to domestic Law and Constitution. States should consider, "when pursuing business- related policy objectives with other States or business enterprises, particularly when they enter into investment treaties or contracts", also domestic Law and Constitution; instead of considering only their "international human rights obligations".

Regards

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Response from Robert Grabosch on 15 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 2 ✖

The worrisome implication here is that States are able to?expressly or tacitly?waive their human rights policy space. **Instead of stating that States *should not* do so, GP 4 should provide that States *do not* waive their policy space tacitly, and *cannot* waive it expressly.**

The basis for this view is to be found in the law of treaties: A look into the 1969 Vienna Convention on the Law of Treaties reveals that it is by no means necessary for States to expressly maintain adequate domestic policy space. **According to the general rule of interpretation of treaties, Article 31(3) of the Vienna Convention, "any relevant rules of international law applicable in relations between the parties" shall be taken into account when interpreting a treaty.** Paying due respect to Article 31(3) of the Vienna Convention, one could hardly come to the conclusion that an investment treaty implies the waiver of human rights policy space.

In particular regarding customary international human rights, it appears difficult to see how a State could legally give up the policy space necessary for fulfilling its international human rights obligations, even if it wanted to.

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Free Trade Agreements pushed by Western countries and by the EU very often reduce the policy space of developing countries by foreseeing inter alia the liberalisation of investments, which opens the door for Western companies and by imposing the removal of export tariffs and quantitative restrictions to exports, which are vital instruments for governments to exercise control over the behaviour of foreign enterprises, particularly in the extractive industries sector.

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Response from Gaston Bilder on 30 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

There seems to be room betwen this principle and the previous one to mention influencing BIT, regional trade agreements and other treaties concerning trade or the protection of investments, so that they incorporate obligations concerning the protection of HR.

In the commentary, the second line could include a reference to "Host" governments.

Fostering business respect for human rights (GP5)

GUIDING PRINCIPLE 5: As part of their policy and regulatory functions, States should set out clearly their expectation for all business enterprises operating or domiciled in their territory and/or jurisdiction to respect human rights, and take the necessary steps to support, encourage and where appropriate require them to do so, including by:

a. Enforcing laws that require business enterprises to respect human rights;

b. Ensuring that laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

c. Providing effective guidance to business enterprises on how to respect human rights;

d. Encouraging, and where appropriate requiring, business enterprises to provide adequate communication on their human rights performance.

Commentary

States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures—national and international, mandatory and voluntary – to foster business respect for human rights.

The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is a significant legal gap in current State practice. Such laws might range from non-discrimination and labor laws to environmental, property or privacy laws. It is therefore important for States to consider which relevant laws are not currently being effectively enforced, why this is the case, and what measures may reasonably correct the situation.

Laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behavior. Yet their implications for human rights remain poorly understood. For example, there is a lack of clarity in corporate and securities law regarding what companies

and their officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable businesses to respect human rights, with due regard to the role of existing governance structures such as corporate boards.

Greater clarity in other relevant laws and policies, such as those governing title to land, is also necessary to protect both rights-holders and business enterprises.

Guidance to business enterprises on respecting human rights should indicate expected outcomes; advise on appropriate methods, including human rights due diligence; and help share best practices.

Encouraging, or where appropriate requiring, businesses to communicate on their human rights performance is important in fostering corporate respect for human rights. Policies or laws in this area can usefully clarify what and how businesses should communicate, helping to ensure both the accessibility and accuracy of communications.

Any stipulation of what would constitute adequate communication should take into account risks that it may pose to the safety and security of stakeholders, personnel and facilities; the legitimate requirements of commercial confidentiality; and variations in companies' size and structures. It also should allow for the reasonable expectation that businesses doing the right thing will not add to their litigation risks as a result.

Financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" from the investors' point of view and indicate when they should be disclosed.

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Response from Kendyl Salcito on 06 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 0 ✔ 1 ✖

Principle #5 bolsters due diligence principles, which is extremely valuable. We suggest a diction change in Principle #5 Commentary, paragraph 7, which adds “stipulations” to “adequate communication.” As we read it, this paragraph allows companies to limit communication for legal reasons of confidentiality and encourages companies to limit communication to protect communities from rights violations by authorities that may misuse the provided information. We see these as such divergent issues that we propose the paragraph be rephrased and divided into two paragraphs.

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Response from Robert Grabosch on 10 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

GP5a talks of "Enforcing laws that require business enterprises to respect human rights".

What about corporate directors? They do not fall under the definition of "business enterprise" (see Appendix B, Definitions). In fact, they seem to play no role anywhere in the GPs. Domestic **tort laws can contain duties of corporate directors** towards third parties. And **criminal law** attaches in most jurisdictions only to individuals, not to corporations (UK and Switzerland being notable exceptions). Should those laws not be enforced as well?

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Response from Robert Grabosch on 11 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

In addition to my previous comment:

SRSG Ruggie outlined only recently as one of four key policy tools for fostering rights-respecting corporate structures the importance of specifying directors’ duties (Report to the Human Rights Council of 9 April 2010, at ¶¶ 39-41).

Eight months later, there is no mention of the role of directors’ duties. Why the sudden change of mind?

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Response from N.A.J. Taylor on 14 Dec 2010

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 2 ✔ 1 ✖

Agreed. This principle must advocate more explicitly embedding human rights into directors duties as well as more general corporate governance principles. This point is inadequately addressed as is.

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Response from N.A.J. Taylor on 14 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Insertion of "investors'" in the final sentence of commentary appears an anomaly. Might consider changing to "financial" since a material or statistically significant impact may or may not involve an investor. For instance, the management of profitability is as much a function of management and the board as it is an investor.

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Response from Elizabeth Umlas on 30 Dec 2010

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Regarding the last passage, “Financial reporting requirements should clarify...", I would say that disclosure of “material” human rights impacts is crucial, and needs further discussion in the Commentary. The SRSG’s report of April 2010 (para. 82) makes the very useful statement that “material risks” include not just those to which the company or investors might be exposed, but those to which “affected individuals and communities” are exposed. This argument seems to be lost here, but should be integral to the principle. It rightly implies rethinking the whole notion of risk in a business context, as it goes beyond the company’s material risks to those that other stakeholders might face. The commentary of GP15 does capture this argument, and it is worth bringing it up here in GP5 in some way, for the sake of consistency or agreement between the two principles.

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Response from Gaston Bilder on 30 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

I fully agree with this comment. The word "material", which is connected to disclosure obligations should not lessen the obligation to disclose risks, and not only from the affected investors point of view, but also from the perspective of the potential stakeholders impacted.

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Response from Emily Howie on 11 Jan 2011

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 2 ✔ 0 ✖

The Human Rights Law Resource Centre argues that States should require corporations to undertake human rights due diligence in their operations, including operations overseas. This arises from the state duty to protect as well as the responsibility to respect.

First, the state duty to protect human rights includes a positive duty to adopt legislative, judicial, administrative and other measures to protect people against harm from third party actors.[1] States must ensure human rights, including through systems to prevent harm by third parties such as corporations:

> There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to **exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities**.[2]

Currently, the draft Guiding Principles only require States to ‘provide guidance’ to corporations on due diligence. Amnesty has stated that this ‘effectively makes corporate human rights due diligence a voluntary tool for business.’[3] This is insufficient to discharge the State duty to protect.

Separately, under the corporate responsibility to respect, the draft Guiding Principles suggest that businesses have a responsibility to undertake due diligence. They state that businesses ‘should have in place policies and processes appropriate to their size and circumstances that enable them to identify, prevent, mitigate and remediate any adverse human rights impacts they cause or contribute to through their activities and relationships, and to account for their human rights performance.’[4] The commentary suggests human rights due diligence is a necessary part of this process.

The draft Guiding Principles would read much more consistently internally, and better reflect international human rights principles and standards, if States were asked to require human rights due diligence of businesses.

Recommendation:

The Guiding Principles would read much more consistently internally, and better reflect international human rights principles and standards, if States were asked to require human rights due diligence of businesses, including through legislation.

[1]ICCPR, article 2. The Human Rights Committee states that '[t]he obligations will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities': Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, [8].

[2]Ibid.

[3]Amnesty International, 'Comments on the United Nations Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises' Draft Guiding

Principles and on post-mandate arrangements', December 2010.

[4]Draft Guiding Principles, [13].

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Response from SANTIAGO ANGEL on 18 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Comment to (a) principle: States should enforce laws to protect and respect human rights, but this should be general laws that apply to everyone. They should not have a narrow scope that they are only built and enforced for business enterprises.

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Response from BASF Group on 25 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

The draft GP recommend states to encouraging, and where appropriate requiring, business enterprises to provide adequate communication on their human rights performance. From our point of view, this recommendation holds the risk of isolated action by states leading to a setback in the current efforts of international initiatives such as the Global Reporting Initiative (GRI) and the UN Global Compact with its annual Communication on Progress (COP). Both initiatives are continually improving their reporting requirements on human rights performance based on international and inclusive stakeholder consultation. Interferences of single states may undermine these efforts by the lack of international scope and the inefficient use of resources for reporting due to multiple and uncoordinated reporting requirements.

Since 2003, BASF has been participating in the feedback meetings of the Global Reporting Initiative and has been working to further develop the guidelines together with experts from industry and society. Since 2003, we base our reporting on the international GRI guidelines. In 2009, BASF Group's sustainability reporting again was recognized with the highest application level A+ from the Global Reporting Initiative. The BASF Report 2009 integrates our financial and sustainability reporting. It also serves as our annual Communication on Progress (COP) to the UN Global Compact. Our reporting is audited by a third party. The audit covers financial and non-financial information and was also conducted in accordance with the International Standard of Assurance Engagements 3000.

http://reports.basf.com/2009/en/informationandservice/griandglobalcompact.html?cat=n

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Greater clarity is needed in setting out the duty of the state to protect against human rights abuses by businesses.

The phrasing of Guiding Principle 5, which emphasises that states should '*take the necessary steps to support and encourage business enterprises*' to respect human rights and *'where appropriate require them to do so'*, is weak. This turn of phrase seems to underplay the state's oversight role in comparison with its incentivising role when dealing with failure by businesses to respect human rights. To fulfil the requirement of neutrality, it would be better to remove the expression *'where appropriate*', or insert it instead before 'take steps', which would imply that the state should intervene if a business is failing to respect human rights. This observation also applies to Guiding Principle 6 on the *'state-business nexus'*.

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Response from Vidar Lindefjeld on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

From Vidar Lindefjeld, assistant director, Confederation of Norwegian Enterprise:

Norwegian business supports the approach of the Special Representative on business and human rights and the SR's "principled pragmatism" on which the framework rests. The GPs reflect the view that through responsible behaviour, companies contribute to economic as well as social development, and indeed to the promotion of human rights. This fact is too often overlooked by certain stakeholders. Let me, however, comment on some issues of concern linked to:

State duty to protect

GP 5:

According to GP 5, states should "set out clearly their expectations" for enterprises. In certain cases, states should even "require" enterprises to act in a certain way, re. GP 5 section d. on adequate communication. Likewise, according to GP 5 Commentary, para 5, states should indicate expected outcomes, "including human rights due diligence". This can be read as if states are being encouraged to impose on companies actions that, according to GPs 14 (communication) and 15 (due diligence), are of a voluntary nature. A rethinking of the coherence between these GPs may be appropriate, as I fear this approach may undermine the innovative and creative voluntary mechanisms and multi-stakeholder initiatives already in existence. The Extractive Industries Transparency Initiative (EITI) and the Voluntary Principles on Security and Human Rights (VPSHR) spring to mind, mechanisms that have been effective in bringing governments, civil society and companies together to discuss and find solutions to sensitive and complex issues.

GP 6:

GP 6 and its commentary provide for stricter regulation of state owned/controlled companies. I can't see convincing reasons for this. In most cases, a state- owned enterprise is run like any other private company, with senior management reporting to a professional board of directors, not to any state agency. In addition, a stricter human rights policy imposed on these companies will impact negatively on their ability to compete in a global market. The principle of "level playing field" should apply even in this context.

State-to-state contacts

Let me add that the GPs on state duty to protect would have benefitted from a specific reference to states' obligations to influence other states human rights performance, not only that of companies; namely those with a poor human rights record when it comes to legislation and/or enforcement.

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The statement that States should set out their expectations for all business enterprises operating or domiciled in their territory overlooks the fact that many developing countries are unfortunately unable to enforce such measures or have governments, which are unwilling to do so. Shell is capable of continuing its activities, which are harmful to the population and the environment of the Niger Delta, because the Nigerian government is both too weak and too corrupt to impose the respect of rules on Shell. The same applies to Areva exploiting uranium in Niger. The government in Congo-DRC is too weak to impose the respect of the rules on mining companies. What is needed are therefore other means to oblige these enterprises to respect human rights and holding them accountable in the country where the parent company has its headquarter would be the most effective way.

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Response from Global Reporting Initiative on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Voluntary initiatives that invite and encourage corporate disclosure on non-financials (including human rights performance) have been instrumental in developing non-financial disclosure practice. But such initiatives have not been successful in mainstreaming corporate disclosure on non-financials (again including human rights performance).

Voluntary corporate human rights performance reporting remains in a nascent stage, despite the availability of metrics that have been agreed in an international multi-stakeholder process; such as the GRI Reporting Framework. Few companies report on their human rights performance. (See UN Global Compact, Realizing Rights – The Ethical Globalization Initiative, Global Reporting Initiative: Corporate Human Rights Reporting - An Analysis of Current Trends (2009) and Global Reporting Initiative: Reporting on Human Rights (2008)). Against this background, there must be a reexamination of assumptions about the adequacy of voluntary disclosure, and the inviting and encouraging of companies to **communicate** on human rights performance.

To achieve adequate levels of corporate disclosure on human rights performance, the Global Reporting Initiative proposes that governments should introduce policy that requires companies to **report** on human rights performance, and other aspects of their economic, environmental and social performance, using the existing metrics or publicly explain why they have not done so.

Reporting on human rights and other aspects of economic, environmental and social performance is the practice of measuring, disclosing, and being accountable to internal and external stakeholders for organizational performance towards the goal of sustainable development.

To reflect the considerations outlined above the Global Reporting Initiative recommends the following edits:

- d. ~~Encouraging, and where appropriate r~~***R***equiring, business enterprises to provide adequate ~~communication~~ ***reporting*** on their human rights performance.
- ~~Encouraging, and where appropriate r~~***R***equiring, businesses to ~~communicate~~ ***report*** on their human rights performance is important in fostering corporate respect for human rights. Policies or laws in this area can usefully clarify what and how businesses should ~~communicate~~ ***report***, helping to ensure both the accessibility and accuracy of ~~communications~~ ***reports***.
- Any stipulation of what would constitute adequate ~~communication~~ ***reporting*** should take into account risks that it may pose to the safety and security of stakeholders, personnel and facilities; the legitimate requirements of commercial confidentiality; and variations in companies' size and structures. ~~It also should allow for the reasonable expectation that businesses doing the right thing will not add to their litigation risks as a result.~~

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Response from Rachel Chambers on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Response and Comments on John Ruggie's Guiding Principles for the implementation of the United Nations 'Protect, Respect and Remedy' Framework.

Introduction

1. John Ruggie's 'Guiding Principles for the implementation of the United Nations 'Protect, Respect and Remedy' Framework' ['Guiding Principles'] provide an attractive road map to the increased accountability of business enterprises for human rights abuses and corporate related harm. However beneath the rhetoric there is little suggestion as to what kind of legal framework is necessary to ensure that business enterprises comply with their international human rights obligations; nor is there any clear indication of how States can enforce such obligations. Those principles pertaining to the corporate responsibility to respect are similarly vague; other than human rights due diligence (which is covered in detail under the Corporate Responsibility to Respect Pillar) it is not clear precisely what it is that the Guiding Principles compel business to do.

Response

2. This response examines what forms of direct legal pressure may be applied to business enterprises to ensure that they comply with their international human rights obligations. It focuses on the role that domestic corporate regulation can play in the effective implementation of the United Nations 'Protect, Respect and Remedy' Framework ("the PRP Framework") and in particular on developments in business enterprises' disclosure and reporting obligations. It examines how a business enterprise's failure to comply with the duty to respect human rights is a material factor that should be disclosed to both shareholders and consumers.

3. In the introduction to his Guiding Principles John Ruggie sets out one of the main obstacles to holding business enterprises legally liable for human rights violations committed abroad:

> '*At present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and / or jurisdiction. But nor are they prohibited from doing so provided there is a recognised jurisdictional basis and that the exercise of jurisdiction is reasonable. Nevertheless, within this permissible space, States have chosen to act only in exceptional cases, and unevenly. 1'*

4. Despite this problem the Guiding Principles place a duty firmly on States to take steps to: *'encourage business enterprises domiciled in their territory and / or jurisdiction to respect human rights throughout their global operations, including those conducted by their subsidiaries and other related legal entities.2'*

They recognise that corporate law can play an important role in achieving this objective and that States should ensure that the laws and policies that govern the creation and ongoing operation of business enterprises do not constrain but enable business respect for human rights3. The Guiding Principles give a number of suggestions as to how companies can be encouraged to respect human rights. These include:

1. 1. i. Business enterprises provide adequate communication on their human rights performance;

ii. Financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" from the investors' point of view and indicate when they should be disclosed4.

iii. Those agencies that finance business enterprise perform their task with the same exacting scrutiny and awareness of human rights impacts as any other business enterprise.5

iv. Business enterprises undertake clear policy commitments to respect human rights and should include consistent internal monitoring of their activities including ongoing human rights due diligence6;

v. Businesses should be prepared to communicate publicly on their response to actual and potential human rights impacts when faced with concerns of relevant stakeholders7

vi. When businesses operate in countries where national law is weak they continue to observe international recognised human rights instruments8.

5. As stated above John Ruggie identifies the difficulty States have in imposing extraterritorial jurisdiction over actions committed abroad by companies domiciled within their territory. In his earlier work he drew a distinction between the use of domestic measures with extraterritorial implications and the exercise of direct extraterritorial jurisdiction over private actors or activities abroad. Examples of the former include, *'asking locally incorporated parent companies to take certain steps in relation to the management of foreign subsidiaries. Other methods involve the use of reporting obligations, or import or export controls, and taking steps to monitor and reduce risks associated with projects requiring export assistance. These measures can be highly influential in relation to private foreign conduct.9'* Examples of the latter include international approaches to areas such as anti-corruption, money-laundering, some environmental regimes and child sex-tourism, many of which proceed by way of multilateral agreements10. The United Kingdom's Bribery Act 2010 is one example of a domestic measure that asserts extraterritorial jurisdiction over the actions of private actors abroad.

6. The use of domestic measures with extraterritorial implications is generally thought to be less controversial than assertions of direct extraterritorial jurisdiction. This is presumably because they focus on acts or persons at home and pose less of a threat to States' political and legal sovereignty. This paper suggests that using domestic company law to impose stringent reporting and disclosure requirements on companies domiciled within a state would be an appropriate way to implement some of the recommendations made in the Guiding Principles and would help to fill some of the conspicuous accountability gaps.

7. Recently the United States of America amended their Securities and Exchange Commission Act 193411 ("the 1934 Act") to impose obligations on the extractive industries to disclose payments made to foreign governments and to make those payments public by way of an annual report. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("the 2010 Act") which amended the 1934 Act was signed into law on July 21 2010. The precise detail of the disclosure requirements are yet to be fully particularised by the Securities and Exchange Commission but the broad obligations now contained in s. 13(q) of the 1934 Act are as follows:

'*each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer, to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals including,*

i. *the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals; and*

ii. *the type and total amount of such payments made to each government'*

8. The 2010 Act also amends the obligations on those companies regulated by the SEC and for whom conflict minerals are necessary to the functionality of a product. S.13(p) asks that:

Those persons disclose annually [...] whether conflict minerals that are necessary as described in paragraph 2B [...] did originate in the Democratic Republic of Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report that includes, with respect to the period covered by the report –

1.1. i. *a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with rules promulgated by the Commission in consultation with the Secretary of State; and*

ii. *a description of the products manufactured or contracted to be manufactured that are not DRC conflict free ('DRC conflict free' is defined to mean the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of Congo or an adjoining country), the entity that conducted the independent private sector audit in accordance with clause (i), the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.*

9. The report required by s.13(p) is to be made available to the public on the internet. It is not clear precisely what consequences will flow from a failure to file a report with the SEC however the SEC does have the authority to bring civil and criminal prosecutions for failure to comply with its regulations. This recent US legislation is a compelling example of how domestic company law can foster an environment that encourages companies to comply with their duty to respect human rights.

10. It is interesting to note that the primary objective of these recent amendments appears to be providing more information for shareholders and consumers rather than the protection of human rights. The Consumer Protection from Unfair Trading Regulations 2008 ("the 2008 Regulations") are a good example, this United Kingdom legislation make it an offence for a trader to make a misleading omission as a result of which the average consumer makes a transaction decision that he would not otherwise have taken (s.6 the 2008 Regulations). A misleading omission is defined as:

(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)

(a) the commercial practice omits material information,

(b) the commercial practice hides material information,

(c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or

d. *the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,*

11. It will be interesting to see whether or not this definition can stretch to include a failure to disclose human rights abuses. The 2008 Regulations are relatively recent but the Fair Trade movement and the Kimberly Process Certification Scheme to prevent trade in conflict diamonds are all examples of how domestic legislation used to inform consumers of the origin of any particular product can be used to encourage business enterprises to respect human rights.

12. Domestic company and consumer law provisions which have extraterritorial effect do not attempt to violate another State's sovereignty. Domestic private law provisions appear to be the most appropriate method of implementing the PRP Framework something that is recognised in Guiding Principle 5 but that is insufficiently fleshed out. Corporate law can be used to impose obligations on companies to report on their impact on human rights abroad particularly in circumstances where such information is material to the interests of shareholders and consumers. It is probable that in Europe such measures will have

competition law implications and these will need to be seriously considered by States seeking to impose such stringent obligations.

Conclusion

13. In conclusion the Guiding Principles talk in broad terms about how States should create an environment that *encourages* business enterprises to respect human rights12 and that they *should enforce laws* that require business enterprises to respect those rights13 but there is no requirement to create clear, enforceable legal obligations. The Guiding Principles acknowledge the difficulty of regulating the actions of companies operating abroad but fail to offer any possible solutions that rely on anything more than a company's ability to regulate its own human rights compliance, something that risks becoming a box ticking exercise. This response has attempted to demonstrate that domestic corporate regulation provides an effective mechanism through which to implement Ruggie's Guiding Principles and through which to overcome some of the hurdles hitherto experienced in the attempt to regulate the actions of companies operating abroad.

1 Ruggie, John. *"Guiding Principles on the Implementation of the United Nations Protect, Respect and Remedy Framework*, p.2.

2 *Guiding Principle 2*.

3 *Guiding Principle 5*.

4 *Guiding Principle 5*.

5 *Guiding Principle 8*.

6 *Guiding Principle 14*.

7 *Guiding Principle 19*.

8 *Guiding Principle 21*.

9 Zerk, Jennifer. *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*. Jennifer Zerk Consulting, June 2010, p5.

10 See n.1, p.2.

11 S.13(q) of this was amended by The Dodd-Frank Wall Street Reform and Consumer Protection Act on July 21 2010.

12 *Guiding Principle 2*.

13 *Guiding Principle 5*.

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Response from Katherine L Tyler on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

This response is by Rachel Chambers and Katherine Tyler.

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Response from Erika George on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Comments on the Draft Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises

The Special Representative is to be commended for facilitating the multi-stakeholder consultations that have culminated in these Draft Guiding Principles for the Implementation of the 'Protect, Respect and Remedy' Framework. The 'principled pragmatism' of the Special Representative has resulted in a draft text with the potential to become an 'authoritative focal point' for future efforts to ensure that business enterprises conduct their operations in a manner consistent with respect for human rights. The Special Representative's work has contributed to an improved understanding of the potential adverse impacts on human rights that business enterprises can present, whether inadvertently or intentionally. The Corporate Responsibility to Respect Human Rights set forth by the Special Representative counsels against industry indifference to adverse impacts and calls for changes consistent with ensuring the protection of human rights.

In presenting these Draft Guiding Principles, the Special Representative has set about the laudable task of ensuring respect for human rights by 'elaborating the implications of existing standards and practices for States and businesses; integrating them within a single coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved." The current regime falls far short. The Draft Guiding Principles provide a promising step forward and could go a long way towards accelerating efforts to ensure transnational corporations and other enterprises conduct business in a manner consistent with respect for human rights.

Respectfully, my comments are offered to encourage further elaboration of certain principles and to recommend revisions to others.

Guiding Principle 5

GP5 presents Fostering Business Respect for Human Rights as one of the State Duty to Protect Human Rights. Because one of the acknowledged challenges to the protection of human rights remains State failure to enact appropriate legislation or implement effective policies and because business enterprises are appropriately being urged to observe internationally recognized human rights even where national laws are weak, absent or not enforced; I recommend revisions to the text stipulating that States should craft their expectations for business enterprises as part of their policy and regulatory functions in a manner that does not deviate from internationally recognized human rights obligations and acknowledges international human rights standards.

5. As part of their policy and regulatory functions, consistent with obligations under international law, States should set out clearly their expectation for all business enterprises operating or domiciled in their territory and/or jurisdiction to respect human rights, and take the necessary steps to support, encourage and where appropriate require them to do so, including by:

In addition, because the Commentary associated with GP5 does not suggest a plausible circumstance in which it would be inappropriate for business enterprises to provide adequate communication on their human rights performance, encouraging communication only "where appropriate" is not sufficiently strong to ensure transparency with respect to human rights performance. To the extent that the Framework envisions the potential for effective remedies, information about human rights performance will be essential and most always appropriate. The Human Rights Council encouraged the Special Representative to "integrate a gender perspective."[1] Communications on human rights performance must include information on how business practices are impacting the rights of women, children and persons belonging to vulnerable or disfavored groups. Accordingly, I recommend that the text be revised to reflect these considerations as follows:

d. ~~Encouraging, and where appropriate~~ Requiring, business enterprises to provide adequate communication on their human rights performance especially with respect to the impact of practices on the rights of women, children, Indigenous peoples, and other disfavored or disadvantaged social groups.

