

SUBMISSION TO THE UNITED NATIONS WORKING GROUP ON
HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS
AND OTHER BUSINESS ENTERPRISES
CONCERNING KEY THEMATIC PRIORITIES FOR THE WORKING GROUP

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Background

The Institute for Human Rights and Business (IHRB) wishes to congratulate the members of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises on being appointed to this important role in advancing the business and human rights agenda globally. We appreciate this early opportunity to provide views and recommendations to help inform the Working Group's decisions concerning key thematic priorities and activities for the initial period of the mandate.

IHRB co-organized a meeting in July 2011 on "What Next for Business and Human Rights at the UN?" in cooperation with the UN Office of High Commissioner for Human Rights and the Friedrich-Ebert-Stiftung, which reflected on the adoption by the Human Rights Council of the UN Guiding Principles for implementing the Protect, Respect, Remedy framework and discussed future actions needed to maintain and build on progress achieved over the past six years. As Working Group members will be aware, the summary of the July meeting¹ includes an extensive list of themes and proposed follow up actions that are worthy of further consideration.

When establishing priorities for its mandate, it is important that the Working Group focuses on those tasks that cannot legitimately be taken by any other body. There will be numerous actors involved in the implementation of the Guiding Principles. The key issue for the Working Group will be to focus on where it can uniquely add value in advancing the business and human rights agenda globally.

¹ http://www.ohchr.org/Documents/Issues/Business/businessHRat_the_UN_4-5July2011.pdf

For the purposes of this submission, IHRB wishes to highlight four specific areas where the Working Group has a particularly important leadership role to play in the time ahead:

1. Developing a system of authoritative interpretation of the Guiding Principles to ensure common understanding and address disputes that may arise over their implementation in multiple and often difficult contexts.
2. Establishing clear effectiveness criteria for human rights due diligence processes undertaken by companies as outlined in the Guiding Principles.
3. Addressing capacity gaps that will likely constrain effective implementation of the UN Protect, Respect, Remedy framework and Guiding Principles.
4. Engaging in dialogue across all global regions during 2012 to ensure that diverse views and concerns about implementation of the Guiding Principles are heard and understood at the start of the mandate.

IHRB would be pleased to respond to any questions or comments the Working Group may have on this submission and looks forward to opportunities for further dialogue and collaboration in support of this important mandate.

1. Developing authoritative interpretations

Building on the principle of prioritization around tasks that cannot be legitimately undertaken by any other body, it is critical that the Working Group develops its interpretive role with respect to the UN Framework and Guiding Principles. This role will become increasingly crucial over the months and years ahead.

The Working Group is called upon to promote the effective implementation of the Guiding Principles. As a first step, even before implementation can begin, the business community, and other stakeholders, must have a clear understanding of what human rights are, what they mean and how they are relevant in a business context. There is a great deal of existing guidance in this area produced by the UN and other actors but much work remains to be done in this respect.

While recognizing that practical actions concerning specific rights will differ depending on each particular business context, there is nonetheless the need for a basic understanding of the core content of each right. The different contexts in which governments must respect, protect and fulfill rights has never been seen as a barrier to government obligations. Instead, the response has been to clarify the key concepts of many specific rights through Treaty Body General Comments (or their equivalent), their application through the review of state action that has then built up a jurisprudence around the content and application of rights through the Treaty Body reporting process, the

elaboration in the UN Special Procedures, and more recently, in the Human Rights Council Universal Periodic Review process.

There is a need for a similar process of elaboration around the corporate responsibility to respect human rights. There are a number of models in the UN system as highlighted above that could be used to develop authoritative interpretations of human rights in a private sector context. Without such authoritative interpretations, there is a very real risk that the implementation of the Guiding Principles becomes more about process than content; more about skimming the surface especially on less well understood rights; and more disputes about the scope and adequacy of due diligence than about prevention and positive contributions that business can make.

At the same time that the Working Group is establishing its own priorities, efforts by a range of governmental, inter-governmental and non-governmental actors to understand and interpret the UN Guiding Principles have already begun. Multiple interpretations emerging in an uncoordinated manner would run the risk of establishing low benchmarks, thus undermining the Guiding Principles. Only the United Nations can legitimately play this role, and within the United Nations it is the Working Group that has been tasked with the effective implementation of the Guiding Principles.

As the most authoritative source of opinion within the United Nations on business and human rights, the Working Group may therefore wish to consider a parallel process that involves the Working Group and other relevant UN bodies in guiding, monitoring and reviewing such interpretations being developed by other actors. This will clearly require ongoing dialogue with all relevant actors and collaborative approaches perhaps involving a period of testing how such guidance could most effectively emerge. As one example, the Working Group might develop a strategic series of dialogues with key industry sectors and relevant stakeholders aimed at testing the uptake of the Guiding Principles and the challenges faced that are common for the industry in question.

Such approaches would not only give the Working Group early insights into the benefits and shortcomings of different approaches to implementing the Guiding Principles but would also be potentially useful ways of focusing dialogue on clear outputs that could in part inform the work of the Annual Forum on Business and Human Rights and involve a wider range of ongoing initiatives and processes at the UN and beyond it.

2. Establishing effectiveness criteria

The human rights due diligence steps for companies set out in the UN Guiding Principles are of critical importance. On their own, however, they do not necessarily provide sufficient basis for ensuring that the due diligence an enterprise conducts is adequate and effective in human rights terms. Failure to move beyond procedural steps risks encouraging a 'box ticking' exercise or reinforcing a purely compliance-driven mentality

in some businesses and could make evaluating the substance of human rights due diligence approaches more difficult.

