

Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises

OPEN PUBLIC CONSULTATION

**SUBSTANTIVE ELEMENTS TO BE INCLUDED IN GUIDANCE ON
NATIONAL ACTION PLANS TO IMPLEMENT THE GUIDING
PRINCIPLES ON BUSINESS AND HUMAN RIGHTS¹**

Introduction and aims of the consultation

The United Nations Working Group on Business and Human Rights is developing guidance on the process, content and follow-up of a State national action plan to implement the Guiding Principles on Business and Human Rights.² The planned guidance will seek to advise on steps to be taken and on practical ways in which the Guiding Principles can be implemented. This effort responds to calls from States and other stakeholders for the Working Group to provide direction and support in this area and aims to build on and complement work carried out by others.³ The Working Group plans to present its preliminary guidance at the third annual Forum on Business and Human Rights to be held in Geneva from 1 to 3 December 2014.

The Working Group considers that national action plans are a practical and powerful vehicle for States to effectively implement the Guiding Principles. While recognizing that implementation can take many forms and that there is no one-size-fits-all approach, the Working Group believes that a national action plan can ensure:

- Greater coordination and coherence within Government on the range of public policy areas that relate to business and human rights;
- An inclusive process to identify national priorities and concrete policy and regulatory options related to business and human rights issues;
- Transparency and predictability for all stakeholders on the direction of the Government's implementation efforts;
- A flexible, yet common format that enables international cooperation, coordination and exchanges of good practices and lessons learned; and
- A platform for ongoing multi-stakeholder dialogue, including in the review and follow-up process, as developing a national action plan should not be a one-off exercise.

The baseline for *all* national action plans is the Guiding Principles themselves. They clarify the overall legal and policy implications of the State duty to protect human rights,

¹ The Guiding Principles on Business and Human Rights, which operationalize the UN "Protect, Respect and Remedy" Framework, A/HRC/17/31, were endorsed by the Human Rights Council in 2011 in resolution 17/4.

² See annex for further background to the Working Group's efforts to promote national action plans.

³ For example, the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR) are producing tools to support the development of a national action plan. See: <http://www.business-humanrights.org/Documents/icar-dihr-naps-project>.

the corporate responsibility to respect human rights, and the need for access to remedy for victims of business-related human rights abuse.

With regard to the process of elaborating national action plans, the Working Group recommends that all plans should be developed through an inclusive human rights-based process. Stakeholders and early adopters have noted that the process to develop a national action plan is as important as its content. The Working Group's guidance will draw on early lessons and considerations on the process.

With regard to the contents of national action plans, the Working Group considers that they should include on some substantive elements that apply to all countries irrespective of their size and geography. Examples of substantive elements include the role of the State as an economic actor, its direct engagement with business enterprises, vertical and horizontal policy coherence, protection of vulnerable groups in the context of business activities, and access to remedy for adverse business-related human rights impacts.

The present online consultation focuses on the contents of national action plans and seeks to solicit further reflections and suggestions that will feed into the Working Group's guidance.

With a view to identifying the *substantive elements* to be included in a national action plan, stakeholders are invited to comment on the list of substantive elements and examples provided in the present consultation document.

The Working Group invites stakeholders to provide information on the following

1. What substantive elements should be addressed in a national action plan? (In addition to those listed in the present document, please add any other elements considered relevant, stating the reasons why.)
2. Amongst those elements, which have the greatest potential to prevent, mitigate and redress adverse business-related human rights impacts?
3. What are concrete examples of good practice concerning the substantive elements identified (including a brief description and relevant links/documents).
4. Comments on the draft list of practical and substantive considerations to help States to develop and enact a national action plan to implement the Guiding Principles included in the present document.

Please send feedback and comments by to wq-business@ohchr.org using the subject heading "NAPs Substantive Elements", by 1 September 2014

Please note that the Working Group will publish submissions online, unless the submission indicates that it should be treated as confidential

PRACTICAL AND SUBSTANTIVE CONSIDERATIONS IN THE DEVELOPMENT AND ENACTMENT OF A NATIONAL ACTION PLAN TO IMPLEMENT THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

This consultation document⁴ comprises a preliminary list of key practical and substantive considerations to help States to develop and enact a national action plan (NAP) to implement the Guiding Principles. The content is expected to be included in a tool that may complement the Working Group's forthcoming guide to support development of NAPs. The present document does **not** contain elements on the *process* of developing and *the review or follow up* to a national action plan. However, the Working Group's guide and other forthcoming recommendations will address these important areas, drawing on input from stakeholders.⁵