[1] Human Rights Council Resolution 8/7, Para. 4(d).

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Response from Michelle de Cordova on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

FROM NEI INVESTMENTS SUBMISSION:

We would strongly recommend adding the concept of fiduciary duty to the list of influential areas of business law and policy that may require review with a human rights lens. The incentive for companies to address human rights issues would be greater if more investment institutions recognized and acted upon their own responsibility to respect human rights in investment decision-making. In recent years, following the publication of the Freshfields report[1], there has been increasing acceptance of the proposition that integration of environmental, social and governance considerations in investment decision-making is consistent with, or indeed part of, fiduciary duty. But this evolution is still at an early stage, and up to now more attention has focused on environmental and governance aspects than on human rights.

We welcome the reference to States requiring companies to communicate on human rights performance, and to the potential materiality of information on human rights impacts. We find that corporate reporting requirements tend to underplay the potential materiality of social matters, and that corporate reporting on the most material aspects of social performance (such as human rights) tends to be weaker than reporting on environmental and governance matters.

[1]**UNEP Finance Initiative.** A legal framework for the integration of environmental, social and governance issues into institutional investment. [Online] 2005. http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf

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Response from Cathal Doyle on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights identifies the need for 'revision or further elaboration' of 'more robust guidance on protecting and respecting the rights of... indigenous peoples' as a critical area that needs to be addressed. The pervasiveness of business activities in indigenous peoples' territories, in particular that of the mining, hydrocarbon, agro-industrial and forestry industries, and the consequential environmental, economic, social and cultural impacts, threatens indigenous peoples' cultural integrity and in some cases their very survival. Ongoing and future challenges posed by industrial activity in indigenous territories necessitates that explicit reference be made in the principles to the duty of the State to protect indigenous peoples human rights as recognised under international human rights law.

International human rights treaty monitoring bodies and regional human rights courts and commissions have clarified that obtaining the free prior and informed consent (FPIC) of indigenous peoples is the standard which States must ensure that corporate entities adhere to. This is considered necessary by human rights bodies to ensure that States respect the principles of equality and non-discrimination and to guarantee that business activities do not negatively impinge on indigenous peoples' rights and potentially threaten their cultural and physical survival. The requirement to obtain indigenous peoples FPIC is increasingly recognized under international law and practice as reflected in the revision of the International Financial Corporations guidelines, the Access and Benefit Sharing protocol to the Convention on Biological Diversity and in negotiations on the text of an agreement on Reducing Emissions from Deforestation and Forest Degradation (UN REDD).

It is therefore suggested that an explicit reference be added in principle 5 to the FPIC requirement in the context of the State duty to protect indigenous peoples against business-related abuse of their international recognized rights. In addition, as pointed out in the joint Civil Society submission, effective human rights

due diligence processes should be required of both private and state-owned enterprises. In the context of activities that impact on indigenous peoples, the commentary could note that in order to be effective these human rights due-diligence should include the requirement to obtain their FPIC.

The State-Business nexus (GP6)

GUIDING PRINCIPLE 6: States should take steps to ensure that human rights are respected by business enterprises that are owned or controlled by the State. This includes encouraging, and, where appropriate, requiring, such enterprises to undertake effective human rights due diligence processes.

Commentary

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Therefore, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights, quite apart from any legal obligations States may have in certain circumstances.

States should find it easiest to ensure respect for rights by State-owned or controlled enterprises. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny. These enterprises are subject independently to the corporate responsibility to respect. But States themselves should take appropriate steps to ensure that these enterprises' respect human rights.

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Response from N.A.J. Taylor on 14 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

This principle may be made more firm. State owned and controlled enterprises, above a certain threshold, must be required to adhere to the highest principles, not merely those applying to general business.

I'd advocate the development of sovereign wealth funds be explicitly referenced, at least in the commentary. Whilst their implementation of a states' principles on human rights is more complex than might be a state owned or operated business entity, they should not nevertheless be excluded from coming under this principle's purview.

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Response from Matt Crossman on 12 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

" Therefore, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights, quite apart from any legal obligations States may have in certain circumstances."

The cause for optimism afforded by proximity of a business to the State's duty to protect is also a source of worry. Firstly, the closer a company is to the state reflects its important to some strategic resource or activity. This may mean the company receives undue political protection from allegations of human rights abuses. For example, the UK Government has put pressure on the Special Fraud Office to drop bribery charges against companies in the defence industry citing the national interest. Secondly, state controlled enterprises may be so close to the state's duty that the absolve themselves of any seperate duties in this sphere. This has been the experience of many engaging with state controlled enterprises - the company managers who report to state agencies simply pass the buck to their political masters.

Presumably teh author deals with these issues through the use of the word 'should' in principle 6 - but perhpas a call for consistent application of a state's duties is needed here.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Guiding Principle 6 on the *'state-business nexus'* uses a turn of phrase which seems to underplay the state's oversight role in comparison with its incentivising role when dealing with failure by businesses to respect human rights. To fulfil the requirement of neutrality, it would be better to remove the expression *'where appropriate*'.

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

This would be the very minimum, but unfortunately very often it does not happen (see for example Areva's (owned by the French government) behaviour in Niger or Eni's (owned by the Italian government) behaviour in Congo-Brazzaville).

The State-Business nexus (GP7 - outsourcing)

GUIDING PRINCIPLE 7: Because States do not relinquish their international human rights obligations by outsourcing the delivery of services, they should ensure that they continue to exercise adequate oversight in order to meet those obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

Commentary

Failure by States to ensure that business enterprises performing services that they outsource respect human rights may entail both reputational and legal consequences for the State itself, given its continuing human rights obligations. Therefore, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms.

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Response from Jose Rafael Unda on 13 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 1 ✖ Agreement 0 ✔ 1 ✖

As in my comment to GP4, I do agree with GP7, fully. But, at the same time, I miss a reference to domestic Law and Constitution. States should consider, also domestic Law and Constitution; instead of considering only their "international human rights obligations".

Regards

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Response from Matt Crossman on 12 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Does principle 7 extend to industries which are privitised in some states e.g. utlities. These functions have been effectively outsourced and have potential HR impacts (especially over charging). How does principle 7 apply to these fully privtised indutries which remain of core public concern and affect the entire population?

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Response from Jack MOSS on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

AquaFed comments on GP 7

State-Business nexus

The Guiding Principle 7 [GP7] is about the State-Business nexus when a State outsources the delivery of services through contract or license to a publicly or privately-controlled business enterprise. We believe that the current GP7 should be augmented to take into account the duty of the State to enable and empower the business enterprise to respect human rights and its duty to ensure that individual right-holders do not act in a way that prevents the business enterprise from delivering essential services to other right-holders.

Therefore, we suggest that the wording of GP7 becomes:

Because States do not relinquish their international human rights obligations by outsourcing, <u>contracting or licensing</u> the delivery of services, they should ensure that they continue to exercise adequate oversight in order to meet those obligations when they contract with, or legislate for, business enterprises to provide

services that may impact upon the enjoyment of human rights. In this case, they should also take the necessary action to enable and empower the business enterprises to respect human rights and to ensure that individual right-holders do not act in a way that hinders or prevents the business enterprise from delivering essential services to other right-holders.

The State-Business nexus (GP8 - state support)

GUIDING PRINCIPLE 8: States should take appropriate steps to ensure respect for human rights by business enterprises that receive support and services from the State, including through export credit agencies and official investment insurance or guarantee agencies.

Commentary

A range of agencies linked formally or informally to the State may provide support and services to business activities. Despite these close links to the State, relatively few of those agencies, such as export credit agencies and official investment insurance or guarantee agencies, explicitly consider their ventures' human rights impacts. Yet these agencies themselves risk exposure to reputational, financial, political and potentially legal implications where a business whose activities or relationships they support contributes to human rights abuses abroad.

Faced with these risks, States should encourage and where appropriate, require human rights due diligence—of the agencies themselves and, wherever their access allows, of project clients. States should individually and collectively help to build capacity of such agencies to this end.

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Response from N.A.J. Taylor on 14 Dec 2010

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 2 ✔ 0 ✖

Very good point.

The US OPIC cancellation (and subsequent reinstatement) of Freeport-McMoRan's insurance in the 1990s, whilst failing to achieve any meaningful change in the corporation's activities, did ensure that the OPIC signalled its disapproval of certain aspects of Freeport's business.

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

It is necessary that compulsory oversight mechanisms are established, which oblige national governments and international donor organisations such as the World Bank, the IMF or the European Investment Bank to verify how the money is spent and to verify that the companies respect human rights and a series of other criteria and are liable to sanctions if they do not.

Commercial transactions of the State (GP9)

GUIDING PRINCIPLE 9: States should seek to ensure respect for human rights by business enterprises when they conduct commercial transactions with them.

Commentary

States conduct a variety of commercial transactions with businesses, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those businesses.

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Response from N.A.J. Taylor on 14 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

This needs to be expanded to explicitly reference the full raft of commerical relationships.

It remains unclear at present what sorts of relationships (i.e. do you mean consulting services who are supplied to governments as well as some disagreeable regime and/or corporation?) as well as what limitiations you place on those relationships (i.e. might this also refer to foreign domiciled corporations or only local ones?).

****

Response from Steven Oates on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

One of the potentially most effective and in general under-exploited means for States to obtain respect for human rights - especially where enforcement and supervision mechanisms are weak - is procurement policies and practices. This is important at federated state and municipality level as well as in central government. Through contracts, whether regarded as pub lic law or private law instruments, actual legal requirements can be made as to protection, respecting and remediation as regards human right. Given States' real duty to protect, this principle should arguably be couched in terms stronger than merely "promote".

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

States should require a human rights due diligence from enterprises before doing business with them and refuse to do business with notorious human rights violators.

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Response from Gaston Bilder on 30 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

This principle could be joined to principle number 6?.

It is unclear what is meant by "business enterprises" (does it exclude other state-owned companies, sovereign funds, other States carrying out commercial activities?)

The state on its own should conduct due diligence - about its counterparts in these type of trade activities. Such due diligence should be a heightened one when dealing with activities in conflictive areas or depending on the type of goods involved.

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Response from Michael Deas on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Guiding Principles 7, 8 and 9 correctly identity state complicity with Business human rights violations as a key issue. However, these principles do not sufficiently ensure that States do not continue business-as-usual relationships with Businesses that are responsible for human rights abuses in a way that may violate their own obligations. The Guiding Principles should explicitly confer on States a responsibility to refrain from any kind of relationship, be it through direct support, providing services, or conducting commercial transactions, with any Business responsible for human rights abuses, and to continually monitor the human rights record of those Businesses with which it has ongoing relationships.

Supporting business respect for human rights in conflict-affected areas (GP10)

GUIDING PRINCIPLE 10: Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts do not commit or contribute to such abuses, including by:

a. Engaging at the earliest stage possible with business enterprises to help them identify and mitigate the human rights related risks of their activities and relationships;

b. Providing adequate assistance to business enterprises to assess and address the heightened risks of abuse;

c. As appropriate, reducing or withdrawing access to public support and services for a business enterprise that is involved in gross human rights abuse and fails to cooperate in addressing the situation;

d. Ensuring that their current policies, regulation and enforcement measures are effective in addressing the risk of business involvement in situations which could amount to the commission of international crimes.

Commentary

The worst business-related human rights abuses occur amid armed conflict over the control of territory, resources or a government itself – where the human rights regime cannot be expected to function as intended. Responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts. Innovative and practical approaches are needed.

It is important for all States to address issues early before situations on the ground deteriorate. The primary duty to ensure that business enterprises do not

contribute to human rights harms, whether knowingly or inadvertently, remains with "host" States even where they are unable to exercise effective control in all circumstances. But in such circumstances, "home" States also have specific roles to play in assisting both their transnational corporations and host States in this regard, while neighboring States can provide important additional support.

To ensure greater policy coherence and adequately assist business in such situations, States should foster closer cooperation among home State development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host government actors; develop early warning indicators to alert government agencies and business enterprises; and attach appropriate consequences to businesses' failure to cooperate in these contexts, including by denying or suspending public support or services.

Because there is a heightened risk of businesses committing or contributing to international crimes in conflict-affected areas, States also should review whether their policies, regulation and enforcement measures effectively address this heightened risk. Where they do not, States should take appropriate steps to address such gaps. This may include exploring civil, administrative or criminal liability for businesses domiciled or operating in their territory and/or jurisdiction that commit or contribute to international crimes. Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives.

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Response from Jose Rafael Unda on 13 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Prevention is mentioned in so many other sections of this Guiding Principles, that I guess you missed adding "prevent" at GP10 "a." In fact, States should concentrate on prevention, leaving little or no space to "mitigate".

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Response from N.A.J. Taylor on 14 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 1 ✖

Agree with previous comment that this principle might go further and explicitly advocate "prevention" strategies. Some reference to the recent UN Global Compact and Principles for Responsible Investment expert group guidance on this matter may help in this regard. That guidance is much about prevention.

Might consider replacing "worst" the first sentence in the commentary to "most common and significant" or somesuch.

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Response from N.A.J. Taylor on 14 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 1 ✖

I've just noticed that elsewhere in the document, the phrase "**identify, prevent, mitigate and remediate**" appears. This might be useful to adopt, where appropriate, throughout the document.

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Response from Matt Crossman on 12 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Under principle 10 c) states are envisaged having a role in varying their contracts with enterprise, 'denying or suspending public support' where breaches of HR are uncovered. Firstly, who decides what constitutes a 'gross human rights breach? Does action by the state act as a proxy for an indicator of blameworthniess in this matter?

Secondly, what safeguards are sensible to ensure that 10 c) does not become an excuse for politically motivated attacks on foreign enterprise, especially where the State may be implicated in the underlying causes of the Human Rights issues? We have seen various examples of political exploitation of environmental regualtion in order to wrest control of valuable natural resources from private hands, or at least improve the terms of joint ventures. Should 10 c) make some reference to this scenario, by stating that such punitive actions against enterprises complicit in gross human rights actions be approved by an independent arbiter?

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

To just reduce or withdraw access to public support and services for enterprises involved in gross human rights abuses is far too little. The companies have to face legal consequences for their action. At the same time also a global certification system like the one foreseen in Dodd-Frank has to be considered, which requires companies importing raw materials from conflict regions to prove that this did not fuel the conflict.

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Response from Jon Fowler on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

This comment may appear focused on one business sector, but it highlights some key issues for conflict sensitive business practices and the role of the State.

The EthicalCargo project (www.ethicalcargo.org), hosted by the Stockholm International Peace Research Institute (SIPRI - www.sipri.org) supports humanitarian agencies and the home State development assistance agencies that fund them to avoid giving transport contracts to air cargo companies involved in arms trafficking and other destabilizing commodities such as narcotics and conflict-sensitive minerals.

Commercial air cargo companies have played a key role in facilitating conflicts, and associated human rights abuses, over the last 20 years, particularly in Africa (see "Air Transport and Destabilizing Commodity Flows" http://books.sipri.org/files/PP/SIPRIPP24.pdf).

Such companies often display specific characteristics that make it difficult to identify which state really bear responsibility for their regulation. A company's aircraft (often old Russian planes such as Ilyushins and Antonovs) are registered in one country (usually one with lax air safety standards or oversight); its bank account/financial activities are registered in another "off-shore" country and the company's operational offices are based in yet another country, often in a tax-free zone.

While it is of course important to emphasise the importance of States' responsibility for businesses domiciled or operating in their territory, for sectors such as transport companies fall under other types of jurisdiction in terms of air safety regulation and the potential for ethical conditions on supply-chain contracts for those involved in supporting aid responses.

This section could benefit from including:

- An emphasis on the importance of other state agencies whose core competencies can be utilised for strengthening responsible business activities in conflict- affected areas. In the example of air transport, Civil Aviation Authorities have a crucial role in applying rigorous (and legally binding) safety standards, and companies exhibiting the characteristics above usually have poor safety records as they wish to avoid inspection and cut corners. Safety standards have an important impact in other sectors such as mining - companies meeting safety standards are tend to be more dilligent, more responsible and more responsive to human rights issues.
- An emphasis on the importance of due dilligence by the State itself when providing assistence to conflict-affected areas. Ethical procurement guidelines for State actors and their implementing humanitarian and development partners would reduce the risk of supporting businesses responsible for, or associated with, human rights abuses.

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Response from Michael Deas on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The provision of guidance to States and Business specifically in relation to Business involvement in human rights abuses in conflict-affected areas, as articulated in Principle 10 and the SRSG commentary associated with Principle 12, is much needed and welcome.

However, the SRSG commentary associated with Principle 10 worryingly confers the majority of State responsibility for Business abuse of human rights on “host” States and in doing so underplays the role that “home” States can play. This disregards the reality that in many conflict situations the “host” State is itself guilty of systematic violations of human rights, and it is these violations that Business is likely to be complicit with. In many conflict situations, “host” States are unable or unwilling to address Business involvement in human rights violations. The Guiding Principles must explicitly articulate that all States have a clear responsibility to prevent Business from committing or contributing to human rights abuses in conflict situations. Recommendations for actions against companies that persist with such abuses must go beyond “withdrawing access to public support and services”.

In addition, the Guiding Principles do not in their current form sufficiently affirm the centrality of international humanitarian law in conflict situations. Businesses can be and often are directly complicit in violations of international humanitarian law, and in the case of Israel/Palestine, the Fourth Geneva Convention in particular.[1] In addition to ensuring the centrality of international humanitarian law within the relevant Guiding Principles, the Guiding Principles should call upon States to take the following steps in this regard:

- Develop mechanisms designed to educate Business and assist Business to make decisions that will prevent complicity with violations of international humanitarian law.
- Establish mechanisms that allow for the investigation and prosecution of companies complicit with violations of international humanitarian law.[2] This includes ensuring legislation and judicial systems are able to ensure prosecutions for such violations, in accordance with relevant provisions and statutes of international law.

[1]For more information on Business complicity with violations of international law in Israel/Palestine, see the findings of the London Session of the Russell Tribunal on Palestine http://www.russelltribunalonpalestine.com/en/sessions/london-session/findings

[2]States should follow the example set by the Dutch public bodies when they launched an investigation into the activities of a Dutch company alleged to be supplying materials to Israel for the construction of its illegal wall http://www.labournet.net/world/1010/cranes1.html

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Response from Michelle de Cordova on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

FROM NEI INVESTMENTS SUBMISSION: We note that effective State action to curb abuses in conflict-affected areas will require strong coordination among different agencies – including those responsible for foreign affairs, international aid, trade promotion and securities regulation[1].

[1]The US Dodd-Frank Act Conflict Minerals Provision provides an example of this concept in action.Section 1502 assigns various roles and responsibilities to the Securities and Exchange Commission, State Department and USAID. See:**US Government Printing Office.** Dodd-Frank Wall Street Reform and Consumer Protection Act. [Online] 2010. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf.

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Response from james eugene constable on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

In areas of open conflict, many peace activists wait to be involved until the military allows them to to do their work. There is much military information which is harmful to the purpose and the work of a good peace activist. Yet, many times, peace is brought about by people - who due to the nature of their involvements, cannot and shall never be allowed to participate at the peace table. To bring peace about and to make non-violence real, all the non-violent interests of all those who participate in conflict must be acknowledged and brought about at the peace table in order to keep and maintain the military discipline of a cessation of violence.

These ' cessations of violence ' are always non-violent, but expressions of belief from the disenfranchised, must be acknowledged as ' peace deals or peace arrangements 'and voluntary social exclusion must be acknowledged at the peace table with the acknowledgement of a register of non-violent peace deals that the political systems can use to encourage interactive representation.

Peace deals and peace arrangements are a way for peace to be possible, without disclosing the identities of the providers of peace.

In this way, social exclusion can be used not only to promote human rights, (and to provide suggestion, remediation, and answer), but also to protect the providers of peace, so that human rights can develop naturally in areas of non-violence, even if unusual peace deals or peace arrangements are used to bring all interests to the peace table.

James Constable

Multilateral Institutions (GP11)

GUIDING PRINCIPLE 11: States, when acting as members of multilateral institutions that deal with business-related issues, should:

a. Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;

b. Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and to help States meet their duty to protect against business-related abuse, including through technical assistance, capacity building and awareness-raising;

c. Draw on the "Protect, Respect and Remedy" Framework to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

Commentary

Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business- related issues, such as international trade and financial institutions.

Capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfill their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches.

Collective action through multilateral institutions can help level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards.

The "Protect, Respect and Remedy" Framework provides a common reference point in this regard, and could serve as a useful basis for building a cumulative positive effect that takes into account the respective roles and responsibilities of all relevant stakeholders.

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Response from Nadia Bernaz on 24 Nov 2010

Ratings (Yes/No): Relevance 4 ✔ 0 ✖ Agreement 4 ✔ 0 ✖

I am glad to see this point included in the *Guiding Principles* as I think that this is one of the key obstacles to change at the macro level. Just like human rights considerations (and law) need to be mainstreamed at the state and company levels, such mainstreaming needs to happen as well within international organisations such as the IMF, the World Bank and the WTO.

Proper leadership from a few influencial states with the view to encourage the systematic inclusion of human rights in the law and policies of these organisations could go a long way. At the moment it is almost as if we had international human rights bodies and specialised organisations on the one hand and trade and financial institutions on the other hand, operating in different worlds. This is illogical since all of these are, after all, organisations created by and made of states. They engage with them and pay for their functioning. Therefore, they must be in a position to demand that human rights law be part of the trade and financial institutions' policies.

In short, real change in the area of business and human rights at the macro level will come through consistency in states' positions and actions.

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Response from N.A.J. Taylor on 14 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Agree wholeheartedly.

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Response from Robert Grabosch on 11 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

A very important provision, as instutionalisation and specialisation has indeed led to a neglect of human rights aspects.

GP11 covers host States ´ duty to protect human rights (GP1), but it seems to not cover home States' responsibility to encourage business respect for human rights abroad (GP2).

Is this because the SRSG does not expect a multilateral institution to take an issue with a home State's encouraging of "its" businesses' respect for human rights abroad (e.g. by fines or import quotas)?

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Response from SANTIAGO ANGEL on 18 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

States, when acting as members of multilateral institutions that deal with business-related issues, should: Foster that all States publish, each year, a White paper with the internal human rights situation and evolution.

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

International donor organisations such as the World Bank, the IMF or the European Investment Bank must carry out thorough analysis of how the investment is going to impact on local population and human rights, before granting the credit and verify how the money is spent.

The Corporate Responsibility to Respect

Foundational Principles (GP12)

GUIDING PRINCIPLE 12: Business enterprises should respect human rights, which means to avoid infringing on the human rights of others and to address adverse human rights impacts they may cause or contribute to. The responsibility to respect human rights:

a. Refers to internationally-recognized human rights, understood, at a minimum, as the principles expressed in the International Bill of Human Rights and in the eight International Labor Organization core conventions;

b. Applies across a business enterprise's activities and through its relationships with third parties associated with those activities;

c. Applies to all enterprises regardless of their size and ownership structure and of how they distribute responsibilities internally or between entities of which they are constituted.

Commentary

The corporate responsibility to respect human rights constitutes a standard of expected conduct for all business enterprises. It exists independently of States' abilities and/or willingness to fulfill their human rights duties, and does not diminish those duties.

Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all rights should be the subject of periodic review.

An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions, as set out in the Declaration on Fundamental Principles and Rights at Work. While these instruments do not impose direct legal obligations on business enterprises, enterprises can infringe on the rights these instruments recognize. Moreover, those rights are the core standards against which other social actors hold enterprises to account for their adverse impacts. This is distinct from the question of legal liability, which remains defined largely by national law provisions in relevant jurisdictions.

Depending on circumstances, companies may need to consider additional standards: for instance, they should also respect international humanitarian law in conflict-affected areas; and those rights specific to vulnerable and/or marginalized groups, such as indigenous peoples, women, ethnic and religious minorities, and children.

The scope of the corporate responsibility to respect human rights extends across a business enterprise's own activities and through its relationships with other parties, such as business partners, entities in its value chain, other non- State actors and State agents. Particular country and local contexts may affect the human rights risks of an enterprise's activities and relationships.

'Influence', where defined as 'leverage', is not a basis for attributing responsibility to business enterprises for adverse human rights impacts. Rather, a business enterprise's leverage over third parties becomes relevant in identifying what it can reasonably do to prevent and mitigate its potential human rights impacts or help remediate any actual impacts for which it is responsible.

A corporate group may consider itself to be a single business enterprise, in which case the responsibility to respect human rights attaches to the group as a whole and encompasses both the corporate parent and its subsidiaries and affiliates. Alternatively, entities in a corporate group may consider themselves distinct business enterprises, in which case the responsibility to respect attaches to them individually and extends to their relationships with other entities – both within the group and beyond – that are connected to their activities.

The responsibility to respect does not preclude business enterprises from undertaking additional commitments or activities to support and promote human rights. But such desirable activities cannot offset an enterprise's failure to respect human rights throughout its operations and relationships.

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Response from Nadia Bernaz on 25 Nov 2010

Ratings (Yes/No): Relevance 4 ✔ 1 ✖ Agreement 6 ✔ 0 ✖

While I agree with the idea of using the international bill of rights (+ ILO Conventions) as a standard, I think it would be helpful to find, in the comments, a little more detail on what business must do to respect these rights.

The contents of the obligations not to torture or not to discriminate, for instance, are relatively straightforward and I believe that individuals with no specific knowledge in human rights can more or less figure out what is expected from them. However, I would argue that it may be more difficult for CEOs and business people in general to make sense of some other provisions, in particular those contained in the Covenant on Economic, Social and Cultural Rights that are not specifically business-related (e.g. Article 13 on Right to education or Article 15 on the Right to take part in cultural life). I am concerned that it could be difficult to engage a majority of them in the process without providing them with slightly more information on this.

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Response from Jose Rafael Unda on 13 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 1 ✖

"As a minimum" is an expression that opens the door to other legal instruments, but I miss here, as in GP4 an GP7, a reference to domestic Law and Constitution. Companies do have an obligation to respect international human rights obligations, but also local Law, and of course local Constitution, which in many countries will mean human rights obligations. The reference -solely- to international legal instruments with no mention to domestic -and regional- human rights instruments would not strenghten but weaken domestic institutions.

