

DRAFT v1.2

DRAFT DISCUSSION PAPER: PROPOSED ELEMENTS FOR GUIDANCE THE ROLE OF BUSINESS IN RELATION TO HUMAN RIGHTS DEFENDERS IN LINE WITH THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

Draft by the UN Working Group on Business and Human Rights

Human rights defenders speaking up against business-related impacts on the rights of communities and workers continue to experience an increase in risks to their safety and security. Data collected by various organizations indicate that the number of defenders who have been killed, physically harmed or threatened is on the rise. Many defenders engage in work focused on human rights issues relating to business activity in their country. The Special Rapporteur on the Situation of Human Rights Defenders recently examined the connection between business activity and harm to human rights defenders in his 2017 report to the UN General Assembly.¹

The UN Working Group on Business and Human Rights has, as part of its ongoing activity, the task of clarifying and unpacking the UN Guiding Principles on Business and Human Rights (“UNGPs” or “Guiding Principles”).² Such unpacking allows stakeholders to improve and refine their own activities in relation to the UNGPs. In 2017, the Working Group launched a work stream focused on clarifying how the UNGPs provide a tool to assist governments, the private sector and civil society to better address how business can respect the human rights of defenders engaged in work relating to business and human rights and corporate accountability.³ The Guidance will also address the changing legal and policy landscape that has led to a decline in civic space and barriers to the ability of defenders and civil society to peacefully advocate for the victims of human rights abuses linked to business activity.

The Working Group is in the process of consulting with stakeholders to prepare guidance on business respect for human rights defenders, and the related issue of how business might address issues of civic freedom and the rule of law. To this end, we have prepared an outline of the proposed elements of such guidance. This is meant to help stakeholders provide further focused input. ***The proposed elements illustrate what issues the Guidance hopes to address, but does not prescribe how the Guidance will do so.***

The UNGPs reference human rights defenders specifically. For example, the commentary to Guiding Principle 19 (identifying adverse human rights impacts) notes that “in situations where consultation with rights holders is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights

¹ UN document A/72/170

² Most recently, UN Human Rights Council resolution A/HRC/RES/35/7.

³ See <http://www.ohchr.org/EN/Issues/Business/Pages/HRDefendersCivicSpace.aspx>

defenders and others from civil society.” The commentary to Guiding Principle 26, on effective State-based judicial mechanisms, clarifies that States should ensure that “the legitimate and peaceful activities of human rights defenders are not obstructed.” Thus, the UNGPs recognize the critical role of human rights defenders as part of the business and human rights ecosystem. Defenders engage in a range of activities to promote human rights, including by facilitating access to justice and remedy. The Working Group aims to further clarify the steps that business enterprises are expected to take under the UNGPs to respect the rights of human rights defenders.

Proposed Elements of Guidance and Related Questions for Stakeholders

I. Pillar One: The State Duty to Protect Human Rights

Foundational Principles

- Guiding Principles 1 and 2

The Guidance could potentially address Principles 1 and 2 – relating to how States should set out expectations relating to business respect for human rights, and how this includes respect for human rights defenders. This can include examples of good state practice and coordination.

Question: What are examples of ways in which States have sought to promote respect for human rights defenders generally, and in situations focused on business and human rights issues.

Operational Principles

- Guiding Principle 3

The Guidance could also explore how states can better provide guidance and enforce laws relating to how business can respect the human rights of defenders, and also actions that can be taken to prevent adverse impacts to defenders.

Question: How can these expectations be effectively communicated to the business community?

The Guidance could focus on how national action plans can identify key issues relating to how States can address harmful business activity that adversely impacts defenders. Similarly, the guidance could address how States can develop or utilize legal and policy frameworks better to protect defenders who are at risk in a business and human rights context.

Questions: What are examples of ways States have identified harm to human rights defenders in their National Action Plans on Business and Human Rights (NAPs), or ways that States have involved defenders in the process of developing NAPs?

Are there other examples of States developing guidance for the private sector on respect for human rights defenders?

State as an Economic Actor

- Guiding Principles 4, 5 and 6

Guiding Principle 4 focuses on how States should take additional steps to protect against human rights abuses by business enterprises owned or controlled by the State, or which receive substantial support or services from State agencies (e.g. export credit, investment guarantees).

The Guidance could address how States can use their trade and other financial support, to encourage respect how human rights defenders. At the same time, the Guidance can also address whether States should consider adverse human rights impacts to defenders that may be caused by, contributed to, or linked to a business, when providing future support or assistance. Similarly, when States either delegate functions to the private sector, or engage in public procurement, an opportunity exists to address how businesses address the issue of human rights defenders.

Questions: Are there examples of ways in which States have used incentives such as export credit or trade promotion to encourage business respect for human right defenders. Are there existing methods that encourage respect for human rights that could serve as models or lessons regarding business respect for human rights defenders?

Conversely, are there examples of how States might factor in businesses engaging in activity that causes, contributes or is linked to negate human rights impacts to defenders, when businesses are seeking future benefits, contracts or other support?

Conflict-Affected Areas

- Guiding Principle 7

The Guidance could address the nature of heightened risks to human rights defenders in conflict-affected areas, and explore whether there should be additional policies or programs that focus on how to ensure business respect in such contexts.