The document is structured around the following nine main headings:

1. General principles
2. State approach (GP 1)
3. Extraterritoriality (GP 2)
4. State regulatory and policy functions (GP 3)
5. State-Business nexus (GP 4)
6. Privatisation and public procurement (GPs 5 & 6)
7. Conflict-affected areas (GP 7)
8. Policy coherence (GPs 8-10)
9. Access to remedy (GPs 25-28)

These topics correspond to the order in which they are covered under the general principles and the first⁶ and third⁷ pillars of the Guiding Principles. They do not necessarily reflect the structure of the Working Group's forthcoming guidance in this area.

1. GENERAL PRINCIPLES

A national action plan should be based upon the general principles set out in the Guiding Principles, in terms of their scope ("all States and all business enterprises, both transnational and others, regardless of size, sector, location, ownership and structure") and the grounding in international human rights standards. In particular, in each area covered by a national action plan, due regard should be given to the requirement that the Guiding Principles "be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or

⁴ The Working Group is grateful to Stéphanie Lagoutte, Senior Researcher at the Danish Institute for Human Rights, for her assistance in preparing this document.

⁵ For a preliminary outline of the process elements, see the informal discussion paper prepared for the State pre-session meeting at the 2013 annual Forum on Business and Human Rights:
<http://www.ohchr.org/EN/Issues/Business/Forum/Pages/PreForumsessionforStates.aspx>

⁶ Pillar 1 of the Guiding Principles: "The State duty to protect human rights".

⁷ Pillar 3 of the Guiding Principles: "Access to remedy".

populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.”

Some concrete examples:

1.1. Gender Perspective

- States should consider the gender perspective in any examination of existing laws and rules and in the creation of new initiatives and actions to implement the Guiding Principles.

Examples:

- *States should collect and analyse gender-disaggregated data; hold meaningful consultations with men and women about the potential and actual impacts of business operations; and policies and procedures need to be considered in terms of whether they provide non-discriminatory access, processes and outcomes for men and women.*
- *A gender perspective is not only about women. Adopting a gender perspective or integrating gender into work on business and human rights means that any analysis looks at the way in which a business entity may have a differential, disproportionate or unforeseen impact on women or men, boys or girls, as a result of their different social, cultural or legal roles, rights or responsibilities.*
- *A gender-neutral approach to policy-making renders invisible important gender issues and marginalizes women’s experiences.*

1.2. Indigenous Peoples

- Free, prior and informed consent is a fundamental element of the rights of indigenous peoples, on which rests the ability to exercise and enjoy a number of other rights.

Examples:

- *States have an obligation to consult and cooperate in good faith in order to obtain free, prior and informed consent before the adoption of legislation or administrative policies that affect indigenous peoples and the undertaking of projects that affect the rights of indigenous peoples to land, territory and resources, including mining and other utilization or exploitation of resources (the UN Declaration on the Rights of Indigenous Peoples).*
- *States should properly consult with indigenous peoples when they enter into free trade agreements and bilateral investment agreements that concern the extraction of natural resources on indigenous lands and territories.*

1.3. Children

- States must have adequate legal and institutional frameworks to respect, protect and fulfil children’s rights, and to provide remedies in case of violations in the context of business activities and operations.⁸

Examples:

- *States must ensure that business-related legislation, policy and programmes include continuous consideration of the impact on the rights of the child.*

⁸ See also Committee on the Rights of the Child, General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en

- *States and business enterprises in consulting communities that may be affected by a potential business project, should also seek the views of children and consider them in decisions that affect them.*

1.4. Other individuals from groups or populations that can be at heightened risk:

- States should identify groups which are at heightened risk of discrimination and human rights abuse, and ensure that particular consideration is given to protect such groups against business-related human rights abuses. Such groups may include, amongst others:
- National or ethnic minorities;
- Religious and linguistic minorities;
- Persons with disabilities;
- Migrant workers and their families;
- Human rights defenders.

2. STATE APPROACH (GP 1)

Guiding Principle 1 - State duty to protect

“States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”

2.1. Inside Government

- Identify the relevant State ministries and agencies whose work touches on business and human rights issues.