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Response from Robert Grabosch on 18 Dec 2010

Ratings (Yes/No): Relevance 2 ✔ 2 ✖ Agreement 1 ✔ 6 ✖

SRSG Ruggie is entitled to his personal opinion, but the Guiding Principles claim to be a re-statement of int'l law. **An honest re-statement of international law would be: Int'l law is moving away from the traditional notion that only States are duty-bearers. However, the question whether business enterprises have duties at international law to respect human rights is currently debated and not yet clarified.**

But Ruggie's re-statement of current int'l law reads: "[T]hese instruments [the International Bill of Human Rights and the eight International Labor Organization core conventions] **do not impose** direct legal obligations on business enterprises" (Commentary to DGP 12).

As a re-statement, that's clearly wrong. Moreover, it's an unnecessary and patronizing preemption of a continuing debate, and it hardly furthers the business & human rights agenda.

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Response from Larry Catá Backer on 14 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 1 ✖

I think it is important to distinguish between functional governance power and formal legal authority. The SRSG correctly incorporates that distinction in the construction of the first two pillars. Today, states continue to create obligations that bind themselves and (to the extent permitted under their respective domestic legal orders) on their populaitons. Many of these obligations are legal obligations, as part of the domestric legal orders of states (internally) and as part of a state's internaitonal obligaitons (externally). Corporations have inc reasingly assumed a functional role that is as important to the lives of stakeholders as that exerted by states. But such governance power is not legal in the classic political sense. Rather, it describes the set of functional relaitonships between a corporate entity and its stakeholders. The relationship between these actors may be shaped by the complex of international legal standards, but they are applied as standards by which these stakleholders hold corporations to account. In this sense, the obligations described in international law, as between stakeholders and corporations, cannot be understood as a consequence of the direct application of international law, but rather as the use of the normative valiues inherent in those standards by non-state actors in holding corporations responsible for the human rights consequences of their action. The state applies law internally; it sometimes binds itself to obligations with the character of law in its relationships with other states and public international organizations. Corporations are bound by the law of the states in whcih they operate, their relationships with states and other public or private actors is contractual and functional. Whatever the future eventually brings, the SRSG's distinction between the duty of states and the responsibilities of corporations, as both formal and functional matter, correctly states the current state of affairs. And by crystalizing the current realities, the SRSG provides a clear framework within which changes, including the changes suggested in this comment, may be developed.

Larry Catá Backer

W. Richard and Mary Eshelman Faculty Scholar & Professor of Law,

Professor of International Affairs

Pennsylvania State University

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Response from Amy Lehr on 20 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 1 ✖

Actually, Professor Ruggie's statement that the International Bill of Human Rights and ILO core conventions do not impose direct legal obligations on business enterprises is entirely correct: Signatory States to these international agreements are expected to translate the contents into domestic law that is binding on third parties, including companies. Unless a country has laws implementing the ILO Conventions, for example, companies cannot be prosecuted for violations of the Conventions in that country.

In the area of international law, concepts can gain traction and become hard international law over time, so it is quite possible that the corporate responsibility to respect human rights is on this trajectory, but Professor Ruggie has never claimed that this has already occurred.

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Response from Cathie Guthrie on 12 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

I have suggested under GP 2 the important role of the state in preparing corporations for their international missions by supporting their acquisition of a human rights lens to guide their business life cycle. But I believe my suggestions are equally relevant under GP12 . For ease of reference, I am repeating my GP 2 comment here.

Without a standardized framework and the opportunity to appreciate the complexity and interdependence of the different rights instruments, businesses are sure to fail by someone's measurement. Might it also be appropriate for voluntary, standardized testing on a human rights framework to be available to relevant employees of a company and administered by a centralized body? This would demonstrate to society, a business's commitment to respect human rights across its operations. Further, I think it is incumbent upon the state to play a role in monitoring corporate efforts to respect human rights and through the Human Rights Council to be held accountable for the behaviours of their corporations through some periodic review process.

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Response from Suzan van der Meij on 13 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Submission on

DRAFT GUIDING PRINCIPLES FOR THE IMPLEMENTATION OF THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY' FRAMEWORK

with regard to

the corporate responsibility to respect human rights in the supply chain

This statement is meant to provide professor John Ruggie, UN Special Representative on Business and Human Rights, and his team with our view on supply chain responsibility. We support the objective of the Special Representative to provide clear guidance to companies to conduct due diligence in the supply chain as this is an essential element to prevent human rights abuses. However, operational criteria are needed to clarify the kind of action expected from enterprises. Although the draft Guiding Principles (GPs) do contain criteria for several elements of the framework (such as non-judicial grievance mechanisms) this is not the case for due diligence in the supply chain. Therefore we strongly request the Special Representative to include in the final version of the GPs operational guidance for due diligence in the supply chain.

Operational guidance for due diligence in the supply chain was explored in earlier stages of the mandate of the Special Representative. One of the results of this exploration is the Discussion Paper by John Ruggie, on the occasion of the OECD Roundtable on corporate responsibility. We welcome the general outline of the action an enterprise should take as presented in this Discussion Paper and therefore we suggest that this paper, as well as the following comments could provide the needed guidance. Our suggestions are based on MVO Platform expert knowledge of supply chain management as well as abuses, through our research and direct contacts with partner organisations facing the effects of corporate misconduct in developing countries.

1. Pro-active, real-time (during the relation) and if necessary remedial actions of buyer companies, are needed to prevent or correct abuses through the services or products they purchase. The Special Representative rightly states that reliance on contract clauses is insufficient especially if companies do not monitor implementation of the contract clauses. It should be part of due diligence to monitor implementation, especially when risks can be reasonably foreseen.

2. In general we support the decision logic as presented in the Discussion Paper. It is especially important that enterprises use their leverage to mitigate abuses or seek to increase leverage to do so. Sector or industry associations can be advised to play a stimulating and/or co-ordinating role in creating common leverage on joint relevant issues.

3. The decision to what extent a source partner is crucial or not, is left to the enterprise. An indication such as "no reasonable alternative source" leaves room for many interpretations still. We urge Ruggie and his team to clarify this formulation and look for operational criteria to define this concept and extend it, where possible, beyond present business practices of the particular company. Examples could be: sourcing outside own region or country when this is not already common, looking for different raw materials or (half)products with the same functionality, changing the production process etc.

4. The decision logic is based on the principle that the amount of leverage the enterprise has towards its supplier is an important factor in determining the required steps. This is reasonable however this is one of the elements in the Discussion Paper which should be elaborated upon for it to serve as guidance. There are several ways leverage can be enhanced such as co-operating with other clients or buyers. We notice in practice that enterprises too often immediately take steps to end the relationship. Even in cases were leverage is low and/or the supply chain entity is not crucial to the enterprise a discussion can be started with the management of the company(supplier) to see if there is willingness to improve the situation. Considerable efforts are required and leverage has to be organized before the decision to end the relationship should be taken.

5. The MVO Platform recommends the following steps to be undertaken by companies:

a. Find out which other companies within the sector are active in the countries where human rights abuses have been identified;

b. Jointly conduct research into violations of human rights abuses, the risks of abuses happening within the supply chain and possible successful efforts to tackle these or similar abuses; Also make use of existing research and available good practices of others.

c. Discuss the results with other companies, industry associations and other stakeholders like NGOs, human rights organizations and labour unions;

d. Draft a business code and implementation plan within the sector and/or with the specific supplier and set clear goals to be met within a reasonable time frame;

e. Seriously consider to become a member of a multi-stakeholder initiative, especially when working in high-risk countries with respect to human rights abuses.

6. The discussion paper is only focused on the (upstream) supply chain. Due diligence should also be conducted for the downstream value chain. That means that enterprises should have measures in place to prevent or mitigate adverse effect in the usage phase and in the waste phase. Well-known examples of abuses in the latter are the dumping of electronics and dismantling of ships.

7. Companies should be transparent about the origin of their products and about how they deal with human rights problems occurring in their supply chains. Supply chain transparency and traceability can be realised in a variety of ways:

a. Statements in the annual sustainability report about the social and environmental circumstances under which products and services are being produced by their suppliers;

b. Giving information on the codes of conduct (based on international human rights and other standards) and control and improvement systems or multistakeholder initiatives that are applied, and describing the implementation thereof;

c. Participation in verification and certification (processes), so that the consumer can obtain information on the nature and extent of a product's sustainability. Examples include the FSC label for wood, the MSC label for fish, the Fairtrade mark and the EKO mark;

d. Being pro-actively transparent about and accountable for human rights problems in which the company is closely involved. Furthermore, the company should indicate how it contributes to tackling the problem;

e. Providing information, on request, to consumers, corporate customers and civil society organisations. For example: for those consumers that want to know under what conditions a product is made in order to take this into account in their choice of products, information on its human rights impact should be available.

Finally, due diligence, although of utmost importance, does not provide sufficient guarantees for transnational corporations to respect human rights. The Ruggie framework/ GPs should encourage further steps governments should take in the case of abuses. It is necessary to **legally anchor** minimum requirements for supply chain responsibility in order to be able to tackle abuses and to counter free riding companies. This implies supply chain liability of companies in certain defined cases. In cases where human rights are infringed upon due to corporate activities, victims should have better access to legal remedies, which include access to courts in the home state of the company involved.

Here you can find this submission as a PDF file.

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Response from John H Knox on 17 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Principle 12 and its commentary are excellent, as are the other principles in this part.

There is a gap, though, in the absence of any discussion of the corporation's responsibility to work with the government in the implementation of the state's duty to prevent. **In particular, it would be very useful to include as a principle that (a) business enterprises should, at a minimum, not hinder states as they implement their duty to protect through the enactment of appropriate laws; and (b) enterprises should comply with domestic laws implementing states' duty to protect against human rights abuses.** The commentary on the principle could make clear that domestic law is important in guiding corporations' responsibility to respect human rights law, and that corporations' responsibility includes working with, not against, states as they comply with their duty to protect through enacting appropriate legislation.

Obviously, the content of domestic law should not be the only relevant consideration in corporations' responsibility to respect. With respect to this latter point, the commentary could tie this new principle to Principle 21(a), which states that corporations should observe human rights when national law is weak, absent, or not enforced.

John H. Knox, Wake Forest University

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Response from geoffrey chandler on 18 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Draft Guiding Principles on Business and Human Rights

Submission from Sir Geoffrey Chandler, Founder-Chair, Amnesty International UK Business Group 1991-2001, Former Director General UK National Economic Development Office, Former Director Shell International.

I am grateful for the opportunity to make a submission on the draft Guiding Principles of the Special Representative of the UN Secretary- General for Business and Human Rights (SRSG). I address my comments to Part III, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS.

The SRSG's draft Guiding Principles have taken the debate on business and human rights to a new level from which it cannot be allowed to fall back. They establish definitively that companies have a direct responsibility for the human rights impact of their operations; that this responsibility exists independently of the role and conduct of states' human rights responsibilities (it is not a 'secondary' responsibility); that this responsibility extends across the whole range of a company's activities and the activities of those associated with it; that it is a responsibility applicable to all companies regardless of their size or function. This constitutes a crucially important advance.

Over the period of his mandates the SRSG has moved the debate from the conflict he inherited to consensus on these fundamental principles. That this has required, and has been given, the utmost skill, diplomacy, energy, scrupulous impartiality and intellectual integrity does not need to be said: it should be obvious to all.

The question is no longer whether companies have human rights responsibilities, but what they are and how they should be managed. The SRSG has laid the foundations, but the work remains to be completed. How to exercise those responsibilities is clearly delineated in the Guiding Principles through the application of due diligence. What those responsibilities are remains to be more specifically defined if market forces, the most potent of all influences on corporate behaviour, are to be enlisted in support of human rights rather than acting against them. Reference is made to the 'authoritative list of core internationally recognised human rights' contained in the International Bill of Rights, its related instruments and the ILO core conventions which need to form the basis for the exercise of due diligence. Much of that list, however, is written for states, in language and concepts appropriate to states, rather than for companies.

In order to avoid every company making its own interpretation of this list's applicability to itself, and in order to provide stakeholders with common criteria against which they can judge, reward or punish comparative company performance on these issues, the list requires interpretation into explicit principles. These need to be

1) in language intelligible to and in terms actionable by managers in the exercise of due diligence;

2) usable by stakeholders for judging the comparative performance of companies on these issues;

3) backed by UN authority.

Such principles, reflecting the values of international society and supported by it, will have normative force - beyond voluntarism, but short of being mandatory - and are the essential next step. They will influence market forces which are currently determined almost exclusively by financial criteria, and which, unless so influenced, will continue to militate against the protection of human rights. But it will not be possible to take that step until there is better understanding by both the corporate sector and human rights movement of the nature of the challenge. Both remain fixed in the sterile conflict between voluntarism and legislation, the dominance of lawyers on both sides of the argument having shrunk the parameters of the debate. Neither voluntarism nor legislation on their own can meet the need. History demonstrates that voluntarism does not work; and the international legislation required lies years, if not decades, ahead and cannot embrace the whole of the diversity and protean nature of corporate activity. We need a wider vision from both companies and NGOs and the support of governments before it will be possible to place the last block on the foundations that the SRSG has established.

It is understandable, in the light of the SRSG's objective of achieving the maximum reduction in corporate-related human rights harm in the shortest possible period of time, that the emphasis of the Guiding Principles should be exclusively on the adverse impact of corporate operations. 'Do no harm' is an important precept; but the Universal Declaration of Human Rights calls for all individuals and organs of society to promote respect for these rights and to secure their effective recognition and observance. It is therefore important that the Guiding Principles should also advocate a positive role for companies in supporting human rights. Such support is a necessary defence for companies against the accusation of

moral complicity when operating in the context of human rights violations. More importantly, by making human rights principles the point of departure for company operations we will harness the support of the international constituency with a greater immediate potential for good and harm than any other.

The Guiding Principles provide us with an opportunity to make a significant advance which can radically change the dynamics of the situation. They make the vitally important contribution of providing the basis for that advance. This will now require the support of governments and a broader vision and better understanding from both sides of the company/NGO divide if we are to seize the opportunity and strengthen both the defence of human rights and the corporate social licence to operate.

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Response from Ian Higham on 19 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

In my research, I have noticed that almost none of the existing corporate human rights policies cite the International Bill of Human Rights in its entirety - most reference only specific rights, and at most the Universal Declaration. As such, I think it is important to explain in the commentary the implications of the International Covenants for business and elaborate on why the rights enumerated in these documents are different from those in the Universal Declaration and equally important.

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Response from Compliance and Capacity International, LLC on 21 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Compliance and Capacity International, LLC

The sanctions practitioners and due diligence advisory group

www.comcapint.com

CCI Comments on the SRSG's draft Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework"

January 10/2011

In the 1970s, when Western countries turned their attention to human rights as a foreign policy tool, the private sector was called upon to assume new humanitarian responsibilities. Professor John Ruggie's current draft "Guiding Principles for the Implementation of the United Nations Protect, Respect, and Remedy Framework" is the latest in a succession of attempts to formulate prescriptions for corporate social responsibility (CSR). How valid are these guidelines for a truly global business context? CCI will confine its remarks to this question from the perspective of its partners' experience in conflict zones and work with all aspects of UN sanctions.

As in the case of earlier texts, the proposed guidelines oscillate between idealistic aspirations and pragmatism. To his credit, Professor Ruggie has cast a wider net and applied more original thought to human rights guidelines for the private sector than ever before. Undoubtedly, implementation of his framework will help to avert future wrongs and alleviate human suffering. However, to practitioners, the SRSG's reports and proposed guidelines still appear to be theoretical and detached from today's realities of atrocities and other human rights violations. CCI's partners speak from their personal experiences as monitors of various crises in Central Africa, the Sudan, Sierra Leone, Liberia, and Cote d'Ivoire and from their close observations of similar situations in the Middle East and in Central-Asia. In all of these conflict zones, ample information has accumulated on the linkage between human rights abuses and private sector responsibility. In none of these cases have sanctions or other consequences been brought to bear against the companies involved. The crux of the matter is the lack of political will to effectively implement measures agreed and adopted by the international community. Recommendations for new

remedies to ensure that corporate enablers of atrocities understand and abstain from their harmful activities are ignored, stymied, or watered down.

Channels for remedy outside the UN-system, such as the OECD's guidelines for multinational enterprises and the follow-up processes under the National Contact Points of the OECD's member States have created much more media and political attention than real corrective action against recalcitrant corporations. Yet, blaming the UN, the OECD or any other international body would be misguided. As the SRSG aptly notes in his first report (A/HRC/8/5), the United Nations "is not a centralized command-and-control system that can impose its will on the world - indeed it has no "will" apart from that with which Member States endow it." The lack of success of these organizations and their aspirational frameworks are no more than a reflection of the low political will of their member states which results in decision-making gridlock.

Those in charge of developing an alternative framework for corporate social responsibility must first address the question of extricating the international community from its current logjam of political ambivalence and expediency. This task is particularly urgent now that tectonic shifts in the political and economic world order have fundamentally altered the geography of the worst atrocities.

Fundamental issues such as these must be faced: What does it matter to the Congolese miners whether the members of ICMM (International Council of Mining and Metals), the lobbying group for the leading OECD mining companies, have evolved into model corporate citizens while an ever-increasing share of the Congo's natural resources are mined by companies from non-OECD industrial powers? What does it matter to the citizens of Darfur, South Sudan, Chad or Somalia that all major global manufacturers of 4x4 vehicles, and many international and regional mobile and satellite communication companies are members of the UN Global compact, when their products are major facilitators in the commission of atrocities? And the ultimate unaddressed corporate social responsibility issue: how to make the manufacturers of weapons and ammunition liable for their unchecked supplies to conflict zones where their products often fall into the hands of belligerents?

Regrettably, when these issues are brought before relevant international bodies, such as the Security Council, no effective, corrective action is taken. The gaping political and economic gulf between the West and new industrial powers such as China, India and others is not conducive to creative ideas or attempts towards building bridges.

While commending the SRSG for his work so far, CCI proposes for his next mandate that a comprehensive outreach initiative be undertaken to include global corporations based in OECD and non-OECD countries with a demonstrated ability to affect populations who are suffering from human rights abuses. This initiative could create a new momentum in several important directions:

1. Accepting the need for a fresh approach to patterns of corporate conduct, including those not fully compatible with current OECD templates.

2. Addressing the sad realities of the responsibility of global corporations in the worst human rights abuses in Africa and Central Asia.

3. Making deliberate efforts to ascertain and incorporate the rapidly evolving CSR guidelines of non-traditional industrial states. For example, the State-owned Assets Supervision and Administration Commission of the State Council of the People's Republic of China has established a framework of CSR principles that also serves as a template for China's private companies.

4. Establishing important building blocks for an eventual framework of CSR and human rights practices that can be accepted, implemented, and enforced by the international community.

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Response from Robert Grabosch on 22 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Ruggie's comment that the int'l bill of human rights *does not impose* direct legal obligations on business enterprises is *not* a re-statement of int'l law. It's his - and many others' - personal opinion. None of the over 50 ATCA cases would be pending before US courts if it was the common opinion.

The traditional approach reflecting in the comments of Lcb911 and a.lehr above is regarded as outdated by many professors and experts.

The old argument (see a.lehr's comment) that private actors are not signatorys to international treaties is pointless. The binding character of law does not depend on whether the subjects bound participated in the process of lawmaking. Instead, the meaning of treaties has to be interpreted.

Many professors and other experts have done so and came to contradict what Ruggie claims to be a "re-statement", for instance:

- Bilchitz, David "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?" 12 *Sur International Journal on Human Rights* (2010) 199;
- Chirwa, Danwood Mzikenge "In search of philosophical justifications and suitable models for the horizontal application of human rights" 8 *African Human Rights Law Journal* (2008) 294; idem "The long march to binding obligations of transnational corporations in international human rights law" 77 *South African Journal on Human Rights* (2006) 22;
- Clapham, Andrew "The Role of the Individual in International Law" 21 *European Journal of International Law* 25 (2010); idem *Human Rights Obligations of Non-State Actors* (2006);
- Francioni, Francesco "Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations" in: *Economic Globalisation and Human Rights*, editor: Francesco Francioni (2007);
- Frey, Barbara "The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights", in 6 *Minnesota Journal of Global Trade* (1997) 153;
- Haas, Robert "Business Role in Human Rights in 2048" 26 *Berkeley Journal of International Law* (2008) 400;
- Halpern, Iris "Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century" 14 *Buffalo Human Rights Law Review* (2008) 128;
- Geldermann, *Heiner Völkerrechtliche Pflichten multinationaler Unternehmen* (2009);
- Kamminga, Menno T. and Saman Zia-Zarafi "Liability of Multinational Corporations Under International Law: An Introduction*"* in: ibid (ed.) *Liability of Multinational Corporations under International Law*, The Hague (2000) 1;
- Köster, Konstantin *Die völkerrechtliche Verantwortlichkeit privater (multinationaler) Unternehmen für Menschenrechtsverletzungen* (2010), and others.

Ruggies comment is unnecessary and pre-empts and patronizes an ongoing legal discussion and development. He should at least state as he has always done: "The issue remains unresolved."

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Response from Eberhard von Wangenheim on 26 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Guiding Principles: Applicability for Financial Institutions

A Comment to John Ruggie's- Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework

Guiding Principle 12 ff

The *"Protect, Respect and Remedy Framework"* developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises**,** *John Ruggie***,** appears to be now a firmly established common conceptual denominator for governmental agencies as well as business enterprises as well as non- governmental organisations concerned with human rights and their relevance to business enterprises. The business enterprises addressed include – so far mostly implicitly - financial institutions.

The Draft released in Nov. 2010 of *Guiding Principles* for the Implementation of the United Nations 'Protect, Respect and remedy' Framework to be submitted in June 2011 to theHuman Rights Council (http://www.business-humanrights.org/Links/Repository/1003306) *does* **not explicitly refer** in its Section III on The Corporate Responsibility to Respect Human Rights ***to financial institutions***.

Recommendation:

1. This note recommends that the *Guiding Principles, in their final version, should refer to financial institutions* explicitly, in order *to highlight the inclusion of financial institutions* as one of the industry sectors which need to be concerned, and to stimulate on the part of financial institutions continued *efforts on conceptual as well as practical grounds in order meet the banking industry's specific challenges for the corporate responsibility to respect human rights*.

2. On that basis individual banks and other financial institutions *should be challenged*. They could and should individually decide *to be pacesetters* in this area, or *to mount collective efforts*, in either case with the objective to intelligently, realistically and efficiently address the significance of human rights for them - which are only in part comparable to the challenges faced by non- financial corporations. Thereby the *development of "industry" standards* could in the end emerge and develop, and in the end agreed upon either on a national level (e.g. by national bankers associations) and/or on an international level (e.g. institutions like the Wolfsberg Group or the Institute of International Finance –"IIF").

Rationale for this recommendation:

3. The Guiding Principles for business enterprises to respect human rights apply, in principle, for all industry sectors; their significance and their implementation will be different, depending on the actual direct and exposures of industry sectors to potential adverse human rights situations and, for individual companies, on the scope and location of their operations and sourcing.

4. The banking industry, and other financial sectors, the same holds, but the direct exposure to human rights violations may, in general, be less significant that the risk of *indirect involvement or complicity* (in the non- legal meaning of the term). Therefore - in addition to all other applicable criteria for the conduct of business- banks and other financial institutions must seek to ensure *integrity*, from a human rights point of view, *of their customers, in their lending activity,*as well as in their *intermediation of financial resources*, and in the exercise of their *fiduciary responsibility* for *assets held or to be held by their clients*, as well as with respect to the advice and, the discretionary powers related to such activities, where applicable.

5. Industry sectors which tend to be most exposed given the nature and geographic arena of their operations, are - as a general rule- also those which are relatively advanced in addressing potentially adverse human rights impacts and in making systematic human rights impact assessments. Those include elements of the mining, oil and gas, forestry, some of the consumer goods industries which to this point have gained more experience than others, albeit not always attaining "perfect" or universally fully satisfying results.

6. In the financial sector ***project financing*** has been a highly exposed area of activity and is therefore also more highly developed, from a human rights compliance point of view, than other financial business

activities. Other fields of financial activity may or may not be less directly exposed and are certainly less developed.

7. Most fundamentally, the ***vetting of clients*** is subject to binding norms with respect to money laundering and terrorism financing. While those acts may be associated, or not, with adverse human rights impact, adherence to human rights standards has *not* been made, within general banking industry practise, an explicit criterion of exclusion. It may be tacitly "implied" in the vetting standards for politically exposed persons ("PEP's"). Doing so explicitly with respect to *all clients* would certainly be critical for the future - notwithstanding that for many institutions the "hit- rate" will be quite low. Conversely, the negative impact and costs of "missing" to identify a potential client's association with a problematic human rights situation are high.

8. In ***lending and underwriting*** (outside project finance) many banks have extended their decision making criteria to include (apart from financial and governance standards) environmental risks. Adherence to human rights standards, or at least the absence adverse human rights impact, as criterion for "engagement" on the part of the bank, and - if and when necessary - as a criterion of exclusion is practised by some, but by far not by all institutions for which this would be relevant. Here too, the institutions most advanced are those which have, given their fields of operations (and given their history), a relatively high exposure and correspondingly more practical experience with problematic human rights situations.

9. In the financial arena, the most underdeveloped area in regard to human rights is probably the ***asset management for account of institutional or private clients***. While UNEP Finance Initiative's Principles for Responsible Investments "PRI" have made progress in terms of membership, endorsement of its principles, and the quantity of assets associated with its members, the idea of "fiduciary responsibility" of asset managers for the integrity, from a human rights point of view, has certainly not yet been incorporated into the "mainstream" of asset management. The well publicised market sub- segment of Socially Responsible Investments ("SRI") is still a "niche market"- with merits in several areas, and relatively forceful practises in some countries. Though it mostly growing faster than the average, it is neither very precisely defined, nor tracked very conclusively. Assets invested under the SRI flag may or may not incorporate abstention from association with adverse human rights impact as a criterion; and this is even more true for the "investment universe" – which needs to be corrected.

Inclusion in the Guiding Principles ?

10. Parts of this comment and recommendation may be inserted, appropriately re-worded and re-fitted, into the Chapter III *Human Rights Due diligence* as one **"***Guiding principle***"** , others in the form of a *Commentary***;,** depending on the final structure of the re-edited Guidelines.

