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**Comments in response to the UN Special Representative of the Secretary General on
Transnational Corporations and other Business Enterprises'
*Guiding Principles – Proposed Outline (October 2010)***

Introduction

Amnesty International appreciated the opportunity to make oral observations on the Proposed Outline of the Guiding Principles at the recent consultation with civil society in Geneva on 11 and 12 October. We take this opportunity to supplement our contribution with further written comments to the outline. We also take this opportunity to again urge the holding of a multi-stakeholder consultation so as to allow States, companies and civil society to jointly discuss the proposed Guiding Principles and the establishment of post-mandate mechanisms.

Summary

Over the past six years of his mandate, the UN Special Representative of the Secretary General on transnational corporations and other business enterprises (SRSG), Professor Ruggie, has significantly progressed discussions on how to address corporate-related human rights abuses. This has occurred through the development of a framework, the “Protect, Respect, Remedy Framework”, within which the discussion has been able to progress among States, companies and civil society. Re-emphasising the duties of States while advocating that companies ought to undertake human rights due diligence so as to prevent, minimize and address adverse human rights impacts have been positive developments. Further, there has been a welcome emphasis on the need for those affected by corporate human rights abuses to obtain remedy.

Despite this progress, however, Amnesty International considers there are several fundamental issues within the Protect, Respect, Remedy Framework that must be addressed as the SRSG finalizes his mandate, particularly in the elaboration of Guiding Principles.

In summary, Amnesty International considers that in order to ensure that the work of the SRSG contributes to closing the governance gaps that he has identified as the root cause of the business and human rights predicament, the Guiding Principles must:

- 1) Clearly articulate that, consistent with their duty to protect human rights, States must - through legal and policy measures - require corporate human rights due diligence and impose sanctions if companies fail to carry out such due diligence. This is essential for linking the first and second pillars of the Protect, Respect and Remedy Framework.
- 2) Accurately reflect the international treaty bodies' interpretation of the duty to protect human rights, which make clear that States must take steps to prevent third parties, including business, from abusing the human rights of individuals in other countries.
- 3) Emphasize the obligation of States to engage in international cooperation and assistance for the realization of human rights, required under various international human rights treaties and the UN Charter.
- 4) Make explicit recommendations regarding how States can take steps to prevent companies

from abusing the human rights of individuals in other countries. These are essential to closing the “governance gaps” when companies operate across territorial borders. In particular, the Guiding Principles should specify that States should:

- a) Put in place legislative and other measures to prevent businesses in their countries from causing or contributing to human rights abuses in their operations outside the country. In particular, States should:
 - i) develop and enforce legal and policy measures with extraterritorial effect, such as requiring corporate entities to undertake human rights due diligence throughout the corporate group; and
 - ii) develop laws and policies to regulate activities that present an identifiable and foreseeable risk to human rights abroad by companies within their territories. Any such legislation or policy should be in conformity with obligations under the UN Charter and relevant principles of international law.
 - b) As a minimum, ensure access to judicial and non-judicial mechanisms within their jurisdiction for those whose human rights are abused by corporate entities domiciled in their territory. This should include removing existing obstacles to such access as far as possible.
 - c) Engage in international cooperation in the context of the provision of remedies for human rights abuses, such as by engaging in international cooperation in investigating alleged human rights abuses, and providing technical and financial assistance to other States to ensure their institutions are equipped to provide remedy to those whose rights are abused by corporate actors.
 - d) Engage in international assistance and cooperation where such cooperation would assist in enforcing penalties imposed for human rights abuses, and enforcing remedies granted to those whose rights are abused by companies.
- 5) Ensure that the third pillar more clearly reflects the right to effective remedy as articulated under international law, including by emphasizing the State duties to: ensure an effective remedy for human rights abuses; develop the possibilities of judicial remedy; ensure that rights-holders have their right to remedy determined by a competent State authority; ensure that competent authorities enforce remedies that are granted; and ensure equality before courts and tribunals and the right to a fair trial.
 - 6) Provide greater clarity on the need for States to overcome the many barriers to judicial remedy that exist in the context of corporate-related human rights abuses, and provide clear guidance on how to achieve this. This should include giving particular attention to obstacles to effective remedy associated with the complex and often obscure nature of multinational corporate groups and their operations across territorial borders.
 - 7) Provide greater guidance on the important role of State-based non-judicial mechanisms in the provision of remedy, including by providing guidance on how their effectiveness and accessibility may be strengthened.
 - 8) Draw upon the work of other Special Procedures to address issues such as the role of business in the provision of public services, the protection of Indigenous peoples’ rights, and protecting the rights of human rights defenders.

Comments

The outline of the Guiding Principles is reproduced in boxed text in this document. Amnesty International's comments follow.

I. THE UN FRAMEWORK

The framework rests on three foundational principles: 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 may occur; and greater access by victims to effective remedy, judicial and non-judicial. (2010)

Each principle is an essential component in a dynamic whole: 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.

The framework's normative contribution does not stem from proposing new legal obligations, but from the compilation of diverse existing standards and practices; integrating them into a single and coherent template; elaborating their implications for states and businesses; and helping us to identify where current practices fall short and how they might be improved.

II. THE STATE DUTY TO PROTECT HUMAN RIGHTS

Legal and policy foundations

The State duty to protect against third party abuse is grounded in international human rights law. The specific language employed in the main United Nations human rights treaties varies, but all include two sets of obligations. First, the treaties commit States parties to refrain from violating the enumerated rights of persons within their territory and/or jurisdiction. Second, the treaties require States to "ensure" (or some functionally equivalent verb) the enjoyment or realization of those rights by rights holders. In turn, ensuring that rights holders enjoy their rights requires protection by States against other social actors, including business, who impede or negate those rights. Guidance from international human rights bodies suggests that the State duty to protect applies to all recognized rights that private parties are capable of impairing, and to all types of business enterprises. ...The State duty to protect is a standard of conduct, and not a standard of result. That is, States are not held responsible for corporate-related human rights abuse per se, but may be considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs. (2009)

The SRSG has emphasized that all three pillars of the Protect, Respect and Remedy Framework "are intended to be mutually reinforcing parts of a dynamic, interactive system to advance the enjoyment of human rights".¹ The SRSG has also clarified that to "discharge the [corporate] responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts".²

Corporate human rights due diligence is clearly an important component in preventing corporate-related human rights abuses. Given that States may be in breach of their duty to protect if they fail to take appropriate steps to prevent human rights abuses by business, the logical conclusion is that States should require companies to undertake human rights due diligence. Yet, the outline of the Guiding Principles does not make this explicit link between the first and second pillars of the Protect, Respect and Remedy Framework.

¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and Human Rights: Further steps towards the operationalization of the "Protect, Respect and Remedy" Framework*, A/HRC/14/27, 9 April 2010 (hereafter SRSG 2010 Report), para 2.

² UN 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 (hereafter, SRSG 2008 Report), para 56.

The Guiding Principles should clearly state that the establishment by States of mandatory corporate human rights due diligence requirements is a central component of the State duty to protect. States should actively monitor due diligence processes, be able to require the provision of information on corporate human rights due diligence, and impose sanctions if companies fail to take adequate steps to prevent, minimize and address adverse impacts on human rights. States should also be encouraged to require companies to publicly report on their due diligence processes so as to facilitate transparency and accountability.

The extraterritorial dimension of the duty to protect remains unsettled in international law. Current guidance from international human rights bodies suggests that States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis, and that an overall test of reasonableness is met.

Within those parameters, some treaty bodies encourage home States to take steps to prevent abuse abroad by corporations within their jurisdiction. ... There are also strong policy reasons for home States to encourage their companies to respect rights abroad, especially if a State itself is involved in the business venture. Such encouragement gets home States out of the untenable position of being associated with possible overseas corporate abuse. And it can provide much-needed support to host States that lack the capacity to implement fully an effective regulatory environment on their own. (2009)

Amnesty International considers the above interpretation of international human rights law both regressive and entirely insufficient for addressing the problems posed by corporate-related human rights abuses. As discussed in more detail below, UN treaty bodies have identified the obligation of States to protect the human rights of people based outside their territory and jurisdiction and clarified that States must take appropriate steps to prevent their own citizens and companies from abusing the rights of individuals and communities in other countries.

Extraterritoriality – essential to close the “governance gaps”

When addressing corporate activity beyond the territory of a State, the Guiding Principles must be more forthright in the steps that States should take. As the SRSG has identified:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.³

The Guiding Principles must address this “fundamental challenge” of transnational activity if the six-year mandate of the SRSG is to effectively contribute to resolving the problems that permit companies to abuse human rights with near impunity.

Clearly, the “governance gaps” are greatest when companies operate across territorial borders. In order to address the governance gaps, the Guiding Principles should provide clear guidance to States on the measures (legislative and other) that they should take to prevent companies from abusing the human rights of individuals outside their territory and jurisdiction. The exercise of jurisdiction to regulate corporate conduct abroad and the provision of remedies for activities that occur outside the territory of a State require far greater attention within the Guiding Principles than is currently proposed.

Extraterritoriality and international human rights law

The outline for the Guiding Principles presents a view of international human rights law that does not reflect interpretations of international law by treaty bodies. In particular, the statements above are inconsistent with the General Comments of the Committee on Economic, Social and Cultural Rights, which has clarified the obligation of States to protect the human

³ SRSG Report 2008 para 3.

rights of people based outside their territories and jurisdiction. In General Comment 14, for example, concerning the right to health, the Committee provided that:

*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.*⁴

The Committee made similar observations on the right to water in General Comment 15,⁵ and the right to social security in General Comment 19.⁶ Similarly, the Committee on the Elimination of Racial Discrimination has also recommended that States parties take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in their country that negatively impact on the enjoyment of rights of Indigenous Peoples in territories outside the country. The Committee has called on State parties to explore ways, including regulatory measures, to hold transnational corporations accountable.⁷

Further, a variety of human rights treaties and other instruments expressly impose obligations on States to establish in their domestic laws, and enforce in practice, criminal jurisdiction over their nationals in relation to, for instance: complicity in torture, enforced disappearance, the sale of children, child prostitution, child pornography, or apartheid, wherever in the world the abuse (and the act constituting complicity) are committed.⁸

The outline of the Guiding Principles also fails to refer to the State duty to engage in international cooperation for the realization of human rights as contained in the UN Charter, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. Under arts 55(c) and 56 of the Charter, all members of the UN pledge themselves to take joint and separate action in cooperation with the UN to achieve universal respect for, and observance of,

⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4 11 August 2000, para 39.

⁵ Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law: ⁵ UN Committee on Economic, Social and Cultural Rights, *General Comment 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2002/11, 20 February 2003, para 33.

⁶ States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law: UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19, para 54.

⁷ For example, in a recent observation on Australia, the Committee on Elimination of Racial Discrimination noted "with concern the absence of a legal framework regulating the obligation of Australian corporations at home and overseas whose activities, notably in the extractive sector, when carried out on the traditional territories of Indigenous peoples, have had a negative impact on Indigenous peoples' rights to land, health, living environment and livelihoods (arts. 2, 4, 5). ... In light of the Committee's general recommendation 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of Australian corporations which negatively impact on the enjoyment of rights of indigenous peoples domestically and overseas and to regulate the extra-territorial activities of Australian corporations abroad. The Committee also encourages the State party to fulfil its commitments under the different international initiatives it supports to advance responsible corporate citizenship": *Concluding Observations of the Committee on Elimination of Racial Discrimination on Australia*, CERD/C/AUS/CO/15-17, 13 September 2010, para 13. See also, *Concluding Observations of the Committee on Elimination of Racial Discrimination on Canada*, CERD/C/CAN/CO/18, 25 May 2007, para 17; *Concluding Observations of the Committee on Elimination of Racial Discrimination on the United States of America*, CERD/C/USA/CO/6, 8 May 2008, para 30.

⁸ See, e.g., *UN Convention against Torture*, 1465 UNTS 85, articles 4(1) and 5(1)(b); *International Convention for the Protection of All Persons from Enforced Disappearance* [not yet in force], articles 6 and 9(1)(b); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 2171 UNTS 227, articles 3 and 4(2)(a); *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 1015 UNTS 243, articles 3 and 4.

human rights and fundamental freedoms for all.⁹ The Committee on Economic, Social and Cultural Rights has noted:

*[I]n accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.*¹⁰ [emphasis added]

The development of laws that have an extraterritorial element is essential to effectively prevent companies from abusing human rights in other countries. The Guiding Principles should make clear that States must put in place legal and other measures to prevent companies abusing human rights in other countries, and that States must establish effective means of cooperating to prevent and address corporate human rights abuses.

Extraterritoriality and regulatory measures

In referencing extraterritoriality the SRSR has referred to “a critical distinction” between “two very different phenomena”:¹¹ jurisdiction that relies on the nationality of the perpetrator so as to be exercised directly in relation to actors or activities overseas; and domestic measures that have extraterritorial implications. Amnesty International would challenge the view that any differences between these two categories constitute a “critical distinction” for the purposes of international human rights protection. In order for States to comply with their international human rights obligations, it is neither necessary, useful, nor in some cases easy, to allocate or divide between these categories. An approach that relies on categorizing regulations as falling into one type of jurisdiction rather than another could be unintentionally misleading insofar as it would understate the actual scope and range of State obligations under international human rights law, and might obscure the fundamental objective of protecting human rights.