Examples:

- *Ministries of Foreign Affairs & Trade; Economic development; Labour/Employment; Finance; Justice; Home Affairs; Health; Social welfare; Environment; Food; Agriculture; Energy; Natural Resources; and Population Development.*
- *Stock Exchange Authority, etc.*
- *Export Credit Agency.*

- Gauge and increase the level of awareness on business and human rights issues in relevant State ministries and agencies.

Examples:

- *Information to management and staff: requires leadership, inter-departmental coordination; information sharing; and training.*

- Consult on, identify and communicate the most pressing business and human rights issues that the State should act upon.

Examples:

- *Major extractive activities or projects.*
- *Major privatisations of public services.*
- *Opening of sectors to new domestic or foreign investors.*
- *Poverty/development challenges.*

- Provide political support to activities to implement the Guiding Principles.

Examples:

- *Strong commitment from senior figures within the Government, research, dissemination and training, projects, consultations, reporting etc.*
- Establish an inter-sectorial body (linked to the highest level of Government) to oversee implementation of the Guiding Principles.

Examples:

- *Cross-ministerial focal point, working group etc.*

2.2. Root and branch look at the State's existing measures under pillar 1 of the Guiding Principles ("State duty to protect human rights")

- Review specific measures (policies, regulation, legislation or other) which may already have been taken to protect individuals against human rights abuse by business enterprises.

Examples:

- *Corporate & security law; stock exchange listing requirements; labour law; environment law; rules on land management; disclosure/reporting requirements; policies creating incentives for business respect for human rights, etc.*
- Establish if the State participates in any multilateral soft-law instruments that promote business respect for human rights.

Examples:

- *Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development; the Voluntary principles on Security and Human Rights, etc.*
- Establish what mechanisms are in place to identify risks and to prevent situations where the State is responsible for or supports any business activity that has an actual or potential adverse impact on human rights.
- Establish how adverse human rights impacts in the informal sector are currently addressed by the State.

2.3 Direct protection/prevention measures

- Assess measures taken to ensure that peaceful protests against business activities that may have adverse human rights impacts are not obstructed.
- Assess the protection against threats and/or harassment afforded to human rights defenders who focus on business-related impacts.

2.4 Implementation of recommendations from UN Treaty Bodies or the Human Rights Council

- Assess follow up given to any recommendations from UN human rights treaty bodies, special procedures mandate holders or the Human Rights Council's Universal Periodic Review process on steps to prevent abuse by business enterprises, including with regard to operations abroad of businesses domiciled within its jurisdiction.

3. EXTRATERRITORIALITY (GP 2)

Guiding Principle 2 - Extraterritoriality

"States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their"

operations.”

3.1. Home State measures to ensure that business enterprises respect human rights in their operations abroad

- Establish if the State has in place measures that clearly set out the expectation that business enterprises respect human rights abroad.

Examples:

- Requirements on “parent” companies to report on the global operations of its entire business enterprise.
 - Participation in multilateral soft-law instruments such as the OECD’s Guidelines for Multinational Enterprises.
 - Performance standards required by State institutions that support overseas investments (see Guiding Principle 4 on export credit agencies).
 - Communicate through foreign embassies and consulates the expectation that business enterprises domiciled in the State’s territory and/or jurisdiction respect human rights abroad. Gauge options for follow-up with companies if standards are not met.
- Identify whether the national legal framework can hold business enterprises domiciled within its territory to account for human rights abuses related to their operations abroad.

Examples:

- Criminal regimes that allow for prosecution based on the nationality of the perpetrator / the domicile of the business enterprise (if prosecution of moral person possible) in the home State, no matter where the offence occurs.
 - Civil liability regime that allows for tort suits based on the domicile/listing of the business enterprise in the home State or legal/financial connection to the home State.
 - Adoption of specific legislation on corruption, conflict minerals etc. which may impact on human rights and the practices of business enterprises.
- Identify options for support measures for business enterprises with operations abroad, in particular for small and medium size enterprises. For example, country-specific information to support human rights due diligence and information about where companies may seek relevant guidance (e.g. ILO helpdesk on international labour standards).

4. STATE REGULATORY AND POLICY FUNCTIONS (GP 3)

Guiding Principle 3 - Scrutinising State policies and regulations

“In meeting their duty to protect, States should:

(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

(b) Ensure that other laws and policies governing the creation and on-going operation of business enterprises, such as corporate law, do not constrain but enable

business respect for human rights;

(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.”

