

To: The Office of the United Nations High Commissioner for Human Rights
c/o Lene Wendland, Research and Right to Development Division, OHCHR
CH-1211 Geneva 10, Switzerland
registry@ohchr.org

26 March 2012.

Dear Members of the Office of the United Nations High Commissioner for Human Rights,

NomoGaia is grateful for the opportunity to submit input to the United Nations High Commissioner for Human Rights with regard to the implementation of the UN's business and human rights agenda. NomoGaia is a non-profit organization based in the United States that is dedicated to the development of human rights due diligence tools for global industries. We have worked with companies, governments, investors and civil society organizations, providing on-the-ground case studies of human rights due diligence and written analysis of emerging topics. For over four years NomoGaia's field research has been oriented toward corporate human rights due diligence, which has positioned us to see firsthand the weaknesses in many existing state protections for human rights in a business context.

In response to the UNHCHR's call for input pursuant to engaging "the United Nations System as a whole" in operationalizing resolution A/HRC/RES/17/4, NomoGaia suggests that the United Nations should focus on helping states to adopt domestic regulations that align with the due diligence components of the Guiding Principles.

The "Protect, Respect and Remedy" framework incorporates the State's duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. Specifically, Guiding Principle No. 3 states that:

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 ongoing 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.

This multifaceted duty to protect is challenging and complex for states, particularly those new to the concept of corporate human rights responsibilities. The UN has strong ties to national governments and longstanding authority in human rights that positions it to help states develop human rights due diligence legislation in accordance with points (a), (c) and (d) in *Guiding Principle 3*, above.

The UN has a limited history of assisting in the drafting of state legislation or stipulating how the obligations of international laws, such as treaties, will be executed domestically. However, the UN does have the right and responsibility to “make use of special programmes of advisory services” to achieve access to remedy for rightsholders (Vienna Declaration, Article 27).¹ This role is associated with the Universal Declaration (Article 8) as well as the International Covenant on Economic, Social and Cultural Rights (Article 2), the latter of which specifically articulates that states must “take the necessary steps... to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.” The UN has outlined four main methods available to states to adopt measures to provide access to remedies:

- a. Direct incorporation of rights recognized in the international instruments into *a bill of rights* in the national legal order;
- b. Enactment of different legislative measures in the civil, criminal and administrative laws to give effect to the different rights recognised in human rights instruments;
- c. Self-executing operation of international human rights instruments in the national legal order; and
- d. Indirect incorporation as aids to interpret other law.²

The human rights relevant to the Guiding Principles are also those enshrined in international norms, specifically, the International Bill of Rights. By encouraging states to implement domestic legislation derived from the Guiding Principles, the United Nations merely ensures that states continue to give effect to the rights recognized in ratified human rights instruments in all applicable contexts – including the newly recognized context of business. In line with General Assembly resolution 60/147 of 16 December 2005, the guidelines contained in this draft statute “do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law.”³ The UN cannot ensure that access to remedy is available if there are no legal mechanisms to endow corporations with human rights duties.

For the states that choose to enact legislative measures under section (b) above, there are very few existing regulations to provide guidance. To fill this legislative gap, NomoGaia has prepared the following model statute as a jumping off point. This model statute uses language directly derived from the *Guiding Principles* in addition to domestic statutory law found worldwide relating to environmental due diligence procedures (found in NEPA Environmental Impact Statement regulations in the United States, Environmental Assessment Regulations under Ghana's Environmental Protection Agency Act, Environmental Impact Assessment Notification of the Environmental Policy Act of India, and the like). Environmental procedures were selected as a model for two reasons: (1) in most countries environmental legislation already incorporates social components of general wellbeing, and (2) the process of conducting environmental due diligence incorporates social, health and various other impact assessments; human rights impact assessment is a natural extension of that process.

This proposed statute's strong foundations in both the Guiding Principles and the well-established frameworks for environmental law currently in use capitalize on an existing legal space

¹ <http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en>

² <http://www.un.org/esa/socdev/enable/comp101.htm#1.7>

³ Preamble, Resolution 60/147, available at <http://www2.ohchr.org/english/law/remedy.htm>

for implementation of human rights due diligence that has 40 years of precedence. From a business perspective, by integrating the model statute below into environmental due diligence regulation, states (1) increase the comprehensiveness of an existing due diligence regulatory structure, and (2) employ a legal framework that that can be easily understood and implemented by companies already familiar with environmental baseline and impact studies.

The Model Human Rights Due Diligence Act

The Purpose of this Act is to declare a national policy which will encourage productive and enjoyable harmony between business enterprises and those stakeholders affected by the enterprise's operations and to promote efforts which will prevent, remedy or eliminate negative human rights impacts of business enterprises operating within [State X].

