

**THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS**

**THE STATE DUTY TO  
PROTECT AGAINST  
BUSINESS-RELATED  
HUMAN RIGHTS ABUSES**

**UNPACKING PILLAR 1 AND 3 OF THE  
UN GUIDING PRINCIPLES ON  
HUMAN RIGHTS AND BUSINESS**

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## **UNPACKING PILLAR 1 AND 3 OF THE UN GUIDING PRINCIPLES ON HUMAN RIGHTS AND BUSINESS**

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## **ABBREVIATIONS**

BIT	Bilateral investment treaty
CSR	Corporate Social Responsibility
CVT	Country Visit Template
ECA	Export credit agency
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GP	Guiding Principle
HRC	Human Rights Council
IIA	International investment agreement
ILO	International Labour Organisation
MNC	Multinational company
NHRI	National Human Rights Institutions
OECD	Organisation for Economic Cooperation and Development
OHS	Occupational, health and safety
PMSC	Private military and security company
SMEs	Small and medium enterprises
SRS	Special Representative of the Secretary General
UN	United Nations
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNWG	United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises

# INTRODUCTION

The purpose of this working paper is to explore and unpack the human rights duties of the state when dealing with business enterprises activities as recalled and detailed in the United Nations' Guiding Principles on Business and Human rights.

Global and multi-level governance approaches to the human rights and business field have yielded major achievements over the past decade. Broad multilateral soft law standards have been adopted, such as the OECD Guidelines for Multinational Enterprises<sup>1</sup> or the ILO Declaration on Fundamental Principles and Rights at Work<sup>2</sup>. Multi-stakeholders initiatives, such as the UN Global Compact in 2000, have been launched and supported by private companies, states, civil society organisations, labour organisations as well as several UN agencies. At the same time, sectorial guidelines and codes of conduct have been adopted<sup>3</sup> and many multi-stakeholders initiatives<sup>4</sup> have been launched on issues pertaining more or less directly to the human rights and business field. In March 2011 the United Nations' Guiding Principles on Business and Human rights (UNGPs) were endorsed by the Human Rights Council (HRC).<sup>5</sup> Subsequently a Working Group on the issue of human rights and transnational corporations and other business enterprises was established by a HRC resolution in June 2011.<sup>6</sup>

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<sup>1</sup> The OECD Guidelines for Multinational Enterprises are annex to the OECD Declaration on International Investment and Multinational Enterprises first adopted in 1976. The Guidelines are far-reaching recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They have been revised several times since 1976.

<sup>2</sup> The Declaration adopted by the ILO in 1998 declares that all ILO members, even if they have not ratified the Conventions in question, have an obligation to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

<sup>3</sup> See for example: Voluntary Principles for Security and Human Rights (2000), which concern extractive sector companies, Code of Conduct for Private Security Service Providers (2010), the OECD Due Diligence Guidelines for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas (2011); The FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012), etc.

<sup>4</sup> Such as the Extractive Industries Transparency Initiative - EITI (2003) or the Kimberley Process on conflict diamonds (2002).

<sup>5</sup> UNGPs Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Annex to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (Human Rights Council, Seventeenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Advance Edited Version Distr.: General, 21 March 2011, Original: English, A/HRC/17/31).

<sup>6</sup> Resolution establishing the Working Group on the issue of human rights and transnational corporations and other business enterprises, Human Rights Council, seventeenth session, 33<sup>rd</sup> meeting, 16 June 2011 (A/HRC/17/4).

The UNGPs build on extensive work by Professor John Ruggie during his mandate as Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises (2005-2011). The UNGPs take stock of existing human rights obligations, regulations and policies, multi-governance initiatives, good practices and challenges, and corporate social responsibility (CSR) developments within the field of human rights and business. They provide for a well-structured presentation of relevant issues in the form of guiding principles. Based on the “Protect, Respect and Remedy” Framework for business and human rights,<sup>7</sup> they enhance and unpack the distinction that exists between the state *duty to protect human rights* and the corporate *responsibility to respect human rights*. They provide for a set of principles that states and businesses must apply, or ought to apply or consider applying (depending on the case) to prevent, mitigate or redress corporate-related human rights abuses. The work of John Ruggie on the Framework and the UNGPs has been closely scrutinised by all actors and has been abundantly commented upon by scholars.<sup>8</sup> Their overall analysis – more or less tainted by criticism – is that wide-ranging consultations, a remarkable consensus-building process, strategic choices to keep away from controversial issues, and a very careful wording of the final document have resulted in the Framework and the UNGPs receiving the endorsement of the HRC and thereby the international community.<sup>9</sup>

The UNGPs are presented, and to some extent seen, as a common reference point that provides a “sound basis” for new initiatives in the field of human rights and business. As SRSG, John Ruggie himself emphasised repeatedly that the UNGPs were only “the end of the beginning” and a “common foundation from which thinking and action of all stakeholders would generate cumulative progress over time.”<sup>10</sup> There is a general expectation that an uptake of the UNGPs in the work of the UN, in global governance framework as well as at domestic and local level, will take place in the years to come.<sup>11</sup> The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) is to play a central role in this respect.

The state duty to protect defined by Pillar 1 of the UNGPs focuses on the traditional role of the state in safeguarding individuals’ human rights against abuses committed by non-state actors (NSAs). The human rights obligation of states with regard to business

<sup>7</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises - *Protect, Respect and Remedy: a Framework for Business and Human Rights*, 7 April 2008 (A/HRC/8/5).

<sup>8</sup> See a. o. two recent anthologies: Mares, Radu (ed.): *The UN Guiding principles on Business and Human Rights: Foundations and Implementation*, The Hague: Brill, 2012 and Deva, Surya and Bilchitz, David (eds.): *Human Rights Obligations of Business. Beyond the Corporate Responsibility to Respect?* Cambridge University press, 2013.

<sup>9</sup> See articles from Karin Buhmann, Carlos López and Surya Deva in Deva and Bilchitz, 2013.

<sup>10</sup> See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, 21 March 2011, A/HRC/17/31, par. 13. See also: Mares, Radu: “Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress, in Mares, 2012, 1-49.

<sup>11</sup> This is already the case a. o. in European Union (see the European Commission’s “Renewed EU Strategy 2011-14 for Corporate Social Responsibility, COM(2011), 681 final, 25 October 2011), within the framework of the OECD Guidelines for Multinational Enterprises (Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011) or in the ISO 26000 on Social Responsibility.

activities is to ensure that such enterprises do not indirectly infringe upon human rights. Where a state is unable or unwilling to protect individuals against human rights related abuses, another state (home state in the case of transnational business activities) or the business enterprise itself may have a responsibility to take action. Pillar 3 of the UNGPs, which addresses the roles of state and non-state actors in securing access to remedy, reiterates the international human rights duty that states have “to 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”.<sup>12</sup>

The nature of the corporate responsibility to respect human rights is very different and has been detailed and discussed in many commentaries to the UNGPs.<sup>13</sup> It is in any case certain that the UNGPs do not create any direct human rights obligation for companies under international law. An attempt to create such human rights obligations imposed directly on business enterprises failed in the past<sup>14</sup>. Such an endeavour raised enormous conceptual, legal and practical challenges.<sup>15</sup> There is today still very little shared understanding between the creators of international human rights law—the states—as to what steps they should take with regard to business enterprises. However, the discussion on the creation of a legally-binding UN treaty on human rights and business that would impose obligations on states (and business enterprises?) has been kept alive by non-government organisations (NGOs) and a group of states within the UN system<sup>16</sup>. On the 26<sup>th</sup> of June 2014, the HRC has voted a resolution that represent a step towards a legally-binding instrument on business and human rights. According to this text, the Council decided to establish an open-ended intergovernmental working group to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.<sup>17</sup> Nevertheless, it remains that the actual elaboration and adoption of such a convention poses monumental foundational challenges.<sup>18</sup>

The nature of the state duties listed in the UNGPs are two-fold: (1) a reminder of international human rights obligations undertaken by states through previous international and regional treaties and conventions and (2) a number of

<sup>12</sup> See GP 25.

<sup>13</sup> Knox, John H.: “The Ruggie Rules: Applying Human Rights Law to Corporations”, in Mares, 2012, 51-83; see also Deva and Bilchitz, 2013, Part III on the Nature and the Extent of corporate obligations, 191-268.

<sup>14</sup> *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, 2003, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2.

<sup>15</sup> Summed up in a 2005 Report of the UN High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regards to human rights, UN Doc. E/CN.4/2005/91. See also: Ruggie, John G.: “Business and Human Rights – The Evolving International Agenda”, *American Journal of International Law*, 207, 822.

<sup>16</sup> Republic of Ecuador Government statement to the UN Human Rights Council: Statement on behalf of a Group of Countries at the 24<sup>th</sup> Session of the Human Rights, General Debate – Item 3 “Transnational Corporations and Human Rights”, Geneva, September 2013. See also NGO Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises, authored by Treaty Alliance (CETIM, Dismantle Corporate Power Campaign, ESCR-Net, FIAN, FIDH, Franciscans Intl., Friends of the Earth Intl., Transnational Institute) and signed by more than 500 organisations, 28 April 2014. Both documents are available on the website of the Business and human rights Resource Centre ([www.business-humanrights.org](http://www.business-humanrights.org)).

<sup>17</sup> HRC Resolution L.22, A/HRC/26/L.22/Rev.1. The final vote was 20 in favour, 14 against and 13 abstentions.

<sup>18</sup> Issue Brief by John G. Ruggie: *A UN Business and Human Rights Treaty?* Harvard Kennedy School, 28 January 2014.

recommendations to take action in specific ways and matters (for example that states should be proactive in ensuring companies operating in conflict-affected areas do not become involved in human rights abuses,<sup>19</sup> or a reminder that states may regulate extraterritorial activities of companies domiciled or listed in their jurisdiction).<sup>20</sup> Accordingly, the state duty to protect consists of a “smart mix”<sup>21</sup> of hard law commitments being recalled (i.e. legally-binding obligations) and soft law commitment of the same non-binding nature as the responsibilities of business enterprises.

