



**United Nations Secretary-General's Special Representative
on business and human rights**

**MANDATE CONSULTATION OUTLINE
October 2010**

In June 2011, the UN Human Rights Council will consider two documents presented by the SRSG. The first is the “Guiding Principles for the implementation of the Protect, Respect and Remedy framework” (“UN framework”), together with Commentaries elaborating upon the GPs. The second is an options paper addressing the pros and cons of various ways the Council might follow up on the current mandate.

This paper outlines some of the key elements in the framework on which guidance for implementation may be desirable. It serves as an outline for this consultation. We will also have a general brainstorming session on follow-up options, but there is no background paper for that.

The process going forward includes the current round of consultations with States, business, and civil society; followed by the posting, sometime in the second half of November, of draft Guiding Principles for public comment and exchange of views; possibly followed by another face-to-face consultation in mid-January (time and resources permitting). The SRSG will then finalize both documents and submit them to the Human Rights Council by early March. It typically takes six weeks thereafter for Council documents to be released publicly.

This paper contains excerpts from the Special Representative's 2008, 2009, and 2010 reports, providing the necessary background and context for the consultations, together with points for discussion of what might be covered in the Guiding Principles and Commentary.

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.¹

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 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)

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

¹ This paragraph and the next summarizes similar statements in prior reports, but is taken from the SRSG's keynote address at the Third Trygve Lie Symposium on Fundamental Freedoms, New York, 24 September 2010, full text available at <http://www.business-humanrights.org/SpecialRepPortal/Home>.

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.

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.

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?

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.

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 fulfill their duty to protect, and to promote the corporate responsibility to respect human rights.
- 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.

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)

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 feedback 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.

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.

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)

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.

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.

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.