Küsnacht (Zürich) 26. January 2011

Author:

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

The reference to the International Bill of Human Rights and the *'eight ILO core conventions*' in the definitions and in Guiding Principle 12a as being *'internationally recognized human rights*' does not go far enough. For example, no mention is made of treaty and customary obligations under international

humanitarian law (1949 Geneva Convention and 1977 Additional Protocols), international undertakings on international criminal law and the 'core' international human rights treaties[1]. Similarly, union rights and consumer rights are not mentioned at all in the text.

[1]CNCDH, *Opinion on Corporate Human Rights Responsibility*, 24 April 2008.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

The use of the adjective 'independent' when referring to corporate responsibility in paragraph 11 and in the commentary to Guiding Principle 12 implies a gap between the trade, wage and financial relationships which characterise the economic order and the citizen-public authority relationships which characterise the political order. This separation between the two orders suggests a liberal economic vision which should not be brought into this discussion if this text is to maintain the neutrality needed to achieve a consensus. To maintain the document's objectivity, the adjective 'independent' should therefore be removed.

Moreover, according to both the report and Guiding Principle 12, businesses must seek above all to avoid infringing the rights of others. However, as the French Government pointed out, corporate human rights responsibility involves as many 'negative responsibilities' (*not to* infringe human rights) as it does positive responsibilities (*to contribute* to the production of common goods, in particular rights such as the right to a decent standard of living, the right to water or the right to health, etc.), whilst not acting as a substitute for public authority. These positive steps are not mentioned here, despite the fact that they are addressed in John Ruggie's 2008 report[1].

As emphasised in the Preamble to the Universal Declaration of Human Rights, 'every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction'. As 'organs of society' therefore, businesses must promote the development of human rights by using their influence among other parties, but also within their own sphere of action. They are therefore clearly in a position to contribute to the right to a standard of living that is adequate to guarantee health and wellbeing, the right to social security, the right to union freedom and collective bargaining, the right to water and food, the right to shelter, the right to scientific progress, etc. These are not risks to be prevented but areas to which businesses can contribute and therefore strictly speaking they are not covered by the 'due diligence' concept. The concept here seems to promote a primarily defensive approach, which does not embrace the significance of certain human rights, especially economic, social and cultural rights and therefore is not sufficient on its own to embody John Ruggie's second pillar.

[1]'Doing no harm is not merely a passive responsibility for firms but may entail positive steps - for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes' and'Companies need to adopt a human rights policy. Broad aspirational language may be used to describe respect for human rights, but more detailed guidance in specific functional areas is necessary to give those commitments meaning', *Promotion and protection of all human rights, civil, political, economic, social and cultural human rights, including the right to development – Protect, Respect and Remedy: a framework for businesses and human rights',* Report by the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 7 April 2008, paragraphs 55 and 60.

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Response from Steven Oates on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The reference here to ILO Conventions is not incorrect. But it is of consequence in relation to both State and business responsibilities. In the ILO Conference States are represented not only by governments but also by employers (business) and workers (article 3(1) of the Constitution). Thus the 1998 Declaration of Fundamental Principles and Rights at Work and the eight core Convetentions in particular are the acts naturally of governments but also of the most representative organisations of employers (along with those of workers). There is for this reason an enhanced responsibility - at least a moral obligation, if you like - for employers to make good their commitments by contributing to the protection of those principles and rights.

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Response from Steven Oates on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

More generally, the first sentence of this principle requires some reworking. And perhaps one reason for its awkwardness lies in the commentary paragraph concerning influence. In the end, that para. is not helpful and could better be omitted. It doesn't ultimately matter, perhaps, whether responsibility in this area is expressed in terms of influence or due dilligence. The latter is arguably even stronger. But when the discussion is less in the imperative mood (shalls) than the subjunctive (shoulds), why should a deliberate swipe be taken at the idea of a business choosing to exercise its influence in aid of human rights?

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Response from Steven Oates on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

There is another element. Although the Guiding Principles are, no doubt correctly, couched in terms of what *should* be done by businesses, it is noticeable in retrospect that GP1 in fact, also correctly, indicates what States *must* do. What is missing is a point in GP12 saying that businesses should (sic) recognise the peremptory character of human rights obligations (of States). The same applies in respect of humanitarian law. These are corollaries of the well-known formulation that businesses must operate within the law.

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Business enterprises *must* (not *should*) respect human rights.

To the principles 12 to 19 the following applies: Voluntary initiatives run by enterprises are of limited use. Code of conducts and internal ethical guidelines are often disregarded by companies and are often more meant to improve the external image of the companies than to really influence business practices. If human rights reports are not verified by independent authorities they will be largely useless, as companies tend to write one thing in them and do another.

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Response from Constantin Köster on 28 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

I am also of the opinion, as others here, that GP 12 is overly cautious and conservative concerning direct human rights obligations of private companies in international law. Nothing in the various human rights

treaties excludes an interpretation that their human rights provisions are binding also for private actors such as corporations. I would argue that at least the prohibitions of slavery and forced labour should already be interpreted as being binding also for private corporations. Also international humanitarian law directly binds at least corporate employees and it can be argued that it also directly binds corporations themselves, since its prohibitions are also directed at non-state-actors. The comment of rGrabosch already refered to the rising number of voices in international law that argue for human rights obligations of corporations in international law. It would therefore be better to leave the question of direct human rights obligations for corporations in international law open and not to state in the commentary of GP 12 that international human rights instruments do not impose direct obligations on companies.

It would also be clearer and better to contain a statement regarding international humanitarian law obligations at least for the corporate personnel and their criminal liability under international law in GP 12 and not only in GP 21 c, since GP 12 can be somehow seen as the fundamental principle about the human rights principles of companies and therefore should contain the whole spectrum of human rights protections.

The chapter on the responsibilities of companies should also clearly state that companies are legally obliged to follow the national law of the states they operate in, if the national laws are in line with international human rights obligations. The chapter should especially emphasize the legal obligation of companies to follow national law that was enacted to fulfill the state duty to protect human rights against violations of non-state-actors. If the framework is also regarded as a restatement of existing law, there is no reason to exclude such a statement and it shouldn't be controversial.

Also somehow hidden in GP 15 c is the responsibility not to be complicit in human rights violations. This principle should be made much more forceful and should be located also in GP 12.

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Response from Eli Bleie Munkelien on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 1 ✖

Submission on

DRAFT GUIDING PRINCIPLES FOR THE IMPLEMENTATION OF THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY' FRAMEWORK with regard to

The Corporate Responsibility to Respect

KLP - Kommunal Landspensjonskasse - is one of Norway's largest life insurance companies. The company provides pension, financing and insurance services to the local government sector and the state health enterprises as well as to businesses both in the public and the private sectors. The KLP Group's total assets are NOK 267.3 billion. We and many others believe it is not unimportant how we do this. As a shareholder in almost 2 000 companies KLP has a responsibility to influence companies in which we invest - for the good of the company and society.

KLP wish to give our support to professor John Ruggie, UN Special Representative on Business and Human Rights, and his team with regard to the draft guiding principles.

We see it as an important step forward in maturing corporation's responsibility to respect human rights. Companies have for some time taken on the responsibility to respect human rights through voluntary initiatives such as UN Global Compact and other Corporate Responsibility guidelines. We see this guideline as an effective tool in clarifying corporation's responsibility vs. states responsibility. It also gives guidance on how to minimise risk of breach of human rights, which corresponds and overlap with other guidance on the subject of Corporate Responsibility. We therefore see it as a powerful common tool for reference and a step forward in standardisation of corporation's obligations.

KLP wants to be a responsible financial investor and therefore actively uses a number of methods to influence companies towards continual improvement. KLP is a member of UN Principles for Responsible Investment and we believe respect for human rights and employee rights, environmental protection and anticorruption are fundamental to responsible business operation. We support continuous improvement on all these subjects, but we also excluded companies from our portfolios that can be linked to gross or systematic violation of international norms, in the main UN conventions.

In our work we have experienced the discrepancy between national laws and international norms, with the corresponding discussions on dilemmas. This document will support and clarify obligations in this regard. Our goal is always to influence companies towards responsible and sustainable value creation. A common language and point of reference on difficult issues of breaches of human rights can prove to be useful.

Authors:

Eli Bleie Munkelien, Vice Presiden Corporate Responsibility, KLP

Jeanett Bergan, Head of Responsible Investments, KLP

Heidi Finskas, Advisor Responsible Investments, KLP

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Response from Erika George on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 1 ✖ Agreement 0 ✔ 1 ✖

January 30, 2011

Comments on the Draft Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises

The Special Representative is to be commended for facilitating the multi-stakeholder consultations that have culminated in these Draft Guiding Principles for the Implementation of the 'Protect, Respect and Remedy' Framework. The 'principled pragmatism' of the Special Representative has resulted in a draft text with the potential to become an 'authoritative focal point' for future efforts to ensure that business enterprises conduct their operations in a manner consistent with respect for human rights. The Special Representative's work has contributed to an improved understanding of the potential adverse impacts on human rights that business enterprises can present, whether inadvertently or intentionally. The Corporate Responsibility to Respect Human Rights set forth by the Special Representative counsels against industry indifference to adverse impacts and calls for changes consistent with ensuring the protection of human rights.

In presenting these Draft Guiding Principles, the Special Representative has set about the laudable task of ensuring respect for human rights by 'elaborating the implications of existing standards and practices for States and businesses; integrating them within a single coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved." The current regime falls far short. The Draft Guiding Principles provide a promising step forward and could go a long way towards accelerating efforts to ensure transnational corporations and other enterprises conduct business in a manner consistent with respect for human rights.

Respectfully, my comments are offered to encourage further elaboration of certain principles and to recommend revisions to others.

Guiding Principle 12

GP12 codifies the important acknowledgement that corporations possess the responsibility to respect human rights. This corporate responsibility exists separate and apart from a given government's ability or willingness to fulfill the duty to protect or enforce respect for human rights. GP12 commends efforts by

business enterprises to undertake activities to support human rights and encourages business enterprises to use their influence to identify what can reasonably be done to prevent and mitigate adverse rights impacts; but, it also counsels that corporate philanthropy will not constitute a substitute for respecting human rights in the first instance. Accordingly, the corporate responsibility to respect obligation requires remediation of those adverse impacts for which a corporation is responsible.

Appropriately, the Commentary to GP12 recognizes that business enterprises can infringe human rights such as those core internationally recognized human rights contained in the International Bill of Rights and in the eight International Labor Organization core conventions. The Human Rights Council encouraged the Special Representative to integrate a gender perspective. It would be consistent with the request of the Council to include explicit reference in the Commentary to GP12 to those internationally recognized human rights instruments that speak directly to the rights of women, children, Indigenous peoples, and other vulnerable, disfavored or disadvantaged social groups. Accordingly I recommend that the Commentary also include at minimum reference to the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Convention on the Elimination of Racial Discrimination, the UN Declaration on the Rights of Indigenous Peoples and the Convention on the Rights of Persons with Disabilities.

Erika George

Professor of Law

University of Utah

S.J. Quinney College of Law

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Response from Jack MOSS on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

AquaFed Comment

Corporate responsibility to respect

The Guiding Principle 12 describes the responsibility of business enterprises to respect human rights. Its paragraph b) says that this responsibility extends to *relationships with third parties associated with those activities*". This is too broad. It might be interpreted by some as including organizations and activities wholly unrelated to the company and divorced from its actions and decisions. Furthermore, it neglects the fact that business enterprises have very llimited capacity to influence the decisions and actions of States.

In accordance with the OECD-BIAC, the International Organization of Employers and the International Chamber of Commerce, we suggest that the paragraph b) of this principle should be revised to read: "*applies across a business enterprise's activities and where, through its own actions and decisions, it has caused or contributed to adverse impacts by others*."

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Response from Child Rights Information Network on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

From the Child Rights Information Network submission:

Principle 12 calls on companies, "depending on circumstances," to "consider additional standards" when seeking to respect human rights. CRIN believes that because children will *always* be in a vulnerable situation, their rights must *always* be considered separately. In this context, the widely ratified Convention on the Rights of the Child is of great utility. It sets out a comprehensive framework for considering

children's rights, and should be included alongside the other instruments listed as an authoritative human rights treaty to be referenced in respecting children's rights.

! *The Commentary should specify that companies have the responsibility to separately consider and respect children's rights in line with the Convention on the Rights of the Child.*

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Response from Michelle de Cordova on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

FROM NEI INVESTMENTS SUBMISSION:

We note that the Guiding Principles do not give specific attention to indigenous rights issues. We understand that the principles are intended to be universal in application, and hence focus on universal human rights. Nonetheless, we are seeing rapid evolution in the standards by which companies, especially in extractive industries, are being evaluated and beginning to follow in the area of indigenous rights, for example with regard to the concept of Free, Prior and Informed Consent[1]. Globally, there are heightened expectations following the adoption of the UN Declaration on the Rights of Indigenous Peoples[2]in 2007, and the issue of engagement and consultation with indigenous peoples impacted by corporate activities has become the subject of intense debate. In practice, we have found that where extractive companies in our portfolios are facing social license challenges, the identity of the impacted communities means that human rights concerns are often intertwined with indigenous rights issues. We therefore believe that additional commentary on integration of indigenous rights considerations into wider human rights policy and practice could be of value to companies.

[1]For example, Talisman Energy has recently released its Global Community Relations Policy, which makes specific mention of the UN Declaration on the Rights of Indigenous Peoples, and incorporates the FPIC principle. See: **Talisman Energy**. Global Community Relations Policy. [Online] 2010. http://www.talisman-energy.com/upload/editor/File/10417493%20-%20GLOBAL%20COMMUNITY%20RELATIONS%20POLICY%20-%20DECEMBER%209%202010%20-%201%20-%20TLMPRD.pdf

[2]**United Nations.** Declaration on the Rights of Indigenous People. [Online] 2007. http://www.un.org/esa/socdev/unpfii/en/declaration.html

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Response from Cathal Doyle on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

This guiding principle recognize that to avoid infringing on human rights of others '[d]epending on circumstances, companies may need to consider additional standards: for instance...those rights specific to indigenous peoples...'. This qualification is necessary but is in and of itself provides insufficient guidance to corporations as to how to realize this responsibility in practice. Recommendations of human rights monitoring bodies, as well as those of the UN Permanent Forum and the UN Special Rapporteur on the Rights of Indigenous Peoples, all clarify that for these specific rights of indigenous peoples to be realized in practice, it is essential for businesses that seek to operate in indigenous peoples' territories to engage in good faith consultations with them, and where proposed activities impact on indigenous peoples' lands, territories and resources or potentially pose a threat to their physical or cultural survival, that their free prior and informed consent should be obtained. To ensure that the specific rights of indigenous peoples are respected in practice an explicit reference to this requirement to obtain their FPIC in line with the requirements of contemporary international human rights law would therefore be a welcome addition to the commentary.

Foundational Principles (GP13)

GUIDING PRINCIPLE 13: In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances that enable them to identify, prevent, mitigate and remediate any adverse human rights impacts they cause or contribute to through their activities and relationships, and to account for their human rights performance.

Commentary

Business enterprises cannot know and show that they respect human rights unless they have certain policies and processes in place. These include a statement of policy to respect human rights that is embedded throughout the enterprise; human rights due diligence; and remediation. The following principles elaborate upon these policies and processes.

While the corporate responsibility to respect human rights applies to all business enterprises, the means through which a business enterprise meets its responsibility will be proportional to its size and the gravity or scale of its human rights impacts. Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. But some small and medium sized enterprises can have significant human rights impacts, which will require corresponding measures regardless of their size.

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Response from Larry Catá Backer on 14 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

It is important to appreciate the connection between Principle 13 and the state duty with respect to remedies. Though Principle 23 might be read to suggest that the remedial obligation derives solely from the state duty (Pillar 1), this Principle 13 emphasizes that the remedial obligation that derives from the corporate responsibility under Pillar 2 is also subsumed within the general obligation to provide remedies. See also Principles 26 and 27.

This interconnection flows from the Introduction framework referencing the "reality that rights and obligations have little meaning unless they are matched to appropriate and effective remedies when breached."

Larry Catá Backer

W. Richard and Mary Eshelman Faculty Scholar & Professor of Law,

Professor of International Affairs

Pennsylvania State University

Policy Commitment (GP14)

GUIDING PRINCIPLE 14: As the foundation for embedding their responsibility to respect human rights, business enterprises should express their commitment through a statement of policy that:

a. Is approved at the most senior level of the business enterprise;

b. Is informed by appropriate consultation with relevant internal and external expertise;

c. Stipulates the enterprise's expectations of personnel and business partners;

d. Is communicated internally and externally to all personnel, business partners and relevant stakeholders;

e. Is reflected in appropriate operational policies and procedures to embed it throughout the business enterprise.

Commentary

The term 'statement' is used generically, to describe whatever means an enterprise employs to set out publicly its responsibilities, commitments, and expectations.

Internal communication of the statement and of related policies and procedures should make clear what the lines and systems of accountability will be and should be supported by training for personnel in relevant business functions.

Just as States should work towards policy coherence, so business enterprises need to provide for coherence between their responsibility to respect human rights and policies and procedures that govern their wider activities and relationships. Such policies and procedures should be aligned with their public human rights commitment so as to enable its effective implementation. This alignment should include, for example, policies or procedures that set financial and other performance incentives for personnel, as well as those that shape procurement decisions and lobbying practices.

Through these and any other appropriate means, the commitment should be embedded from the top of the business enterprise, down through all its functions, which otherwise may act without awareness or regard for human rights.

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Response from Elizabeth Umlas on 30 Dec 2010

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 3 ✔ 1 ✖

Lobbying practices are mentioned here: consider adding more commentary/guidance on this point. There is increasing focus on corporate influence on policy, as well as recent work on the notion of "responsible lobbying" in specific areas (e.g. water policy, climate change). Both the positive and negative aspects of corporate lobbying deserve further coverage in the principles or the commentary.

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Response from susan aaronson on 07 Jan 2011

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

I think we need more commentary in general on how lobbying and human rights intersect. For example: should governments use their economic leverage abroad to advance human rights in nations where governance is inadequate? If so how? Is this lobbying effective? Have there been any studies?

I think we also need more commentary on lobbying related to issues like appropriate taxation especially as industrialized nations are cutting social safety nets due to budget deficits.

Susan Aaronson

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Response from Matt Crossman on 12 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The framework of principle 14 is sensible. The application of 14 e) will be very tricky to evaluate, as it essetially aks questions regarding the culture of a company. All the correct policies and procedures do not fully inform an oberserver as to whether certain values are 'embedded' in an organisation. Perhaps some further guidance is necessary on the key characteristics of an embedded policy / statement - beyond the existence of a due dilgence systems as mentioned in the next system. Policies and statements also serve a useful function for external stakeholders as they often form the basis for company engagement.

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Response from BASF Group on 25 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The draft GP correctly state that a business enterprise's commitment to human rights should be reflected in appropriate operational policies and procedures to embed it throughout the business enterprise. Otherwise, a company's commitment to human rights would not be effective.

As a globally operating company, we act in accordance with internationally recognized standards such as the United Nations' Universal Declaration of Human Rights, both U.N. Covenants on Human Rights,the International Labor Organization's (ILO) eight core labor standards and its Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration). For BASF, six values form the framework for all of our decisions and activities. Each of these values is complemented by binding principles that specify how we want to implement our values and standards in day-to-day business. Observance of our values and principles is an integral element in the annual target agreements of all senior executives in the BASF Group. Based on our Group-wide values and principles, our Group companies have also created codes of conduct for individual countries, taking into account the local laws and customs. These codes of conduct are binding for all employees in the relevant countries and must be explained and incorporated in daily business operations. Compliance training for all employees worldwide is an important prerequisite for successful implementation of the codes of conduct.

http://www.basf.com/group/corporate/en/sustainability/our-values/index

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Response from Antoine Martin on 26 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Although the Draft recalls that businesses "should" (rather than must) respect human rights (n°12), I think that it lacks a clear statement as to any responsibility or obligation **to respect the sovereign regulations and policies of Host-States**. For instance, the following provisions of the 2003 UN Norms on Transnational Corporations could have been integrated to the proposal and would have made clearer the idea defended in Principle n°4 of the 2010 Draft:

E. Respect for national sovereignty and human rights

10. Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate.

12. Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.

G. Obligations with regard to environmental protection

14. Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development. (Emphasis added)

This point is very relevant considering that the issue of stabilisation clauses has been raised in different report of Prof. Ruggie in the past. Ignoring it, therefore, would constitute a significant step backward. For this reason, I suggest that a provision similar to the above should be added as an independent principle in the draft, while a corporate commitment to respect local regulations might also be added to the list provided in Principle n14. Overall, this -more than a constraint- would play in favour of corporate reputation and help picturing as major development funding entities rather than as 'greedy' persons.

Thank you for your attention.

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Response from Gaston Bilder on 30 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Subsection c) could include the word "directors".

An additional point f) "Periodic and regular review of such policy by the senior level of the business enterprise" (and tie this to principle 19).

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Response from Gaston Bilder on 30 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

In the commentary, please consider discussing whether a role of an entreprise is not only being informed/ aligned with its HR commitments, but also to shape/promote its industry/sector HR policy, and be an active player in national HR policy that may affect its stakeholders.

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Response from Erika George on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖v

Comments on the Draft Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises

The Special Representative is to be commended for facilitating the multi-stakeholder consultations that have culminated in these Draft Guiding Principles for the Implementation of the 'Protect, Respect and Remedy' Framework. The 'principled pragmatism' of the Special Representative has resulted in a draft

text with the potential to become an 'authoritative focal point' for future efforts to ensure that business enterprises conduct their operations in a manner consistent with respect for human rights. The Special Representative's work has contributed to an improved understanding of the potential adverse impacts on human rights that business enterprises can present, whether inadvertently or intentionally. The Corporate Responsibility to Respect Human Rights set forth by the Special Representative counsels against industry indifference and calls for change.

In presenting these Draft Guiding Principles, the Special Representative has set about the laudable task of ensuring respect for human rights by 'elaborating the implications of existing standards and practices for States and businesses; integrating them within a single coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved." The current regime falls far short. The Draft Guiding Principles provide a promising step forward and could accelerate efforts to ensure transnational corporations and other enterprises conduct business in a manner consistent with respect for human rights.

Respectfully, my comments are offered to encourage further elaboration of certain principles and to recommend revisions to others.

Guiding Principle 14

GP14 offers simple, yet significant content to the Corporate Responsibility to Respect Human Rights in calling for express policy commitments from corporations to embed the responsibility to respect obligation. While the Principle calls for policy to be informed by consultation with those who possess "relevant internal and external expertise," I recommend that the Commentary to GP14 be expanded to suggest that policies be crafted in cooperation with a wide range of stakeholders who may not have "expertise" in the conventional sense but who may by virtue of their experience or potential exposure to adverse human rights impacts have much to offer a policy planning process.

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Response from Child Rights Information Network on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

From the Child Rights Information Network submission:

The policy-making procedure described in Principle 14 does not seem to contemplate the participation of children in the process or the delivery of finalized policies into children's hands. Participation is one of the four general principles of the Convention on the Rights of the Child, and Article 12 of that Convention recognizes the right of children to participate in all decisions that affect them. This would necessarily include discussions of corporate human rights policies that will undoubtedly impact their lives.

While the Principle 14 does call for "external expertise" to be included in human rights policy-making, it does not recommend or require the involvement of stakeholders directly. All stakeholders should be consulted, and – because children are unlikely to be considered "experts" in the traditional sense – targeted efforts must be made to include children in the process.

By the same token, as "relevant stakeholders", children are entitled to receive information targeted to their level of understanding. Again, this right is guaranteed under the Convention on the Rights of the Child, which requires in Article 17 that States Parties ensure the accessibility of information and material of social and cultural benefit from a diversity of sources. Surely, the same can be asked of corporations wishing to communicate their human rights policies to the wider public. Indeed, if the purpose of human rights policies is to set expectations for executives, employees, and those in the community alike, all must understand what these expectations entail if they have any reasonable chance at fulfillment. The Guidelines, therefore, should ensure that businesses communicate these policies in a manner and in language that children can comprehend.

! *Principle 14 should be amended to call for appropriate consultation with not only experts, but stakeholders, and to provide for policies to be communicated externally in a manner accessible to all. The Principle 14 Commentary should further elucidate the special attention that businesses must pay to children during and after the policy-making process.*
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Response from Michelle de Cordova on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

FROM NEI INVESTMENTS SUBMISSION:

We greatly value the references to the need to align performance incentives of corporate executives and corporate lobbying practices to human rights commitments. Over the past several years we have been engaging companies on the need to integrate long-term ESG performance measures into executive compensation packages - including human rights performance measures, where these are material for the company in question. We also strongly support greater public accountability and transparency around corporate lobbying on public policy and regulatory issues.

We believe the Guiding Principles would be enhanced by addition of a reference to the need for the board of a company to take responsibility for human rights issues. We believe this is an important aspect of mainstreaming human rights within companies, given the role of the board in risk oversight and setting strategy. We would also observe in this context that at many companies, the level of human rights awareness and expertise among board members needs to be improved. For example, over the last year we successfully engaged Barrick Gold, the world's 's largest gold mining company, to put forward a director candidate with experience in corporate responsibility, environment or human rights and community engagement issues, in recognition of the significance for the company of these areas of risk.

Human Rights Due Diligence (GP15)

GUIDING PRINCIPLE 15: In order to identify, prevent and mitigate adverse human rights impacts, and to account for their performance, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, and tracking as well as communicating their performance. Human rights due diligence:

a. Will vary in scope and complexity with the size of the business enterprise, the severity of its human rights risks, and the context of its operations;

b. Must be on-going, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve;

c. Should extend beyond a business enterprise's own activities to include relationships with business partners, suppliers, and other non-State and State entities that are associated with the enterprise's activities.

Commentary

The aim of human rights due diligence is to identify and prevent or mitigate any adverse human rights impacts that its activities and associated relationships may have on individuals and communities. Human rights due diligence can be included within broader enterprise risk management systems provided that it goes beyond simply identifying and managing material risks to the company itself to include the risks a company's activities and associated relationships may pose to the rights of affected individuals and communities.