4.1. Legislation that directly or indirectly regulates business activities that may impact on human rights

- Establish the status of State ratification of international human rights treaties, including ILO conventions, and their incorporation into domestic law.
- Identify the existing national laws that directly or indirectly regulate business respect for human rights.

Examples:

- *References to human rights and non-State actors in a Constitution or domestic/regional human rights act/charter.*
- *Regulation on intellectual property.*
- *Non-discrimination laws.*
- *Labour laws (including occupational health and safety, minimum wage, non-discrimination, forced and child labour, and industrial relations).*
- *Environmental law.*
- *Property/access to land including resettlement and compensation.*
- *Cultural heritage and intellectual property.*
- *Privacy law.*
- *Consumer law.*
- *Anti-bribery/corruption laws, lobbying regulation.*
- *Law on civil liability (corporate liability, attribution of liability, etc).*
- *Corporate and securities laws.*
- *Laws that require human rights due diligence (general or specific to some high risk business activities) and public reporting on business and human rights.*
- Outline if companies and/or their staff have direct obligations under these laws.
- Identify existing enforcement mechanisms of these laws and regulations.
- Outline mechanisms to periodically assess gaps in laws and in their enforcement.
- Outline measures are being taken, or are planned, to address legal gaps and factors that constrain effective enforcement of these laws.

4.2. Laws that govern the creation and on-going operation of business enterprises

- Outline requirements under corporate and securities laws aiming at ensuring that business enterprises (and their staff) respect human rights.

Examples:

- *Requirement for companies to state their commitment to respect human rights in their articles of incorporation.*
- *Listing requirement for companies to commit to their human rights responsibility or to act with a ‘lawful purpose’ or ‘respect for the public order’ as above through CSR, ethics or social commitments for example.*

- If no requirement exists, identify what regulation exists in other areas, such as the protection of the environment or fight against corruption, that can/should be adopted into corporate and securities laws.

Examples:

- *Relevant provisions in laws on the protection of the environment.*
- *Relevant provisions in anti-bribery laws.*
- *Laws and regulations concerning the assessment of environmental and social impacts.*
- Ascertain if and how current laws require or encourage respect for equality and non-discrimination principles (e.g. regarding gender and other diversity on company boards).

4.3. Policies that seek to foster business respect for human rights and State guidance to business enterprises

- Evaluate if current securities and corporations laws/policies provide sufficient guidance to allow business enterprises to respect human rights and identify which public authorities are involved.
- Outline other policies or guidance material that seeks to foster business respect for human rights are in place and assess their impact.

Examples:

- *National action plans on human rights, on corporate social responsibility (CSR), etc.*
- *CSR policies by local bodies, particular government departments, and/or regional organisations.*
- *Human rights and anti-discrimination policies.*
- *Sector-specific policies concerning high-risk industries.*
- *Policies that promote business enterprises to carry out human rights due diligence.*
- *Policies that incentivise companies to publicly report on human rights. Advice for companies on how to do this.*
- *Information and training to explain the Guiding Principles, OECD Guidelines or other key international standards.*
- *Advice on appropriate actions that companies should take to meet their responsibility to respect human rights, including undertaking human rights due diligence and reporting.*
- *Specific guidance for companies operating in high risk sectors and environments.*
- *Guidance for small and medium sized enterprises.*
- *Guidance to companies on how to address specific human rights issues, such as working conditions, anti-discrimination, resettlement, access to water etc.*
- Identify the government department, with a clear focal point, that is responsible for any policy/guidance on business and human rights.
- Ensure that policies and guidance are routinely evaluated and updated through a multi-stakeholder and transparent process.

4.4. Human rights due diligence, reporting and communication by business enterprises

- Clarify what business enterprises are required to do in law to communicate their activities that may impact on human rights.

Examples:

- *Legal requirement for companies to hold or participate in public consultations prior to a major project.*
- *Free prior and informed consent requirements on land used by indigenous peoples.*
- *Human rights due diligence and public reporting requirements.*
- *Mandatory public release of social and environmental impact assessments.*
- Clarify if companies are required to report on their business operations or operating contexts when these pose a significant risk to human rights.
- Clarify if there are laws or policy guidance to determine what constitutes adequate communication and/or public reporting on human rights (or related issues such as social and environmental impacts)?

Examples:

- *Requirements on the accessibility of the information.*
- *Requirement regarding accuracy of reporting.*
- Create mechanisms to ensure adequate company reporting.

