

**Comments on the “Guiding Principles for the Implementation of the United Nations
‘Protect, Respect and Remedy’ Framework” Developed by the United Nations
Special Representative on Transnational Corporations and other Business
Enterprises**

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Introduction

The Guiding Principles for the Implementation of the United Nations ‘Protect, Respect and Remedy’ Framework (“GPs”) mark the evolution of the extensive body of work undertaken by the Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises, Prof. John Ruggie. The GPs present recommendations on how to operationalize the ‘Protect, Respect and Remedy’ Framework (“Framework”) and are undoubtedly an articulate step in giving life to the Framework. However, concerns with the Framework present themselves again in the GPs. This report will address those concerns as well as outline suggestions for promoting accountability at the international level when nations are unwilling or unable to do so themselves.

Background

The groups submitting these comments have been extensively involved in the mandate and work of the Special Representative for some time.¹ Our initial concerns centered around the lack of legal obligations on corporations pertaining to human rights, the consequences of relegating legal duties to protect human rights to States alone who may be unwilling or unable to adequately ensure the promotion and protection of human rights due to political or economic factors, as well as the lack of coherence amongst voluntary systems seeking to protect human rights.

During the 14th Session of the Human Rights Council, we again urged the Special Representative to consider further the viability of international legal obligations to be placed over non-State actors, noting in particular the failures of the Framework in protecting human rights where governments cannot or will not enforce human rights protections.² At this time, we also advocated for mandating domestic disclosure laws pertaining to human rights.³

We are pleased to see that many of our recommendations have been included in the GPs, most notably those relating to disclosure, both under the State duty to protect and the corporate responsibility to respect.⁴ We do, however, note that the GPs suffer from similar deficiencies present in the Framework.

We believe that the GPs fail to and should consider:

- the viability of international legal mechanisms, including accountability and oversight mechanisms, to be placed over corporate actors to address situations where States cannot or will not engage in their duty to protect human rights or where States outsource sensitive functions;
- the need for consensus around standards pertaining to corporate disclosures on human rights, and specifically for support of the Global Reporting Initiative (“GRI”);
- the imperative of home State governments to regulate the activities of their corporations by ensuring recognition of human rights impacts both

¹ See, eg., “Corporate Accountability – Ensuring the Promotion and Protection of Human Rights by Non-State Actors” submitted to the 11th Session of the Human Rights Council and available at <http://daccess-ods.un.org/TMP/7326339.html>

² “Corporate Accountability: The State Duty to Protect and Mandating Social and Human Rights Reporting” submitted to the 14th Session of the Human Rights Council and available at <http://daccess-ods.un.org/TMP/9013309.html>

³ Id.

⁴ GP 5 and commentary under “Fostering Business Respect for Human Rights”: “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.” See also GP 19 and commentary under “Human Rights Due Diligence”: “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.”

- in corporate policy and through mandating corporate disclosures on human rights;
- the necessity of strong legal remedies to be provided for human rights abuses and encouraging host States, home States, multi-lateral organizations and international organizations to provide such measures.

Comments Pertaining to the State Duty to Protect

Our comments pertaining to the State duty to protect focus on two persisting concerns: 1) the State-business nexus that may merge both a duty to protect with a responsibility to respect, and 2) the ability of States to act as human rights protectors in conflict areas.

With reference to the State-business nexus, the Commentary properly recognizes the imperative of human rights due diligence not only as a voluntary effort, but rather as a requirement stemming from the duty to protect and responsibility to respect.⁵ Importantly, the Commentary also refers to the creation of independent monitoring and accountability mechanisms in situations where States outsource the delivery of services.⁶ HRA, Earthjustice and Right Respect echo the need for strong accountability mechanisms to be created, especially considering the increased outsourcing of sensitive public functions, including military and security services and immigration detention services, both industries that have evidenced a high degree of human rights abuses.⁷ In such cases, the creation of oversight mechanisms should not be an after-thought to outsourcing, but rather a necessary predicate before outsourcing occurs.

In terms of business activity in conflict zones, the Commentary notes that home States have specific roles to play in assisting when host States “whether knowingly or inadvertently... are unable to exercise effective control in all circumstances”.⁸ We agree. Host States may lack the ability or interest to enforce any human rights protections for their local populations.

Reports from the diamond mines in Zimbabwe, for example, paint such a picture. The stand on human rights abuses taken by the Kimberley Process – a joint government, industry and civil society initiative to stem conflict and abuse associated with diamond mining - has taken center stage since Zimbabwe’s government clamped down on operations at the Marange mine at the end of 2008, during which Human Rights Watch reported that more than 200 people were killed by government forces seeking to secure the resources of the mine.⁹ Following several inspections, the Kimberley Process cleared two sales of diamonds mined by Mbada Diamonds and Canadile Resources from the mine. Nonetheless, Human Rights Watch reported that large parts of the fields remain under the control of the Zimbabwe Defense Forces, “who harass and intimidate the local

⁵ Commentary for GP 6.

⁶ Commentary for GP 7.

⁷ Supra at note 2.

⁸ Commentary for GP 10.

⁹ Avi Krawitz, “Delegates Call Upon Kimberley Process to Address Human Rights”, Diamonds.net, Nov. 1, 2010. Available at <http://www.diamonds.net/news/NewsItem.aspx?ArticleID=33157>.

community and engage in widespread diamond smuggling.”¹⁰ Still, the Kimberly Process is moving forward in Marange before concerns are fully addressed, awarding Anjin Limited, a Chinese company with concessions in the fields.¹¹ Although State forces are among those implicated, the involvement of both mining companies and the Kimberly Process is fuelling these human rights violations.