Across the spectrum of legal measures that would have extraterritorial dimensions in relation to the human rights impacts of business, a range of measures are permissible, necessary to discharge the duty to protect human rights beyond borders, and vital to meaningfully address the challenges of transnational corporate operations and the governance gaps created by globalization. These include, for example:

- General requirements placed by States on companies to take actions such as carrying out human rights due diligence throughout their operations, or publically reporting on certain aspects of performance. Such laws could be based on territory for jurisdictional authority, but could also employ notions of nationality by requiring the conduct of corporate human rights due diligence abroad.
- Laws that address a specific and foreseeable risk to human rights as a result of specific corporate activity. For example prohibitions on the export of certain materials such as hazardous waste, prohibitions on certain specific conduct, prohibitions on supplying certain goods or services, prohibitions on companies operating in specific countries or areas, etc. Again, such laws may be based on notions of territoriality and/or nationality, or other bases for jurisdiction.

The overriding imperative is not whether the exercise of jurisdiction is based on one notion of jurisdiction or another, but that States are urged to develop laws and put in place other steps to prevent companies abusing human rights in other countries. States should also be encouraged to cooperate in the development of regulatory frameworks as this is vital to ensure that “governance gaps” are closed, and would be consistent with the SRSR’s emphasis on the need for States to ensure policy coherence at the national and international levels.

⁹ *Charter of the United Nations* arts 55(c) and 56. See also art 1(3), which refers to the purpose of the UN as including “to achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all”.

¹⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties’ obligations*, U.N. Doc. E/1991/23, annex III at 86 (1991), para 14.

¹¹ SRSR Report 2010, para 48.

Extraterritoriality and enforcement

The Guiding Principles should also make clear that States must adequately enforce regulations to prevent companies causing or contributing to human rights abuses in their operations outside the country. Many of the legal measures described above could be effectively enforced by and sanctions imposed within the territorial State. In some cases cooperation between States may be necessary. The Guiding Principles should call on States to cooperate in such cases, in line with accepted principles and obligations of international law. An over-riding consideration must be that jurisdictional vacuums are not enabled to exist, and that jurisdictional uncertainties are dealt with swiftly and with the protection of human rights as an overriding concern.

Beyond traditional measures for corporate sanctions, such as fines, other measures should also be encouraged. This would include the withholding of State support to corporate entities that fail to respect human rights. States, individually and collectively, should ensure that access to public finance and other forms of official support, including support through multilateral agencies, be made explicitly conditional on companies respecting human rights, including when acting outside the territory of the supporting State. In this regard, States should ensure that when assessing the potential for provision of official support to corporate activities their export credit agencies undertake their own human rights due diligence and require companies to undertake human rights due diligence.

Extraterritoriality and remedy

The Guiding Principles should also clearly urge States, as a minimum, to enable access to judicial and effective non-judicial mechanisms in their jurisdiction for those whose human rights are abused by corporate entities domiciled in their territory. The SRSG has queried under the third pillar whether access to judicial mechanisms may be appropriate in relation to “alleged egregious human rights abuses” abroad by business enterprises domiciled in a State’s territory and/or jurisdiction. The SRSG clarified during the consultation with civil society that this was intended to refer to activities that amount to international crimes. Amnesty International considers it entirely inappropriate to seek to restrict access to home State courts to cases of “egregious” human rights abuses (as discussed further below). The challenges faced by rights-holders whose rights have been abused by companies are the major obstacles to accessing courts in practice, not in principle. Moreover, such a recommendation would be regressive, given many States already allow access to their courts for foreigners to claim damages or seek other forms of relief in cases that do not amount to international crimes.

The Guiding Principles should also refer to the duty to engage in international cooperation in the context of the provision of remedies for human rights violations. Consistent with the Vienna Declaration and Programme of Action,¹² such international cooperation should involve providing technical and financial assistance to other States to ensure their institutions are equipped to provide remedy to those whose rights are abused by corporate actors. Further, the Guiding Principles should urge States to engage in international assistance and cooperation where such cooperation would assist in enforcing penalties imposed for human rights abuses, and enforcing remedies granted to those whose rights are abused by companies.

¹² “Every State should provide an effective framework of remedies to redress human rights grievances or violations. ... [I]nstitutions concerned with the administration of justice should be properly funded, and an increased level of both technical and financial assistance should be provided by the international community”: *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, [art 27], UN Doc No A/CONF.157/23 (1993). See also arts 1, 4, 10 and 13 referring to the need for international cooperation.

Ensuring policy coherence

State practices exhibit substantial legal and policy incoherence and gaps, which often entail significant consequences for victims, companies and States themselves. The most common gap is the failure to enforce existing laws, although for “at-risk” and vulnerable groups there often is inadequate legal protection in the first place. The most prevalent cause of legal and policy incoherence is that departments and agencies which directly shape business practices – including corporate law and securities regulation, investment, export credit and insurance, and trade – typically work in isolation from, and uninformed by, their Government’s own human rights obligations and agencies. (2010)

Key issues:

- Discussing ways to raise awareness and observance of States’ human rights obligations by State-based institutions that shape business practices.
- Considering options for how to avoid States’ constraining their ability to meet their international human rights obligations when pursuing business-related policy objectives with other States and business enterprises, including trade and investment agreements and commercial contracts.

Amnesty International welcomes the SRSG’s proposal to highlight the need for legal and policy coherence within States so as to ensure better protection of human rights. We note the SRSG’s reference to the fact that often inadequate legal protections exist in the first place, particularly in relation to protecting the rights of “at-risk” and vulnerable groups. As such, addressing policy coherence requires not just raising awareness within governments of existing laws, but should entail States actively seeking to identify and address areas in which legal protections are inadequate to safeguard against human rights abuse. Addressing inadequate legal protections should include repealing or amending laws and altering policies that are in conflict with the State’s obligations to protect, respect and fulfil human rights.

Doing business with business

States conduct many kinds of transactions with businesses: as owners, investors, insurers, procurers or simply promoters. This provides States – individually and collectively – with unique opportunities to help prevent adverse corporate-related human rights impacts. Indeed, the closer an entity is to the State, or the more it relies on statutory authority or taxpayer support, the stronger is the State’s policy rationale for ensuring that the entity promotes respect for human rights. (2010)

Key issues:

- Exploring the opportunities for, and pitfalls of, States seeking to promote corporate respect for human rights when the State itself is involved in the particular business or transaction (eg, State-owned enterprises, export credit and investment insurance agencies, etc).
- Discussing the need for States and businesses to establish clearly who has what obligations with regard to human rights when States contract with or legislate for business enterprises to provide public services.