Due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of defining contracts or other agreements, and may be inherited through mergers or acquisitions.

Where business enterprises have large numbers of suppliers, this may render it impossible to conduct human rights due diligence with regard to them all. If so, they should identify general areas of heightened human rights risk, whether due to certain suppliers' operating context, the particular products or services involved, or other relevant considerations, and prioritize those suppliers for human rights due diligence.

Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by third parties. Complicity has both legal and non-legal meanings. Many jurisdictions prohibit knowingly providing assistance to the commission of a crime and a number allow for criminal liability of legal entities in such cases. Typically, civil actions can also be based on an enterprise's alleged contribution to a harm, although these are often not framed in human rights terms. In relation to complicity in international crimes, the weight of international legal opinion indicates that the relevant standard for aiding and abetting such crimes is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime. Of course, business enterprises may be perceived as being 'complicit' in the acts of another entity whether or not they can be held legally responsible, for example, where they are seen to benefit from an abuse.

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

The specific components of human rights due diligence are elaborated in the principles that follow.

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Response from Elizabeth Umlas on 30 Dec 2010

Ratings (Yes/No): Relevance 3 ✔ 0 ✖ Agreement 3 ✔ 0 ✖

The passage noting that businesses with large numbers of suppliers should identify human rights risks associated with "particular products or services" hints at the notion - but doesn't actually say - that a company's business model itself could cause or exacerbate human rights abuses. I would think that part of a company's assessment process, long before looking at individual suppliers, should start with asking whether this is the case. Human rights organizations have focused on this question for years, and in recent years some companies have entered the discussion about business models in their dialogue with both rights groups and social investors. It seems a fundamental point to include here.

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Response from Emily Howie on 11 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

The Human Rights Law Resource Centre argues that States should require corporations to undertake human rights due diligence in their operations, including operations overseas. This arises from the state duty to protect as well as the responsibility to respect.

First, the state duty to protect human rights includes a positive duty to adopt legislative, judicial, administrative and other measures to protect people against harm from third party actors.[1] States must ensure human rights, including through systems to prevent harm by third parties such as corporations:

> There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to **exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities**.[2]

Currently, the draft Guiding Principles only require States to 'provide guidance' to corporations on due diligence. Amnesty has stated that this 'effectively makes corporate human rights due diligence a voluntary tool for business.'[3] This is insufficient to discharge the State duty to protect.

Separately, under the corporate responsibility to respect, the draft Guiding Principles suggest that businesses have a responsibility to undertake due diligence. They state that businesses 'should have in place policies and processes appropriate to their size and circumstances that enable them to identify, prevent, mitigate and remediate any adverse human rights impacts they cause or contribute to through their activities and relationships, and to account for their human rights performance.'[4] The commentary suggests human rights due diligence is a necessary part of this process.

The draft Guiding Principles would read much more consistently internally, and better reflect international human rights principles and standards, if States were asked to require human rights due diligence of businesses.

Recommendation:

The Guiding Principles would read much more consistently internally, and better reflect international human rights principles and standards, if States were asked to require human rights due diligence of businesses, including through legislation.

[1]ICCPR, article 2. The Human Rights Committee states that '[t]he obligations will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities': Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, [8].

[2]Ibid.

[3]Amnesty International, 'Comments on the United Nations Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises' Draft Guiding Principles and on post-mandate arrangements', December 2010.

[4]Draft Guiding Principles, [13].

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Response from Matt Crossman on 12 Jan 2011

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 2 ✔ 0 ✖

Best practice Human Rights due diligence should include some element of external verification /auditing. This is commonplace in the retail sector.

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Response from BASF Group on 25 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The draft GP point out that human rights due diligence should extend beyond a business enterprise's own activities to include relationships with business partners,

suppliers, and other non-State and State entities that are associated with the enterprise's activities. From our point of view, the effective limits of this extended scope for human rights due diligence are not sufficiently specified. This would cover activities under a business enterprise's direct control. Also, as the draft GP correctly point out with regard to suppliers, large numbers of relationships may render it impossible to conduct human rights due diligence with regard to them all.

In 2009, BASF procured raw materials from more than 6,000 suppliers worldwide, and approximately 500,000 different raw materials and technical goods as well as plant construction and maintenance services and logistics. Risk matrices help us to identify potential high-risk suppliers. The assessment is based on country, product and sector risks. We visit suppliers on site according to their risk potential. If we establish that they do not meet our standards or only meet them partially, we agree on corrective measures and provide help with implementing these.

http://www.basf.com/group/corporate/en/sustainability/management-and-instruments/supply-chain

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

To strengthen Guiding Principle 15 on human rights due diligence, it would be useful to include a definition of 'due diligence' among the definitions at the end of the document. This definition could state that in addition to public commitments, due diligence includes: a) analysis of known or potential risks; b) the suitable prevention or protection measures undertaken; c) the resources needed to implement these duties effectively; d) systems to evaluate the results; e) proof of having made the necessary modifications and f) statutory notification of the steps taken to address the risks identified. It is also crucial to underline that this does not relate to the risks facing the business, but risks relating to individuals and groups who could potentially be harmed. Furthermore, the need for objectivity and impartiality raises the question of the need for an independent evaluator if there is a risk of conflicting interests.

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Response from Vidar Lindefjeld on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

From Vidar Lindefjeld, Assisitant Director, Confederation of Norwegian Enterprise

GP 15 with its emphasis on human rights due diligence is fully supported. I also agree that the due diligence process should extend to a company's business partners, although here, certain concerns arise: The very process of due diligence itself may result in situations where companies acquire greater liability by gaining information on human rights compliance issues in the supply chain without a corresponding degree of control. This may be particularly true for companies with a huge and complex supply chain structure. From the individual company's perspective, a worst case scenario is, after having conducted a credible due diligence, being accused of complicity or facing allegations that it should have done more. Human rights due diligence assessments are primarily preventative and should not be used to attribute liability to a company. I would have liked to see this more adequately addressed in the commentary.

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Response from Global Reporting Initiative on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Voluntary initiatives that invite and encourage corporate disclosure on non-financials (including human rights performance) have been instrumental in developing non-financial disclosure practice. But such initiatives have not been successful in mainstreaming corporate disclosure on non-financials (again including human rights performance).

Voluntary corporate human rights performance reporting remains in a nascent stage, despite the availability of metrics that have been agreed in an international multi-stakeholder process; such as the GRI Reporting Framework. Few companies report on their human rights performance. (See UN Global Compact, Realizing Rights – The Ethical Globalization Initiative, Global Reporting Initiative: Corporate Human Rights Reporting - An Analysis of Current Trends (2009) and Global Reporting Initiative: Reporting on Human Rights (2008)). Against this background, there must be a reexamination of assumptions about the adequacy of voluntary disclosure, and the inviting and encouraging of companies to **communicate** on human rights performance.

To achieve adequate levels of corporate disclosure on human rights performance, the Global Reporting Initiative proposes that governments should introduce policy that requires companies to **report** on human rights performance, and other aspects of their economic, environmental and social performance, using the existing metrics or publicly explain why they have not done so.

Reporting on human rights and other aspects of economic, environmental and social performance is the practice of measuring, disclosing, and being accountable to internal and external stakeholders for organizational performance towards the goal of sustainable development.

To reflect the considerations outlined above the Global Reporting Initiative recommends the following edit:

In order to identify, prevent and mitigate adverse human rights impacts, and to account for their performance, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, and tracking as well as ~~communicating~~ ***reporting*** on their performance.

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Response from Gaston Bilder on 30 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

The commentary discusses being "complicit" as benefiting from being perceived as benefiting from an abuse by a third party. I would propose extending this to also failing to act when knowing that such abuse exists, even if there is no economic benefit arising from such situation.

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Response from Jack MOSS on 31 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

AquaFed Comment Complicity risk

The commentary of Guiding Principle 15 says that "*complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights caused by third parties*". It should be clarified whether the State may be one of such third parties.

- If not, this should be clearly stated.
- If yes, the wording should be modified to say "*other* parties" in lieu of "*third* parties".

  In addition a balance between States and Businesses should be maintained by including a similar paragraph on the risk of complicity for the State in GP9 about "Commercial transactions of the State".

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Response from Maplecroft on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Guiding Principles 15-19: Human rights due diligence

Human rights due diligence as set out in the Guiding Principles highlights the importance of having in place an adequate human rights risk management system for businesses to be able to avoid human rights abuses or the complicity therein enabling companies to address their responsibilities effectively as well as manage legal, reputational, operational or strategic risks. We have found the concept very helpful in our daily work advising companies on risks and responsibilities they may be facing particularly when operating in, sourcing from or distributing to emerging markets where the risk landscape is volatile and problematic.

We are aware that we must not presume these challenges are only in emerging economies or developing countries as our risk mapping shows that human rights abuses in relation to migrant workers and trafficked women, as well as child labour and bonded labour, are also reported in developed economies, in cities and rural locations – whether in urban sweat shops or on farms. However, Maplecroft would welcome additional guidance relating to human rights due diligence in emerging economies and developing countries which present particularly high risks of human rights violations.

Human rights due diligence in supply chains

Maplecroft would encourage the Special Representative and his team to further elaborate on appropriate courses of action to promote responsible supply chain management (Principle 15.c). For example, in our daily interactions with business we face insecurities of companies as to how far their responsibility reaches with respect to human rights abuses by suppliers, particularly in lower tiers of supply chains. While companies have the ability to apply human rights due diligence to include many suppliers, modern supply chains, which are extensive, complex and often obscure, may not warrant full control by companies, particularly when operating in or sourcing from emerging markets. We believe that there is room for resources, discourse and solutions relating to the articulation of the responsibility of companies to mitigate adverse human rights impacts in supply chains.

Human rights due diligence in weak governance zones

Based on our experiences advising companies on human rights risks in emerging economies and in relation to the comments above, Maplecroft is interested in seeing further guidance regarding the application of the Framework particularly with respect to the responsibilities of companies operating in countries with weak governance structures, not only those where there is conflict but those with fragile systems of governance and lack of institutional capacity. When companies operate in weak governance or

conflict zones, they are at a very high risk of complicity in human rights violations when States are incapable of implementing or enforcing internationally recognised human rights standards.

The pervasiveness of human rights violations in these countries warrant the application of heightened scrutiny in human rights due diligence for businesses. We would thus welcome additional guidance as to what this heightened standard of scrutiny might entail for companies' due diligence responsibilities in countries that present an extreme risk of human rights violations. An example would be of a technology or telecommunications company that does not deliberately source minerals for electronics from conflict zones from Eastern Democratic Republic of the Congo (DRC), where sexual violence against women is pervasive. However, the several tiers of suppliers involved in the global mineral trade may make it difficult to determine whether or not some of the minerals have been sourced from the DRC and other conflict zones. It is an unfortunate fact that essential minerals for the production of electronic goods - on which large segments of society now rely - cannot be sourced with any veritable certainty that they did not come from regions like Eastern DRC. How can the business obligation to exercise due diligence be meaningful when extreme human rights risks are present? What steps are required of the company to best fulfil this responsibility in conflict zones?

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Response from Investors Against Genocide, Chairperson Eric Cohen on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Principle 15 – Human Rights Due Diligence for the Corporate Responsibility to Respect Human Rights

It would be helpful for the commentary on Principle 15 to include a paragraph explaining that the duty of care expected for human rights due diligence increases when dealing with the most serious human rights abuses, such as genocide and crimes against humanity. For example, in a conflict affected area with widely reported cases of crimes against humanity or a concern of possible genocide, business enterprises operating in these contexts must exercise a maximum effort to ensure that they are not contributing, directly or indirectly, to such abuses.

Giving special, explicit consideration to the increased requirements for the duty of care when exercising due diligence in cases of the most serious human rights abuses supports Principle 15's bullet (a.) which states that human rights due diligence "Will vary in scope and complexity with the size of the business enterprise, the severity of its human rights risks, and the context of its operations." In addition, this inclusion is consistent with other sections of the Draft Framework which includes elements focused on the worst cases of human rights abuses. For example, Principle 10 begins "Because the risk of gross human rights abuses is heightened in conflict affected areas, States should ..."

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Response from Dawn Wolfe on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Boston Common Asset Management fully supports the principle that business enterprises should carry out human rights due dilligence, that such due dilligence should assess both actual and potential impacts on human rights, and that performance should be communicated to stakeholders.

The commentary to Principles 15 states that human rights due diligence can be included in broader risk management systems. Presuming those systems are robust and already integrated into high-level analysis and decision making processes, hooking in to existing systems is an important option to consider. It has been our experience that too often human rights specific due diligence can be relegated to isolated teams that do need feed into the risk management process at the appropriate level. Putting human rights due

diligence on equal footing with other standardized due diligence practices can provide the crucial bridge from human rights as a 'CRS issue' to human rights as a legitimate business risk.

Human Rights Due Diligence (GP16 - assessing)

GUIDING PRINCIPLE 16: In order to become aware of human rights risks generated through their activities and relationships, business enterprises should identify and assess the actual and potential adverse human rights impacts of those activities and associated relationships. This process should:

a. Draw on internal or external human rights experts and other resources;

b. Involve meaningful engagement with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of its operations.

Commentary

The initial step in conducting human rights due diligence is to identify and assess the nature of the actual or potential human rights impacts of a business enterprise's activities and associated relationships. Typically this includes assessing the human rights context prior to the proposed business activity, where possible; identifying the people whose human rights might be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity could adversely affect their existing enjoyment of those rights. During this process, particular attention should be paid to identify any actual or potential human rights impact on marginalized and vulnerable groups, who may face particular human rights risks.

Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by engaging directly with them. In situations where such engagement is not possible, business enterprises should consider reasonable alternatives such as consulting credible expert resources, including from civil society.

The assessment of human rights impacts informs subsequent steps in the human rights due diligence process.

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Response from Kendyl Salcito on 06 Dec 2010

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 3 ✔ 0 ✖

We are pleased to see the continued acknowledgement that certain rightsholders are particularly vulnerable to rights violations and should be identified early (Guidance Principles 16, Commentary Para. 1). Professor Ruggie's broader call for cataloging, not just of human rights "standards" but also of "issues" in Principle #16 Commentary is a welcomed improvement. We would encourage a word order reversal, so that cataloging "issues" is shown as perhaps more important than just cataloging the standards, which are already listed in the International Bill of Rights and ILO Core Conventions.

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Response from BASF Group on 25 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The draft GP elaborate on assessing human rights impacts as an important component of human rights due diligence. We are currently under the impression that beyond the draft GP the idea of assessing human rights impacts is likely to be narrowed down to a simple survey tool that is applied from time to time, preferably by external consultants. From our point of view, these "human rights impact assessments" in their current form fail to substitute an ongoing stakeholder dialogue shaped by trust, open exchange and mutual learning. The draft GP correctly refer to the importance of meaningful engagement with regard to assessing human rights impacts.

For example, as a company in the chemical industry we are aware of the particular responsibility we have towards our neighbors. Thus we set up Community Advisory Panels (CAPs), mostly at our larger production sites. At present there are 75 CAPs. A CAP consists of a group of individuals who live near or around a chemical facility and who represent the fabric of their community. The CAP meets regularly to discuss common issues of mutual interest. It is a forum for open and honest dialogue between citizens and plant management. By encouraging a two-way flow of information, we hope to enhance communication with the communities in which we operate.

http://www.basf.com/group/corporate/en/sustainability/dialogue/good-neighbors

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Response from Erika George on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Comments on the Draft Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises

The Special Representative is to be commended for facilitating the multi-stakeholder consultations that have culminated in these Draft Guiding Principles for the Implementation of the 'Protect, Respect and Remedy' Framework. The 'principled pragmatism' of the Special Representative has resulted in a draft text with the potential to become an 'authoritative focal point' for future efforts to ensure that business enterprises conduct their operations in a manner consistent with respect for human rights. The Special Representative's work has contributed to an improved understanding of the potential adverse impacts on human rights that business enterprises can present, whether inadvertently or intentionally. The Corporate Responsibility to Respect Human Rights set forth by the Special Representative counsels against industry indifference and calls for change.

In presenting these Draft Guiding Principles, the Special Representative has set about the laudable task of ensuring respect for human rights by 'elaborating the implications of existing standards and practices for States and businesses; integrating them within a single coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved." The current regime falls far short. The Draft Guiding Principles provide a promising step forward and could accelerate efforts to ensure transnational corporations and other enterprises conduct business in a manner consistent with respect for human rights.

Respectfully, my comments are offered to encourage further elaboration of certain principles and to recommend revisions to others.

Guiding Principles 15 & 16

GP15 and GP16 outline the importance of conducting human rights due diligence in identifying, preventing or mitigating any adverse human rights impacts that business enterprise may have on individuals or communities. The Commentaries that accompany these Principles appropriately urge business enterprises to seek to understand the concerns of potentially affected stakeholders and advise regular assessments of rights impacts due to the dynamic nature of different operating environments.

These Commentaries could be further improved by including reference to the importance of understanding the situation of women and other vulnerable, disfavored or disadvantaged groups by including them in processes. For instance, GP 16 might be revised to read:

16. In order to become aware of human rights risks generated through their activities and relationships, business enterprises should identify and assess the actual and potential adverse human rights impacts of those activities and associated relationships. This process should:

a. Draw on internal or external human rights experts and other resources;

b. Involve meaningful engagement with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of its operations.

c. <u>Ensure inclusion of women and members of other vulnerable, disfavored or disadvantaged groups in any engagement of those potentially affected.</u>

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Response from Jack MOSS on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

AquaFed Comment

Complicity risk

The commentary of Guiding Principle 16 says that "*complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights caused by third parties*". It should be clarified whether the State may be one of such third parties.

- If not, this should be clearly stated.
- If yes, the wording should be modified to say "*other* parties" in lieu of "*third* parties".

  In addition a balance between States and Businesses should be maintained by including a similar paragraph on the risk of complicity for the State in GP9 about "Commercial transactions of the State".

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Response from Child Rights Information Network on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

From the Child Rights Information Network submission:

Principle 16 recommends that business enterprises "involve meaningful engagement with potentially affected groups," and its Commentary further suggests that businesses should "identify any actual or potential human rights impact on marginalized and vulnerable groups, who may face particular human rights risks." As discussed above, children's right to participate in matters that affect them is well established in international law. Because they will invariably be counted among marginalized and vulnerable groups, the specific duty to involve children in conducting human rights due diligence should be included under Principle 16. Moreover, as the Principle 18 Commentary asks companies to "make particular efforts to track their human rights performance with regard to...children," it would only be logical to expect that companies make these same efforts when identifying and assessing human rights risks at the outset.

The Principle 16 Commentary also calls on businesses to "engage directly" with stakeholders in conducting human rights due diligence, just as Principle 18 would require companies to "draw on feed-back from both internal and external stakeholders" in monitoring and assessment. Neither Principle, however, provides any guidance or context for the engagement of children. CRIN recognizes that many have little or no experience consulting with children, and the draft Guiding Principles would be ideally

suited to both emphasize the importance of engaging children directly and to provide clearer instructions for doing so. The involvement of children should be actively sought, and the tools and methods used must be accessible to all and child-friendly.

! *Principle 16 and/or the Principle 16 Commentary should clarify that children must be directly involved in the process of conducting human rights due diligence. The Commentaries for Principles 16 and 18 should be revised to provide clearer obligations and instructions for companies to engage children in identifying, assessing, monitoring and addressing human rights impacts.*

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Response from Michael Deas on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Principal 16 must further emphasise the centrality of engagement with rights-holders, and non-governmental civil society organisations in particular, as part of the due-diligence process.

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Response from Michelle de Cordova on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

FROM NEI INVESTMENTS SUBMISSION:

We value the incorporation of the concept of due diligence in the human rights context, as it points to the high measure of prudence business enterprises should exercise when evaluating their human rights risks. Principle 15 details the elements of sound human rights due diligence, including assessment, integration of findings, monitoring performance, and communication on performance. We especially support the proposition that due diligence should start "as early as possible in the development of a new activity or relationship". Acquiring sufficient and relevant baseline information on human rights and social issues is a necessary condition for effectively addressing risks, and avoiding possible rights infringements and conflicts.

Principle 16 provides useful guidance on human rights impact assessment for proposed or new operations, and for human rights aspects which companies have more experience in managing. However, we would argue that many companies face more complex human rights-related challenges, involving existing operations with a problematic human rights history, and human rights matters on which they as yet lack well-developed internal expertise. While recognizing that this is a high-level document, we feel that a slightly more detailed discussion of considerations for defining the approach to assessment may be warranted, including the role of formal Human Rights Impact Assessments (HRIA) - especially in light of the work already undertaken by the Special Representative on the topic of HRIA[1]and examples of practice in the field. In 2008, we were part of a group of responsible investors that called on Goldcorp, a Canadian gold mining company, to commission an independent Human Rights Impact Assessment (HRIA) of the Marlin mine in Guatemala. Goldcorp agreed to the request, and we were involved in the process as a member of the independent steering committee responsible for overseeing the assessment. The assessment confronted a number of challenges that may be relevant in the context of the Guiding Principles: notably, human rights assessment was a relatively novel field, and the focus was an existing and controversial mining operation. In this context, the involvement of external human rights experts proved to be crucial when the assessment itself was challenged by some actors. Although Principle 19 deals with communication and reporting on human rights due diligence in general, we would suggest adding a specific reference under Principle 16 to the value of publishing the findings of human rights assessments. In keeping with the tenet of transparency, the Marlin Mine Human Rights Assessment was released publicly in 2010[2]. Not only was this a demonstration of openness and commitment to action on the part of the company, but it also made available an important body of work on methodology in the

emerging field of HRIA. We also note that published assessments may serve as a convening mechanism for government participation in resolution of human rights challenges. The Marlin assessment report included recommendations for government, as well as for Goldcorp.

[1]The Special Representative submitted a report in 2007 discussing the basic tenets of Human Rights Impact Assessment (HRIA). This report outlined a number of private sector initiatives and NGO approaches that were under development including guidance documents, assessment tools and pilot projects. See: **UN Human Rights Council.** Human rights impact assessments - resolving key methodological questions. [Online] 2007. http://www.reports-and- materials.org/Ruggie-report-human-rights-impact-assessments-5-Feb-2007.pdf

[2]**Steering Committee.** Human Rights Assessment of Goldcorp's Marlin Mine. [Online] 2010. http://hria-guatemala.com/en/default.htm

Human Rights Due Diligence (GP17 - integrating)

GUIDING PRINCIPLE 17: In order to prevent and mitigate potential adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes and take appropriate action. Effective integration requires that:

a. Responsibility for addressing such impacts is assigned to the appropriate level and function;

b. Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.

Commentary

The horizontal integration across the business enterprise of specific findings from assessing human rights impacts can only be effective if the foundational human rights policy commitment has been embedded from the top of the business enterprise down into all relevant business functions. This prior process of embedding is required to ensure that the findings from assessments are properly understood, given due weight, and acted upon.

In assessing human rights impacts, business enterprises will have looked for both actual and potential adverse impacts. Potential impacts should be prevented or mitigated through this process of horizontal integration of findings across the business enterprise, while actual impacts that have already occurred should be a subject for remediation (see Principle 20).

Where a business enterprise identifies that it has contributed through its own actions or decisions to acts by a supplier that harm human rights, it should take steps avoid or mitigate the continuation of those contributions.

Where a business enterprise identifies that it is associated with adverse human rights impact by a supplier solely because it procures the goods or services that are provided in abusive conditions, it should carefully assess what appropriate action to take going forward, based on a combination of what leverage it possesses to change the wrongful practices of the supplier, how crucial that supplier is to its business, and the implications for human rights of any course of action.

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Response from Kendyl Salcito on 06 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

In requiring integration of human rights findings, Principle #17 ensures that due diligence is more than a report that, once written, collects dust on a shelf. Protecting human rights, this Principle recognizes, is not just a box to be checked on a form, but requires effort, time and money. This is laudable and will develop a valuable body of human rights-related data if made publicly available.

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Response from Gaston Bilder on 30 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

In relation to item b) internal decision making, processes, please consider adding some commentary requiring traceability (internally) for such decisions and the possibility to access, ie. be informed about the processes implemented, decisions made, etc. for stakeholders. There needs to be a connection - in terms of communication - both internally and externally, between the decisions taken, processes implemented, etc. and how these are evidenced by the externalized actions of the relevant business enterprise.

Human Rights Due Diligence (GP18 - tracking)

GUIDING PRINCIPLE 18: In order to verify whether adverse human rights impacts are being effectively addressed, business enterprises should track their performance. Tracking performance should:

a. Be based on appropriate qualitative and quantitative metrics;

b. Draw on feed-back from both internal and external stakeholders;

c. Inform and support continuous improvement processes.

Commentary

Tracking performance is necessary in order for a business enterprise to know if its human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement.

The tracking of human rights performance also creates a critical feedback loop for business enterprises, which enables them to understand better the concerns of relevant stakeholders. Business enterprises should make particular efforts to track their human rights performance with regard to vulnerable and/or marginalized groups, such as indigenous peoples; women; national, ethnic and religious minorities; and children.

Tracking human rights performance should be integrated into relevant internal reporting processes. Business enterprises might employ tools they already use to track their performance on other issues, including performance contracts, reviews, surveys and audits. Operational-level grievance mechanisms can also provide important feedback on the business enterprise's human rights performance from those directly affected.

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Response from Kendyl Salcito on 06 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 1 ✖ Agreement 1 ✔ 0 ✖

Principle #18 incorporates a valuable addition of "qualitative and quantitative metrics" for tracking human rights performance. The explicit requirement of stakeholder feedback ensures that rightsholders themselves may participate in the discussion of a company's successes and shortcomings in respecting human rights. We think Professor Ruggie should consider using the word "*rightsholders*" instead of stakeholders in this section and others, in light of the myriad definitions that "stakeholder" has acquired over the years. We also encourage him to consider adding "interviews" in the Commentary section, to suggest that performance tracking for rights issues requires meeting and speaking with the rightsholders themselves, because sometimes surveys and spokesperson interviews cannot reveal the issues most relevant to them. This has been a key learning from our work.