The nature and content of state obligations in the field of human rights and business are best exemplified by the jurisprudence of the European Court of Human Rights (ECtHR). According to well-established case law of the ECtHR, states have both a negative obligation to protect individuals’ rights against violations by business enterprises acting as state agents, and a positive obligation to protect individuals against violations by business enterprises as third parties. In the former, the abusive acts of the private actor (the business enterprises) are attributed to the state so that the state is considered to directly interfere with the right(s) at stake.<sup>22</sup> In the latter, the human rights violation is constituted by the state’s failure to take reasonable measures to protect individuals against corporate abuse.<sup>23</sup>

Augenstein correctly distinguishes three types of state obligations in the case law of the ECtHR:

1. Substantive obligations to regulate and control corporate activities including the licensing, setting up, operation, security, and supervision of dangerous activities, and the provision of essential information about dangerous activities to the general public;
2. Procedural obligations to enable public participation and ensure an informed decision-making process that involves investigations, studies, and environmental impact assessments;
3. Obligations pertaining to law enforcement and judicial process, including the proper administration of justice and the provision of effective remedies.<sup>24</sup>

In the same way as the European human rights system, the Inter-American Court and Commission for Human Rights have elaborated jurisprudence that pertains directly to the field of human rights and business. Based on articles 1.1 and 2 of the American Convention on Human Rights, the state has an overall obligation to act with due

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<sup>19</sup> See GP 7.

<sup>20</sup> See GP 2.

<sup>21</sup> Commentary under GP 3.

<sup>22</sup> Attribution based on legal status of the business enterprises, the nature of the activity carried out and the context in which it is carried out, and the degree of independence from the political authorities, see: *Yershova v. Russia*, judgement of 8 April 2010, *Oesterreichischer Rundfunk v. Austria*, judgement of 7 December 2006, *Radio France & others v. France*, admissibility decision of 23 September 2003.

<sup>23</sup> See abundant case-law on human rights violations in the environmental sphere (article 2, 8 and 1 P1 of the ECHR): See ECtHR factsheet on Environment-related cases, December 2012: [http://www.echr.coe.int/Documents/FS\\_Environment\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf).

<sup>24</sup> Augenstein, Daniel: *State Responsibilities to regulate and Adjudicate Corporate Activities under the European Convention on Human Rights*, Submission to the Special Representative of the United Nations Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, April 2011, par. 42.

diligence to prevent human rights violation. This implies that the state must regulate and adjudicate activities of non-state actors – including business enterprises.

More specifically, the Inter-American Court and Commission have considered the rights of indigenous people linked to their natural resources.<sup>25</sup> In 2012, the Court ruled that indigenous communities throughout the Americas must be consulted before their governments approve investment projects that affect their use and enjoyment of their traditional lands.<sup>26</sup>

The UN human rights treaty bodies also participate in defining the international human rights obligations of states in the field of human rights and business, through the promulgation of soft law norms, non-binding reports and analyses. A series of reports on each of the UN treaty bodies prepared on behalf of the SRSG mapped the obligations of states to regulate and adjudicate corporate activities under the UN core human rights treaties. This role of the state is considered as being part of its duty to protect against abuse by third parties. The reports identify “a trend towards increasing pressure on States to fulfil this duty in relation to corporate activities” within its territorial jurisdiction, regardless of whether the entities in question are privately or publicly-owned or controlled.<sup>27</sup> The situation is different concerning extraterritorial corporate activities.<sup>28</sup>

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Many initiatives have been launched following the endorsement of the UNGPs by the HRC and there is a need to ensure that they all address consistently relevant issues under the UNGPs.

Taking as its starting points extensive research work done in relation to working on a country visit template on the UNGPs,<sup>29</sup> this working paper sets out to unpack more specifically the State duties under Pillars 1 and 3. The idea here is to systematically identify actual human rights obligations, recommendation, challenges, good practice,

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<sup>25</sup> Inter-American Commission on Human Rights: *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System*, Organisation of American States, 2010; Anicama, Cecilia: *State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System. Report on the American Convention on Human Rights*, April 2008 (prepared to inform the mandate of the Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights, Professor John Ruggie).

<sup>26</sup> Inter-American Court of Human Rights, *Sarayaku v. Ecuador*, Judgement of 25 July 2012.

<sup>27</sup> See: *State responsibilities to regulate and adjudicate corporate activities under the United Nations' core human rights treaties: an overview of treaty body commentaries*, Addendum 1 to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises on *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, 13 February 2007 (A/HRC/4/35/Add.1).

<sup>28</sup> See below on extraterritoriality.

<sup>29</sup> Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 14 March 2013, A/HRC/23/32, par. 60: “... the Working Group has adopted a systematic approach to its country visits and developed, in collaboration with the Danish Institute for Human Rights, a template to guide each country visit. The draft template was publicly presented and consulted on during the 2012 Forum on Business and Human Rights. The Working Group will continue to develop, refine and consult on the template throughout 2013 with a view to further strengthen its approach and generate interest, understanding and engagement with country visits.”

lessons learned and opportunities to advance the understanding and thereby the dissemination and implementation of the UNGPs regarding the state duty to protect. Hence the working paper builds on previous and extensive work by the former SRSG on human rights and transnational corporations and other business enterprises, and his team, as well as contributions made to the field by scholars and analysts from states and civil society.<sup>30</sup>

In doing so, this working paper respects the careful choice of language<sup>31</sup> that is implemented throughout the UNGPs concerning the human rights duties of states in relation to business enterprises' activities. As mentioned above, the UNGPs do not create new international law obligations: as far as the duty of the state is concerned, the UNGPs reiterate two pre-existing international human rights law obligations:

- States *must* protect against human rights abuse within their territory and/or jurisdiction by third parties (GP 1);
- States *must* provide individuals access to remedy for human rights abuses. This obligation includes investigation into allegations of abuse, the possibility to establish legal responsibility, an effective and independent mechanism, fair trial, sanctions and reparation (GP 25).

In addition, the UNGPs elaborate the implications of existing standards and practices for states in the form of recommendations (in a broad sense) on what states should do, or more specifically are encouraged to do, in various domains including procurement, privatisation and international trade agreement.

The working paper considers state duties in the following three parts: overall issues such as the state's approach to its duty to protect, state regulatory and policy functions and the question of extraterritoriality (part 1); specific issues covered by the UNGPs such as state businesses, privatisation and public procurement, conflict-affected areas and international economic agreements concluded by states (part 2); and finally state duties pertaining to access to remedy (part 3). Hence this working paper covers all the guiding principles under the UNGPs Pillar 1 as well as the relevant state principles under Pillar 3.

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<sup>30</sup> See list of sources at the end of the working paper. The various drafts of the Country Visit Template (CVT) have been developed through consultations: A preliminary consultation draft was presented at the inaugural multi-stakeholder UN Annual Forum on human rights and business in Geneva in December 2012. In 2013, the CVT was further developed through formal and informal consultations with states and civil society groups (during state survey and civil society survey meetings in Copenhagen). Informal expert consultations were carried out at the end of 2013 and start of 2014. Several meetings took place with the UNWG on human rights and business in Geneva in 2013 and 2014 where both the CVT and states duties were discussed.

<sup>31</sup> This careful and consequent choice of language reflects the realities of Public international law, but has also been criticized by the sponsors of the idea that companies must be made legally accountable for human rights violations, see: Deva, Surya: "Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles, in: Deva and Bilchitz, 2013, 78-104.

# CHAPTER 1

## 1 OVERALL STATE DUTIES

This first part of this paper presents an overview of the state's overall approach to its duty to protect in terms of activities, institution building, and commitment to international human rights cooperation mechanisms (1.1), its regulatory and policy functions (1.2) and the issue of the possible extraterritorial implications of the state's duty to protect (1.3).

### 1.1 OVERALL STATE APPROACH TO ITS DUTY TO PROTECT

#### **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.

GP 1 recalls that the state has a positive international obligation to protect against human rights abuse within their jurisdiction and/or territory by third parties, i.e. private actors such as business enterprises. This obligation requires that the state takes appropriate steps to prevent, investigate, punish and redress private actors' human rights abuses which take place in its jurisdiction. Such steps include effective policies, legislation and regulation, access to remedies, adjudication and redress. The GP 1 has a very broad realm and encompasses a large scope of possible human rights violations from the violation of the right to life (e.g. conduct of security personnel, work-place safety, life threatening pollution or other lethal health hazards) to violation of the prohibition not to discriminate (e.g. employment legislation, maternity policies) to violations of collective rights (e.g. legislation that forbids the right to organise trade union).

In general, the obligation to protect against human rights abuse by third parties implies:

- a substantive obligation to insure human rights protection through legislation as well as ensure the protection of vulnerable groups or individuals, such as children, women, indigenous people, migrant workers, disabled people, elderly, etc.;
- a procedural obligation to investigate, punish and redress potential human rights abuses;
- an obligation to inform about and monitor high-risk activities (extracting industry, chemical industries, PMSC).

It must be underlined here that, in legal terms, business enterprises do not violate human rights, but breach labour law, environmental law or criminal law provisions, etc. These breaches, which, in some cases, may amount to committing actual criminal offences, are human rights-related in the way that they occur within the realm of the state obligation to protect human rights. For example, the state has a human right obligation to regulate safety in the work place and criminalise the most hazardous conduct in order to implement the right to life; the business enterprises must follow the safety rules established by the state and must not commit criminal offense.

According to the UNGPs, “in meeting their duty to protect, the state should consider implementing a 'smart mix' of measures - national and international, mandatory and voluntary to foster business respect for human rights within its territory and jurisdiction and should consider the full range of permissible preventive and remedial measures available to it”. Hence the state is expected to take a broad approach to managing the human rights and business agenda.