The State does not require a policy rationale for ensuring a corporate entity within its territory respects human rights. The closeness of the relationship between a State and a company operating within its territory is irrelevant to the duty of the State to prevent the entity from abusing human rights; the State must prevent human rights abuses by all companies within its territory. This is a legal duty. In relation to the activities of companies acting outside the State’s territory, as noted above, there are also legal foundations to insist that States use legal and policy measures to prevent human rights abuses by companies acting abroad. Consistent with its obligation to protect human rights, the State should also use its legal and political influence over companies to prevent the abuse of human rights by companies when acting outside the territory of the State.

Within this context, additional considerations apply to particular situations:

- State-owned and State-supported companies:

Consistent with their international obligations to respect, protect and fulfil human rights, States must not engage in, support or condone human rights abuses, whether by State-entities or by companies. The involvement of State-owned enterprises or State-supported enterprises in human rights abuses may also amount to a violation of rights by the State.

- Private companies performing public services necessary for the fulfilment of human rights:

The duty to realize human rights remains with the State, even when States contract with or legislate for business enterprises to provide public services. Companies performing public services may also have responsibilities that extend beyond the responsibility to respect human rights. The State ought to clarify any responsibilities of the company in relation to the protection and/or fulfilment of human rights, including by making these explicit in contractual arrangements or regulatory provisions. The State must ensure that these contractual and legal requirements are complied with. Amnesty International urges the SRSG to draw upon the observations of other Special Procedures so as to make specific recommendations regarding the measures that States should take to ensure the fulfilment of human rights when public services are carried out by private corporations.¹³

Fostering business respect for human rights

The State duty to protect extends well beyond its direct involvement in business enterprises or transactions. Many States have adopted measures and established institutions relevant to business and human rights, including labour standards, workplace non-discrimination, health and safety and consumer protection. However, States have been slow to address the more systemic challenge of fostering rights-respecting corporate cultures and practices. ...Ironically, the most under-utilized tools are those that most directly shape business behaviour. States should reconsider the misconception that companies invariably prefer, or benefit from, State inaction. Indeed, where companies are facing difficult, politically charged situations, they are particularly in need of and look for guidance from Governments on how to manage the risks such environments inevitably pose. (2010)

Key issues:

- What should or could be the role of laws, regulations and policies that affect the creation and ongoing operation of business enterprises in fostering business respect for human rights?
- What other areas of public policy seem to be particularly fruitful in encouraging business enterprises to assess, prevent and address adverse human rights impacts?
- What role should reporting play in this process?

There are significant references in the outline to States encouraging, fostering and supporting companies to respect human rights. By contrast, there is a conspicuous absence in the outline of any guidance for States to regulate and hold companies accountable if companies abuse human rights or are complicit in human rights abuses by others.

¹³ For example, the Independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation recently reported on the role of non-State actors in the provision of water and sanitation: Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, 29 June 2010, A/HRC/15/31. Her recommendations include that: (i) the process of decision-making and implementation, any instruments that delegate service provision including contracts, and instruments that outline roles and responsibilities must be transparent, which requires the disclosure of adequate and sufficient information and actual access to information; (ii) all instruments for delegation, including contracts, must be in line with human rights standards, and States must adopt strong regulatory frameworks for all service providers in line with human rights standards; (iii) States must put into place accountability mechanisms at the national level; and (iv) non-State actors must not obstruct access to State-based mechanisms and should also provide grievance mechanisms.

Corporate accountability for human rights abuses should be outlined as an important component of the State's role under both the first and third pillars, and as an effective incentive for corporate respect for human rights. The Guiding Principles should make clear that States should use all legal and policy measures available to them to prevent human rights abuses by corporate entities and to hold accountable those entities that are involved in human rights abuses.

The establishment of clear legal requirements remains the most direct and transparent means by which States can shape business behaviour and should be emphasized as such in the Guiding Principles. Other administrative and policy measures to encourage respect for human rights can and should supplement legal developments.

Supporting business respect for human rights in conflict-affected areas

The worst corporate-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 and illicit enterprises flourish. However, even reputable firms may become implicated in abuses, typically committed by others; for example, security forces protecting company installations and personnel. Businesses increasingly seek guidance from States. Yet, Governments – host, home and neighbouring alike – are reluctant and poorly equipped to provide such assistance. ... As noted, the Special Representative has convened a group of States in informal, scenario-based, off-the-record brainstorming sessions to generate innovative and practical approaches for preventing and mitigating corporate abuses in these difficult contexts. On the agenda are the potential roles of home-country embassies; closer cooperation among home-State development assistance agencies, foreign and trade ministries and export finance institutions, as well as between them and host government agencies; and the possibility of developing early warning indicators for government agencies and companies. The lessons that the Special Representative took away from the first meeting are the need to address issues early before situations on the ground deteriorate and to improve in-country coordination between trade promotion and human rights functions within the same embassy. (2010)

Key issues:

- Considering how best to provide guidance to business enterprises operating in conflict-affected areas, including by engaging at the earliest stage possible to help them identify and mitigate human rights-related risks.
- Achieving more effective communication and coordination between governmental entities, including diplomatic posts.
- Exploring incentives and disincentives in relation to preventing and addressing business contributions to human rights abuses in conflict-affected areas, including the role of public advantages (such as the provision of export credits, investment insurance).
- Determining tools for States to assess whether 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.

Gross violations of human rights, including those involving corporate entities, are not limited to conflict zones. Many cases in which corporate activity has been a significant factor in the development and/or escalation of violent conflict have been documented in countries that do not consider themselves in a state of civil or international conflict. Indeed, it is often the pursuit of the corporate activity itself that gives rise to armed conflict.¹⁴ As such, Amnesty

¹⁴ For example, in July 2005, journalist Julio Vasquez and 28 others were involved in a peaceful protest against the Minera Majaz SA (now Rio Blanco SA) mining project in north-west Peru. They allege they were detained on 1 August 2005, held for three days, and tortured, by police and security guards inside the mining camp. The case has been the subject of police investigations and is now also the subject of a civil claim in the UK courts. Since 2005, people living around the site have seen an escalation in violence. On 23 December 2009, for example, Amnesty International released an urgent action after excessive use of force by police led to the killing of 2 men and the wounding of 8 other unarmed civilians. The police were investigating an arson attack that had killed three mining company employees and burned down the Rio Blanco encampment. See: Ford D, "Peru mining security firm faces investigation", *Reuters*, 5

International would encourage the SRSG to promote the use of any “innovative and practical approaches for preventing and mitigating corporate abuses” in all contexts where human rights are at risk from corporate actors or because of their activities.