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Response from susan aaronson on 12 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Human rights metrics are in their infancy. Some are widely used such as the CIRI human rights dataset, which informs the WB Governance dataset. We don't know how accurate these datasets are as they often survey experts or are summaries of expert perceptions. They don't actually measure performance but outsider perceptions of performance. I think we need a broader discussion of how firms can measure their human rights impact, what metrics are available and how they can be improved.

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Response from BASF Group on 25 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The draft GP correctly state that monitoring, or tracking performance, is necessary in order for a business enterprise to know if its human rights policies are being implemented optimally.

At BASF, we introduced a three-part monitoring system to evaluate whether we adhere to internationally recognized labor and social standards within the BASF Group. This includes:

- close dialogue with employee representatives and international organizations in order to recognize new developments and challenges early on,
- a compliance hotline that all employees can use anonymously and confidentially to obtain information about valid labor and social standards or to report grievances, and
- an annual survey in our Group companies to ensure adherence to voluntary commitments in day-to-day business.

If the evaluation and comparison of the monitoring tools indicate deficits at any of our Group companies, we investigate these and take appropriate action. This ranges from a verbal warning to dismissal.

http://www.basf.com/group/corporate/en/sustainability/employees/human-rights/monitoring

Experts for safety, environment and occupational medicine monitor all our sites and plants. Using clearly defined criteria, they track how our standards are implemented locally. Safety, environment and occupational medicine audits are conducted separately at BASF sites and at our majority-owned subsidiaries and the results subsequently tallied, giving a comprehensive performance profile for every site.

http://www.basf.com/group/corporate/en/sustainability/management-and-instruments/audits

Human Rights Due Diligence (GP19 - communicating)

GUIDING PRINCIPLE 19: In order to account for their human rights performance, business enterprises should be prepared to communicate publicly on their response to actual and potential human rights impacts when faced with concerns of relevant stakeholders. Those business enterprises with significant human rights risks should report regularly on their performance. The frequency and form of any communications on performance should:

a. Reflect and respond with adequate information to an enterprise's evolving human rights risks profile;

b. Be subject to any risks such communications pose to stakeholders themselves, to personnel or to the legitimate requirements of commercial confidentiality.

Commentary

The responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice; showing involves communication. Therefore, an appropriate level of transparency is required at a minimum when relevant stakeholders raise concerns about a business enterprise's human rights performance.

Communications can take on a variety of forms, such as reports, online dialogues, in-person meetings, and stakeholder review panels. Communication that focuses on particular countries or business lines might also be useful where those parts of the business enterprise's operations pose particular human rights risks.

Periodic public reporting is expected of those business enterprises whose activities pose significant risks to human rights, whether this is due to the nature of the industry or the operating environment. Reporting provides a measure of accountability to groups or individuals who may be impacted and to other relevant stakeholders, including investors. The reporting should cover topics and indicators that reflect the business enterprise's actual and potential adverse impacts on human rights. Third party assurance of human rights reporting can strengthen its content and creditability. Sector-specific indicators can provide helpful additional detail.

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Response from Kendyl Salcito on 06 Dec 2010

Ratings (Yes/No): Relevance 5 ✔ 0 ✖ Agreement 2 ✔ 0 ✖

The reasoned Principles laying out Due Diligence are put to the test in this Principle. This is the weakest of the Due Diligence Principles, and we question both the necessity and the wisdom of such limited communication requirements. The Principle is bimodal, first requiring companies to respond to human rights complaints, and then calling on "business enterprises with significant human rights risks" to "report regularly on their performance."

The first sentence creates a reactive human rights approach. This puts the onus on rightsholders to inform the company of possible rights violations. Professor Ruggie recognizes that rightsholders are often extremely vulnerable and powerless; a complaint-initiated disclosure system can in practice alienate the very people human rights due diligence is designed to protect.

The second sentence asks companies to self-select their projects into a "significant risk" category without explaining how they should make that selection. Without defining what constitutes "significant risk" – which could range from non-negligible to life-threatening – what would compel a company to categorize itself as such? Presumably this is done through a process of assessing human rights risks (as is called for in Principle #15). If this is the case, Principle #19 should state that. Further to this point, companies that

do not deem their projects to pose any significant rights risks should disclose this determination, accompanied by supporting documentation (i.e. the risk assessment itself). If companies are confident they pose no significant rights risks, they should be confident publishing the research that asserts and supports this. Allowing for public analysis would provide verification of the company's findings, protecting the company from unforeseen issues and protecting otherwise invisible rightsholders from impacts.

Professor Ruggie need not limit his calls for disclosure to such an extent. He has argued that companies refuse to subject themselves to public human rights scrutiny fearing HRIAs will be used as fodder for lawsuits and anti-project activism. Setting aside that these concerns have never compelled companies to refuse government requests for EIAs (which pose much stronger litigation risks), Nomogaia has found the opposite to be true in practice. Companies have changed policies and practices, righthsolders have benefitted, and managers have enquired about human rights impact assessments for additional projects, but no law suits, administrative proceedings or criminal claims have resulted or even been threatened. While in principle nervous companies and their attorneys may have expressed opposition to human rights disclosure, every major company with which Nomogaia has collaborated has willingly provided data and site access, even when findings have been negative. We have completed three comprehensive HRIAs (with several more underway), all with company permission and collaboration, and all with the advance knowledge that Nomogaia would own and publish the final assessments. No backlash has resulted. On the contrary, one company included Nomogaia's HRIA findings in its 2009 Annual Report. Another altered policies and practices to the extent that Nomogaia staff was thanked by rightsholders and managers on a follow-up site visit for recommending wage changes, food provisions and improved worker transportation, all of which had been acted on by the company.[1]

Our on-the-ground experience working with companies directly on public Human Rights Impact Assessments has shown that companies remain intimidated by the concept of human rights. Human Rights Impact Assessment, rather than threatening companies, has demystified a previously alien concept. Professor Ruggie is in a prime position to encourage companies to further investigate assessment tools and methodologies, to critique and contemplate methodologies, and to engage with rightsholders and communities in the process. By allowing companies a non-transparent alternative, he all but closes the door to active development of a universally accepted, recognizably effective human rights impact assessment process. Professor Ruggie's 2007 *Human Rights Impact Assessments - Resolving Key Methodological Questions*suggested that the proliferation of HRIAs would help clarify which approach is most appropriate to the human rights impacts of corporate capital projects. [2]This clarification process only works if HRIAs are made public. If HRIAs remain strictly internal, there can be no discussion, let alone agreement, on whether a methodology predicts and mitigates human rights impacts.

[1]Assessments have been conducted on the Paladin Uranium Mine in Kayelekera, Malawi; the Green Resources Tree Farm in Uchindile, Tanzania; the Dole el Muelle Pineapple Plantation in San Carlos, Costa Rica. Additional human rights research has been conducted in Indonesia, Egypt, Zambia, and Sierra Leone, on projects that were stalled for funding reasons. Full HRIAs can be accessed online at http://nomogaia.org/HRIA/HRIA.html

[2]"As HRIAs for business become more common, both the costs and the benefits of the exercise should become clearer, hopefully leading other business enterprises to experiment with HRIAs. It should also become clear which approach would be most appropriate for which sort of company, depending on the scale and nature of the business." Ruggie 2007 (A/HRC/4/74)

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Response from Vidar Lindefjeld on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

From Vidar Lindefjeld, Assistant Director, Confederation of Norwegian Enterprise

GP 19: While we appreciate the need for a company to publicly communicating on its human rights performance, the draft GP 19 provides insufficient guidance on how this should be achieved. A large number of companies already report on their human rights policies and achievements. My main concern relates to the extent to which such reporting is expected to include potential human rights impacts of their activities, including incidents, which may raise litigation risks. It is true that the Commentary to GP 5, in relation to human rights communication, states that there should be room for "the reasonable expectation that businesses doing the right thing will not add to their litigation risks as a result". This should also be taken into account in relation to the level of public communication on human rights performance, and adressed in GP 19 or its commentary.

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Response from Global Reporting Initiative on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Voluntary initiatives that invite and encourage corporate disclosure on non-financials (including human rights performance) have been instrumental in developing non-financial disclosure practice. But such initiatives have not been successful in mainstreaming corporate disclosure on non-financials (again including human rights performance).

Voluntary corporate human rights performance reporting remains in a nascent stage, despite the availability of metrics that have been agreed in an international multi-stakeholder process; such as the GRI Reporting Framework. Few companies report on their human rights performance. (See UN Global Compact, Realizing Rights – The Ethical Globalization Initiative, Global Reporting Initiative: Corporate Human Rights Reporting - An Analysis of Current Trends (2009) and Global Reporting Initiative: Reporting on Human Rights (2008)). Against this background, there must be a reexamination of assumptions about the adequacy of voluntary disclosure, and the inviting and encouraging of companies to **communicate** on human rights performance.

To achieve adequate levels of corporate disclosure on human rights performance, the Global Reporting Initiative proposes that governments should introduce policy that requires companies to **report** on human rights performance, and other aspects of their economic, environmental and social performance, using the existing metrics or publicly explain why they have not done so.

Reporting on human rights and other aspects of economic, environmental and social performance is the practice of measuring, disclosing, and being accountable to internal and external stakeholders for organizational performance towards the goal of sustainable development.

To reflect the considerations outlined above the Global Reporting Initiative recommends the following edits:

19. In order to account for their human rights performance, business enterprises should be prepared to ~~communicate~~ *report* publicly on their response to *significant* actual and potential human rights impacts ~~when faced with concerns of relevant stakeholders~~. Those business enterprises with significant human rights risks should report regularly on their performance.

The frequency and form of any *report* ~~communications~~ on performance should:

a. Reflect and respond with adequate information to an enterprise's evolving human rights risks profile;

b. Be subject to any risks such *reports* ~~communications~~ pose to stakeholders themselves, to personnel or to the legitimate requirements of commercial confidentiality.

The responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice; showing involves ~~communication~~ **disclosure** ***of information****. Therefore, an appropriate level of transparency is required at a minimum when relevant stakeholders raise concerns about a business enterprise's human rights performance.*

~~Communications~~ **Disclosure** *can take on a variety of forms, such as reports, online dialogues, in-person meetings, and stakeholder review panels. ~~Communication that focuses~~* **Disclosure** ***focusing*** *on particular countries or business lines might also be useful where those parts of the business enterprise's operations pose particular human rights risks.*

Periodic public reporting is expected of those business enterprises ***that have significant actual or potential adverse impacts on human rights*** *~~whose activities pose significant risks to human rights, whether this is due to the nature of the industry or the operating environment~~. Reporting provides a measure of accountability to groups or individuals who may be impacted and to other relevant stakeholders, including investors. The reporting should cover* ***human rights performance*** *topics and indicators that reflect the business enterprise's* ***significant*** *actual and potential adverse impacts on human rights* **or that would substantively influence the assessments and decisions of stakeholders**. *Third party assurance of human rights reporting can strengthen its content and creditability. Sector-specific indicators can provide helpful additional detail.*

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Response from Michelle de Cordova on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

FROM NEI INVESTMENTS SUBMISSION:

Under Principle 19, we would suggest highlighting that different stakeholders have different needs in terms of human rights reporting. Responsible investors require material information on human rights policy and mitigation measures, and aggregated reporting that reveals the company's level of exposure to human rights risk, and the quality of corporate performance in mitigating that risk. Rights holders associated with the company's operations in a specific location may require more granular information on topics such as local human rights performance, as well as detailed information on how to access grievance mechanisms. One-size-fits-all reporting is unlikely to meet the needs of all stakeholders.

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Response from Dawn Wolfe on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Principle 19: Communication

Public communication of human rights performance is absolutely essential. Managements that expect stakeholders to simply "trust us" will come under increasing pressure from shareholders and other interested parties to actually demonstrate robust risk management in connection to human rights. Boston Common therefore welcomes the SRSG's inclusion of GP19 as a form of accountability.

Unfortunately, public communication on human rights risk is thoroughly under-developed by many business enterprises. As a result, accountability is weak and the general mood regarding corporate human rights commitments is low. It has been Boston Common's experience that human rights performance is often reported in a lofty manner, lacking data or discussion of specific action. Boston Common therefore supports the SRSG's commentary that reporting should "cover topics and indicators that reflect the business enterprise's actual and potential adverse impacts on human rights." We understand that the GPs represent guidance on what a business enterprise should or could do. With respect to communication and

accountability for stated commitments, Boston Common challenges the SRSG to strengthen Framework language to convey that public communication and accountability measures are imperative.

Remediation (GP20)

GUIDING PRINCIPLE 20: Where business enterprises identify that they have been responsible for adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Commentary

Even with the best policies and practices in place, a business enterprise may cause or contribute to an adverse impact that it has not foreseen or been able to prevent. Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires that it should help ensure that the impact can be remediated.

Business enterprises should have procedures in place to respond to such situations directly, where appropriate, and where possible should address problems before they escalate. Operational-level grievance mechanisms for those potentially impacted by the business enterprise's activities can be an effective means of providing for such procedures when they meet certain core criteria, as set out in Principle 29.

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Response from Favio Farinella on 30 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Maybe, it is important to add in this point which will be the legal use given to such a recognition done by the corporation. Could it be used in judicial proceedings as a burden of proof against the same corporation?. Surely not, if we want the provision to be effective. So I think that this may be taken into account explicitly.

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Response from Robert Grabosch on 05 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Are you suggesting that, in judicial proceedings, the burden of proving the plaintiff's allegations wrong might/should be higher if the corporation generally does not undertake any human rights due diligence and generally does not cooperate in the remediation of violations? Interesting idea! But what do you mean by "Surely not, if we want the provision to be effective."?

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Response from Matt Crossman on 12 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

It may be dealt with elsewhere, but what of legacy issues?

Companies as discrete legal entities undergo continual flux through growth, re-organsiation and mergers and acquisitions. The typical lifespan of a company and a potentially affected individual are not comporable. How far does the duty to remediate adverse impacts extend into new corporate entities (e.g. Bhopal / Union Carbide; affected group's may be facing consequences for years after a company has left. These issues may be dealt with in other areas as I say, or even by aspects of national law - but perhaps the commentary should make some expression of best practice as regards legacy HR issues inheritted on acquisition.

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Response from Gaston Bilder on 30 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

In the same spirit as principle 18, which highlights the importance of continious improvement processes, subject to the required protection to its shareholders, and other stakeholders, business enterprises should identify potentially adverse impacts that were avoided ("near misses") and contribute the lessons learned to other entities.

Also this principle should be phrased in a way that clarifies whether the word "they" refers only to the business entreprise or could include responsibility for its suppliers/subcontractors/employees, etc.

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Response from james eugene constable on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

When possible, businesses would prefer immediate and practical solutions to transgressions in order to obtain powerful and helpful publicity as well as to administrate difficulties in a thoughtful, timely and appropriate way. Could a set of ' universal remediations ' be compiled by the human rights community ' be developed so as to offer a series of choices to companies that would prefer to immediately act in a way responsible to change? Are there areas of appropriate guidance which the Human Rights Center could advise to as to rapidy assist compliance as according to international goals and norms?

James Constable

Issues of Context (GP21)

GUIDING PRINCIPLE 21: While the scale and complexity of policies and processes for ensuring that business enterprises respect human rights will vary according to the enterprises' size and the severity of their human rights impacts, in all cases enterprises should:

a. Observe internationally recognized human rights also where national law is weak, absent or not enforced;

b. Seek ways to honor the principles of internationally recognized human rights where domestic legal compliance may undermine their responsibility to respect;

c. Respect the principles of international humanitarian law when operating in conflict-affected areas;

d. Treat the risk of causing or contributing to international crimes as though it were a legal compliance issue.

Commentary

All business enterprises have the same responsibility to respect human rights wherever they operate. They are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances and to be able to demonstrate their efforts in this regard.

Where legal compliance with domestic law puts the business enterprise in the position of potentially being involved in gross abuses such as international crimes, it should consider whether or how it can continue to operate with integrity in such circumstances.

Some operating environments, such as conflict affected areas, may increase the risks of enterprises contributing to, or being complicit in, international crimes committed by other actors (for example, war crimes by security forces). Prudence suggests that companies should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and in the criminal sphere from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In jurisdictions where business enterprises themselves cannot be held criminally liable, or where international standards are interpreted so as not to include civil liability of business enterprises as legal entities, corporate directors, officers and employees nevertheless may be subject to individual responsibility for acts that amount to international crimes.

In complex situations such as these, business enterprises will often be well advised to draw not only on expertise and cross-functional consultation within the enterprise, but also to consult externally with respected experts, including from governments, civil society and national human rights institutions, in assessing how best to respond, and to understand how the approaches they might take to addressing dilemmas are likely to be perceived.

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Response from Jose Rafael Unda on 13 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 1 ✖

As in my comment to GP4, GP7 and GP12, I miss a reference to domestic Law, regional human rights instruments and Constitution.

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Response from Jose Rafael Unda on 13 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Is there really a need to include "b."? I just can't imagine when such a situation takes place. Are any examples available?

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Response from Kendyl Salcito on 18 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

My colleagues and I have repeatedly come across this issue, primarily as it affects Nondiscrimination. In one case the Government of Indonesia refused to acknowledge a village's existence (it was inconveniently located on a district border) and encouraged the company to do the same. Inadvertently, the company contributed to marginalization of that community, failing to hire its residents and widening an income gap between them and their neighbors. In rights terms, the company contributed to "structural inequality" built out of a discriminatory context.

In another case, the Government of Malawi instituted a nation-wide anti-discrimination policy to limit regional/tribal discrimination, which meant that the operating company couldn't set up hiring systems that would give preference to local inhabitants. The people whose lives were most impacted by the uranium mine were given no opportunity to reap benefits. This may not look like a human rights issue on its surface, but the end result was that poor, undereducated northern malawians remained poor and undereducated, while their wealthier and more privileged southern neighbors developed new skills and earned high salaries. As in the Indonesian case, this is a situation where the law led the company to exacerbate structural inequalities, even though the law was designed to reduce discrimination.

The most blatant case of laws undermining human rights, while companies are committed to respecting them, comes up with gender inequality. Laws in some regions severely disempower women, and a company committed to nondiscrimination does not uphold its standards simply by accepting that laws and mores eliminate women from its workforce.

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Response from Jose Rafael Unda on 13 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

As these Guiding Principles are aimed at companies, it would be a good idea to specify as clearly as possible what is meant by "the **principles** of international humanitarian law"

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Response from BASF Group on 25 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

We find it important that the draft GP recognize the fact that business enterprises can be confronted with compliance challenges such as conflicting requirements by international standards and national law. However, drawing on our experience as a multinational company operating in over 170 countries, we would prefer these compliance challenges to be even more clearly addressed by the draft GP, preferably by providing examples such as legal restrictions to the right of freedom of association and collective bargaining. At BASF, we have defined the challenges with regard to the specific implementation of labor and social standards within the BASF Group as follows:

1. National and local law prohibits the application of internationally recognized standards. In this case we are faced with the dilemma of conflicting self- commitments: compliance with national law versus compliance with internationally recognized standards. For example, in some countries in which we operate, the right of freedom of association and collective bargaining is restricted by law.

2. National and local regulations and labor market conditions set lower standards than requirements of internationally recognized standards. In this case we face the challenge of reconciling our self-commitment to maintain international standards with our economic competitiveness. For example, in several countries in which we operate, the entitlement to paid vacation is much lower than the three working weeks stipulated by the ILO.

BASF has developed a position regarding these challenges and discusses it with various stakeholders such as the ILO or the Global Compact Network:

- We are committed to comply with effective law. This also applies if, in some countries, the resources or the political will to implement and enforce applicable law are lacking (BASF Compliance Program).
- We strictly uphold the ILO core labor standards as long as this is not explicitly prohibited by applicable law. If the implementation of international conventions is restricted by national law, we develop innovative approaches to adhere in our actions to the principles underlying the internationally recognized standards. For example, we have developed suitable solutions for a dialogue in locations where the employees' right to elect employee representatives is restricted. In these cases we discuss with employee representatives topics of common interest at the regional level, e.g. in regional network meetings and the BASF Euro Dialogue (commitment to the Global Compact Principles 3-6; ILO Declaration on Fundamental Principles and Rights).
- While taking into account the local economic conditions and the state of social development, we as a responsible employer aspire to implement stepwise the internationally recognized labor and social standards to the fullest extent. Our goal is to reconcile the economic and social dimension of sustainability (MNE Declaration; UN Covenant on Economic, Social and Cultural Rights).

http://www.basf.com/group/corporate/en/sustainability/employees/human-rights/index

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Response from Steven Oates on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Cf. GPs 1 and 12. Para. (c) should be phrased in terms of respecting the principles *and rights* or *obligations* of international humanitarian law. Para. (d) does no justice to international crime: at least, the words "though it were" should be omitted; but there should be no doubt that complicity in crime is not acceptable.

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Response from Maplecroft on 31 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Guiding Principle 21: Conflicts of national and international law

Companies have substantial economic interests in emerging economies due to high growth rates, expanding markets and their overall development potential. When companies conduct business in emerging economies, however, national laws can sometimes contravene international human rights standards. Using labour rights as an example, if national laws impose excessive regulations on trade unions and require companies to facilitate the enforcement of these regulations, the company may be unable to comply both with domestic law and international human rights standards contained in the International Bill of Human Rights and in the eight core conventions of the International Labour Organization. When companies comply with international standards in contravention of domestic law, they may put their own assets and operations in jeopardy. We would like to encourage further clarification with respect to Principle 21 b on the nature of companies' responsibilities to address this challenging

dilemma, particularly when the continuation of business activities is perceived to be vital to the development of the region and may enhance the protection and respect for human rights.

Issues of Context (GP22 - prioritizing actions)

GUIDING PRINCIPLE 22: Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

Commentary

It may not always be possible for business enterprises to address simultaneously all adverse human rights impacts their activities and relationships may generate. In the absence of specific legal guidance, if prioritization is necessary, business enterprises should begin with those human rights impacts that would be most severe, or where the risk of irremediable impact is high. Severity is not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified.

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Response from Cathie Guthrie on 12 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 0 ✔ 1 ✖

I have difficulty with the implied prioritization of rights and the risk of assigning weight to different rights. Rights treaties have already done a decent job informing us that all rights are equal; there are no lesser and no greater rights. GP22 obviates what is clearly stated in other human rights instruments.

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Response from Child Rights Information Network on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

From the Child Rights Information Network submission:

In line with Principle 20, CRIN believes that business enterprises that have caused human rights violations must be responsible for remedying them. CRIN is very concerned, however, that the "legitimate processes" designed to facilitate this will in practice exclude children. As violations of children's rights require special attention, children especially must be provided with speedy, accessible, and effective justice.

Under Principle 22, business enterprises are told to "first seek to prevent those [potential adverse human rights impacts] that are most severe or where delayed response would make them irremediable." Because children are still developing physically and psychologically, they are likely to suffer disproportionately from any rights violations. This particular vulnerability should be made explicit. It must also be remembered that many children, especially very young children, will be unable to bring attention to violations of their rights and may even be unaware of the lasting harm that such violations can cause. Businesses should therefore be required to approach all potentially adverse human rights impacts on children with a view to providing immediate and effective relief.

! *Principle 22 should draw particular attention to the special situation of child victims of human rights violations, and businesses should be explicitly required to consider all such potential violations with a view to providing immediate and effective relief.*

Access to Remedy

Foundational Principle (GP23)

GUIDING PRINCIPLE 23: As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy through judicial, administrative, legislative or other appropriate means.

Commentary

Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.

The more recent international human rights treaties expressly contemplate States taking steps to eliminate abuse by business enterprises or establishing liability for legal persons, beginning with the Convention on the Elimination of All Forms of Discrimination Against Women, adopted in 1979, and including the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

With respect to earlier treaties, which require in more general terms that States investigate, punish and redress human rights abuse by third parties, commentary from the UN Treaty Bodies and relevant regional human rights commissions and courts has provided some clarification of how these provisions can apply to abuse by business enterprises.

An effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, guarantees of non-repetition, restitution of property, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines).

State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory basis. They may be judicial or non-judicial. Examples include the courts, labor tribunals, national human rights institutions, National Contact Points under the OECD Guidelines for Multinational Enterprises, many ombudsperson offices, and government-run complaints offices.

Ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed and any support (financial or expert) for doing so.

State-based judicial and non-judicial mechanisms should form the foundation of a wider system of remedy for business-related human rights abuse. Within such a system, operational-level grievance mechanisms can provide early- stage recourse and possible resolution. State and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms.

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Response from Emily Howie on 11 Jan 2011

Ratings (Yes/No): Relevance 2 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

The Human Rights Law Resource Centre argues that the draft Guiding Principles should express the right to a remedy.

The requirement to provide an 'effective remedy' as part of a State's obligations in relation to particular human rights is found in many human rights conventions, including under the ICCPR,[1] the *International Convention on the Elimination of All Forms of Racial Discrimination*[2]and the *Convention*

on the Rights of the Child.[3] The Human Rights Committee has recognised the 'unqualified' right of victims to a remedy for breach of their human rights under international human rights instruments, including the ICCPR.[4]

The right to a remedy imposes a positive duty on states to ensure avenues for redress for violation of human rights. Remedies must be adapted to take into account the special vulnerability of certain categories of person, including and in particular children, and should be both judicial and non-judicial.[5] Remedies must be accessible and effective and remedial mechanisms should account for the resource and power disparities that often exist between individuals or communities on the one hand and corporations on the other hand.

The HRLRC supports the draft Guiding Principles' recognition of the utility of providing a range of remedies – State-based judicial mechanisms, State-based non- judicial mechanisms and non-state based non-judicial mechanisms. However, the draft Guiding Principles do not explicitly recognise the right to a remedy itself, which is the basis for the requirement of States to provide and ensure the utility these grievance mechanisms.

Recommendation:

The Guiding Principles should explicitly state the existence of the right to a remedy. The Guiding Principles should reflect the potential resource and power disparities between parties in cases of corporate misconduct in order to ensure that the remedies are accessible and adapted to the vulnerability of claimants.

[1]UN Human Rights Committee, *General CommentNo. 31,: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, , [15].

[2]*International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December1965, 660 UNTS 195 (entered into force 4 January 1969).

[3]Opened for signature20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[4]Article 2; UN HumanRights Committee, *General CommentNo. 31*, above n 1, [14].

[5]Ibid, [15].