GP 2 to 10 elaborate on GP 1 which is the general framework for the state duty to protect against business-related human rights abuse under Pillar 1 and 3. GP 3 looks into the general regulatory and policy measures which must or might/could be taken by the relevant state authorities in order to protect individuals against human rights abuse by business enterprises. Here the state must be aware of business-related human rights risks in the field of a. o. corporate and security law, stock exchange listing requirements, labour law, environment law, land management law, criminal law, etc.<sup>32</sup>

In order to inform and support the enacting and implementing of relevant measures in the field of human rights and business, state authorities can follow various avenues:

- undertaking or supporting activities that identify pressing human rights and business issues, high-risk activities and vulnerable persons and groups (1.1.1)
- increasing awareness on human rights and business issues within relevant ministries and agencies of the state (1.1.2)
- strengthening and supporting work on human rights and business at international level (1.1.3)

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<sup>32</sup> See below 1.2. on the state regulatory and policy functions.

### **1.1.1 UNDERTAKING OR SUPPORTING RELEVANT ACTIVITIES**

In order to secure that adapted measures are put into place, states must identify pressing circumstances and issues which are relevant to the human rights impact of business activities. Hence state authorities should envisage to commission information gathering on and analysis of various problems, challenges and opportunities, as well as raise awareness on relevant human rights and business issues and promote advances in specific areas through research projects, meetings with stakeholders, conferences, consultations prior to developing new legislation, etc.

These activities should be concerned with a. o.

- General circumstances in the country, such as armed conflicts or social, ethnic, religious, etc. tensions in the whole or part of the country as well as major poverty/development challenges;
- Business activities or sectors that may have particularly significant impacts on human rights, such as extracting industry, chemical industries, informal sector, garment industry, private military and security companies (PMSC), export of strategic good and technologies, i.e. weapons, etc.;
- Major developments relevant to corporate activities, such as major extractive activities or projects, major privatisations of public services, opening of some sectors to new domestic or foreign investors, etc.;
- Identification of impacts on particularly vulnerable groups, such as children, women, indigenous people, migrant workers, disabled people, elderly, etc.

### **1.1.2 AWARENESS OF HUMAN RIGHTS AND BUSINESS ISSUES AND CAPACITY BUILDING OF RELEVANT MINISTRIES AND AGENCIES OF THE STATE**

The awareness of human rights and business issues within relevant ministries and agencies of the state should be enhanced through training of management and staff and other dissemination activities. These concerns all level of the state, both at federal and state level, and at national and local level. This includes:

- top leadership (Prime minister, Vice-presidencies, etc.) and the Parliament, both at federal and state level;
- various ministries regardless of their actual name and covering the following areas: foreign affairs, development aid, international cooperation, justice, home affairs, labour, employment, industry, mining, forest, natural resources, energy, food, agriculture, manufacture, commerce, trade, economic development, environment, population, health, social welfare, finance, defence, etc.;
- the National Human Rights Institution and/or the ombudsman's office including industry specific ombudspersons, if any;
- the state-owned enterprises governing body;

- State financial institutions such as Export Credit Agency, Sovereign wealth fund or Stock exchange authority;
- the state audit authority.

In addition, GP 8 expects the state to be ensuring both vertical and horizontal policy coherence within its own organs.

#### **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.

According to the commentary to GP 8, vertical coherence means the state having the necessary policies, laws and processes to implement their international human rights obligation. Horizontal coherence entails supporting and equipping relevant departments and agencies. More specifically this implies that the state should make an effort to identify a person or a team, or establish a service, to help coordinate human rights and business issues between and across different government agencies and departments, such as the departments and agencies responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour. In addition, the state should consider putting in place information and training with its departments and agencies on implementation of international human rights law obligations within the field of business and human rights. Finally the state should also consider whether the necessary support and equipment is given to relevant departments and agencies.

The UNGPs also mentioned the role of National Human Rights Institutions (NHRI). The commentary under GP 3 underlines that: “NHRI have a role to play in helping states identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-state actors”. Under Pillar 3, the role of the NHRI work as a possible remedy is also mentioned.<sup>33</sup> More generally in term of awareness-raising and capacity building of public institutions, the state should consider whether it has formally recognised the role of the NHRI in promoting human rights in relation to business enterprises activities (mandate of the NHRI) and in term of whether the state is actively supporting this role (funding provided by the state). This may take the form of the state supporting the NHRI to support the state to identify and assess whether relevant laws are aligned with the state's international human rights obligations, and to whether these

<sup>33</sup> See below Part 3 on the state duties pertaining to access to remedy.

laws are being effectively enforced in practice. In addition the state may consider supporting the NHRI to provide guidance on human rights to business enterprises and other non-state actors (advisory services, tools, guidance, etc.). Finally, the state should support the NHRI to monitor the national human rights and business situation and to provide access to justice for victims of corporate human rights abuses.

### **1.1.3 THE STATE'S OVERALL COMMITMENT TO INTERNATIONAL HUMAN RIGHTS COOPERATION MECHANISMS**

The state should put general activities into place in order to work towards further up-take of the UNGPs by state organs and administration and implementation of the UNGPs through e. g. research, projects, meetings, conferences, statements, information, dissemination, training, etc. GP 10 also expects that states participate in multilateral soft-law instruments and in international cooperation that promote business respect for human rights.

#### **GUIDING PRINCIPLE 10 – STATES AS MEMBERS OF MULTILATERAL INSTITUTIONS:**

- a. States, when acting as members of multilateral institutions that deal with business related issues, should:
- b. 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;
- c. 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;
- d. Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

Here states are expected to support international initiatives that promote business respect for human rights, such as the UN Global Compact, the International Code of Conduct for Private Security Service Providers (2010), the OECD Due Diligence Guidelines for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas, the Extractive Industries Transparency Initiative (EITI), etc. When international soft law instruments on human rights and business exist, states should consider joining them and implement the actions and supervision mechanisms that they recommend. This concerns both institutionalised inter-governmental initiative such as

the OECD Guidelines for Multinational Enterprises, the Declaration on Fundamental Principles and Rights at Work of 1998 (ILO) or the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO), as well as various forms of more informal initiatives, such as the Voluntary Principles for Security and Human Rights, 2000 or the Kimberley Process, 2002 (on diamonds trade).

The state should also consider actions within international trade and financial institutions<sup>34</sup> as well as cooperation with international employers organisations and with international trade unions organisations.

## 1.2 STATE REGULATORY AND POLICY FUNCTIONS

### 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.

GP 3 is at the core of the state duty to protect: it covers the whole state regulatory and policy function. It entails that the state must consider passing laws that directly or indirectly regulate business respect for human rights and ensure that these laws are effectively enforced, as well as reviewed in order to secure that they continuously provide an environment conducive to business respect for human rights (1.2.1). In addition laws and policies that govern the creation and on-going operation of business enterprises may be used as an avenue to provide human rights guidance to business enterprises and regulate their activities if necessary (1.2.2). States should also consider to adopt policies that seek to foster business respect for human rights and guidance to business enterprises (1.2.3). Finally, the state should envisage which requirement and

<sup>34</sup> On international financial institutions, see: Narula, Smita: "International Financial Institutions, Transnational Corporations and Duties of States", in Genugten, Willem van; Langford, Malcolm; Scheinin, Martin and Vandenhole, Wouter (eds.): *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social, and Cultural Rights in International Law*, Cambridge University Press, 2012, 114-149.

encouragement re. communication by business enterprises (incl. reporting on human rights due diligence) could be put in place (1.2.4).

### **1.2.1 LEGISLATION THAT DIRECTLY OR INDIRECTLY REGULATES BUSINESS RESPECT FOR HUMAN RIGHTS**

There is a wide range of legislation that, directly or indirectly, regulates the possible human rights impact of business enterprises' activities. Overall constitutional provisions on human rights, i.e. in the Constitution or a human rights act/charter may include, directly or potentially, duties for non-state actors such as companies. This is also the case concerning non-discrimination or equality laws. In the same way, the state may adopt procedural provisions regarding both criminal and civil liability and their regulation, or not, of jurisdiction<sup>35</sup>, corporate liability and more generally of attribution of liability to corporate actors, such as parent companies and their subsidiaries.

In addition, many laws have a close connection to human rights and business activities. Here we can mention a. o. labour laws (including occupational health and safety, minimum wage, non-discrimination, forced and child labour, and industrial relations), environmental law, law on property/access to land including resettlement and compensation, cultural heritage and intellectual property law, consumers law, anti-bribery laws, etc.

Finally, the state may consider passing or strengthening implementation of laws or provisions of law that are aimed at regulating the human rights impact of business activities such as due diligence requirement in the law (general or specific to some high risk business activities), corporate and securities laws, financial reporting laws or requirements to formally and publicly report on human rights, etc.<sup>36</sup> In order to implement GP 3 states may want to consider to introduce direct obligations (to report on, monitor, mitigate etc. human rights impact) under these laws for companies, their officers, or both. They may also consider how they want to introduce or strengthen governing mechanisms to help enforcing these laws as far as business enterprises are concerned.

The UNGPs also recommend that factors that constrain the effective enforcement of these laws may be addressed by the state and that measures be taken, or plan, to address these factors. It is also important that state authorities assess whether existing laws provide the necessary coverage in light of evolving circumstances and provide a regulatory environment conducive of business respect for human rights.

### **1.2.2 LAWS THAT GOVERN THE CREATION AND ON-GOING OPERATION OF BUSINESS ENTERPRISES**

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<sup>35</sup> See below on extraterritoriality (1.3).

<sup>36</sup> See below on reporting requirements (1.2.4).

All states have corporate and security laws, but it is only in a few states that the current laws state clearly what companies (and their officers) are permitted or required to do regarding respecting human rights.<sup>37</sup> Many avenues can be envisaged here, such as:

- requirement of or encouragement to state the company’s commitment to respecting human rights in the corporation’s articles of incorporation;
- requirement of or encouragement to state the company’s commitment to pursuing a ‘lawful purpose of the company’ or ‘respect for public order’ or more broadly, acting in a socially responsible manner, in the corporation’s articles of incorporation, which may indirectly include a responsibility to respect human rights;
- 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).