Particular considerations regarding human rights defenders and Indigenous peoples

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 counter-insurgency 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.¹⁵

The use of Indigenous peoples’ lands for extractive industry and other business activities raises the potential for particular impact on the rights of Indigenous peoples, including the right to free, prior and informed consent as reflected in the UN Declaration on the Rights of Indigenous Peoples. Often, Indigenous peoples’ human rights are poorly protected by host State laws and practice. A lack of mechanisms to demand their legitimate rights to be consulted or to protect their land and territories can leave Indigenous peoples feeling that their only option is to engage in social protest that may result in activities contrary to law.¹⁶

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.¹⁷ We urge the SRSG to align the Guiding Principles with the recommendations contained in these reports.

Multilateral Institutions

Greater policy coherence is also needed at the international level. States do not leave their human rights obligations behind when they enter multilateral institutions that deal with business-related issues. States should encourage those bodies to institute policies and practices that promote corporate respect for human rights. Additionally, capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfil their duty to protect. (2010)

Key issues:

- Considering appropriate steps for States to take in order to ensure that the multilateral institutions of which they are members do not restrain either the fulfilment of the State duty to protect human rights nor the corporate responsibility to respect human rights.
- Exploring ways for multilateral institutions to help build capacity for States to fulfil their duty to protect, and to promote the corporate responsibility to respect human rights.

Feb 2009, available at <http://www.reuters.com/article/latestCrisis/idUSN0537766>; Amnesty International, *Urgent Action: Police Shoot Two Dead, More at Risk*, 23 December 2009, UA: 343/09 Index: AMR 46/019/2009 Peru.

¹⁵ See, for example, *Peru: Bagua, Six Months On: "Just because we think and speak differently, they are doing this injustice to us"* (2009) AMR 46/017/2009.

¹⁶ As noted by the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in his report on his mission to Peru: See UN doc A/HRC/12/34/Add.8, page 18.

¹⁷ 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 2020: A/HRC/15/37.

- The role of the UN Framework in helping to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

Amnesty International agrees with the SRSG's assessment that State duties in relation to human rights should also direct their activities when acting multilaterally. In this regard, we would welcome a clear statement within the Guiding Principles that States should ensure that multilateral institutions do not impede the ability of States to protect against human rights abuses by corporate entities. States should also work towards common agreement at the international level on the means by which States individually and collectively could ensure that corporate actors respect human rights, are held accountable for human rights abuses, and ensure that victims of corporate-related human rights abuses receive remedies. When acting multilaterally, States should ensure the inclusion of human rights considerations in the provision of financial or other forms of support to corporate entities. In particular, States should require the inclusion of human rights considerations in international instruments that seek to establish a common standard for the provision of export credit, such as the Organisation for Economic Cooperation and Development (OECD) Common Approaches on the Environment and Officially Supported Export Credits. Similarly, States should also require international financial institutions, such as the International Finance Corporation (IFC), to respect human rights. Such international financial institutions should ensure that respect for human rights by their clients throughout the life-cycle of projects or other business activities is a precondition to support by the institution. States should insist that international financial institutions conduct human rights due diligence and ensure that their clients conduct human rights due diligence.

II. THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

Foundations

The term “responsibility” to respect, rather than “duty”, is meant to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies, although elements may be reflected in domestic laws. At the international level, the corporate responsibility to respect is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Council itself (2010).

The corporate responsibility to respect human rights means avoiding the infringement of the rights of others and addressing adverse impacts that may occur. This responsibility exists independently of States' human rights duties. It applies to all companies in all situations. (2010)

What is the scope of this responsibility? What acts or attributes does it encompass? Scope is defined by the actual and potential adverse human rights impacts generated through a company's own business activities and through its relationships with other parties, such as business partners, entities in its value chain, other non-State actors and State agents. In addition, companies need to consider how particular country and local contexts might shape the human rights impact of their activities and relationships. ...Because companies can affect virtually the entire spectrum of internationally recognized rights, the corporate responsibility to respect applies to all such rights. In practice, some rights will be more relevant than others in particular industries and circumstances and will be the focus of heightened company attention. However, situations may change, so broader periodic assessments are necessary to ensure that no significant issue is overlooked. (2010)

Amnesty International agrees that the Guiding Principles should clearly state that the corporate responsibility to respect applies to all human rights and that, while some rights may be more at risk in some circumstances, the potential to impact all human rights should be considered. However, in our view, the Guiding Principles should be explicit that corporate activities impacting human rights include those that relate to seeking regulatory changes. The Guiding Principles should make clear that companies should ensure that they do not undermine existing legal guarantees or institutional mechanisms established to protect human rights. There should be clear and explicit guidance that companies must not oppose measures to protect human rights or otherwise encourage agreements, laws, policies or measures, whether at the international or national level, that would undermine the effective protection of human rights. Further, the Guiding Principles ought to specify that, as the SRSG has previously noted, respect for human rights is the *baseline* responsibility of companies, and there may be situations in which companies have additional responsibilities.

We note that the SRSG has in previous reports referred to the need for companies to look for guidance at the international bill of human rights and the core conventions of the ILO at a minimum. Amnesty International considers it important that the Guiding Principles encourage companies to refer to a broader spectrum of international human rights instruments, which provide substance to the international bill of human rights and which reflect the evolving nature of international law. For example, the UN Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the UN Declaration on the Rights of Indigenous Peoples are of particular relevance, especially in light of resolution 8/7 of the Human Rights Council which requires the SRSG to “integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children”. In this regard, the Guiding Principles ought to refer in an inclusive manner to the Universal Declaration of Human Rights, core UN human rights conventions, as well as UN Declarations such as the Declaration on the Rights of Indigenous Peoples, and ILO documents such as the ILO Declaration on Fundamental Principles and Rights at Work. The work of international human rights bodies, such as UN Treaty Bodies and Special Procedures, should also be referenced as providing useful interpretation and guidance on how to respect internationally recognised human rights standards.

Policies and Processes

The appropriate corporate response to managing the risks of infringing the rights of others is to exercise due diligence (2010) ...whereby companies become aware of, prevent, and mitigate adverse human rights impacts. (2009)

Key issues:

- The most effective means for business enterprises to articulating a statement of commitment to respect human rights, supported by appropriate operational policies, as the foundation for the internationalization of respect for human rights.
- Operationalizing human rights due diligence, appropriate to the size and circumstances of a business enterprise, in order to identify, prevent and mitigate adverse human rights impacts.
- Providing for or cooperating in the remediation of adverse impacts.