Examples:

- *Auditing of reports and verification of information.*
- *Sanctions in situations of publication of false report/information.*

4.5. The role of national human rights institutions

- Formally recognise the role that national human rights institutions (NHRI) can play to promote implementation of the Guiding Principles.

Examples:

- *Does the mandate of the NHRI specifically include the ability to look at human rights challenges related to business activities?*
- *What funding is the State providing to the NHRI on human rights and business activities?*
- Ensure that the NHRI has the necessary resources to ensure that it can effectively support the State in assessing if its laws adequately cover its international human rights obligations.
- Ensure that the NHRI is able to monitor the business and human rights situation on the ground and facilitate access to effective remedy for victims of corporate-related human abuses.

5. STATE-BUSINESS NEXUS (GP 4)

Guiding Principle 4 - State-Business nexus

“States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.”

5.1. State owned or controlled business enterprises

- Establish whether State agency management reports include human rights impact assessments of State owned or controlled business enterprises.

- Gauge options to ensure that relevant government departments can scrutinize and have oversight over the human rights impacts of State owned or controlled business enterprises.
- Give relevant government departments the authority to ensure that effective human rights due diligence is undertaken.

5.2. Agencies linked to the State

Examples:

- *Export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions.*
- Establish whether agencies, such as the export credit agency, take into account actual and potential human rights impacts when providing finance to projects.
- Identify measures that require the State agencies and business enterprises to undertake human rights due diligence on projects receiving State support, especially in cases where the nature of business operations or operating contexts pose significant risk to human rights.

6. PRIVATISATION & PUBLIC PROCUREMENT (GPs 5 & 6)

Guiding Principle 5 - Delivery of services to the State

“States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.”

Guiding Principle 6 - State commercial transactions with business enterprises

“States should promote respect for human rights by business enterprises with which they conduct commercial transactions.”

- Assess whether the State is undertaking human rights impact assessments of the potential consequences of planned privatisation of provision of goods or services.
- Establish whether public procurement contracts or legislation clarify the State’s expectations that the enterprises delivering services and goods respect human rights.

Examples:

- *Assess whether public procurement contracts comply with human rights standards and whether the terms recognise States’ relevant obligations under national and international law.*
- *Assess whether the relevant State agencies effectively oversee the business enterprises’ activities.*

Examples:

- *Which relevant agencies?*
- *What type of oversight mechanism?*
- Examine whether the State has adequate, independent monitoring and accountability mechanisms for the activities of business enterprises employed to provide services for the State.

- Identify whether legislation and public procurement contracts provide specific oversight of high risk services (e.g. health, security, etc.).
- Identify measures to promote the second pillar of the Guiding Principles for business enterprises which the State has commercial transactions with.
- Assess how the corporate responsibility to respect human rights can be addressed in legislative measures or terms of public procurement contracts.

Examples:

- *Due diligence requirements for companies that operate in high risk environments.*
- *Exclude companies that have a proven poor human rights record from State supplier lists or procurement processes.*

7. CONFLICT-AFFECTED AREAS (GP 7)

Guiding Principle 7 – Ensuring that business enterprises respect human rights in conflict-affected areas

“Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

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

(b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

(c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.”

7.1. Help business enterprises to identify, prevent, mitigate and account for the how they address their human rights impacts

- Identify measures to assist corporations and host States to ensure that business enterprises do not become involved in human rights abuses in conflict-affected areas.

Example:

- *Advising or alerting companies about the sale of equipment to States or non-State actors which could be used to violate/abuse human rights.*
- Develop early-warning indicators to alert government agencies and business enterprises about potential or actual human rights harms.

7.2. Provide assistance to business enterprises to help them assess and address the heightened risks of causing, contributing or having their activities linked to adverse human rights impacts in conflict-affected areas

- Pay specific attention to the risk of sexual and gender-based violence, which is especially prevalent during times of conflict.
- Identify ways to provide guidance for business enterprises on how to avoid causing or contributing to human rights harms in conflict-affected areas.

7.3. Measures that States could consider taking if companies are unwilling to meet the standards set for conflict-affected situations

- Identify options to investigate the activities of business enterprises suspected or accused of human rights abuses, for example through its foreign embassy in the host State.

Examples:

- *Appoint an independent mission that may report to the Parliament.*
- *Ask the embassy to investigate in the host State and report back to the relevant authorities in the home State.*
- Consider the appropriate penalty, including financial, that a business enterprise could suffer if it fails to cooperate in situations of alleged corporate-related human rights harms.