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Response from Larry Catá Backer on 14 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The SRSG correctly emphasizes the central place of remedy to both the state duty to protect and the corporate responsibility to respect human rights. Principle 23 is written in a way that emphasizes the principle role of the state and the foundational importance of legal remedial frameworks in the contexts of human rights. However, it should not be forgotten that remedy is also critical to the autonomous operation of the corporate responsibility. Principle 23 should not be read to suggest that remedy is less central to the corporate responsibility than it is to the state duty to protect human rights or that it rekates solely to the first Pillar responsibility of states. Indeed, the development of the conceptual basis of the Second Pillar and its emphasis on the autonomy of the standards under which corporations may be held by its stakeholders suggests the importance of the corporate remedial responssibility. This is picked up in Principles 13, 26 and 27, to which cross reference might usefully be made.

Thus understood, I believe that the Guiding Principles do make explicit the remedial rights inherent in the state duty and the corporate responsibility in a way that is embedded within the substantive obligations of states and corporations. Recall, as well, the Introduction, which declare that the "Guiding Principles are grounded in recognition of. . . . the reality that rights and obligations have little meaning unless they are matched to appropriate and effective remedies when breached."

Larry Catá Backer

W. Richard and Mary Eshelman Faculty Scholar & Professor of Law,

Professor of International Affairs

Pennsylvania State University

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The text does not define precisely what is meant by the right to *'effective remedy'*, whereas such a definition would shed more light on the subsequent analysis of the different types of mechanisms and how valuable they are in terms of the genuine effectiveness of the right to remedy. Among the definitions at the end of the document, a definition could therefore be given of the right to effective remedy as comprising: a) the existence of a procedure allowing a fair hearing of both sides before an independent and impartial judicial body; b) adjudicating judges with appropriate powers and jurisdiction; c) a reasonable timescale for processing grievances; d) access for third parties, NGOs and victims' associations; e) guarantees regarding the transparency and public visibility of the procedure; effective enforcement of rulings and g) sanctions and assurances that the offence will not be repeated, as well as suitable reparation, restitution, compensation or rehabilitation measures.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The document presents forward various different remedy procedures: judicial and non-judicial; state and non-state. The effect of the discussion on purely internal control mechanisms in the business world is to place excessive emphasis on these as opposed to judicial remedy procedures, which should always be the principal avenue. The principle of access to independent, impartial justice should be strongly affirmed, as should the duty of States to guarantee such access in practice. Alternative procedures may only be envisaged if the interests of all the parties concerned are taken into consideration, in full compliance with international human rights law and in particular the right to information, the right to the truth, the right to justice and the right to reparation. France's official position emphasises *'the risk of marginalising state jurisdictions, whereas judicial systems need to be reinforced*'. The text of Guiding Principle 25 could be used to remove all ambiguity by clearly stating that non-judicial mechanisms are not a substitute for state judicial mechanisms.

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

This does not consider those cases where the state is too weak or too corrupt to ensure that those who are victims have access to remedy.

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Response from Child Rights Information Network on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

From the Child Rights Information Network submission:

Principle 23 would obligate States to provide victims of rights violations with effective access to justice through "judicial, administrative, legislative or other appropriate means," and its Commentary further

states that “State-based judicial and non-judicial mechanisms should form the foundation of a wider system of remedy for business-related human rights abuse.” Reasonable as this may seem, basing access to justice on existing mechanisms promises little to child victims of rights violations. Indeed, children's ability to access these mechanisms under national laws is at best limited and at worst absent entirely. The vast majority of children cannot bring cases in their name, and even where this is a legal possibility, it is of no value if these mechanisms are not designed for children to use.

The Principle 23 Commentary does cite the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which obligates States Parties to take numerous and detailed steps in making justice systems accessible for children, but this citation is only in the context making business entities liable for human rights violations. States must do more than simply establish liability for legal persons, they must guarantee that all persons are able to address violations of their human rights.

! *Principle 23 must recognize that children often do not have meaningful access to justice and call on States to provide children with effective means to seek redress for human rights violations. This should include not only permitting children to access State-based judicial and non-judicial mechanisms, but also adapting these mechanisms to suit the evolving capacities of children to participate in these processes.*

State-Based Judicial Mechanisms (GP24)

GUIDING PRINCIPLE 24: States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing human rights-related claims against business, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

Commentary

The effectiveness with which judicial systems can handle business-related human rights claims reflects their broader independence and integrity. For claims of this kind it is particularly important that courts be independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed.

States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of such remedy or alternative sources of effective remedy are unavailable.

Legal barriers that can prevent legitimate claimants from accessing judicial remedy for business-related human rights abuse can arise where, for example:

- the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;
- where claimants face a denial of access to effective remedy in a host State and cannot access home state courts regardless of the merits of the claim.

Practical and procedural barriers to accessing judicial remedy can arise where, for example:

- State prosecutors lack adequate resources, expertise and support to meet the State's own obligations to investigate individual and corporate involvement in human rights-related crimes;
- the costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through government support, "market-driven" mechanisms (such as litigation insurance and legal fee structures), or other means;
- claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
- there are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), thereby preventing effective remedy for individual claimants.

Additional barriers to access for business-related human right claims may exist within some jurisdictions and legal systems. For example, whether through active discrimination or as the unintended consequences of the way judicial mechanisms are designed and operate, vulnerable and marginalized groups often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from them. Particular attention should be given to the rights and specific needs of such groups at each stage of the remedial process: access, procedures and outcome.

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

This does not consider those cases where the state is too weak or too corrupt to ensure that those who are victims have access to remedy.

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Response from Child Rights Information Network on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

From the Child Rights Information Network submission:

Similarly, Principle 24 asks States to "consider[ ] ways to reduce legal, practical and other relevant barriers that could lead to denial of access to remedy." CRIN believes this language is both too weak and too vague to significantly increase children's access to justice on a national level. Furthermore, in the accompanying Commentary's illustrative list of barriers to accessing judicial remedies, age does not appear even once despite being a primary factor in opening courtroom doors. And while the need to give "particular attention" to "vulnerable and marginalized" groups in general is discussed, children again do not feature.

! *Principle 24 should be strengthened to require that States take affirmative measures to eliminate all barriers that could lead to a denial of access to a remedy. In the accompanying Commentary, illustrative examples should include a reference to children facing age-related barriers to justice, and children's concerns should be given the "particular attention" envisioned. This discussion should include specific steps that States must take to eliminate barriers to access to justice for children in line with established principles of child-friendly justice.*

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Response from Lauri R. Tanner on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Language regarding respect for and protection of **human rights defenders** and **environmental defenders** should be added to the *Guiding Principles*.

In my Working Paper on the 2011 Update of the OECD Guidelines for Multi-National Enterprises (to be posted shortly on http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions), I have drawn on a number of resources to substantiate these proposals for the OECD and the SRSG.

One of the key resources is the Report to the UN General Assembly[1] of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya, and the Human Rights Council April 2010 Resolution on *Protection of human rights defenders*[2].

Highlights follow:

On December 30, 2009 Ms. Sekaggya delivered her first **Report of the Special Rapporteur on the situation of human rights defenders** to the UN Human Rights Council.[3] In section (c) she addressed the "Role of non-State actors and responsibility of the State" with the following statements (emphasis added), which apply to the proposed new Human Rights chapter for the Updated OECD Guidelines, as well as to the SRSG's Guiding Principles:

38. These past few years, the safety of defenders has been increasingly threatened by a growing number of **non-State actors** in a climate of impunity.

42. One way to ensure the safety of defenders is to put an end to impunity for non-State entities. The Special Rapporteur would like to reiterate that States bear the primary responsibility for protecting individuals, including defenders, under their jurisdiction, regardless of the status of the alleged perpetrators. In cases involving non-State actors — including **private companies** and illegal armed groups — it is paramount that prompt and full investigations be conducted and perpetrators brought to justice. Failure by States to prosecute and punish such perpetrators is a clear violation of article 12 of the *Declaration on Human Rights Defenders*.[4] Addressing the issue of impunity is a key step to ensuring a safe environment for defenders.

44. Finally, it must be recalled that the *Declaration on Human Rights Defenders* is addressed not only to States and human rights defenders, but to everyone. It is set forth in article 10 of the Declaration that, "no one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms". Non-State actors and **private entities** should therefore also abide by the Declaration and refrain from endangering the safety of defenders and/or impeding their work.

Following up on her Human Rights Council Report noted above, the Special Rapporteur delivered her first report to the UN General Assembly in August 2010, focusing on the **responsibility for human rights violations against defenders by non-State actors**. Emphasis has been added to these points from Ms. Sekaggya's Report Summary:

> The first part of the report identifies armed groups, **private corporations**, individuals and the media as the categories of non-State actors to be addressed by the Special Rapporteur in the framework of the report as well as the types of violations they commit. The Special Rapporteur then addresses the scope of their responsibility for violations of the rights of defenders, including the **corporate responsibility to respect human rights**.
>
> The second part of the report surveys States' obligations under international law with respect to human rights violations against defenders by non-State actors. The Special Rapporteur argues that a State's duties to respect and protect human rights include a **duty to protect defenders against human rights violations by third parties**. State responsibility can therefore be engaged for violations by non-State actors in specific situations. Furthermore, a State's obligation to provide victims of human rights violations with an **effective remedy** is also reaffirmed.[5]

In Section B. **"Responsibility of non-State actors to respect the rights of human rights defenders"**, Ms. Sekaggya makes the following assertions on the issue of "Corporate responsibility to respect human rights". I suggest that this language applies to Professor Ruggie's Guiding Principles in this Access to Remedy section and should be utilized in the updated Commentaries (emphasis added below):

> 23. In relation to private national or transnational corporations, the Special Rapporteur refers to the **responsibility of companies to respect human rights**, as emphasized by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Mr. John Ruggie, in his report to the Human Rights Council (A/HRC/8/5), submitted in 2008. The Human Rights Council endorsed the Special Representative's policy framework for business and human rights, as elaborated in his report. The framework rests on the three principles of "protect, respect and remedy": the State duty to protect against human rights abuses by third parties, including businesses; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The Human Rights Council later emphasized that transnational corporations and other business enterprises have a responsibility to respect human rights (see Human Rights Council resolution 8/7). **Consequently, business enterprises also have a responsibility to respect the rights of human rights defenders**.
>
> 24. The corporate responsibility to respect human rights (see A/HRC/14/27, paras. 54-78) is recognized in soft-law instruments such as the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the **Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises**, and it constitutes one of the commitments that companies undertake when joining the United Nations Global Compact.[6] The corporate responsibility to respect notably applies to the rights enshrined in the International Bill of Human Rights.[7] Therefore, the rights enshrined in the ***Declaration on human rights defenders***, such as the right to security and liberty, freedom of association and freedom of opinion and expression, including access to information, must be respected by companies, whether national or transnational.
>
> 25. The Special Representative also stated that discharging the responsibility to respect human rights required due diligence. This concept, which is derived from, but should be distinguished from, a State's due diligence responsibility, should be understood to mean that companies must ensure that their activities do not infringe upon the rights of others, **including human rights defenders**. This implies that **companies should identify and prevent human rights violations against defenders**

that may result from their activities and operations. The Special Rapporteur would like to **call upon companies to engage with human rights defenders while implementing the four components of the human rights due diligence standard**, as elaborated by the Special Representative of the Secretary-General on business and human rights.

26. In addition, companies should envisage incorporating a reference to the ***Declaration on human rights defenders*** into their corporate social responsibility and/or human rights policies. Transnational corporations should also systematically **consider involving human rights defenders in their country assessment prior to undertaking any investment in a given State**. Early and transparent discussions on the consequences of the activities of companies on the enjoyment of human rights in their areas of operation could prevent violations of the human rights of populations, communities and defenders. Such a participatory process would also contribute to an acknowledgment of the key role of defenders in the promotion of human rights, democracy and good governance. Transnational companies could also play a key role in influencing their national parent companies and overseas subsidiaries to adopt the same approach.

27. Transnational and national companies should also consider developing national human rights policies **in cooperation with defenders**, including **monitoring and accountability mechanisms in case of violations of the rights of human rights defenders**.[8]

I hope that Professor Ruggie and his team seriously consider this proposal, as well as my proposal posted in the Comments section for Guideline 29.

Thank you,

Lauri Tanner

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[1] http://www2.ohchr.org/english/issues/defenders/docs/A-65-223.pdf

[2] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/129/00/PDF/G1012900.pdf?OpenElement

[3] http://www2.ohchr.org/english/issues/defenders/docs/A.HRC.13.22.pdf

[4] In 1999, the UN General Assembly Resolution adopted the *Human Rights Defenders Declaration*. http://www2.ohchr.org/english/issues/defenders/declaration.htm; http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement.

[5] http://www2.ohchr.org/english/issues/defenders/docs/A-65-223.pdf

[6] http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html.

[7] The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

[8] http://www2.ohchr.org/english/issues/defenders/docs/A-65-223.pdf

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Response from Cathal Doyle on 31 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

For effective operationalization of principle GP24 in the context of the specific situation of indigenous peoples a welcome addition to the commentary would be the requirement to afford due respect for, and recognition of, indigenous peoples' customary law in all State based judicial remedies which address

business related abuses of indigenous peoples' rights. A similar addition to the commentary for GP25 in relation to non-judicial remedies would also be helpful.

Likewise commentary could be added to GP26 and GP27 explaining that alternative dispute resolution mechanisms addressing indigenous peoples rights should be premised on respect for their governance institutions with due regard afforded to their customary law. In addition the commentary could suggest that corporations operating in indigenous peoples' territories recognize indigenous governance systems and take appropriate steps to adhere to decisions they make regarding respect for indigenous peoples rights.

State-Based Non-Judicial Grievance Mechanisms (GP25)

GUIDING PRINCIPLE 25: States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights harms.

Commentary

Administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all legitimate claims; judicial remedy is not always required or necessary; nor is it always the favored approach for all claimants.

Gaps in the provision of remedy for business-related human rights harms could be filled, where appropriate, by expanding the mandates of existing non- judicial mechanisms and/or by adding new mechanisms. These may be mediation-based, adjudicative or follow other culturally-appropriate and rights-compatible processes - or involve some combination of these – depending on the issues concerned, any public interest involved, and the potential needs of the parties.

National Human Rights Institutions have a particularly important role to play in this regard.

As with judicial mechanisms, vulnerable and marginalized groups often face particular barriers in accessing, using and benefiting from non-judicial grievance mechanisms, which should be taken into account at each stage of the remedial process.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The document presents forward various different remedy procedures: judicial and non-judicial; state and non-state. The effect of the discussion on purely internal control mechanisms in the business world is to place excessive emphasis on these as opposed to judicial remedy procedures, which should always be the principal avenue. The principle of access to independent, impartial justice should be strongly affirmed, as should the duty of States to guarantee such access in practice. Alternative procedures may only be envisaged if the interests of all the parties concerned are taken into consideration, in full compliance with international human rights law and in particular the right to information, the right to the truth, the right to justice and the right to reparation. France's official position emphasises *'the risk of marginalising state jurisdictions, whereas judicial systems need to be reinforced*'. The text of Guiding Principle 25 could be used to remove all ambiguity by clearly stating that non-judicial mechanisms are not a substitute for state judicial mechanisms.

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Response from Thomas Lazzeri on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

To the principles 25 to 29 the following applies: Too much attention is given to non-judicial grievance mechanisms. This reduces the relevance of judicial liability of business, which remains paramount. Non-judicial grievance mechanisms can integrate judicial ones, but it must not be an easy alternative, which allows business to escape its legal responsibilities and allows them not to face the judicial consequences of their action.

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Response from Child Rights Information Network on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

From the Child Rights Information Network submission:

Principle 25 presents identical issues in relation to non-judicial grievance mechanisms. While more States provide for children's ombudspersons than for direct access to the courts, children must again be given special attention when considering their ability to reach effective and appropriate non-judicial mechanisms. The same can be said for Principle 27's guidance on Operation-level grievance mechanisms, and it is perhaps even more unlikely that business enterprises would have child-friendly grievance mechanisms than would States. Yet in listing common barriers to accessing these mechanisms, Principle 29 again does not include age or concomitant development or maturity.

The Commentary for Principle 29 states that "a grievance mechanism can only serve its intended purpose if those whom it is intended to serve know about it, trust it, and are able to use it." This would apply more broadly to any remedial mechanism, and each of these aspects is particularly challenging with regard to children. Because they will almost invariably lack access to justice, the Remediation Principles must ensure that children in particular are aware of, understand, and can access effective judicial, non-judicial, and Operation-level mechanisms to remedy violations of their rights.

! *The Commentaries for Principles 25 and 27 should include specific discussions of the special challenges that children face in accessing justice before non- judicial and Operation-level grievance mechanisms. These discussions should include specific steps that States and business enterprises must take to eliminate barriers to access to justice for children in line with established principles of child-friendly justice.*

! *Principle 29 should list age or a proxy consideration among those barriers to be addressed. The Commentary for Principle 29 should review effectiveness criteria specifically in relation to children, and should include specific steps that States and business enterprises must take to eliminate barriers to access to justice for children in line with established principles of child-friendly justice.*

Non-State-Based Grievance mechanisms (GP26)

GUIDING PRINCIPLE 26: States should consider ways to facilitate access to effective non-state-based mechanisms dealing with business-related human rights grievances.

Commentary

One category of non-state-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally-appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.

Another category comprises regional and international human rights bodies. While they focus primarily on remedies for human rights violations by the State, some are also able to address certain alleged human rights abuses by business enterprises.

States can play a helpful role in raising awareness of, or otherwise facilitating access to, such options, alongside the mechanisms provided by States themselves.

Non-State-Based Grievance Mechanisms (GP27 - operational level)

GUIDING PRINCIPLE 27: To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective, operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

Commentary

Operational-level grievance mechanisms are accessible directly to individuals and communities who may be adversely impacted by a business enterprise. They are typically administered by enterprises, alone or in collaboration with others, including stakeholders. They may also be provided through recourse to a mutually acceptable external expert or body. They do not require that those bringing a complaint first access other means of recourse. They can engage the company directly in assessing the issues and seeking remediation of any harm.

Operational-level grievance mechanisms perform two key functions regarding the corporate responsibility to respect.

- First, they support the 'tracking' of human rights performance as part of the enterprise's on-going human rights due diligence. They do so by providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be harmed. By analyzing trends and patterns in complaints, business enterprises also can identify systemic problems and adapt their practices accordingly.
- Second, these mechanisms make it possible for grievances, once identified, to be addressed and for harms to be remediated early and directly by the business enterprise, whether alone or in collaboration with others involved, thereby preventing harms from compounding and grievances from escalating.

Such mechanisms need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised, but specifically aim to identify any legitimate concerns of those who may be adversely impacted. If their concerns are not identified and addressed, they may over time escalate into more major disputes and human rights abuses.

Operational-level grievance mechanisms should reflect certain criteria to ensure their effectiveness in practice (see Principle 29). These criteria can be met through many different forms of grievance mechanism according to the demands of scale, resource, sector, culture and other parameters.

Operational-level grievance mechanisms should not be used to undermine the role of legitimate trade unions in addressing labor-related disputes, or to preclude access to judicial or non-judicial grievance mechanisms.

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Response from BASF Group on 25 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The draft GP raise important aspects concerning company-level grievance mechanisms and its functions regarding the corporate responsibility to respect. We support the notion that such mechanisms should specifically aim to identify any legitimate concerns of those who may be adversely impacted in order to prevent escalation into more major disputes and human rights concerns. Company-level grievance mechanisms should therefore be seen as one part of a larger stakeholder engagement process. Each organization should establish its own stakeholder engagement process and appropriate grievance mechanisms.

At BASF, we employ various mechanisms to address employees and communities as well. We conduct a close dialogue with stakeholders important for us, such as employees and their representatives, employer

associations, NGOs and international organizations such as the International Labor Organization (ILO) or the United Nations (UN). Our employees have the opportunity to seek guidance from superiors, the human resources or legal department and employee representatives regarding their own behavior and draw attention to potential abuses in their own working environment. Compliance hotlines that can be used anonymously and confidentially are available to our employees. We have established a large number of separated hotlines at national and regional level. This gives our employees the opportunity to submit their inquiries and complaints in their native language. The hotlines are open in all the countries in which they are legally allowed. A standardized procedure guarantees that every incoming call received is followed up. To enhance communication with the communities in which we operate, we set up Community Advisory Panels (CAPs), mostly at our larger production sites.

http://www.basf.com/group/corporate/en/sustainability/employees/human-rights/monitoring

http://www.basf.com/group/corporate/en/sustainability/dialogue/good-neighbors

http://www.basf.com/group/corporate/en/sustainability/employees/employee-representatives

Non-State-Based Grievance Mechanisms (GP28 - collaborative)

GUIDING PRINCIPLE 28: Collaborative industry or multi-stakeholder initiatives in this domain should also provide for effective grievance mechanisms.

Commentary

Human rights-related standards are increasingly reflected in commitments undertaken by industry bodies and multi-stakeholder groups, through codes of conduct, performance principles and similar undertakings.

Such collaborative initiatives should ensure the availability of effective mechanisms through which affected parties or their legitimate representatives can raise concerns when they believe the commitments in question have not been met. The mechanisms could be at the level of individual members, of the collaborative initiative, or both. These mechanisms should provide for accountability and enable remediation of harms.

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Response from Matt Crossman on 12 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

In order for companies to collaborate in this manner, the incentives must be clear. Beyond the issue of trust / legitimacy of an industry body as regards affected groups, collaborative approaches to remediation will be limited if sectors are populated by a majority of responsible operators and a few bad apples.

Whilst there are clear incentives for industry to colloborate on industry level issues to reduce costs or lobby government on a level which is unattanable for an individual enterprise (i.e. where the benefits of membership are shared), what is the incentive for an industry body to share the wrongs of rogue operators through establishing grivance procedures?

Perhaps the commentary needs to briefly mention the advantages to the company of such a collaborative approach to grievance mechanisms; althought the issue might well be avoided by the application of membership criteria, this does not help the affected individual or group which is seeking remediation.

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Response from Gaston Bilder on 30 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Please consider adding a recommendation for business entreprises to provide effective grievance mechanisms, irrespective of state-based mechanisms, or multi- stakeholder / industry mechanisms. Any company could appoint an ombusdman / independent panel, as long as the criteria indicated in principle 29 are adhered to.

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Response from Investors Against Genocide, Chairperson Eric Cohen on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Principle 28 states that “Collaborative industry or multi-stakeholder initiatives in this domain should also provide for effective grievance mechanisms.” The commentary specifies that there must be mechanisms to raise concerns when commitments are not met and to provide for accountability.

Investors Against Genocide supports this proposal and would welcome its application to U.N. bodies. For example, the U.N. Global Compact declined to act when concerns were raised about PetroChina, a signatory to the Global Compact, not meeting its commitments to support the human rights principles of the Global Compact. (For details on this example, see http://www.investorsagainstgenocide.org/ungcandpetrochina2.)

Principle 28 rightly requires an effective grievance mechanism, supporting procedures for accountability and remediation, and a commitment to use those procedures. Good actors may do well without these elements, but bad actors may too easily finesse general guidance to use the framework to insulate themselves from criticism while actually doing little to no good and continuing to support harm.

Effectiveness criteria for non-judicial grievance mechanisms (GP29)

GUIDING PRINCIPLE 29: Non-judicial grievance mechanisms, whether state-based or non-state-based, should be:

a. Legitimate: having a clear, transparent and sufficiently independent governance structure to ensure that no party to a particular grievance process can interfere with the fair conduct of that process;

b. Accessible: being publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal;

c. Predictable: providing a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome;

d. Equitable: ensuring that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms;

e. Rights-Compatible: ensuring that its outcomes and remedies accord with internationally recognized human rights standards;

f. Transparent: providing sufficient transparency of process and outcome to meet the public interest concerns at stake and presuming transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.

Operational-level mechanisms also should be:

g. Based on Dialogue and Engagement: focusing on processes of direct and/or mediated dialogue to seek agreed solutions, and leaving adjudication to independent third-party mechanisms, whether judicial or non-judicial.

[Note: These effectiveness criteria may be further refined in light of the SRSG's grievance mechanism pilot project.]

Commentary

A grievance mechanism can only serve its intended purpose if those whom it is intended to serve know about it, trust it and are able to use it. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst stakeholders by heightening their sense of being disempowered and disrespected by the process.

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Response from Jose Rafael Unda on 13 Dec 2010

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

As in my comment to GP4, GP7, GP12 and GP21, I miss at "e. Rights-Compatible" a reference to domestic Law, regional human rights instruments and domestic Constitution.

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Response from Jose Rafael Unda on 13 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Could you please provide more information, or elaborate on the meaning of "presuming transparency" at "f. Transparent"?

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Response from Martijn W. Scheltema on 28 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

HUGO

- Hague Utilities for Global Organisations -

Comments on the report of the Special Representative of the Secretary/General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Draft Guiding Principles for the Implementation of the United Nations ´Protect, Respect and Remedy ´ Framework*

28 January 2011

World Legal Forum Foundation

Buren van Velzen Guelen

Institute for Environmental Security

Pels Rijcken & Droogleever Fortuijn

World Legal Forum Foundation together with its mentioned partners (hereinafter: 'WLF') comments on the report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Draft Guiding Principles for the Implementation of the United Nations ´Protect, Respect and Remedy ´ Framework*

Introduction

In 2008, the United Nations Special Representative for Business and Human Rights proposed the 'Protect, Respect and Remedy Framework', a policy framework which rests on three pillars: the state duty to protect against human rights abuses, the corporate responsibility to respect human rights and greater access for victims to effective (judicial and non-judicial) remedies. WLF welcomes and supports the Special Representative in his initiative to provide clear guidance and recommendations to states, businesses and other parties for the implementation of this Framework.