***The language of this section is directly derived from the National Environmental Policy Act of 1969 (NEPA), the language of which has been used as the basis for adoption of environmental due diligence requirements for business enterprises worldwide.

(a) This Act applies to business enterprises operating within the territory of [State X] that meet one of the following requirements:

- (i) the enterprise's capital costs related to operations within the territory of [State X] are equal to or greater than \$10 million;
- (ii) the potential or actual area affected by the enterprise's operations within the territory of [State X] are equal to or greater than 250 hectares; or
- (iii) the actual, planned number of persons employed by the enterprise, either directly or indirectly through contracting, within the territory of [State X] is equal to or greater than 200.

(b) In order to identify, prevent, mitigate and account for adverse human rights impacts, each such business enterprise must carry out *human rights due diligence*. The form and complexity of such due diligence may vary, depending on size of the proposed project, the degree of human rights risks, and the nature and context of operations.

***The language of this section (b) is directly derived from *Guiding Principle* No. 17.

(c) The human rights due diligence process described in section (b) shall include assessing actual and potential human rights impacts with which the business enterprise may be involved and integrating and acting upon the findings. This process shall:

- (i) Draw on internal and/or independent external human rights expertise;
- (ii) Involve meaningful consultation with potentially affected groups and other relevant stakeholders;
- (iii) Cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (iv) Be updated to reflect significant developments in the business enterprise's operations and operating context.

***The language of this section (c) is directly derived from *Guiding Principle* Nos. 17 & 18.

(d) At the conclusion of the human rights due diligence process described in sections (b) and (c) above, the business enterprise shall prepare a detailed human rights impact statement describing the enterprise's assessed positive and negative impacts on human rights.

(e) Within 30 days of completion, the human rights impact statement described in section (d) shall be made available in a form and frequency that is accessible to all affected stakeholders for a period of public consultation of not less than 120 days, during which time the public shall be provided the opportunity to provide commentary on the adequacy, adequacy and comprehensiveness of the human rights impact statement. These comments will be submitted to [State X's national human rights institution or other agency]. The business enterprise shall have the opportunity to respond to any or all comments submitted.

(f) Within 60 days of completion of the public consultation process described in section (e), the business enterprise shall submit the human rights impact statement to [State X's national human rights institution or other agency] where such statements, as well as the comments and responses from the business enterprise, will be maintained and made publicly available for either 10 years or the duration of the enterprise's assessed operations within the territory of [State X], which ever is longer.

Commentary

Commentary to Section (a): The most significant human rights impacts are often caused by capital-intensive projects with large footprints (*i.e.*, mining projects, dams, etc) and a legally required human rights due diligence process may unnecessarily burden small business enterprises whose operations are not likely to impact human rights on a material level. Section (a) recognizes this reality by integrating a materiality threshold, thus tailoring human rights due diligence requirements to those projects that have historically posed the biggest threat from a human rights perspective due to their recognizable and visible human rights impacts. However, this materiality threshold may vary based on factors such as the size of the adopting state, its level of economic development, and industries prevalent within its borders.

Commentary to Sections (b) and (c): Human rights due diligence required by sections (b) and (c) must be completed before the enterprise's operations within the adopting state have caused irreparable human rights impacts. Thus, due diligence procedures should be implemented for each new capital project contemplated within the territory of [State X] after feasibility studies have been completed but prior to the earlier of initiation of construction or permitting/licensing processes.

Commentary to Section (d): The form of the detailed statements required by section (d) may vary based on the context of the assessed project. However, such statements must include a baseline valuation of relevant human rights indicators for the context, company and project and a comparison between such baseline values and the project impacts. The detailed statement also must consider all relevant human rights (derived from the International Bill of Rights) likely to be impacted.

Commentary to Section (e): The public consultation process described in section (e) is intended to mirror the public consultation process used in the environmental impact assessment process, which has been widely adopted by states worldwide. As used in this section (e), affected stakeholders

include, at a minimum: investors in the enterprise; those persons employed by the enterprise, either directly or indirectly through contracting entities; those persons residing in geographic proximity to the enterprise's operations within the territory of [State X], those persons relocated as a result of the enterprise's operations within the territory of [State X], and financial institutions contributing to the enterprise's operations within the territory of [State X].

Commentary to Section (f): After conclusion of the public consultation process, human rights impact statements should remain publicly accessible for the duration of the capital project assessed. Public accessibility to such statements ensures transparency of the human rights due diligence process and ensures that fluctuation in human rights impacts may be measured over the life of the capital project, in recognition of the fact that human rights risks may change over time as the business enterprise's operations and operating context evolve.