Examples:

- *Deny or withdraw public support or services to businesses that are involved in gross human rights abuses.*
- *Deny access to future provision of public support for business enterprises that are involved in gross human rights abuses.*
- Clarify available criminal sanctions if a business enterprise fails to cooperate in these contexts.

Examples:

- *Extraterritorial criminal liability.*
- *Impose specific sanctions on persons or entity.*
- *Seizing of equipment, freezing of assets, etc.*

7.4. Ensure that current policies, legislation, regulations and enforcement measures effectively address the risk of business involvement in gross human rights abuses

- Explore options for warning mechanisms for business enterprises on the heightened risk of being involved in gross human rights abuses in conflict-affected areas, including sexual or gender-based violence.
- Identify ways to foster closer cooperation between development agencies, foreign and trade ministries, export finance institutions in the capital city and foreign embassies, as well as between host government actors.
- Identify options to address any identified liability gaps.

Example:

- *Introduce civil or criminal liability for business enterprises domiciled or operating in its territory and/or jurisdiction that commit or contribute to gross human rights abuses.*
- Consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives.

8. POLICY COHERENCE (GPs 8-10)

Guiding Principle 8 - Ensuring both vertical and horizontal policy coherence within the State

“States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.”

Guiding Principle 9 - Economic agreements concluded by States

“States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.”

Guiding Principle 10 - States as members of multilateral institutions

“States, when acting as members of multilateral institutions that deal with business related issues, should:

- (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;*
- (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;*
- (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.”*

8.1. Capacity building of State institutions

- Have in place a senior and fixed person/team or system to help coordinate human rights and business policies and issues between and across different government agencies and departments.
- Identify and engage with all relevant government departments, agencies and other State-based institutions.

Example:

- *Departments/agencies responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour.*
- Provide appropriate information and training for staff in the relevant government departments and agencies on how to meet the State’s international human rights law obligations in the field of business and human rights.

- Assess the capacity-building and other needs of relevant departments and agencies so that they can ensure that business enterprises are informed of and act in a manner compatible with international human rights standards.

8.2. Facilitate multi-stakeholder initiatives and cooperation with civil society and business enterprises

- Actively and constructively engage with civil society and business enterprises on human rights.

Example:

- *NGOs, human rights and indigenous peoples' organisations, trade unions, employers' organisations, chambers of commerce, etc.*

- State engagement in multi-stakeholders initiatives.

Example:

- *Nationwide, regional or local consultations or conferences on specific projects, etc.*

8.3. Economic agreements concluded by States

- Examine the content of international investments agreements (IIA), bilateral investment treaties (BITs), free-trade agreements or contracts for investment projects and whether they conflict with or limit the State's ability to meet its international human rights obligations.
- Ensure that the negotiation process between the host State and the business investor is designed to identify, avoid and mitigate human rights risks.

Example:

- *Increase awareness among relevant State institutions of the Principles for Responsible Contracts (UN Document A/HRC/17/31/Add.3, 2011) and their key implications.*

- Assess whether the State is able to retain adequate regulatory control and policy space to protect human rights under the terms of the agreements that it has signed.

Examples:

- *Inclusion of human rights provisions in IIAs, BITs (etc.) signed by the State.*
- *Inclusion of social issues (environment, labour rights, social rights) in the IIAs, BITs (etc.) signed by the State.*
- *Stabilisation clauses that do not limit the host State's ability to meet its human rights obligations.*

- Establish whether the relevant government departments are aware of and able to include human rights provisions in IIAs, BITs, etc.
- Identify ways for home States to ensure that companies based in its territory do not sign investment agreements with host States that can result in negative human rights impacts on employees or local communities.

8.4. States as members of multilateral institutions

- Explain how the State is already involved in collective action concerning business and human rights through international trade and financial institutions.

Examples:

- *Awareness-raising/promoting the Guiding Principles.*
- *Awareness-raising/promoting other elements of the business and human rights agenda.*
- *Offering technical assistance/capacity building.*

- Explain what the State is doing to promote the Guiding Principles.