Question: Are there specific considerations that States and businesses should consider with respect to the potential for harm to defenders, in conflict-affected areas?

II. Pillar Two: The Corporate Responsibility to Respect Human Rights

Foundational Principles

- Guiding Principles 11 -15

The Guidance could focus on the types of impacts that business activity can have on human rights defenders. This segment would be illustrative and not exhaustive – simply highlighting the nature and magnitude of risks.

Questions: What are some of the key adverse impacts on human rights defenders that a business enterprise may be causing or contributing to through its own activities, or which may be directly linked to its operations, products or services by its business relationships?

Are there specific considerations relating to defenders focused on specific issues or representing specific groups (e.g. women defenders, indigenous defenders, environmental defenders)?

Operational Principles

- Guiding Principles 16-21

A main objective of the Guidance is to clarify the responsibility of business enterprises to respect human rights defenders, and how this responsibility entails the identification, prevention and mitigation of human rights risks to defenders.

In light of this, the Guidance could provide more detail on the nature of how business can respect the human rights of defenders, by identifying adverse impacts related to defenders who may be affected by business activity (e.g. at a project site, within a particular community, organizations who advocate for rights relating to a particular issue such as environmental rights, or women's human rights). The Guidance could discuss how business can better identify, prevent and mitigate human rights abuses against defenders by engaging in human rights due diligence that factors in the risks of such abuse.

The Guidance may also address the issue of leverage in terms of how business enterprises might engage with other stakeholders— whether it be a supplier who is causing a harm, a government that may be connected to the harm and other parties that may be connected to adverse impacts to defenders.

The Guidance could also focus on how business enterprises can engage in more meaningful engagement and consultation with defenders as part of their human rights due diligence. By viewing defenders as justice enablers and as part of a front-line system for identifying human rights issues, defenders can serve as constructive partners in human rights due diligence and impact assessment.

Questions: What are examples of how business can engage in impact assessment and human rights due diligence that takes account of potential impacts to human rights defenders?

If risks are identified, how can they be effectively mitigated?

What are examples of how businesses can work with human rights defenders as partners or key stakeholders who are partners on human rights due diligence and impact assessment, to better identify, and mitigate impacts to rights holders?

Remediation

- Guiding Principle 22

The Guidance could address the use of remediation and how businesses can meaningfully engage in remediation processes. The Guidance could also address how States and the private sector should address how defenders face retaliation or are instructed in their attempts to seek remedy for themselves or for impacted rights holders.

Questions: How can businesses best either provide for or cooperate in providing remediation when a human rights defender is harmed?

Similarly, to the extent that a defender may be the subject of criminal proceedings or other retaliation for exercising legal rights relating to accessing remedy for themselves or for victims of business-related human rights abuses, how can businesses engage in meaningful activities designed to prevent further harm?

How might this be achieved through either collective action, participation in legal proceedings or otherwise attempting to use leverage to prevent further harm to the defender?

Issues of Context

- Guiding Principles 23 and 24

The Guidance could explore to what extent business respect for human rights defenders may be different when there is a risk of causing or contributing to gross human rights abuses (e.g. extrajudicial killings), or where delayed response would make a human rights risk irreparable.

Question: What are examples of how business can act quickly and effectively to remediate imminent harms to defenders, or harms that constitute gross human rights abuses?

III. Pillar Three: Access to Remedy

Operational Principle

State-Based Judicial Mechanisms

- Guiding Principle 26

The commentary to Guiding Principle 26, notes that legitimate and peaceful activities of human rights defenders should not be obstructed, when they are exercising a right to access judicial remedy. As documented by research organizations and civil society groups, there are a growing number of situations where defenders have been the subject of reprisals, lawsuits and other

examples of action by State entities as well as business enterprises, aimed at thwarting lawful activities by civil society and human rights defenders, seeking access to an effective remedy.

The Guidance could provide examples of such activities (e.g. defamation lawsuits or other types of strategic litigation against defenders who have sought a judicial remedy for victims) and how States can take steps to ensure that defenders and civil society are not hindered from exercising their right to access the justice system in pursuit of a remedy.

Question: What steps should States or the private sector take, to address the issue of retaliation or reprisals against human rights defenders who seek to access judicial remedy?

Non-State-Based Grievance Mechanisms

- Guiding Principles 28-31

The Guiding Principles set forth criteria for how business or business associations can develop effective non-judicial grievance mechanisms. The proposed Guidance could address what specific consideration businesses should take into account to ensure that defenders can effectively access non-judicial grievance mechanisms as part of seeking access to an effective remedy for victims of business related human rights impacts. The Guidance could address specific issues of confidentiality and security, for whistleblowers and others who may fear for their safety and security when accessing such mechanisms. This would discuss how companies can create mechanisms that follow best practices with respect to such issues.

Questions:

What are examples of operational level grievance mechanisms, that have useful mechanisms for protecting whistleblowers (including defenders) or that have mechanisms designed to ensure confidentiality and security of those seeking remedy via these mechanisms?

Comments can be sent to wg-business@ohchr.org, cc bhrconsultant@ohchr.org, by 20 Jan 2018.