Conducting Human Rights Due Diligence

Human rights due diligence can be a game-changer for companies: from “naming and shaming” to “knowing and showing”. Naming and shaming is the response by external stakeholders to the failure of companies to respect human rights. Knowing and showing is the internalization of that respect by companies themselves through human rights due diligence. (2010)

Many corporate human rights issues arise because companies fail to consider the potential implications of their activities before they begin...As is true for States, human rights considerations are often isolated within a company. That can lead to inconsistent or contradictory actions: product developers may not consider human rights implications; sales or procurement teams may not know the risks of entering into relationships with certain parties; and company lobbying may contradict commitments to human rights...Tracking generates information needed to create appropriate incentives and disincentives for employees and ensure continuous improvement. (2008)

Because the process is a means for companies to address their responsibility to respect human rights, it must go 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.

[Moreover] because a main purpose of human rights due diligence is enabling companies to demonstrate that they respect rights, a measure of transparency and accessibility to stakeholders will be required. (2010)

Key issues:

- **Assessing** actual or potential adverse human rights impacts on an ongoing basis, drawing on internal or external expert resources; involving meaningful engagement with relevant stakeholders as appropriate to the size of the business enterprise and the nature and context of its activities.
- **Integrating** the findings from their assessments across internal functions and processes to enable appropriate action, including by clarifying internal accountabilities and aligning personnel incentive structures.
- **Tracking** performance to know whether human rights risks are being effectively addressed, based on appropriate qualitative and quantitative metrics, drawing on feed-back from both internal and external stakeholders, and supporting continuous improvement processes.
- **Communicating** performance on human rights in response to stakeholder concerns, including reporting formally as appropriate, taking into account any risks posed to stakeholders themselves, company personnel or to the legitimate requirements of commercial confidentiality.

A framework for the willing?

The above excerpts of previous reports of the SRSG demonstrate that due diligence within the second pillar of the Framework is primarily directed at those companies that wish to respect human rights, but which for lack of processes to understand their potential impacts, inadvertently cause adverse effects. In this sense, the proposed guidance under the second pillar of the framework as currently articulated only speaks to the willing. However, a system for the willing does not address the “governance gaps” which the SRSG has identified as the root cause of the business and human rights predicament. In this context, and as referred to above, there is a clear need for the Guiding Principles to articulate the role of the State in requiring due diligence. This would capture the need for the less than willing to also carry out due diligence. In the absence of such guidance, only some companies (those who are already committed to respecting human rights) will undertake the due diligence necessary to ensure they respect human rights.

A clear articulation that States should require due diligence would also overcome one of the fears expressed by many companies during the mandate of the SRSG; that by doing the “right thing”, they may be more exposed to litigation than if they did not undertake due diligence. While Amnesty International would challenge the underpinning assumptions that appear to be being made by companies in this regard, a clear path forward is to require all companies by law to undertake human rights due diligence. The fear expressed by companies about the potential implications of carrying out voluntary human rights due diligence - and the obvious implication that many of the “willing” may not even do it - compels the logical conclusion that it must be required by law. Otherwise it seems very likely that the core idea of the second pillar of the Framework is rendered unworkable.

Primary objective of corporate human rights due diligence

Amnesty International considers the Guiding Principles must make clear that while undertaking due diligence would enable companies to demonstrate their commitment to respecting rights, the overriding objective is to prevent adverse human rights impacts. It should therefore be made clear that companies must make every effort, which may include actions above and beyond due diligence, to avoid adverse impacts on human rights. Where these adverse impacts occur despite best endeavours, they should be minimized and addressed.

Content of corporate human rights due diligence

Adequate human rights due diligence should include an express policy commitment to respect human rights, which should be integrated into the corporation’s decision-making, management and operational systems, as well as business relationships. There is no doubt that assessing actual or potential human rights impacts is an essential component of effective human rights due diligence. However, the Guiding Principles ought to be very clear that the findings of such assessments must result in the development of clear action plans outlining effective measures to prevent, minimize and address negative human rights impacts. The effective implementation of the policy commitment and corresponding action plans should be monitored throughout the business, as well as independently verified.

Carrying out human rights due diligence should involve meaningful and transparent engagement with stakeholders, particularly rights-holders who may be impacted. Such engagement must be consistent with the human rights of rights-holders, such as the rights of Indigenous peoples to free, prior and informed consent. It should occur both in the assessment of potential human rights impacts, as well as the design of means by which such impacts can be avoided, minimized and addressed.

Amnesty International considers that the Guiding Principles should make clear that due diligence is an ongoing process involving action prior to, during and after undertaking any business activity that may have an adverse impact on human rights. The Guiding Principles should also clearly state that if due diligence indicates that there is a likelihood of human rights abuses occurring, companies must reassess their business activities to ensure abuses are avoided or refrain from the business activity contemplated.

Issues of Scale and Context

The Special Representative's aim is to provide companies with universally applicable guiding principles for meeting their responsibility to respect human rights, recognizing that the complexity of tools and processes companies employ will necessarily vary with circumstances. (2010)

[M]any corporate-related human rights abuses violate existing domestic laws that are enforced poorly or not at all. Early in his mandate, the Special Representative asked the world's largest international business associations to address this problem. Their response was resolute: "All companies have the same responsibilities in weak governance zones as they do elsewhere. They are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent." (2010)

One of the toughest dilemmas companies face is where national law significantly contradicts and does not offer the same level of protection as international human rights standards. (2009)

[M]anaging the risk that companies may be implicated in human rights-related international crimes. Few reputable companies may ever directly commit acts that amount to international crimes. Yet, there is growing risk that they will face allegations of complicity in such crimes committed by others connected to their business. ...Prudence suggest that companies should treat this risk robustly. (2010)

Depending on circumstances, companies may need to ... take into account international humanitarian law in conflict affected areas (which pose particular challenges); and standards specific to "at risk" or vulnerable groups (for example, indigenous peoples or children) in projects affecting them. (2010)

Key issues:

- How to balance the fact that the appropriate scale and complexity of human rights policies and processes may vary according to the size and circumstances of the business enterprises' operations with the realization that even small firms on occasion can have major adverse impacts.
- Affirming the need for broader periodic assessment of adverse human rights impacts to identify any new or evolving human rights issues.
- Addressing situations where national law is weak, absent or not enforced; where domestic legal compliance may undermine the corporate responsibility to respect; as well as heightened sensitivity when operating in conflict-affected areas and/or when operating in situations involving vulnerable or "at risk" groups.
- Managing the risk of involvement in international crimes.
- How to prioritize mitigative or remedial action when all steps cannot be taken at once.