In case, no such requirement exists, lessons can be learned from similar regulation re. other areas, as for instance the relevant provisions in law on the protection of the environment or in anti-bribery law.

As far as company directors are concerned, legislation may require or encourage them to consider the human rights impacts of their company’s activities. This can exist in the form of a direct requirement to consider human rights impacts or to consider environmental and social impacts, an indirect requirement through a requirement to act in the company best interest or, simply, a permission for directors to consider human rights impacts or to consider environmental and social impacts. The state may also consider regulating or encouraging the respect of equality principles or quotas regarding gender and other diversity on company boards.

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<sup>37</sup> *Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative*. Addendum 2 to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 23 May 2011 ([A/HRC/17/31/Add.2](#))

### **1.2.3 POLICIES THAT SEEK TO FOSTER BUSINESS RESPECT FOR HUMAN RIGHTS AND GUIDANCE PROVIDED BY THE STATE TO BUSINESS ENTERPRISES**

The UNGPs invite states to develop policies, both at national, federal, provincial or local level, that seek to foster business respect for human rights been adopted. These policies can take a variety of shapes, such as:

- national action plans on human rights, or more specifically on human rights business<sup>38</sup> as well as national action plans on corporate social responsibility, which include human rights impacts;
- human rights and anti-discrimination policies;
- policies that encourage business enterprises human rights due diligence, sector-specific policies concerning high-risk industries or policies that create incentives to formally and publicly report on human rights, etc.

In addition, the state may provide guidance to business enterprises on respecting human rights through a variety of actions, such as:

- providing information and material explaining the UNGPs, OECD Guidelines or other key international standards, as well as relevant national law standards to business enterprises;
- indicating expected outcomes as far as human rights performance of business enterprises is concerned, advising on appropriate methods, including human rights due diligence and helping sharing of best practices;
- providing guidance on how to meet effectively the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families;
- providing specific guidance for companies working in high risk sectors, for SMEs, for informal sector etc.;
- providing guidance on addressing particular human rights issues (e.g. working conditions issues, discrimination, OHS, resettlement, access to water etc.).

As far as the policy-making process is concerned, the government bodies leading the creation of policies and guidance on business and human rights should be clearly identified and supported. They should include a relevant multi-stakeholder consultation process in devising policies or guidance. These policies or guidance documents should be made publicly available. Finally, states should envisage systematic evaluation of these policies and guidance instruments and make outcome of evaluation and potential follow-up measures available.

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<sup>38</sup> See the National Action Plans of the United Kingdom (Foreign and Commonwealth Office: Good Business: Implementing the UN Guiding Principles on Business and Human Rights, 2013), Spain (Plan de empresa y derechos humanos, 2013), the Netherlands (National Action Plan on Business and Human Rights, 2013), and Denmark (Danish National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights, 2014).

#### 1.2.4 REQUIREMENT AND ENCOURAGEMENT RE. COMMUNICATION BY BUSINESS ENTERPRISES

The UNGPs are very specific regarding due diligence and reporting by business enterprises, which are the two main elements of the business enterprises responsibility to protect.<sup>39</sup> As far as the state duty to protect human rights is concerned, this aspect of corporate human rights responsibility is apprehended through recommending states to “encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts”.<sup>40</sup> This does not imply that states have a human rights obligation to require through regulation companies to address their human rights impacts through due diligence and reporting. However, the UNGPs recommend the state to consider implementation of their pre-existing regulatory requirements on these matters, possible creation of such requirements or designing of means to encourage companies to adopt such due diligence and reporting processes on a voluntary basis.

In this respect, the state should map out the type of communication by business enterprises on how they address their *human rights impacts* which is required by law as well as identify what is otherwise expected by relevant state authorities. Are there, for example, reporting requirements in the law - human rights legislation or corporate and securities laws - to expressly report on human rights? And do corporate or securities laws or policies encourage this type of reporting even if it is not required? More specifically, in case of large project affecting the population, there can be a legal requirement for companies to have public consultations or FPIC (free prior and informed consent) requirements on lands used by indigenous people. In the same way, there can be a specific requirement of mandatory reporting in sectors where the nature of business operations or operating contexts poses a significant risk to human rights (informal sector, extractive industries, health sector, etc.).

If there are no explicit human rights requirement in the law, it is possible to get inspiration from other comparable fields (CSR, environment, health) where impact assessment by companies are mandatory. Another starting point could be to find out whether there are laws to report on material impacts of business activities and if so, whether there is any guidance making it clear that such impacts may include human rights impacts.

Many countries have chosen a “comply or explain” mechanism.<sup>41</sup> Mandatory reporting may apply equally to all types of companies or only to some companies depending, for example, on their activities or their size.

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<sup>39</sup> Pillar 2.

<sup>40</sup> GP 3, d.

<sup>41</sup> See the German Corporate Governance Code or the Danish legislation on CSR: According to a 2008 provision of the Danish Act on financial reporting, a large company or a financial institution must either give information on its CSR policy, its implementation, the results that have been achieved and the expectations for the future or expressly state that the company will not be engaging in CSR. In 2012 an amendment was adopted by the Danish Parliament to specifically include human rights (and climate policies) into this legal requirement (comply or explain) for reporting on CSR, available in Danish at: [http://www.ft.dk/samling/20111/lovforslag/l125/html\\_som\\_vedtaget.htm](http://www.ft.dk/samling/20111/lovforslag/l125/html_som_vedtaget.htm)

Whether reporting is mandatory or voluntary, there can be policy or legislative requirement as to what constitutes adequate formal public reporting/communication on human rights (or related matters including social and environmental issues). Requirements may concern accessibility or accuracy of reporting. In case of mandatory reporting, implementation and monitoring mechanisms should be in place in the form of, for example, the auditing of report and verification of information, a requirement to publish reports or sanctions in case of publication of false report/information. In any case, new development concerning reporting rules around human rights - and social issues more generally - should be done by government departments or bodies in consultations with companies and other stakeholders.

### 1.3 EXTRATERRITORIALITY

#### **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.

The wording of GP 2 has been discussed extensively. When dealing with extra-territoriality in the context of human rights and business, the main issue is the exercise of extraterritorial jurisdiction by a home state over the overseas activities of a transnational company with some link to that state (domicile, registration or listing on the territory or within the jurisdiction of the state). Seen against this background, the wording of GP 2 appears very cautious and non-committal: states should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

This “minimal”<sup>42</sup> wording of GP 2 comes from the fact that at present, states are not required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. However there are a lot of vivid debates on the actual existence – and possible future extent - of such an obligation. These discussions find their source in both legally-binding and non-legally binding instruments and standards.

First of all, it must be mentioned that some human rights treaty bodies recommend that home states take steps to prevent abuse abroad by business enterprises within their

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<sup>42</sup> Augenstein, Daniel; Kinley, David: “When human rights responsibilities become duties: the extra-territorial obligations of states that bind corporations?” In: Deva and Bilchitz, 2013, p. 275.

jurisdiction. For example, the Committee on Economic, Social and Cultural Rights has stated in its general comment on the right to water that “steps should be taken by states parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where states parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.”<sup>43</sup> Transnational activities that have critical human rights impacts such as trafficking of women and children have also compelled the Committee on the Rights of the Child to urge states to take action in order to prosecute and punish those engaging in trafficking. Hence Article 3 (1) of the Optional Protocol on sale of children, child prostitution and child pornography requires that such offences be criminalized, whether they are committed “domestically or transnationally or on an individual or organized basis”.<sup>44</sup> Reference to transnational activities or “other countries” is however not equal with creating a legally-binding obligation to regulate exercise business activities abroad or exercise extraterritorial jurisdiction. Nevertheless states are expected to take action or “steps” to prevent violations as part of their obligation to protect. Hence state should envisage which type of human rights issues as well as of activities could necessitate a more compulsory monitoring by home state.

Second, states may adopt domestic measures which set out clearly the expectation that businesses respect human rights abroad. Such measures can be of a legal, regulatory or policy nature such as requiring by law that parent companies report on the human rights impacts of the global operations of the entire enterprise. States can also choose to participate in multilateral soft-law instruments such as the OECD Guidelines for Multinational Enterprises or in multi-stakeholder initiatives such as the Voluntary Principles on Security and Human Rights which both address extraterritorial implications of business activities. States may also elaborate and enforce performance standards required by state institutions that support overseas investments.

Third, the state may also choose to adopt direct extraterritorial legislation in specific areas as done by the United States regarding the fight against corruption<sup>45</sup> or consumer protection<sup>46</sup> and hereby regulate to a larger or lesser extent extraterritorial activities of companies which have a connection to their territory or jurisdiction. State can also choose to extend criminal responsibility to allow for prosecutions based on the nationality of the perpetrator (physical or legal person) no matter where the offence

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<sup>43</sup> Paragraph 33 of general comment 15 on the right to water (E/C.12/2002/11 ). See also CESCR general comments 14 on the right to the highest attainable standard of health (E/C.12/2000/4), at para. 39 for similar comments to general comment 15, paragraph 33 in relation to influencing third party actions abroad.

<sup>44</sup> Optional Protocol on sale of children, child prostitution and child pornography (General Assembly resolution A/RES/54/263 of 25 May 2000), see also Art. 3.2, Art. 4.2 and 4.3. See also a. o. CRC concluding observations, Lebanon, UN Doc. CRC/C/LBN/CO/3, 8 June 2006, at para. 82 (e). See also the international framework for combatting terrorism, which relies heavily on States establishing extraterritorial jurisdiction. On this point see the 2000 International Convention for the Suppression of the Financing of Terrorism; and for references to several other standards see: De Schutter, Olivier: *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*, December 2006 (background paper to the seminar organized in collaboration with the Office of the UN High Commissioner for Human Rights in Brussels on 3-4 November 2006).