9. ACCESS TO REMEDY (GPs 25-28)

Guiding Principle 25 – the State duty to ensure access to effective remedy

“As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”

9.1. The State duty to take appropriate steps to investigate, punish and redress business-related human rights abuses

- Assess to what extent victims of business-related human rights abuses have access to local judicial or non-judicial grievance mechanisms, and identify ways to strengthen such systems to address business-related human rights impacts.
- Clarify the different types of mechanisms that exist to redress business-related human rights abuses in the country.
- Identify ways to facilitate public awareness and understanding of judicial and non-judicial grievance mechanisms (both State-based and non-State-based).
- Consider ways to ensure easy access to information on these mechanisms for affected stakeholders and how they may be used, including capacity building measures.
- Ensure that special attention is paid to women, indigenous peoples and other vulnerable groups and the possible difficulties that they face in accessing redress mechanisms (see GPs 26 and 27).
- Assess whether the State is providing support to victims to access redress mechanisms.

Examples:

- *Legal aid.*
- *Counselling through support from NHRIs, civil society organisations or other relevant organisations.*
- *Adequate support for vulnerable groups/persons, such as children, minorities, persons living in poverty, marginalized groups and populations, etc.*
- Identify possibilities for international cooperation (bilateral and multilateral) to build capacity of State mechanisms to enhance access to effective remedy for victims of business-related human rights abuse.

9.2. State-based judicial mechanisms

Guiding principle 26 - Effectiveness of State-based judicial mechanisms

“States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”

9.2.1. Type of State-based judicial mechanisms

- Outline the types of State-based judicial mechanisms available to adjudicate business-related human rights abuses in the country, and examples of cases.

Examples:

- *Judicial courts (competent for both criminal and civil actions).*
- *Labour tribunals.*

9.2.2. Examine how legal liability for legal persons such as corporations is established under national law

- Outline how criminal liability is attributed under domestic law.

Examples:

- *Attribution of criminal liability to corporations and/or their managers, concept of corporate complicity, definition of offences (criminal intent, recklessness, negligence), rules of limitation applicable, etc.*

- Consider how civil liability is attributed under domestic tort-based regimes (i.e. civil claims for damage relating to negligence or intentional wrongs).

Examples:

- *Separate corporate personality, causes of action, allocation of civil liability between individuals and corporate entities, allocation of civil liability between members of corporate groups, liability of the acts of third parties (nature and scope of liability), etc.*

- Clarify if any elements of extraterritorial jurisdiction can be found under domestic criminal and civil liability legislation (i.e. where claimants face the denial of justice in a host State, can they access the court system in the home State and, if so, under what conditions?).

Examples:

- *Respective roles of home and host States in investigation and enforcement; choice of law in cross-border cases; use of extraterritorial jurisdiction in cases of business involvement in gross human rights abuses (in both the public and the private law sphere), etc.*

9.2.3. Examine whether practical or procedural barriers prevent legitimate cases from being brought before the courts

- Assess legal and practical barriers which may hinder access to remedy and outline steps taken to address such barriers.
- Examine cost factors for bringing claims against business enterprises and whether these present undue obstacles to access the courts.

Examples:

- *Costs of civil or criminal litigations against private companies.*
- *Civil and criminal legal aid.*
- *'Market-based' mechanisms, such as litigation insurance and legal fee structures.*

- Ensure that the State is taking steps to secure legal representation for claimants in this area.

Examples:

- *Legal representation or other type of incentives for lawyers.*

- Clarify if adequate options exist for aggregating claims or enabling representative proceedings.

Examples:

- *Class actions, multi-party litigation or other collective action procedures.*

- Explain what resources, expertise and support State prosecutors have to meet the State's own obligations to investigate individual and business involvement in human rights related crimes.

9.3. State-based non-judicial grievance mechanisms

Guiding principle 27 - State-based non-judicial grievance mechanisms:

“States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.”

Guiding Principle 31 - Effectiveness criteria for non-judicial grievance mechanisms

“In order to ensure their effectiveness, non-judicial grievance mechanisms, both State based and non-State-based, should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

9.3.1. Type of State-based non-judicial mechanisms

- Identify the different types of administrative, legislative and other non-judicial mechanisms that exist to address business-related human rights abuses.