The above outline for the Guiding Principles acknowledges the limited manner in which domestic laws are enforced in some jurisdictions and circumstances. As discussed above, greater clarity regarding the role of home States should therefore be provided. In particular, Amnesty International urges the SRSG to encourage States to engage in international cooperation towards the realization of all human rights, consistent with State duties under the UN Charter.

Amnesty International welcomes the guidance provided in earlier reports of the SRSG that "the corporate responsibility to respect human rights includes avoiding complicity" and urges a

clear statement to this effect in the Guiding Principles.¹⁸ In particular, companies should be directed to ensure that they specifically assess in their human rights due diligence processes the potential to be complicit in the human rights abuses of others.

We also urge the SRSG to provide clearer guidance in relation to how companies should respond to the potential for domestic laws to require conduct that would place a company in non-compliance with their responsibility to respect human rights. The Guiding Principles should specify that in such situations, companies should strive to find ways to respect human rights, and they should be able to demonstrate that they have taken all possible steps to ensure that their activities do not result in human rights abuses or in complicity with human rights abuses caused by others. If necessary, companies should reassess their operations in the jurisdiction, and adapt or refrain from aspects of their operations that could result in non-compliance with the responsibility to respect.

¹⁸ SRSG Report 2008 para 73.

III. ACCESS TO REMEDY

Foundations

As part of their duty to protect, States must take appropriate steps within their territory and/or jurisdiction to ensure access to effective remedy for corporate-related human rights abuses through judicial, administrative, legislative or other appropriate means. (2010) Without such steps, the duty could be rendered weak or even meaningless. (2009)

Effective grievance mechanisms are an important part of the corporate responsibility to respect. They complement monitoring or auditing for human rights compliance. They also provide an on-going channel through which the company gains early warning of problems and disputes and can seek to avoid escalation—many of now-emblematic cases of corporate-related human rights abuse started out as far lesser grievances. Moreover, by tracking complaints, companies can identify systemic problems and adapt practices to prevent future harm and disputes. (2009)

Under international human rights law, people whose rights are violated are entitled to an effective remedy. The foundations of the third pillar should more clearly refer to the content of the right as outlined in international human rights law. The right to remedy involves both procedural and substantive entitlements. It encompasses both the ability to access justice to bring claims of wrongdoing and seek reparation, and the substantive reparation itself.

Under the ICCPR, States are obliged to ensure that any person whose rights under the Covenant are violated has an effective remedy, and to ensure that any person claiming such a remedy has their right determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.¹⁹ States are also obliged to develop the possibilities of judicial remedy, and to ensure that competent authorities enforce remedies when they are granted. Further, as part of the right to remedy, States have a duty to ensure equality before courts and tribunals and to a fair trial.²⁰ The Committee on Economic, Social and Cultural Rights has also stated that provision of effective remedy is one of the means through which States are expected to progressively realize all rights contained in the ICESCR.²¹

The right to effective remedy is separate and distinct from the rights allegedly violated and for which a remedy is sought. The right to remedy can therefore be violated without a finding of violations of other rights.²² The State duty to protect human rights and the corporate responsibility to respect human rights include protection of and respect for the right to effective remedy.

The outline of the Guiding Principles refers to judicial means as but one of several means for providing “access to effective remedy”. Amnesty International urges the SRSG to more fully and clearly reflect the scope and content of the right, as outlined above.

The role of non-State mechanisms, such as corporate grievance processes, in the discussion of remedy must be clearly placed within the context of the State’s obligation to ensure effective remedy. States must be clear that encouraging the proliferation of non-State grievance mechanisms is not a substitute to building the availability, effectiveness and accessibility of judicial and State-based non-judicial remedial processes. Additionally, the Guiding Principles ought to outline key obstacles to judicial remedy in the context of corporate human rights abuses and propose suggestions for how States may address these obstacles both domestically

¹⁹ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), (ICCPR), Art 2.

²⁰ Article 14(1) of the ICCPR; Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007).

²¹ UN Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties’ obligations*, U.N. Doc. E/1991/23, annex III at 86 (1991), para 5.

²² The Committee on the Elimination of Racial Discrimination has stated in several cases that violations of the right to remedy can be found without finding violations of any of the substantive rights. See *Mr. Dragan Durmic v. Serbia and Montenegro*, Communication No. 29/2003, U.N. Doc. CERD/C/68/D/29/2003 (2006), paragraph 9.6.

and through international assistance and cooperation.

Judicial Mechanisms

The responsibility for establishing judicial mechanisms, ensuring their functionality and facilitating access to them rests with States. If access to judicial remedy for corporate-related human rights impacts is to be improved, it is essential that both States and companies act in a manner supportive of the independence and integrity of judicial systems. States that deliberately erect barriers to prevent cases from being brought against business or that obstruct or intimidate the peaceful and legitimate activities of human rights defenders may breach their duty to protect. (2010)

Key Issues

- Improving access and reducing barriers to effective remedy through judicial mechanisms, for alleged human rights abuses within a State's territory and/or jurisdiction;
- Situations in which access to judicial mechanisms may be appropriate in relation to alleged egregious human rights abuses abroad by business enterprises domiciled in a State's territory and/or jurisdiction.

Amnesty International welcomes the statement in the outline of the Guiding Principles that both States and companies must act in a manner supportive of the independence and integrity of judicial systems. It is also important that the Guiding Principles make clear that States must not deliberately erect barriers to prevent cases from being brought against business. Equally, however, the Guiding Principles should reflect the SRSG's 2010 report, which references the need for companies to respect human rights by not obstructing or corrupting judicial mechanisms.²³ Companies are not just passive participants in the context of remedy. Amnesty International has examined cases in which the direct action of companies and the nature of their relationship with governments have resulted in changes to laws and regulations to prevent potential claims against the company.²⁴ It is crucial that the way in which companies take full advantage of obstacles to remedies, exacerbate or directly create them be acknowledged and addressed in the Guiding Principles.

In this context, Amnesty International urges greater clarity from the SRSG in elaborating the Guiding Principles as to how States should address many of the obstacles to judicial remedies identified in the 2010 report.²⁵ These include:

- the complexity of attributing responsibility within a corporate group;
- challenges posed by the foreign operations of multinational corporations;
- challenges faced by prosecutorial investigations across borders; and
- practical barriers such as costs, standing, and availability of legal representation for rights-holders.

²³ SRSG 2010 Report, para 103.