<sup>45</sup> US Foreign Corrupt Practice Act of 1977. See also: UK Bribery Act of 2010.

<sup>46</sup> US Dodd-Frank Act of 2010 , Section 1502 on conflict free minerals.

occurs as this is the case for some states and some specific offences according to the Statute of the ICC.

Finally, states can reform their civil liability regimes (torts) in order for victims of human rights-related abuses outside the territory of the state to obtain remedy in the form of damages from the companies that have perpetrated or are complicit of the abuses. The 2013 *Kiobel* judgment of the US Supreme Court<sup>47</sup> has curtailed the possibility for victims to obtain redress for *human rights violations* by companies operating outside their territory of domicile.<sup>48</sup> However, numerous cases against multinational companies have been pursued in many countries on the basis of tort (negligence arising from a breach of the duty of care that companies have). Even though there are not yet a final legal determination on the point of establishing an indirect duty of care for parent companies that could serve as the base of an “extraterritorial” tort claim,<sup>49</sup> some cases are not dismissed from the outset on the basis of lack of territorial jurisdiction.<sup>50</sup> Civil liability litigations are still facing a number of legal obstacles in terms of separate corporate personality, lack of causes of action, allocation of civil liability between individuals and corporate entities and between members of corporate groups and liability of the acts of third parties.<sup>51</sup>

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<sup>47</sup> *Esther Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

<sup>48</sup> Until the *Kiobel* judgement in 2013, the US Alien Tort Statute of 1789 had been interpreted by US federal courts “as implying that they have jurisdiction over enterprises either incorporated in the United States or having a continuous business relationship with the United States, where foreigners, victims of violations of international law wherever such violations have taken place, seek damages from enterprises which have committed those violations or are complicit in such violations as they may have been committed by State agents” (see De Schutter, Olivier: *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*, December 2006 (background paper to the seminar organized in collaboration with the Office of the UN High Commissioner for Human Rights in Brussels on 3-4 November 2006), 2006. p. 6.

<sup>49</sup> Meeran Richard, “Access to remedy: The United Kingdom experience of MNC tort litigation for human rights violation in Deva and Bilchitz, 2013, 378-402. See also for example the list of tort cases litigated in the UK at 388.

<sup>50</sup> See for instance, the Quebec Superior Court of Justice in the *Anvil* judgment of 27 April 2011: the court dismissed a motion to strike the claim brought by Anvil based on absence of jurisdiction. In so doing, the Court left the door open for extraterritorial human rights claims against Canadian corporations in Quebec courts. The Quebec Court of Appeal ultimately overturned that decision and dismissed the case but not on the base of lack of jurisdiction. See also the judgment against Royal Dutch Shell and its subsidiary SPDC, District Court of The Hague, 30 January 2013.

<sup>51</sup> *Idem*. See also: Zerk, Jennifer: *Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies*. A study prepared for the Office of the UN High Commissioner for Human Rights, 2014.

# CHAPTER 2

## 2 SPECIFIC STATE DUTIES

The human rights and business field encompasses a wide range of activities and issues. Pillar 1 of the UNGPs deals with a number of specific issues where states have a particular role to play due to their particular standing in international human rights law. As mentioned previously, states are both the authors and the subjects of international human rights law<sup>52</sup> and have therefore imposed on themselves an actual legal duty to protect human rights (negative state obligation) when business activities can be attributed to the state. This is the case when states own or control corporations (2.1) or when corporations are exercising public functions for example in the case of privatisation of state functions, such as health or social care (2.2). The link between the state and corporate activities is more indirect in cases where the state concludes contracts with private parties (procurement, see. 2.2) or with other states, private business or investors (2.3). Finally, states have a particular role to play in relation to situations of conflict where the worst human rights abuses are most likely to occur (2.4).

### 2.1 STATE BUSINESSES, PRIVATISATION AND PUBLIC PROCUREMENT

Before looking into the UNGPs' take on the state business nexus, it should be mentioned that the European Convention on Human Rights (ECHR) imposes an obligation on states to protect Convention rights against violations by business enterprises acting as state agents, that is when the acts of the business enterprises can be attributed to the state, or a public authority, so that the state is considered to directly interfere with the rights protected in the ECHR.<sup>53</sup> The case law of the European Court of Human Rights (ECtHR) concerns both the case where the state owns or controls a business enterprises and the case where private corporations exercise public functions through procurement contracts and privatisation of public services. As analysed by Daniel Augenstein, the ECtHR uses "a combination of different criteria to determine on a case-by-case basis whether corporate activities can be directly attributed to the State". They include: the corporation's legal status, the rights conferred upon the corporation by virtue of its legal status, the institutional independence, the operational independence, including *de lege*

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<sup>52</sup> See also in Ruggie's words: "State individually are the primary duty-bearers under international rights law" (commentary under GP 4).

<sup>53</sup> This negative obligation must be distinguished from the positive obligation of the state to take all reasonable measures to regulate and control corporate activities to prevent the violation of Convention rights, and to take effective enforcement measures, that is, to investigate, adjudicate and redress violations of Convention rights when they occur. See, among others: *Tatar v. Romania* (judgement of 27 January 2009), *Fadeyeva v. Russia* (judgement of 9 June 2005), *Oneryildiz v. Turkey* (judgement of 30 November 2004), *Guerra & Others v. Italy* (judgement of 19 February 1998), *Lopez Ostra v. Spain* (judgement of 9 December 1994).

or *de facto* state supervision and control, the nature of the corporate activity, and the context in which the corporate activity is carried out.<sup>54</sup> As far as privatisation and public procurement are concerned, the ECtHR established in the early 90's that "the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals".<sup>55</sup> Within the legal context of the ECHR, there is a clear framework as to the obligations that apply to the state when directly involved with business and investment activities.

### 2.1.1 STATE OWNED OR CONTROLLED BUSINESS ENTERPRISES

#### GUIDING PRINCIPLE 4 - STATE-BUSINESS

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.

Much in line with what is mentioned above re. the ECHR, the UNGPs consider that *additional* steps must be taken by states to protect against human rights abuses by business enterprises that are either owned or controlled by state (the responsibility of the state might be directly engaged), or that receive substantial support and service from state agencies.

As far as state-owned or controlled business enterprises, their human rights performance ought to be included in their management reports to relevant state agencies. In this respect the state should identify the state agencies which should have a scope for scrutiny and oversight of state owned or controlled business enterprises' human rights performance. The relevant state agencies should help defined the type of scrutiny and oversight that is needed. They should also set up requirement or incitement for state-owned or controlled companies to implement effective human rights due diligence and reporting.

<sup>54</sup> Daniel Augenstein: *State Responsibilities to regulate and Adjudicate Corporate Activities under the European Convention on Human Rights*, Submission to the Special Representative of the United Nations Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, April 2011, 8-9. This list of criteria is based of the judgement of the ECtHR in the case of *Yershova v. Russia*, Judgement of 8 April 2010, para 55. In this case, the ECtHR found that "notwithstanding the company's status as a separate legal entity, the municipal authority, and hence the State, is to be held responsible under the Convention for its acts and omissions" (para 62). The ECtHR focused on the company's strong institutional ties with the municipality and the public nature of its functions (main heating supplier in the town) (para 57-58).

<sup>55</sup> *Costello-Roberts v. United Kingdom*, Judgement of 25 March 1993, para. 28. This case concerns corporal punishment in private schools in England. See also: *Woś v. Poland*, Admissibility Decision of 01 March 2005, para 72: "The responsibility of the respondent State thus continues even after such a transfer".

In addition, many agencies are linked formally or informally to the state, such as export credit agencies (ECA), official investment insurance or guarantee agencies, development agencies and development finance institutions. According to the UNGPs, state agencies such as ECA ought to take human rights consideration into account when providing finance to projects. The state could also require human rights due diligence both by the agencies themselves and by those business enterprises or projects receiving its support, especially in cases where the nature of business operations or operating contexts pose significant risk to human rights (for ex. extractive industry, health, private military and security companies, etc.). The state is here in a unique position to consider setting up requirements/incitements for the business enterprises or projects receiving its support to implement effective human rights due diligence and reporting.

### **2.1.2 PRIVATISATION AND PUBLIC PROCUREMENT**



#### **GUIDING PRINCIPLE 5 – DELIVERY OF SERVICES TO 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.



The language of the UNGPs is softer than the one of the ECtHR. According to GP 5 and 6, the state should ensure that private providers of goods and services comply with human rights standards when they engage in contracts with a public authority. In addition, the state should be aware that tendering, contracting out and privatising public services such as prison services, health, housing, and social care may impact negatively on the protection of the human rights of the most vulnerable groups and individuals. Hence, prior to the privatisation of provision of goods or services, the state should perform a human rights impact assessment of the potential consequences of the planned privatisation in order to map out the human rights risks at stake and the possibility to mitigate them.

As far as public procurement contracts and legislation are concerned, it is important that the state clarifies its expectations that the enterprises delivering services and goods

respect human rights.<sup>56</sup> In this respect, the state may consider taking measures to promote awareness of and respect for human rights by enterprises, which it has commercial transaction with. In addition, public procurement contracts must comply with human rights standards. The terms of the contracts with these enterprises ought to provide for due regard to the state’s relevant obligations under national and international law. Relevant state agencies should be identified and effectively oversee the enterprises’ activities. The state could also consider providing for adequate independent monitoring and accountability mechanisms of the activities of the private providers. In the case of high risk services (e.g. health, security, prison, asylum and immigration etc.), the state should provide for specific oversight mechanisms.