This is just one example of the weakness in relying on host States to protect human rights with regard to business activity. The reality is that home States hold the power in this regard, and should impose real and meaningful consequences on businesses complicit or engaged in human rights abuses. The Special Representative notes this in Commentary: “[States should be] ... exploring civil, administrative or criminal liability for businesses domiciled or operating in their territory and/or jurisdiction that commit or contribute to international crimes.”

HRA, Earthjustice and Right Respect thus believe that in the context of outsourcing State functions as well as in conflict zones, legal mechanisms, including standards of conduct and accountability mechanisms, need to be put in place to ensure human rights are protected. These mechanisms should be encouraged in home States, host States, multilateral organizations as well as at the international level. Consideration should also be given to whether the International Criminal Court could play a role in holding corporations or their CEOs accountable. Lastly, consideration should be given to how a special procedure under the auspices of the Human Rights Council can be used to provide accountability for human rights abuses by corporate actors.

Comments Pertaining to the Corporate Responsibility to Respect

Our comments pertaining to the corporate responsibility to respect center on human rights due diligence contained in GPs 15 through 19. We commend the Special Representative for noting the importance of involving stakeholder groups in the dialogue with businesses as a means of understanding human rights impacts, and echo the need for inclusive, transparent and open dialogue with various stakeholders prior to engagement.¹²

Further, we commend the Special Representative for elaborating on the need for communication and transparency in a business enterprises’ human rights performance.¹³ We refer back to our submission during the 14th Session of the Human Rights Council, where we called for specific adoption of the GRI Indicators as a consistent lens for human rights reporting. The GRI provides tools to assist companies in their human rights reporting, including in helping companies begin the process of identifying human rights-relevant issues in their operations and to assist in translating these into meaningful and effective reporting.¹⁴ The outright adoption of a common framework like the GRI is

¹⁰ Id.

¹¹ Avi Krawitz, “Canadian Officials Appear in Court”, Diamonds.net, Nov. 9, 2010. Available at <http://www.diamonds.net/news/NewsItem.aspx?ArticleID=33289>.

¹² Commentary for GP 16.

¹³ Commentary for GP 19.

¹⁴ Global Reporting Initiative, *A Resource Guide to Corporate Human Rights Reporting*, available at www.globalreporting.org/humanrights

imperative as consistency in standards of disclosure is necessary for such disclosure to have any value.

HRA, Earthjustice and Right Respect thus believe that the GRI should be used as a common system for developing corporate disclosures pertaining to human rights, and we encourage the Special Representative to urge States to require corporations to align themselves with the reporting requirements of the GRI.

Comments Pertaining to Access to Remedy

With regard to access to remedy, the Special Representative is to be particularly commended for clarifying the importance of building both judicial and non-judicial mechanisms, and housing them within enterprises, across enterprises as in industry associations, and within home and host States.¹⁵

The GPs note in Commentary that the “State-based judicial and non-judicial mechanisms should form the foundation of a wider system of remedy for business-related human rights abuse”.¹⁶ We agree that business level grievance mechanisms can act as early level warning system. However, for true accountability to exist, States must ensure robust judicial mechanisms to prevent and remedy human rights abuses by non-State actors. Mechanisms housed in enterprises or industry associations cannot be allowed to substitute for independent judicial mechanisms. This threat of legal recourse is not targeted at well-intentioned corporate actors, but rather at the worst offenders: those engaged in or acting in complicity with human rights violations. One good example of existing legal remedies is the Alien Tort Statute in the United States. We are concerned that one federal court recently held that it did not apply to corporations and we hope that this decision is reversed by the Supreme Court or through legislation.

We also welcome the “Effectiveness Criteria for Non-Judicial Grievance Mechanisms” as contained in GP 29 which clarifies that such mechanisms should be legitimate, accessible, predictable, equitable, rights-compatible, transparent and operational-level mechanisms should be based on dialogue and engagement. However, the reality is that non-judicial mechanisms are currently both under-used and under-developed.

HRA, Earthjustice and Right Respect therefore believe that emphasis should be focused on building or strengthening home and host State judicial mechanisms to ensure human rights promotion and protection. Issues of access must be paramount in States’ consideration of this end. Non-judicial dispute mechanisms should be explored. However, the key to meaningful accountability is the presence of robust legal remedies.

¹⁵ Commentary for GP 23.

¹⁶ Id.

Conclusion

HRA, Earthjustice and Right Respect credit the good work of the Special Representative towards developing these GPs. However, we believe that the aforementioned concerns highlight areas where the GPs are deficient.

We believe that the GPs should consider:

- the viability of international legal mechanisms, including accountability and oversight mechanisms, to be placed over corporate actors to address situations where States cannot or will not engage in their duty to protect human rights or where States outsource sensitive functions;
- the need for consensus around standards pertaining to corporate disclosures on human rights, and specifically for support of the of the Global Reporting Initiative (“GRI”);
- the imperative of home State governments to regulate the activities of their corporations by ensuring recognition of human rights impacts both in corporate policy and through mandating corporate disclosures on human rights;
- the necessity of strong, independent legal remedies to be provided for human rights abuses and encouraging host States, home States, multi-lateral organizations and international organizations to provide such measures.