²⁴ For example by the company urging changes to legislation that limit the capacity of individuals or groups to initiate legal action. This occurred, for example, in Papua New Guinea where legislation was passed at the instigation of BHP to prevent claims from compensation related to the Ok Tedi mine. The Mining (Ok Tedi Re-stated Eighth Supplemental Agreement) Act 1995 contained a number of provisions that directly infringed on affected villagers' right to seek redress. The Act eliminated all previously available legal grounds to seek compensation from Ok Tedi Mining Limited (OTML) and its shareholders (including BHP Limited) in the PNG courts; excluded compensation claims arising from environmental or social impact; and limited claims arising from environmental impact of the mine: Mining (Ok Tedi Re-stated Eighth Supplemental Agreement) Act 1995, clause 5. During a trial in Australia initiated by members of some affected communities, it emerged that BHP's Papua New Guinean lawyers had been involved in drafting the legislation. BHP's role in the preparation of the legislation resulted in the community members' lawyers filing a contempt of court action with the Supreme Court of Victoria. Cummins J found BHP to have acted in contempt of court, stating in his judgement: "I am satisfied beyond reasonable doubt, that [BHP] has sought to block the actions of these plaintiffs presently before this court."... "The conduct of [BHP] is to interfere with the due administration of justice by impeding the lawful right of the plaintiffs to law.": *Dagi, Rex & Ors v BHP Ltd (ACN 004 028 077) & Ok Tedi Mining Ltd*, Judgement, Contempt of Court, 20 September 1995. For the full text of the Judgement, see: <http://vsc.sirsidynix.net.au/Judgments/Civil/1990+/492814.pdf>, last accessed June 2010.

²⁵ SRSG 2010 Report, pp 20-21.

Other barriers to remedy include lack of access by victims of human rights abuses to information that is held by companies and/or States, the imbalance of power between corporate entities and rights-holders, and the disparity of “arms” (resources) when companies and rights holders are involved in judicial processes.

The SRSG has identified in his reports many of the potential solutions to several of these obstacles, including parent-company or corporate-group liability, the exercise of extraterritorial jurisdiction by courts, international cooperation by States in prosecutorial investigations, innovative funding and fee rules for covering legal expenses, and increasing the scope for group claims. Amnesty International would welcome the reflection in the Guiding Principles of clear and specific guidance on the measures States should take to remove or overcome the obstacles to effective remedy.

In responding to the particular barriers posed by the multinational character of many business structures and operations, Amnesty International urges the SRSG to provide more robust guidance regarding the role of States other than the host State. When human rights abuses are committed by or with the complicity of multinational corporations, achieving accountability and effective remedy will often require the action by and/or within more than one State. As such, the Guiding Principles should emphasize that States, consistent with their obligations to engage in international cooperation, should provide assistance to the host State to ensure accountability and remedy are effectively achieved regarding corporate activities that result in human rights abuses. Further, as a minimum States in whose jurisdiction companies are domiciled should allow foreign victims access to their courts to seek reparation from companies within their jurisdiction when their acts or omissions have resulted in human rights abuses abroad. Allowing such access to courts can be a key component to ensuring effective remedy and must involve States addressing the obstacles that foreign victims face in seeking redress through judicial mechanisms in their jurisdiction.

State-Based Non-Judicial Mechanisms

The importance of non-judicial, State-based mechanisms, alongside judicial mechanisms, is often overlooked, as regards both their complaints-handling role and other key functions they can perform, including promoting human rights, offering guidance, building capacity and providing support to companies and stakeholders. [But] the universe of State-based non-judicial grievance mechanisms remains both under-populated and under-resourced. These gaps contribute to the heavy reliance by aggrieved parties and their representatives on campaigns and lawsuits against companies. (2010)

Key issues:

- Expanding the role of national non-judicial mechanisms to include business-related human rights issues (eg, National Human Rights Institutions);
- Improving and expanding international state-based non-judicial mechanisms (eg, OECD Guidelines, International Finance Corporation Performance Standards, etc).
- The role of international and regional human rights mechanisms in the provision of remedy.

Amnesty International agrees that greater efforts ought to be made in ensuring the availability of and access to competent State-based administrative and other non-judicial bodies to provide effective remedy. In this regard, however, we would urge the SRSG to ensure that emphasis is given to the capacity of such bodies to provide remedy to those whose rights are abused, including their capacity to investigate and their authority to enforce remedies.

The Guiding Principles should refer to existing examples of State-based non-judicial bodies that effectively provide remedies, highlighting characteristics that contribute to their effectiveness as a potential model for others. This would include referencing specific examples of State mechanisms for regulating aspects of corporate activity and providing remedies for breaches of relevant regulations or standards, such as national human rights institutions, consumer protection authorities, national and industry-specific ombudsman, competition and

anti-trust regulatory entities, fair trading agencies, and advertising regulatory agencies, among others.

Company-level Grievance mechanisms

As noted, [company-level] grievance mechanisms perform two key functions regarding the corporate responsibility to respect. First, they serve as early warning systems, providing companies with ongoing information about their current or potential human rights impacts from those impacted. By analysing trends and patterns in complaints, companies can identify systemic problems and adapt their practices accordingly. Second, these mechanisms make it possible for grievances to be addressed and remediated directly, thereby preventing harm from being compounded and grievances from escalating. Such mechanisms may be provided directly by a company, through collaborative arrangements with other companies or organizations, or by facilitating recourse to a mutually accepted external expert or body. (2010)

Key issues:

- The role, design and effective implementation of grievance mechanisms at the company level.
- Operationalizing the effectiveness criteria for all non-judicial human rights-related grievance mechanisms, including the company-level: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency.
- A seventh criterion specifically for company-level mechanisms: they should operate through dialogue and engagement rather than the company itself acting as adjudicator.
- Particular challenges faced by “at-risk” or potentially vulnerable groups in accessing grievance mechanisms.

The Guiding Principles must be clear that there will be some corporate human rights impacts that must involve the State ensuring accountability and remedy. This includes, but is not limited to corporate impacts that amount to crimes. As outlined above, States have a duty under international law to provide effective remedy for human rights abuses. As such, while corporate grievance mechanisms can assist in resolving many problems before they escalate to more complex issues and possibly human rights abuses, the remediation of human rights abuses should involve the State. Corporate grievance mechanisms that seek to address human rights abuses may leave victims of abuses unprotected, and may allow the corporate perpetrator of the abuse to go unpunished. As a consequence, it is essential that the State has some monitoring role of corporate grievance mechanisms to ensure that, where appropriate, the State intervenes. It is also important to emphasize that corporate grievance mechanisms should not in any way impede access to or the availability of State-based remedial mechanisms.