State can envisage a variety of types of requirement or incitement to respect human rights through legislative measures or terms of public procurement contracts, such as:

- Selective or targeted public procurement, such as preferential award to discriminated groups (e.g. indigenous people) or to companies working to achieve specific non-discrimination objectives (e.g. equality between men and women);
- Excluding companies with commercial contacts with high-risk countries from state suppliers lists or public procurement;
- Excluding companies with a bad human rights record from state suppliers lists or public procurement.<sup>57</sup>

## 2.2 ECONOMIC AGREEMENTS CONCLUDED BY STATES

### 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.

International investments agreements (IIA), bilateral investment treaties (BIT), free-trade agreements or contracts for investment projects. These instruments are signed by states and investors to promote and protect foreign investment in a given country through providing them with guarantees regarding their activity, their assets or the taxes that will be applied to them. They include stabilisation clauses, which are a risk mitigation tool for investors that protect them against changes in the law that could be disadvantageous to them, such as discriminating law against foreign investors,

<sup>56</sup> According to The Guidance on Social Care Procurement published by the Scottish Government (September 2010), human rights are incorporated into the service specifications, the selection and award criteria and contractual clauses.

<sup>57</sup> For further recommendations re. steps to be taken by public authorities in order to ensure that human rights are fully respected in connection to public procurement, see for instance: Northern Ireland Human Rights Commission: *Public Procurement and Human Rights in Northern Ireland*, November 2013.

nationalisation or expropriation, etc.<sup>58</sup> These treaties also guarantee foreign investors the right to enforce treaty provisions through international arbitration. In practice, this allows the foreign investor to bring a claim under the treaty's provisions arguing that a state's regulation has interfered with their investment and should therefore be compensated.

These economic agreements are a tool to foster a favourable investment climate especially emerging market where regulations can be under constant development. However, international investment instruments raise a number of human rights concerns in terms of their contents or the way they are being arbitrated in case of conflict.<sup>59</sup> One topical example is stabilisation clauses exempting investment project from new laws aiming at better protecting worker rights or human rights at large.<sup>60</sup>

Well-aware of the necessity to strike a balance between the state's need to attract foreign investors and its duty to protect human rights, the UNGPs stress that states have a unique possibility to impact on the human rights consequences of business activities when negotiating and concluding economic agreements with other states, business investors or others.

Hence, the negotiation process between the host state and the business investor ought to be designed from the start to ensure to identify, avoid and mitigate human rights risks. In this respect, it is important that the relevant state institutions are made aware of the Principles for responsible contracts elaborated in 2011, which contain guidance for negotiators as to their and their key implications.<sup>61</sup>

In addition, the host state should retain adequate policy and regulatory ability to protect human rights under the terms of the agreements it has signed. This can be done through including express human rights provisions in the IIA, BIT, etc. signed by the state or through including relevant social issues, such as environment, labour rights, social rights) in the agreements. Most importantly, stabilisation clauses should not limit the host government's ability to meet its human rights obligations.

In order to reach this aim, it is important that the relevant state agencies are made aware of the possibility to include human rights provisions in IIAs, BITs, etc. as an additional tool to fulfil its international duty to respect human rights. As far as contracts

<sup>58</sup> For a definition and categorization of stabilization clauses see: Shemberg, Andrea: *Investment Agreements and Human Rights: The Effects of Stabilization Clauses*. Corporate and Social Responsibility Initiative Working Paper No. 42. Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2008, 4-9.

<sup>59</sup> Dupuy, Pierre-Marie; Petersmann, Ernst-Ulrich; Francioni, Francesco: *Human rights in international investment law and arbitration*, Oxford University Press, 2009; Jacob, Marc: *International investment agreements and human rights*. INEF Research paper series on human rights, Corporate Responsibility and Sustainable development 03/2010. Duisburg: Institute for Development and Peace, University of Duisburg-Essen, 2010; Mann, Howard: *International investment agreements, business and human rights: key issues and opportunities*. Prepared for Prof. John Ruggie. International Institute for Sustainable development, 2008.

<sup>60</sup> Shemberg, Andrea, 2008, cited above.

<sup>61</sup> *Principles for Responsible Contracts: Integrating the management of human rights risks into State-investor contract negotiations - Guidance for negotiators*. Addendum 3 to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 23 May 2011 ([A/HRC/17/31/Add.3](#)).

for investment projects made by business enterprises, home states should ensure that their companies are not making investment agreements with weak host states that have a negative human rights impact on employees or local communities.

### 2.3 CONFLICT-AFFECTED AREAS

#### **GUIDING PRINCIPLE 7 - SUPPORTING BUSINESS RESPECT FOR 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.

There is a heightened risk of gross human rights abuses in conflict-affected areas and especially, as emphases by the UNGPs a risk of gender-based and sexual violence in such context. Even though the commentary under GP 7 acknowledges that, in such situation, the host State might be “unable to protect human rights adequately due to lack of control” on the situation, both companies’ home and host states must address the human rights issues arising in conflict areas.

Here it is important to recall that all states have a human rights obligation to take step to regulate both public and private activities, within their jurisdiction, that may have negative human rights implications. They must especially investigate, prosecute and redress crimes committed within their jurisdiction. Therefore, states should ensure that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses (GP 7d) and ought to take appropriate steps to address any identified liability gaps. Home states may choose, for instance, to introduce civil or criminal liability for enterprises domiciled or

operating outside their territory that commit international crimes or contribute to gross human rights abuses.<sup>62</sup>

### **2.3.1 ENGAGING WITH AND PROVIDING ASSISTANCE TO BUSINESS ENTERPRISES TO IDENTIFY, PREVENT AND MITIGATE HUMAN RIGHTS-RELATED RISKS**

Both home and host states should envisage various way of supporting business respect for human rights in conflict-affected areas and hereby deal with possible gross human rights violations related to business activities. GP 7a insists on the necessity for states to engage with business enterprises as early as possible in order to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships (business partners, suppliers, etc.).

As far as home states are concerned, they ought to play a role in assisting both business enterprises and host states to ensure that businesses are not involved with human rights abuse in conflict-affected areas (GP 7 b). In order to do so, they may develop system of early-warning indicators to alert state agencies and business enterprises to problems, as well as advise and alert companies about the human rights risk that their business activities may entail (for example advising or informing companies about the sale of equipment to government or hostile groups that could use it to violate human rights e.g. surveillance equipment sold to China and used in Tibet, trucks sold to Sudan and used in Darfur, etc.). In addition the UNGPs put an emphasis on the risk of sexual and gender-based violence, which is especially prevalent during times of conflict. Hence, when providing business corporations with guidance in order to avoid contributing to human rights harm in conflict-affected areas, the home and the host state ought to be specific about the risk of sexual and gender-based violence.

In order to provide that type of assistance, the state may also foster closer cooperation among its development assistance agencies, foreign and trade ministries, and export finance institutions in its capitals and within its embassies, as well as between these agencies and host state actors. Finally the state could consider multilateral approaches to prevent and address such risks of gross human rights violations, as well as support effective collective initiatives.<sup>63</sup>

<sup>62</sup> See GP2 on extraterritoriality and part 3 on remedies.

<sup>63</sup> For instance, as part of the State's responsibility to protect (See UN documents on the Responsibility to Protect (R2P): Outcome Document of the 2005 United Nations World Summit (A/RES/60/1); Secretary-General's 2009 Report (A/63/677) on Implementing the Responsibility to Protect; General Assembly 2005 resolution (A/RES/63/308); Secretary-General 2012 report on "The responsibility to protect: timely and decisive response" (A/66/874-S/2012/578)). The participation of Businesses to the R2P is starting to get some attention, see for instance: Seyle, D. Conon: *Business Participation in the Responsibility to Protect*. Working paper prepared for presentation to the 2013 annual conference of the International Studies Association. April 5, 2013: San Francisco, California, One Earth Future Foundation, 2013.

### **2.3.2 TAKING MEASURES IF COMPANIES ARE UNWILLING TO MEET THE STANDARDS SET BY THE STATE**

The state may choose to attach appropriate financial consequences to any failure by enterprises to cooperate in these contexts. GP 7c explicitly mentions the denial of “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”. Along the same line, the home state could also envisage to deny access to future provision of public support for business enterprises that are involved with gross human rights abuses.

A prerequisite to the application of this type of financial consequences is that the State has the possibility to investigate the companies activities, for example through its embassy in the host state. One could envisage appointing a mission on business activities in a specific conflict affected area that report to the Parliament. An other option could be to mandate the embassy to investigate in the host State and report to relevant authorities in the home state.

Finally, the state may choose to attach appropriate criminal consequences to any failure by enterprises to cooperate in these contexts. The state may choose to extend extraterritorial criminal liability for the commission of international crimes to legal persons. In the absence of such a legally-binding instrument encompassing international crimes committed by legal entities, the state is not internationally obliged to do so, but has the possibility to choose to extend, in its domestic legal system, criminal liability to very serious crime which amount to gross violations of human rights if not punished and remedied. The state may also choose to imposing sanctions on persons or entities, such as seizing of equipment or freezing of assets.

## CHAPTER 3

# 3 STATE DUTIES PERTAINING TO ACCESS TO REMEDY

According to international and regional human rights law, the state has an international obligation to provide all potential victims access to remedy for human rights abuses. This obligation include:

- Investigation into allegations of abuse
- Possibility to establish legal responsibility
- Effective and independent mechanism / fair hearing
- Sanctions
- Reparation

This obligation is restated in GP 25 as the foundational principle of Pillar 3 on access to remedy.

### **GUIDING PRINCIPLE 25 - STATE DUTY RE. ACCESS TO 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.

GP 25 describes the state's overall approach to its duty to protect against business-related human rights abuse. GP26 to 28 elaborate on GP25 focusing on measures that guarantee the accessibility and effectiveness of both state-based and non-state-based mechanisms.

In order to fulfil its duty to remedy business-related human rights abuses, the state should envisage the whole range of remedies at its disposal, such as sanctions (whether criminal or administrative), financial or non-financial compensation, alternative to sanctions such as apologies, restitution, rehabilitation or measures to prevent harm through, for example, injunctions or guarantees of non-repetition. Hence the state has a

role to play in establishing both state-based judicial and non-judicial mechanisms (GP 26 and 27) as well as in supporting relevant non-state based mechanisms (GP 28).