WLF particularly welcomes the Special Representative's attention to the topic of *access to remedies*. While considerable expertise and practices have been built up in conflict management systems with sophisticated early dispute resolution mechanisms such as mediation and conciliation in so called 'business to business conflicts' and the basics of these mechanisms are certainly valuable for CSR related conflicts, it must be acknowledged that these mechanisms may need adaptation for the types of conflicts addressed by the Ruggie Framework. After all, CSR related conflicts between business enterprises and individuals, civil society organizations and other stakeholders may be characterized by elements such as inequality of power and resources, major cultural and political differences, possible internal political conflicts in host states and absence of rule of law or weak law enforcement in the countries in question.[1] The Draft Guiding Principles confirm the six main principles, specified in the 2008 Framework Protect, Respect and Remedy, underpinning all non-judicial grievance mechanisms: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency of any conflict resolution mechanism in field of business and human rights. It is important to note that the SGSR in his 2009 Report has added a seventh principle, specifically for company-level mechanisms, that they should operate through dialogue and mediation rather than the company itself acting as adjudicator.[2]

WLF aims to contribute to the operationalization of the third pillar of the Ruggie Framework *greater access for victims to effective remedies* and in particular non- judicial mechanisms. In Principle 29(g) of the Draft Guiding Principles, professor Ruggie emphasises that operational level grievance mechanisms should be based on dialogue and engagement, leaving adjudication to independent third party mechanisms whether judicial or non judicial. WLF has embarked on a project to investigate the feasibility of the establishmentof a non-judicial Conflict Management Facility (hereinafter: 'CMF') for disputes between business enterprises and stakeholders in the field of human rights, environment and labour. This facility should focus on facilitating in settlement of disputes between business enterprises and stakeholders. WLF recognizes that grievances based on alleged violations of human rights or other CSR-related issues are best addressed locally, preferably by non-judicial means. However, the question whether judicial or non-judicial means are preferable should be addressed on a case-by-case basis.The CMF intends to serve primarily as a hub assisting parties involved in a dispute to find the appropriate local dispute management mechanisms. Whereas local non-judicial means are not available, or fail to offer an appropriate solution, the CMF itself could provide mediation services. Additionally, the CMF intends to contribute to prevent business-related conflicts by offering assistance and expertise to individual business enterprises in the development of an internal conflict management system including a complaint procedure for external stakeholders. The CMF will also offer to business enterprises and stakeholders advice on best practices on conflict management and due diligence methods in connection with early conflict management mechanisms. Furthermore, the CMF intends to take up a proactive role in raising awareness for CSR conflict management by organising conferences and workshops on alternative conflict management of CSR disputes. The CMF also supports training and further capacity building for companies in how best to integrate human rights into their day to day business and to support institutions on a national level committed to solving business and human rights conflicts (also as far as these issues relate to labor or environment). Lastly, it strives to become a facility where companies and other institutions can find information, advice, networking opportunities as well as the professional means to help find, facilitate and offer the appropriate remedy on business related human rights conflicts.

The Hague could be a neutral place with a long tradition of international law and international organizations to establish this facility, in cooperation with other initiatives.

The Draft Guiding Principles

The aim of the CMF is reflected and underpinned by and consistent with the Draft Guiding Principles.

Draft Guiding Principle 10(b) states there is a need for providing adequate assistance to business enterprises to assess and address the heightened risk of abuse. In the comment on this principle it is noted that innovative and practical approaches are needed. A (worldwide) conflict management facility as CMF could contribute to such a innovative and practical approach.

Draft Guiding Principle 12 emphasizes the need for business enterprises to respect human rights, in light of the impact business enterprises can have on virtually the entire spectrum of internationally recognized human rights and their responsibility to respect these rights. The SGSR points out the importance of risk management (i.e. the risk of harming third parties' rights) as one of the principles supporting corporate responsibility. It is in the direct interest of a business enterprise to prevent tensions or problems escalate into a human rights violation, which will inevitably cause reputational and financial harm. Financial harm could for example be caused if because of the alleged human rights violations licences to continue local operations would be withdrawn or if this leads to the withdrawal of funds invested by institutional investors pursuing a SRI strategy (if a company is associated with possible human rights violations this might lead to a decision by institutional investors to put this company on the so-called 'exclusion list'). Dialogue and engagement, as well as due diligence (prevention) could lead to reduced systemic risk, thereby avoiding conflicts or at least minimizing damages on both sides. However, business enterprises

should incorporate or adhere to human rights standards not only from a risk management but more importantly from a values perspective, enhancing an adequate corporate culture.

To enable business enterprises to assess their human rights impacts accurately, they should, as is noted in the comment to Draft Guiding Principle 16, seek to understand the concerns of potentially affected stakeholders by engaging directly with them. In situations where such engagement is not possible, business enterprises should consider reasonable alternatives such as consulting credible expert resources. These business enterprises could in such circumstances also make use of independent mediation services before the tensions or problems escalate.

In the comment to Draft Guiding Principle 25 it is noted that gaps in the provision of remedy for business-related human rights harms could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms. These may be mediation-based, adjudicative or follow other culturally-appropriate and rights-compatible processes ! or involve some combination of these – depending on the issues concerned, any public interest involved, and the potential needs of the parties. A conflict management facility as CMF could contribute to assessing options for existing mechanisms and, where these options are not available or not appropriate, could provide for new mechanisms.

Draft Guiding Principle 27 covers access to effective operational-level grievance mechanisms. However, as professor Ruggie emphasizes, in a world of 192 UN Member States and 80.000 transnational enterprises a 'one size fits all approach' does not serve the cause of business and human rights, and that tailor made solutions that fit both the specific circumstances of the case and the organizational structure of the enterprise concerned, offer the best perspective at progress. Business enterprises and other stakeholders should therefore be informed about and offered effective remedies through judicial, non-judicial and/or other appropriate means whichever fit the complaint, tension or problem at hand the best.

As the comment on principle 27 states, this may be provided through recourse to a mutually acceptable external expert or focal point. This focal point need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised, but specifically aim to identify any legitimate concerns of those who may be adversely impacted. If their concerns are not identified and addressed, the complaint or grievance may over time escalate into more major disputes and human rights abuses. This emphasizes the relation between human rights and related fields such as labor and environment in the context of CSR.[3] The focal point therefore should assess options for dispute management mechanisms, establish standards for neutral parties and processes and, if not available or appropriate on a local level, provide dispute management services itself with regard to a much wider range of issues than human rights (in a strict sense).

According to the comment on Draft Guidance Principle 29 (draft report page 26): 'A grievance mechanism can only serve its intended purpose if those whom it is intended to serve know about it, trust it and are able to use it.' In this respect, as was noted in connection with Draft Guiding Principle 10(b), CMF could have an enhancing role.

To emphasize the need for a worldwide neutral facility which is not adversely affected by any business, stakeholder, local or regional interest, WLF would propose an addition to the comment on Draft Guiding Principle 29 in which the need for a worldwide facility is promulgated. This facility could assess options for dispute management mechanisms, establish standards for neutral parties and processes and, if not available or appropriate on a local level, provide dispute management services itself. Additionally the facility should advocate the need for dispute management with key institutional actors, should train and build capacity of stakeholders and should develop case studies and best practices.

Acknowledgement

WLF would like to take this opportunity to express its sincere gratitude to professor Ruggie for his efforts to propose global standards in the area of business and

human rights, to increase the dialogue between business, stakeholders and communities and to connect corporate responsibility and global governance.

WLF consists of:

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[1]. The reference to other stakeholders encompasses states. This is reflected by the Draft Guiding Principles. For example Draft Guiding Principle 4 sees at host states concerns. The SRSG has mooted the idea of mediation/arbitration as a means of offering remedies in human rights claims. According to his report of 2009: 'Arbitration by [an existing body or network with international standing that could offer mediation of disputes involving human rights issues] might also be an option. In particular, companies operating in conflict affected areas should have a strong incentive to agree ex ante to use such mediation/ arbitration bodies in the event of disputes with communities, and their investors and States should have a strong interest in seeing them do so.' See **UN Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises** 'Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework' of 22 April 2009 UN Doc A/HRC/11/13, par. 112-113.

[2]. **UN Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises** 'Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework', UN General Assembly of 22 April 2009, UN Doc A/HRC/11/13, par. 99.

[3]. Reference can be made to the addendum to the 2008 Report entitled Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse, UN Doc A/ HRC/8/5, Add. 2 of 23 May 2008. The European Commission also defines CSR as a concept whereby companies integrate social and environmental concerns into their business operations and in their interaction with their stakeholders on a voluntary basis.

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Response from Michelle de Cordova on 31 Jan 2011

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

FROM NEI INVESTMENTS SUBMISSION: We compared the list of criteria for grievance mechanisms against several current and proposed standards: the International Finance Corporation Performance

Standards[1], the Canadian CSR Counsellor's review mechanism[2], the complaint mechanism proposed under Canadian Bill C-300 on extractive activity in developing countries[3], and the Responsible Jewellery Council code of practices[4]. The Guiding Principles criteria are comprehensive and reflect, or go beyond, the current scope of these principles and mechanisms. We look forward to further refinements that may emerge from the grievance mechanism pilot project.

Under requirement b (accessibility) there is a requirement for "adequate assistance to aggrieved parties who may face barriers to access, including... fear of reprisal". We would note that an important accessibility factor in such cases is the option for parties to remain anonymous, though this is perhaps implied here. At several points, reference is made to the concept of "legitimacy" in the context of human rights complaints. It might be helpful to elaborate this concept, which can be an area of disagreement among stakeholders, particularly when human rights complaints are made by individuals or organizations other than the rights holders themselves.

[1]**International Finance Corporation.** Performance Standards on Social & Environmental Sustainability. [Online] 2007. http://www.ifc.org/ifcext/sustainability.nsf/A ttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf

[2]**Government of Canada.** Review Process of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor. [Online] 2010. http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/info%20brochure%20Nov1.pdf

[3]**House of Commons Canada.** Bill C-300. [Online] 2009. http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4

[4]**Responsible Jewellery Council.** Principles and Code of Practices. [Online] 2009. http://www.responsiblejewellery.com/downloads/boxed_set_2009/S001_2009_RJC_Prin_COP.pdf

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Response from Lauri R. Tanner on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

Language regarding respect for and protection of **human rights defenders and environmental defenders*** should be added to the *Guiding Principles*.

In my Working Paper on the 2011 Update of the OECD Guidelines for Multi-National Enterprises (to be posted shortly on http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions), I propose that the new OECD Guidelines and Professor Ruggie's Guiding Principles should be revised by adding commentary designed to

> 1) help prevent reprisals, retaliation and other human rights abuses against **environmental and human rights defenders**, and,
>
> 2) protect these at-risk advocates around the world.

These defenders are often leaders of community groups which, for example, may be utilizing the OECD "Specific Instance Complaint" Mechanism through National Contact Points[1], as well as employing other methods to achieve environmental and social justice.

I have discussed this proposal with key stakeholders at OECD Watch, the Institute for Human Rights & Business, EarthRights International, and Human Rights Advocates (among others), all of whom agree that both the SRSG's Guiding Principles and the new 2011 OECD Guidelines' Human Rights chapter should

include Commentary about **human rights defenders and environmental defenders** who are at risk from abusive human rights violations from businesses or their supply chains.

Here, in the Draft Guiding Principles' final section- Guideline 29, the SRSG examines the six elements for **"Effectiveness Criteria for Non-Judicial Grievance Mechanisms"**.

It is in the second element – that these grievance mechanisms should be **"Accessible"** – that he distinguishes a significant area of concern for **environmental defenders and human rights defenders**, that of the **"fear of reprisal"**.

OECD Watch has documented numerous cases in which retaliation has been carried out against communities utilizing the OECD Specific Instance Complaint Grievance Mechanism.

Additionally, OECD Watch has seen reprisals carried out against its member NGOs in situations in which the underlying motive for the measures that have been taken (such as repeated legal actions constituting violations of freedom of association and expression) has been to prevent them from exercising their right to express concerns about intolerable labor practices and workplace conditions.[2]

According to an OECD Watch coordinator, there are also a number of other cases where there were threats to **human rights and environmental defenders** that prevented OECD Specific Instance Complaints from being filed with National Contact Points.

In Amnesty International's **"Comments in response to the UN Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises"**[3] for the Guiding Principles – Proposed Outline, posted November 4, 2010, they addressed particular considerations regarding **human rights defenders** and Indigenous peoples.

I support this language proposed by Amnesty and suggest that the SRSG consider elaborating on these concepts in the **Guideline 29 Commentary** accordingly and adding the term "environmental defenders"* (emphasis added below):

> In many cases of corporate-related human rights abuses, **human rights defenders** are at particular risk. Often, the host State plays a significant role in these abuses, not only through the use of public security forces, but also by failing to establish and implement adequate legal and practical protections.
>
> States have also often inappropriately used anti-terror or counterinsurgency laws to restrict the capacity of individuals and communities to carry out legitimate and peaceful activities in defence of human rights.
>
> **Amnesty International has documented cases in which human rights defenders,** and Indigenous and community leaders **have been threatened, intimidated, ill-treated and charged with unfounded offences when they have campaigned against extractive developments on their land or defended their right to be consulted before a government grants a concession for exploration or extraction of natural resources.**
>
> In this context, Amnesty International urges the SRSG to provide particular guidance for the effective protection of the rights of **human rights defenders** and the rights of Indigenous peoples against corporate-related abuses.
>
> We note that in the past few months, the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous People, and the Special Rapporteur on the situation of Human Rights Defenders have each released reports relevant to the protection of human rights in the context of corporate activity.[4] We urge the SRSG to align the Guiding Principles with the recommendations contained in these reports.

I hope that Professor Ruggie and his team seriously consider this proposal, as well as my proposal posted in the Comments section for Guideline 24.

Thank you,

Lauri Tanner

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J.D./LL.M. Candidate 2011-2012

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* Please note: In the Appendix of my Working Paper mentioned above, I direct the reader to the Executive Summary of a recent Report on Environmental Defenders in Mesoamerica from The Center for International Environmental Law, which provides a succinct definition of the term "Environmental Defender", and briefly elaborates on relevant issues of corporate social responsibility. http://www.ciel.org/Publications/IACHR_Oct10.pdf

[1] http://www.oecd.org/document/33/0,3746,en_2649_34889_44086753_1_1_1_1,00.html

[2] *See, e.g.* http://oecdwatch.org/cases/Case_165; http://oecdwatch.org/cases/Case_109.

[3] http://www.amnesty.org/en/library/info/IOR50/001/2010/en, Page 11.

[4] Report of the Special Rapporteur on the situation of **human rights defenders** to the 65th session of the UN General Assembly: 4 Aug 2010, A/65/223; Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of **indigenous people** to the 15th session of the UN Human Rights Council, 19 Jul 2010: A/HRC/15/37.

Definitions

For the purposes of these guiding principles:

The term **business enterprise** refers to all companies, both transnational and others, regardless of sector or country of domicile or operation, of any size, ownership form or structure.

The term **corporate** is used in the non-technical sense, interchangeably with 'business enterprises', regardless of their form.

Internationally recognized human rights refers at a minimum to the principles contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights), coupled with the eight ILO core conventions that form the basis of the Declaration on Fundamental Principles and Rights at Work.

Human rights risks refer to potential adverse impacts on human rights through a business enterprise's activities or relationships. Identifying human rights risks comprises an assessment both of impacts and – where they have not occurred – of their likelihood.

A **grievance** is understood as a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities.

The term **grievance mechanism** is used to indicate any routinized, state-based or non-state-based, judicial or non-judicial process through which grievances related to business abuse of human rights can be raised and remedy can be sought.

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Response from N.A.J. Taylor on 14 Dec 2010

Ratings (Yes/No): Relevance 1 ✔ 0 ✖ Agreement 1 ✔ 0 ✖

Here "business enterprise" should be extended to refer to institutional investors such as pension funds also. Apologies for repeating this point over (see: Preface and Introduction).

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Response from Cathie Guthrie on 12 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The identity of "duty bearer" needs to be defined. The general public will have difficulty making the distinction between 'having responsibility to respect' yet not being a 'duty bearer'.

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Response from French Human Rights Commission on 27 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

The definitions given at the end of the document do not go far enough. In particular, we feel it is essential to specify that the concept of 'enterprise' covers all social and economic activities, including services; that it relates to both public and private sector enterprises and that it expressly refers not only to parent companies but also to their subsidiaries, subcontractors and contracting parties.

Similarly, the concept of *'internationally recognized human rights'*, which is a questionable term in itself, seems to have been narrowed down to a definition *'at a minimum'*, which we feel is particularly unsatisfactory. The proposed 'definition' ignores quasi-universal treaties such as the International

Convention on the Rights of the Child, neglects international humanitarian law and international criminal law and overlooks relevant regional sources of law. It also makes no mention of customary law, which complements treaty law, even without including *jus cogens* norms and/or *erga omnes* obligations (see below*)*.

Lastly, the use of the term *'risks'* suggests a precautionary principle which fails to embody the notion of *'violations'* or *'abuses'* by businesses which constitute a chargeable offence. The notion of *'grievance'* should not be reduced to a vague sense of injusticebut should at the very least refer to an alleged violation for which a company can be held liable for the harm caused.

To strengthen Guiding Principle 15 on human rights due diligence, it would be useful to include a definition of 'due diligence' among the definitions at the end of the document. This definition could state that in addition to public commitments, due diligence includes: a) analysis of known or potential risks; b) the suitable prevention or protection measures undertaken; c) the resources needed to implement these duties effectively; d) systems to evaluate the results; e) proof of having made the necessary modifications and f) statutory notification of the steps taken to address the risks identified. It is also crucial to underline that this does not relate to the risks facing the business, but risks relating to individuals and groups who could potentially be harmed. Furthermore, the need for objectivity and impartiality raises the question of the need for an independent evaluator if there is a risk of conflicting interests.

In addition, the text does not define precisely what is meant by the right to *'effective remedy'*, whereas such a definition would shed more light on the subsequent analysis of the different types of mechanisms and how valuable they are in terms of the genuine effectiveness of the right to remedy. Among the definitions at the end of the document, a definition could therefore be given of the right to effective remedy as comprising: a) the existence of a procedure allowing a fair hearing of both sides before an independent and impartial judicial body; b) adjudicating judges with appropriate powers and jurisdiction; c) a reasonable timescale for processing grievances; d) access for third parties, NGOs and victims' associations; e) guarantees regarding the transparency and public visibility of the procedure; effective enforcement of rulings and g) sanctions and assurances that the offence will not be repeated, as well as suitable reparation, restitution, compensation or rehabilitation measures.

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Response from james eugene constable on 31 Jan 2011

Ratings (Yes/No): Relevance 0 ✔ 0 ✖ Agreement 0 ✔ 0 ✖

As an alternative to the grievance procedure, I would suggest instead a register of pre-condtions or pre-contract conditions. In English law, these conditions would be veiwed as invitations to treat rather than binding contracts. However in International ADR dispute, the different parties would have recourse in a non-violent way to the original intentions so as to restart or recharacterize the agreement, which evloves into a contract, in times of dsiagreement or where international efforts of reconciliation are needed.

James Constable

Contributors who created public user profiles

Amy Lehr	a.lehr	Attorney at Foley Hoag's CSR practice.
Anita Kelles-Viitanen	kellesa	I am chair of Attac Finland and a vice member in the Finland Advosory Board on Corporate Responsibility, also an adviser in the Norway/Finland financed World Bank Trust Fund on Environmentally and Socilally Sustainable Development. I am also a former member in the Finland National Advisory Board on International Human Rights.
Antoine Martin	a.p.martin	PhD researcher and Associate Lecturer in Public International Law
BASF Group	BASF - The Chemical Company	BASF is the world’s leading chemical company. With about 105,000 employees, six Verbund sites and close to 385 production sites worldwide we serve customers and partners in almost all countries of the world.
Cathie Guthrie	cguthrie@company2keep.com	I am founder and President of Company2Keep Inc., an on-line platform where socially responsible organizations in the profit and not-for-profit sectors engage consumers about their value commitments. Our Mission is to advance and popularize the cultural shift occurring in the way business is conducted and the way consumers are examining their individual and collective footprints to enrich their legacy.
Chamber of labour austria	Arbeiterkammer	The Federal Chamber of Labour in Austria represents the interests of 3.2 million employees and consumers in Austria.
Compliance and Capacity International, LLC	comcapint	Compliance and Capacity International, LLC, is a sanctions practioniers and due diligence advisory group formed by former UN officials
conor anthony gearty	conor	professor of human rights law at LSE (UK)
Constantin Köster	ConstantinKoester	I recently published my doctorial thesis on the Human Rights Responsibilities of Multinational Corporations in International Law (Die völkerrechtliche Verantwortlichkeit privater (multinationaler) Unternehmen für Menschenrechtsverletzungen, Berlin 2010)
Danny Vannucchi	dvannucc	Amnesty International

Dawn Wolfe	Dawn Wolfe	Boston Common Asset Management is dedicated to the pursuit of financial return and social change. Dawn researches and engages global companies for Boston Common's portfolios.. Prior to joining Boston Common, Dawn worked as an account executive and development consultant for non-profit organizations across the U.S. Dawn has a history of interest in human rights and labor. She has served as a journalist in Chile covering human rights abuses there. She has researched employment issues in the NAFTA countries with a heavy emphasis on Mexico, where she spent time with the Foreign Affairs Ministry working on economic competitiveness issues. She received her BA in Communications and Spanish from Santa Clara University and her MA in International Affairs from the Johns Hopkins University, where she specialized in emerging market finance and Latin American political economy.
Eberhard von Wangenheim	evwangenheim	Consultant
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Favio Farinella	faviofarinella	Professor of International Human Rights Law and Public International Law, Argentina
French Human Rights Commission	French Human Rights Commission	The French Human Rights Commission is the national institution for the promotion and protection of human rights in France. It is accredited with A status by the International Coordinating Committee.
Gao Wei Wei	Serenity.Serena	I am aware of my attention constantly onto a vision of the world where workplaces are full of self-expressions; where humanities benevelantly participant in the evolution of our own consciousness by allowing the bodies' self-healing (or in another word, nature's self-balancing) capacities to manifest.
Gaston Bilder	gbilder	International Legal Counsel - Community Relationships
Global Reporting Initiative	Global Reporting Initiative	Global Reporting Initiative (GRI) is a network-based non-governmental organization that aims to drive sustainability reporting and Environmental, Social and Governance (ESG) disclosure by all organizations. GRI produces the world's most widely used Sustainability Reporting Framework to enable this drive towards greater transparency. The Framework, incorporating the G3 Guidelines, sets out the Principles and Indicators organizations can use to measure and report their economic, environmental, and social performance. GRI is committed to continuously improving and increasing the use of the Guidelines, which are freely available to the public.

Ian Higham	ihigham	I am writing a thesis on the business response to the work of the Special Representative. I am a student of International Affairs at The George Washington University in Washington, D.C.
Initiativ for etisk handel	ETI Norway	Multi stakeholder initiative for ethical trade
Investors Against Genocide, Chairperson Eric Cohen	Eric Cohen	Chairperson, Investors Against Genocide
james eugene constable	cnmlly@aol.com	NGO and international peace worker. The mission of this Center is very much at the forefront of world change.
John H Knox	jhknox	Professor of Law, Wake Forest University, North Carolina, USA.
Jose Rafael Unda	jrunda	Public-private partnership
Katherine L Tyler	K Tyler	
Kendyl Salcito	Nomogaia	Nomogaia is a think tank dedicated to clarifying the corporate responsibility to respect human rights. To this end, Nomogaia has been developing and testing a clear, comprehensive, repeatable methodology for human rights impact assessment. On-the-ground research and test-HRIAs have been conducted in Africa, Southeast Asia and Latin America.
Lauri R. Tanner	laurirose	I am a nonprofit/NGO fundraising consultant and also currently a law student in my 4th of 5 years of joint J.D./LL.M. program in San Francisco. My focus is on how we can protect environmental defenders from human rights violations, particularly in the Americas, but globally as well. I am seeking communication with any others working or interested in this critical human rights defenders issue. My publications & résumé are at http://lauritanner.com. Email is laurirose@mac.com.
lescuyer	animal_social	
Maplecroft	Maplecroft	http://www.maplecroft.com
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Matt Crossman	MattCrossman	Although I am from the business community, I work in SRI & am interested in the application of the principles through the responsible investment process.
Matthew Tukaki	mtukaki	Executive Chairman of The Sustain Group based in Sydney Australia, also the Local Network Representative for the United Nations Global Compact
Michael Deas	Palestinian BDS National Committee	In 2005, Palestinian civil society issued a call for a campaign of boycotts, divestment and sanctions (BDS) against Israel until it complies with international law and Palestinian rights. The Palestinian BDS National Committee is a wide coalition of the largest Palestinian mass organisations, trade unions, networks and organisations.

Michael Eastman	meastman	Executive Director, Labor Law Policy US Chamber of Commerce
Michelle de Cordova	mdecordova	Manager, Public Policy & Research at NEI Investments, Canada. About NEI Investments: With over C$4.8 billion in assets under management, NEI Investments' approach to investing incorporates the thesis that companies integrating best environmental, social and governance (ESG) practices into their strategy and operations will provide higher risk-adjusted returns over the long term. Through our company evaluations, our active engagement with the companies in our funds, and our issues research, we have developed considerable insight into good practices and weaknesses in corporate practice with respect to human rights, which we endeavour to share in the context of consultations on public policy and standards. Mining and oil and gas companies are strongly represented on Canadian exchanges, and in recognition of this fact our ESG Program has a special focus on the extractive industries. Lack of consensus on expectations of companies with respect to human rights has long been a source of reputational and social license risk for Canadian companies, particularly for extractives companies that operate in high-risk countries and create major impacts on host communities.
N.A.J. Taylor	najtaylordotcom	N.A.J Taylor is a doctoral candidate in International Relations at La Trobe University, principal of Taylor McKellar, and a lecturer at the Graduate School of Management.
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Robert Grabosch	rGrabosch	German candidate attorney, European Center for Constitutional and Human Rights. My views are not necessarily those of the ECCHR, unless expressly stated.
susan aaronson	saaronson	research on trade and human rights, procurement and human rights,
Suzan van der Meij	MVOPlatform	The MVO Platform is a network of Dutch civil society organisations and trade unions that are working together to promote Corporate Social Responsibility. The goal of the Dutch CSR Platform is to stimulate, facilitate and coordinate activities of the different organizations in order to reinforce each other's efforts. The emphasis of the MVO Platform lies on issues dealing with CSR in developing countries.
Vidar Lindefjeld	vlindefjeld	I work for the Confederation of Norwegian Enterprise on i. a. CSR issues