Examples:

- *National human rights institutions (NHRIs).*
- *National Contact Points under the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development.*
- *Ombudsperson offices.*
- *Government-run complaints offices.*
- *Mediation-based, adjudicative or other culturally-appropriate and rights-compatible processes.*
- Outline the role of NHRIs with regard to redressing corporate human rights abuses.
Examples:
 - *Mandate that allows the NHRI to receive and handle complaints relating to corporate human rights abuse.*
 - *Mandate that allows the NHRI to offer mediation, conciliation, support to individual cases, legal aid, etc.*
 - *Promoting awareness of remedy and redress for corporate human rights abuses.*
 - *Training of relevant stakeholders.*

9.3.2. Assess the effectiveness of State-based non-judicial grievance mechanisms

- Assess the effectiveness of State-based non-judicial grievance mechanisms against the criteria set out in Guiding Principle, including whether they are:
 - (a) Legitimate: Do the grievance mechanisms enable trust from the stakeholder groups for whose use they are intended?

Examples:

- *Do they have a mandate (and resources) that ensure their independence?*
- *How does the State ensure that the different parties to a grievance process cannot interfere with its fair conduct?*
- *Is it possible for parties to lodge a complaint regarding unfair conduct of the process to the relevant public authorities? Who deals with this complaint process?*

- (b) Accessible: Has the State ensured public awareness of the grievance mechanisms, taking into account accessibility elements?

Examples:

- *Language & literacy, costs, physical location, protection of individuals against fear of reprisal, providing assistance for those who face barriers to access remedies, etc.*

- (c) Predictable: Is the State providing clear and public information about the procedure?

Examples:

- *Timeframes for each stage of the process.*
- *Information on types of process and outcomes available.*

- (d) Equitable: Does the State provide reasonable access to information, advice and expert resources for the different parties involved?

- (e) Transparent: Does the State communicate regularly with the different parties about the status of individual grievances? Does the State ensure that the mechanism's performance is made publicly available to wider stakeholders?

Examples:

- *Statistics, case studies, more detailed information about the handling of cases (NB: confidentiality of the dialogue between parties and of individuals' identities should be provided where necessary).*

(f) Rights-compatible: Does the State ensure that grievances are framed in terms of human rights when they raise human rights concerns?

Example:

- *By providing for training of relevant laws, institutions and mechanisms.*

(g) Continuous learning: Does the State support regular analysis of the frequency, patterns and causes of grievances, which can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm?

9.4. Non-State-based grievance mechanisms

Guiding Principle 28 - Non-State-based grievance mechanisms

“States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.”

- Raise awareness of non-State-based grievance mechanisms.

Examples:

- *Provide information on non-State-based grievance mechanisms administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group.*
- *Provide information on how to complain to regional and international human rights bodies.*

- Identify gaps and ways to enhance access to non-State-based grievance mechanisms.

Example:

- *Capacity building and support to civil society organizations that can assist victims to access regional and international human rights bodies.*

ANNEX

Background: the Working Group's focus on national action plans

The Working Group is mandated by the Human Rights Council to promote wide and comprehensive dissemination of the Guiding Principles.⁹

In its first report to the Human Rights Council in 2012, the Working Group urged States to consider adopting a national action plan to implement the Guiding Principles. In February 2014, it decided to prioritize national action plans in its strategy to fulfil its mandate. It is dedicating its report to the sixty ninth session of the UN General Assembly to a discussion of national action plans¹⁰. It has held a number of formal and informal discussions with Governments on national action plans, including at the annual Forum session in December 2013¹¹, which resulted in a first round of peer learning and identified early achievements, opportunities, and challenges for further action.

In early 2014, the Working Group devised a roadmap to promote the uptake of effective national action plans. The roadmap includes an open consultation on the strategic elements of national action plans (held in February 2014)¹²; the launch of its online database on "State national action plans"¹³; this open e-consultation on substantive elements in a national action plan; and a State survey to better understand existing government practice on business and human rights.

In addition, the roadmap includes the convening of an expert workshop in May 2014 to discuss substantive elements that national action plans should include; engaging with other initiatives, such as tools to support national action plans being developed by the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR)¹⁴; the Working Group's report on national action plans to the UN General Assembly; and its guidance on the process, substantive content and review of a national action plan. A preliminary guide will be presented at the annual Forum in December 2014, reviewed in 2015 and finalised in 2016 after a pilot period.

⁹ Human Rights Council resolution 17/4.

¹⁰ See the outcome document of the Working Group's sixth session held in November 2013:

<http://www.ohchr.org/EN/Issues/Business/Pages/2013Sessions.aspx>

¹¹ <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/PreForumsessionforStates.aspx>

¹² See A/HRC/WG.12/7/1

¹³ <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>

¹⁴ See <http://www.business-humanrights.org/Documents/icar-dihr-naps-project>.