In order for such remedies to play their role, the state should insure that the relevant public authorities are competent and equipped to investigate allegations of business-related human rights abuses and attribute them to the relevant redress mechanism (see also GP 26). A key element of accessibility to raise awareness of the existence of such remedies. The state ought to facilitate public awareness and understanding of these mechanisms (both state-based and non-state-based) and provide information on how they can be accessed. In this respect, special attention should be paid to vulnerable groups and their possible difficulties (language, geographical remoteness, etc.) to access such mechanism (see also GP 26 and 27). In the context of the human rights impact of business activities, attention must be paid to vulnerable groups, such as indigenous people, women, children, migrant workers, disabled people, etc., and to high-risk sectors, such as extraction, forestry, health, security, etc.

Finally, the state should provide for support for accessing these mechanisms, through for instance, counselling through support to NHRI, civil society organisations or other organisations. Here also, adequate support for vulnerable groups of persons should be provided. Concerning children, for instance, the Committee on the Rights of the Child has stated that States parties must “give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives” and that such procedures should include “access to independent complaints procedures and to the courts with necessary legal and other assistance”.<sup>64</sup>

As this working paper focuses on state duties, we will analyse the Guiding principles relating to state-based mechanisms.

### 3.1 EFFECTIVE 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.

The state-based judicial mechanisms that must be available to adjudicate business-related human rights abuses in the country are ordinary courts or specialised courts,

<sup>64</sup> Committee on the Rights of the Child, GC no. 5 (2003), CRC/GC/2003/5, para. 24; see also GC no. 8 and no.9.

such as civil and criminal courts, labour courts or tribunal of commerce. In the absence of actual human rights domestic redress mechanisms that target business enterprises as violators of human rights law, these state-based judicial mechanisms come into play in the form of criminal proceedings, labour law cases or tort litigations against business enterprises. When dealing with state-based judicial remedies, the UNGPs only deal with *domestic* remedies. In this respect, GP 26 addresses both the fairness and effectiveness of domestic justice systems in general and more specifically the issue of legal, practical and other relevant barriers that could lead to a denial of access to remedy in the state domestic legal order.

### **3.1.1 ENSURING THE EFFECTIVENESS OF DOMESTIC JUDICIAL MECHANISMS**

The general effectiveness of domestic judicial mechanisms (i.e. the domestic justice system) is of course paramount to the state capacity to address and redress corporate human rights-related abuses. This is a very broad topic. Here we just need to mention that the UNGPs refer generally to the overall ability of the state to guarantee fair trial and due process. The justice system must be independent and impartial and its integrity must be guaranteed by the state, which must take measure to eradicate any form of corruption. Political and economic pressures by state agents, business enterprises or any other actors must be investigated and prosecuted. Pressures on civil courts and criminal courts, as well as on any other actors in the justice system, must be sanctioned.

In addition, the justice system must be adequately staffed and financed in order for it to play its role. The GP 26 commentary puts the accent on the fact that state prosecutor offices must have the necessary resources (and competences) to meet the state's obligation to investigate and prosecute human rights-related crimes committed by state agent, individuals or business entities.

Finally, the state should guarantee that the work of human rights defenders is not obstructed by other actors. This implies that harassment and crimes committed against human rights defenders (including trade union activists, indigenous people defenders, etc.) by public or private agents must be investigated and prosecuted.

All these elements are of course closely linked to the general functioning of the domestic justice system and its ability to adequately protect individuals against human rights-related abuses. GP 26 also focuses on a number of barriers that are specifically and directly relevant to litigations in the field of human rights and business.

### **3.1.2 ENSURING THAT NO LEGAL BARRIER PREVENTS LEGITIMATE CASES FROM BEING BROUGHT BEFORE THE COURTS**

A number of legal barriers that prevent legitimate cases from being brought before the courts may exist at domestic level. These legal barriers concerns mostly the attribution

of criminal or civil liability to business enterprises and its extent. They pose a number of challenges to potential victims (lack of remedy) and to states, as lifting such barriers may require quite fundamental changes in their domestic legislation. In addition, the variations existing in this respect between domestic jurisdictions around the world create inequalities and legal uncertainty that may amount to actual impunity. Legal uncertainty is also detrimental to business enterprises when assessing legal risks for their operation. It is therefore necessary for states to start considering and possibly harmonising the many elements of civil and criminal liability which are relevant to business operations.<sup>65</sup>

As far as attribution of *criminal* responsibility to business enterprises under domestic law is concerned, a number of issues ought to be envisaged by states, such as the possible attribution of criminal liability to corporations and/or their managers, the extent of the concept of corporate complicity, the definition of offences (criminal intent, recklessness, negligence) and how it applies to legal person, or the rules of limitation applicable.

Different but similar issues may be considered concerning the attribution of *civil* liability under domestic tort-based regimes, i.e. civil claims for damage for negligence or intentional wrongs. Here the state may look into issues relating to, for instance, separate corporate personalities, possible causes of action, allocation of civil liability between individuals and corporate entities, allocation of civil liability between members of corporate groups and liability of the acts of third parties (i.e. the nature and scope of liability).

As mentioned previously, the state may also consider elements of *extraterritorial* jurisdiction which are to be found under domestic criminal and civil liability legislation in order to permit claimants facing a denial of justice in a host state to access home state courts. The conditions under which extraterritorial jurisdiction may be exercised should also be considered. Relevant issues are, for instance, the respective roles of home and host states in investigation and enforcement, the choice of law in cross-border cases, the use of extraterritorial jurisdiction in cases of business involvement in gross human rights abuses (in both the public and the private law sphere), etc. It must be reminded here that pillar 3 concerns domestic remedies. Hence the UNGPs is silent as to whether state ought to consider attribution of criminal responsibility to corporations under international criminal law<sup>66</sup>, for example in the form of a legally-binding international instrument<sup>67</sup> and hereby providing victims for a possible international remedy. But these considerations and discussions are being carried out in other fora.<sup>68</sup>

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<sup>65</sup> Concerning domestic law remedies for corporate gross human rights abuses: Zerk, Jennifer, 2014, cited above.

<sup>66</sup> For a detailed analysis of corporate criminal liability at both domestic and international level, see Slye, Ronald C.: Corporations, Veils, and International Criminal Liability, Brooklyn Journal of International Law, Vol. 33, 2008, 955-973. See also: Zerk, Jennifer, 2014, cited above..

<sup>67</sup> Ruggie, John: *A UN Business and Human Rights Treaty?*, An Issues Brief by John G. Ruggie, Harvard Kennedy School, 28 January 2014.

<sup>68</sup> See references in the footnotes above. See also the recent establishment of an open-ended intergovernmental working group to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (HRC Resolution L.22, A/HRC/26/L.22/Rev.1).

Finally, the state must consider whether discriminatory legal barriers apply to certain groups, such as indigenous peoples, migrants, etc. and, if so, remove them as such discrimination would violate the human rights obligations they have subscribed to.

### **3.1.3 ENSURING THAT NO PRACTICAL OR PROCEDURAL BARRIER PREVENTS LEGITIMATE CASES FROM BEING BROUGHT BEFORE THE COURTS**

The terms “practical or procedural barriers that can prevent legitimate cases from being brought before the courts” concern a wide range of issues pertaining to legal representation, costs of litigation, the possibility to aggregate claims as well as the general functioning of the judiciary.

Bringing claims, especially in civil liability litigations, can be extremely costly. As stated in the commentary to GP 26, barriers can arise where “... the costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and /or cannot be reduced to reasonable levels through government support, ‘market-based’ mechanisms (such as litigation insurance and legal fee structures) or other means”.<sup>69</sup>

As far as legal representation is concerned, the UNGPs stay away of the issue of free legal representation and access to legal aid. If there is a general obligation for the state to secure legal representation for claimants a. o. through providing legal aid or free legal representation in both criminal and civil cases, the exact contents and extent of the international human rights obligation to provide legal aid and free legal assistance is subject to discussion. The main difficulty stems for the fact that many countries still lack the necessary resources and capacity to provide free legal assistance for persons involved in domestic proceedings. However, legal assistance is considered, without discussion, an essential element of fair trial and of any justice system that is based on the rule of law. Providing free legal assistance and legal aid in *criminal* litigations is a general requirement of the right to a fair trial and the respect of the principle of “equality of arms” between the parties in a criminal case.<sup>70</sup> As far as the situation of victims in criminal litigations is concerned, their access to legal aid may depend on their standing in domestic criminal law. The existence of an actual obligation to provide victims with free legal assistance in *civil* tort litigation is not established. This does not mean that states may not provide legal assistance in civil litigations. In any case, when legal aid is available, it must be awarded on the basis of transparent and non-discriminatory criteria.

GP 26 commentary underlines the possible role of the state in regulating legal fees, costs and aggregation of claims. This implies, first of all, that the legal fee structure should be reasonable and affordable to both the client and the lawyer. There is a large variety of legal fee structures around the world: some fees are fixed in advance (flat fee,

<sup>69</sup> GP 26 commentary p. 29.

<sup>70</sup> See: Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems adopted in December 2012 by the United Nations General Assembly, Resolution A/RES/67/187.

hourly rate, monthly retainer), other fee are a percentage of an award or settlement (no win no fee systems, success fee, etc.)<sup>71</sup> Some domestic law allows for contingency fees<sup>72</sup> (USA) and other prohibits them (United Kingdom). Third party litigation funding is well-established in England and Australia. It allows a third party to provide litigants with funds to pursue a lawsuit, in return for a share of the success fee and reimbursement of costs if the claim is successful.<sup>73</sup> Hence fees are often closely linked to the damages awarded in case of success. For EU countries, the legal landscape is even complicated by the provisions of the Rome II Regulation which stipulate since January 2009 that damages in cross-border litigations must be assessed according to the law and procedure of the country where the harm has occurred (and not the country where the case has been litigated).<sup>74</sup> All in all, GP 26 entails that the legal fee structure should not raise a barrier for potential claimant.