IHRB stresses in this context the need to develop rights-based criteria similar to those presented in 2008 by the UN Secretary-General's Special Representative on Business and Human Rights (SRSG) under the 'Remedy' pillar of the Protect, Respect, Remedy framework. This point was made in IHRB's submission to the SRSG in January 2011.² It is essential for the United Nations to define 'effectiveness criteria' which apply to the due diligence dimensions of the 'Respect' and 'Remedy' pillars of the UN framework. This will ensure that the human rights due diligence methodologies developed and adopted by a range of private sector actors are legitimate and fit for purpose. Without these common criteria, there is a risk that businesses, the marketplace, individual governments or regional inter-governmental organizations will develop their own definitions in isolation, and the proliferation of definitions will lead to confusion and competing views on how human rights due diligence should be applied in practice.

There are already numerous key criteria around carrying out human rights due diligence that appear at various points in the Guiding Principles and their commentary – such as the requirement for meaningful consultation with stakeholders. What is needed is to draw the relevant concepts out into a more clearly defined list of criteria and to explore what further criteria are needed. Any process aimed at developing criteria of this kind should be open and consultative. The full set of criteria should apply to the entire due diligence process but some elements will be more relevant than others when specific due diligence steps are considered.

It will be crucial that effectiveness criteria cover both the *process* dimension of ensuring that due diligence is carried out in accordance with human rights principles, and the *content* of the relevant human rights as well. In this sense, the Working Group might draw inspiration from the approach to earlier work in the UN system to define core concepts relating to human rights based approaches to development as there are important analogies.³ This reinforces the importance of the authoritative interpretations highlighted above as these interpretations would become the core reference point in determining whether due diligence carried out by companies was effective from a human rights point of view: did the due diligence address the relevant set of rights and with respect to those relevant rights, did the due diligence address the core dimensions of the right relevant to the context?

Other ongoing initiatives such as those relating to ISO 26000 and the Global Reporting Initiative are also relevant in this context as they may contribute important concepts such as scope and materiality that are relevant to due diligence processes. Once in place, such 'effectiveness criteria' would enable the United Nations, governments and others to express views about the legitimacy and appropriateness of specific business approaches to human rights due diligence.

² http://www.ihrb.org/pdf/2011_01_25_IHRB-Submission_on_Draft_Guiding_Principles.pdf

³ http://hrbportal.org/?page_id=2127

This is not to argue for a single rigid template for companies to undertake human rights due diligence processes. It is recognized that much depends on company size, industry sector, and the context in which business activity takes place. The creativity of business itself should be engaged in developing appropriate tools to more clearly define appropriate methodologies to apply the effectiveness criteria.

3. Addressing capacity challenges

Human Rights Council resolution A/HRC/RES/17/4 establishing the Working Group's mandate, recognizes "the importance of building the capacity of all actors to better manage challenges in the area of business and human rights" and requests the Working Group to "provide support for efforts to promote capacity-building and the use of the Guiding Principles"⁴. The resolution also requests the UN Secretary-General "to prepare a report on how the United Nations system as a whole, including programmes and funds and specialized agencies, can contribute to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles, addressing in particular how capacity-building of all relevant actors to this end can best be addressed within the United Nations system"⁵.

As the members of the Working Group will be aware, in February 2011, the SRSR recommended⁶ that the Human Rights Council give consideration to the establishment of a Voluntary Fund for Business and Human Rights, with the primary purpose of addressing capacity building needs. It is evident that a UN sponsored initiative in this area would ensure legitimacy and well established practices in terms of governance and disbursement of funds to support business and human rights projects at local and national level. It is also true that such an initiative may require considerable time to take shape and that other interim measures might prove effective as well in providing increased access to funding for capacity related challenges. These could, for example, include creation by interested parties of a separate non-profit organization for this purpose or utilizing an existing non-profit organization to administer a new fund with a separate and independent governance structure.

Although the SRSR's recommendations concerning the establishment of a new voluntary fund on business and human rights were not pursued by the Human Rights Council in 2011, IHRB encourages the Working Group to give particular attention to the range of capacity related challenges facing all actors addressing business and human rights issues and to play an active role in efforts aimed at addressing these through a creative mix of measures.

⁴ Human Rights Council Res A/HRC/RES/17/4, paragraph 6(c).

⁵ Human Rights Council Res A/HRC/RES/17/4, paragraph 11.

⁶ <http://www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf>

4. Engaging in global dialogue

The Working Group would do well to develop its own evidence-based platform for action and use 2012 as a time to draw together diverse perspectives on the Guiding Principles from around the world and from a broad range of constituencies including business, governments, national human rights institutions, civil society, communities, trade unions and others.

To make such a process of global engagement manageable given limited resources, and to encourage shared capacity and ownership of the mandate in the time ahead, the Working Group should give consideration to requesting that five governments (one from each UN global region) be asked to host and provide funding support for a consultation meeting for the Working Group during 2012 for their respective regions.

Ideally, each consultation would include the participation of all members of the Working Group, with a specific member taking the lead in helping to plan the agenda for the discussions within their own region. The outcome from these regional meetings, which would ensure participation from all stakeholders, would result in a thorough stock-taking of how the Guiding Principles have been received to date and provide an opportunity for the Working Group to prioritize its actions for 2013 and 2014 based on firm and publicly shared views and recommendations.

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