As far as costs are concerned, the law of costs (in a broad sense) also varies from state to state. There are general rules concerning settlement agreements and costs orders: the losing party pays costs. The parties to a settlement can always also settle on the costs. Costs orders by a judge determine who is the paying and who is the receiving party, and assess the amount of costs. In some states, courts have the possibility to adopt protective cost orders. English courts, for instance, can issue orders according to which, regardless of the outcome of the proceedings, the party applying for the order shall either not be liable at all for the other party's costs or be liable only for a fixed proportion thereof. If successful the party applying for the order may be entitled to recover all or part of his costs from the other party.<sup>75</sup> Here again, the situation can vary very much from one country to the next and states should check that their law of costs does not hinder claimants' access to domestic remedies.

Finally, collective action procedures can be a way of distributing cost of litigations among several/many claimants. States should therefore envisage whether there are adequate options for aggregating claims or enabling representative proceedings in their domestic procedure rules, such as class actions, multi-party litigation, etc.

### **3.1.4 IMBALANCES BETWEEN PARTIES AND VULNERABLE GROUPS AND INDIVIDUALS**

In addition to ensuring the effectiveness of domestic judicial mechanisms in general, GP 26 also entails that the state should consider ways to address any imbalances between the parties to business-related human rights claims whether in terms of financial resources, access to information and expertise.

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<sup>71</sup> See Meeran, Richard: "Access to remedy: the United Kingdom experience of MNC tort litigation for human rights violations", in: Deva and Bilchitz, 2013, 378-402 at 395-396.

<sup>72</sup> i.e. sharing of the damages awarded to the claimant.

<sup>73</sup> Irish Centre for Human Rights: *Business and Human Rights in Ireland. Context, International Standards and Recommendations*, Irish Centre for Human Rights, April 2012, p. 45.

<sup>74</sup> See Meeran, Richard, cited above, p. 395.

<sup>75</sup> *Idem*, p. 44-45.

The state should consider ways to address additional barriers to access remedies faced by individuals from groups or populations at heightened risk of vulnerability. In this respect, the state can envisage to target awareness-raising among vulnerable groups, such as women, indigenous people, children, etc. For example, one could envisage support for indigenous people exposed to adverse impacts of transnational extractive and forestry industry to access to remedy in home state, if the complaint cannot be raised in the host state. Concerning children, an avenue could be to ensure that there are child-sensitive effective procedure available to children and their representatives as well as necessary legal aid and other type of assistance targeted at children.

### 3.2 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.

Many types of administrative, legislative and other non-judicial mechanisms may be put in place to address business-related human rights abuses. This includes:

- National Human Rights Institutions (NHRI);
- National Contact Points under the OECD Guidelines for Multinational Enterprises
- Ombudsperson offices;
- Government-run complaints offices;
- Mediation-based, adjudicative or other culturally-appropriate and rights-compatible processes.

In this respect, the state could envisage the role that National human rights institutions play or may play in regard to redressing corporate human rights abuses. The state may give the NHRI a mandate that allows it to receive and handle complaints relating to corporate human rights abuse or to offer mediation, conciliation, support to individual cases, legal aid, etc. The mandate may also be broader and allow for promoting awareness on remedy to and redress for corporate human rights abuses, training of relevant stakeholders or counselling on which remedy to access. The state ought to staff and finance its NHRI adequately.

When establishing non-judicial grievance mechanisms, the state should consider ways to address any imbalances between the parties to business-related human rights claims. In

the same way as with judicial mechanisms, the state should consider ways to address any additional barriers to access faced by individuals from groups or populations at heightened risk of vulnerability or marginalization. Hence, information on state-based non-judicial mechanisms should be made accessible to people living in marginalised area / remote rural districts, etc. as well as to children or women where necessary.

More generally, non-judicial grievance mechanisms should comply to the effectiveness criteria set out in GP 31.

### **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;
- h. Operational-level mechanisms should also be:
  - i. Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

GP 31 lists a number of criteria: legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, continuous learning and engagement and dialogue. According to the commentary to GP 31, these criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. They are a guidance for both state and non-state actors. We focus here only on the non-judicial grievance mechanism established by states.

As far as legitimacy is concerned, it is important that the state establishes non-judicial grievance mechanisms which have a mandate that provide them with institutional independence and clear proceedings in order for these mechanisms to enable trust from the stakeholder groups for whose use they are intended. In addition the state should ensure that the parties to a grievance process cannot interfere with its fair conduct by for example, making it possible for the parties to lodge complain re. unfair conduct of the process by the relevant public authorities.

Regarding accessibility, the state should build awareness of the grievance mechanism, taking into account accessibility elements such as: language and literacy, costs, physical location, protection of individuals against fear of reprisal, providing assistance for those who face barriers to access remedies, etc. In addition, the state should help ensuring that grievances are framed in terms of human rights when they do raise human rights concerns by, for instance, providing for training and supervision of relevant institutions.

Regarding the predictability and the equitability of the procedure, the state should provide clear and public information about the procedures available for example by providing timeframes for each stage of the procedure or information on types of process and outcomes available. The state should also provides reasonable access of all parties to information, advice and expert resources. In addition, it is important that the state communicates regularly with the parties about the progress of individual grievances. GP 31 makes a point of underlying that this requirement of transparency does not preclude that confidentiality of the dialogue between the parties be provided when necessary<sup>76</sup>.

Finally, the state should envisage supporting 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.

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<sup>76</sup> GP 31 commentary, p. 35

### 3.3 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.



GP 28 aims at two types of grievance mechanism: 1) those administrated by non-state actors at local level (business enterprise, industry association, multi-stakeholder group, etc.) and supra-national grievance mechanisms, such as international and regional human rights bodies. The later are not state-based in a territorial sense but are created by states through intergovernmental international or regional organisations.

Non-state-based grievance mechanisms are by definition outside the realm of the state duties. However GP 28 recommend that the state consider ways to facilitate access to such grievance mechanisms. Hence the state should consider providing information re. non-state-based grievance mechanisms administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group.

As far as supra-territorial grievance mechanisms are concerned, the state should also provide information on how to complaint to regional and international human rights bodies. In order to facilitate access to non-state-based grievance mechanisms, legal aid or assistance to access regional and international human rights bodies ought to be provided.

## CHAPTER 4

# 4 CONCLUSION AND PERSPECTIVE

This working paper has explored and unpacked the human rights duties of the state when dealing with business enterprises activities as expressed in the United Nations' Guiding Principles on Business and Human rights.

Even though the UNGPs is not a legally-binding instrument, it refers to a number of actual human rights obligations. In addition, it must be kept in mind that the GPs have been endorsed unanimously by a UN organ, the Human Rights Council, and hereby are the expression of an international commitment of all UN states. Hence, in some areas the state must take action to protect human rights; in other areas, the state is committed, in a less compelling manner, to consider ways of improving individuals' protection against detrimental corporate activities.

The working paper has tried to give a picture of the type of actions that is required or expected to be taken by states. It is impossible to get into the details of each issue, each required regulation, each policy, etc. This would be far too extensive and would require a high-level technical knowledge in a huge variety of domains from OHS issues in the medical industry in Asia to regulation of stock exchange listing in Northern America or certification of PMSC's staff in Southern Africa.

The strength of the UNGPs is to stay at a general level of regulation and operation and envisage business activities (and collateral relevant state actions) through the prism of human rights protection. When unpacking all the GPs relating to state duties in the field of human rights and business, one gets a very exhaustive view of all the areas and avenues that the state could explore in order to improve the protection of individuals against human rights-related corporate abuses. This general take on the human rights and business field is also a factor of many ambiguities that the working paper tries to point out.

When companies breach the domestic laws of the state where they operate, they do not breach any human rights standard as such. They breach provisions of labour law, criminal law, environmental laws, etc. These breaches may open the door to litigations according to domestic law in the countries where the laws were broken or in the home state of the company, in the case of a company operating abroad and depending on the rules of jurisdiction that the home state applies in various areas of law. In a few cases, these breaches of domestic law can be labelled human rights-related abuses, but this is not a legal qualification of the abuse, in the way that it does not open any access for the

victim to a human rights remedy that would target the company as the perpetrator of a human rights violation. As the legal framework, both at domestic and international level, is formed so far, only the state can be the perpetrator of the human rights violation if it does not fulfil its obligation to regulate, through domestic laws, private activities in the ambit of human rights law and, if necessary, redress breaches of these laws. The victims may bring a claim against the state for violation of their human rights. If they want to act against the business enterprises, they have only access to tort litigation or, in case of criminal acts, can be associate to criminal proceedings if possible according to domestic procedures. Victims may also access non-judicial domestic remedies, if such remedies have been made available by the state or by business enterprises.

The collision between the general and state-centred perspective of public international law, and more specifically human rights law in the UNGPs, with the very specific, diverse, technical and procedural provisions of domestic laws is a key feature of the business and human rights field. It is also a key feature of human rights protection by the state at large as actions from private actors are never human rights violations as such but are “translated” into human rights violations by the state.

The UNGPs take stock of this complexity and attempt to give general guidance to all states on how to deal with the many issues pertaining to the human rights and business field. The UN Working group is prioritising issues and angles of attack, picking up issues, developing tools and all in all trying to be more specific and explicit about the implication of the UNGPs. The National Action Plans adopted by some states show that states are perfectly able to conceive plans on how to improve their action within the field of human rights and business. There has been and still is indeed a variety of initiatives launched in the aftermath of the endorsement of the UNGPs by the HRC proposing sector or actor specific guidance as well as general implementation tools to both states and business enterprises.<sup>77</sup> States which actually seriously mean to take action to implement the UNGPs can easily find guidance to start doing so.

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<sup>77</sup> The Danish Institute for Human Rights and The International Corporate Accountability Roundtable: *National Action Plans on Business and Human Rights. A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks*, June 2014 at: <http://www.humanrights.dk/publications/national-action-plans-business-human-rights>.

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