

The Role of the United Nations in Furthering Comprehensive and Universal Human Rights Due Diligence Legislation

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I. Introduction

Between 2005 and 2011, the United Nations (UN), through the Secretary-General's Special Representative for business and human rights, John Ruggie, developed a framework to incorporate multinational corporations into the human rights regime. The comprehensive and universally embraced 2008 Framework for Human Rights and Business, and the 2011 Guiding Principles that followed, reaffirm the state's continued duty to *protect and promote* human rights and define the duty of business enterprises to *respect* human rights. To demonstrate that they respect human rights, companies are to conduct "human rights due diligence." In tandem, governments are urged to develop mechanisms to ensure that corporate actors do not violate human rights and to provide remedies if or when they do.² This multifaceted *duty to protect* is challenging and complex for states, particularly those new to the concept of corporate human rights responsibilities. Guidance from a well-respected international body, such as the UN, is necessary to ensure implementation of comprehensive and universal human rights due diligence standards in domestic legislation.

The following paper reviews the legal and practical precedent for the UN taking on such a guiding role. The UN has prior practice issuing comprehensive legislative guides on subjects needing universal, standardized law. In addition, the UN has already begun providing guidance on human rights due diligence as it applies to indigenous rightsholders. The development of standardized human rights due diligence laws is crucial to ensuring corporate respect for human rights; the UN's strong ties to national governments and longstanding authority in the human rights arena best positions it to provide guidance to states on how to effectively do so. In providing public guidance to states on model corporate human rights due diligence, the UN would not be creating new human rights obligations but would instead be assisting states to meet existing obligations in the new context of business. Further, with the UN's guidance, human rights due diligence regulations could be built into existing frameworks for impact assessment and monitoring that many states have already established.

II. The UN Has a Prior History of Providing Legislative Guidance in Other Contexts

The UN has an established history of assisting in the drafting of state legislation and stipulating how the obligations of international laws, such as treaties and conventions, should be executed domestically. The UN Office of Drugs and Crime's legislative guidance on implementation of three conventions, in particular, demonstrates this. Those conventions are the UN Convention Against Transnational Organized Crime and the Protocol Thereto, the UN Convention against Corruption and the Universal Anti-Terrorism Conventions and Protocols. In

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² For more background on the Guiding Principles and these duties of states and business enterprises, see the March 26, 2012 submission by NomoGaia to the Office of the United Nations High Commission for Human Rights in response to the UN's call for input on the UN's role in implementing the business and human rights agenda, *available at*: <http://www.nomogaia.org>.

each legislative guide, the UN body responsible for dissemination of the guide (i) specifically expounds on the type of substantive laws that signatories should draft and (ii) provides reference materials and technical guidance aimed at helping to achieve implementation of the relevant conventions.³ For example, the Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols references “legislative templates adaptable to a wide variety of legal systems,” including “models of an illustrative nature.”⁴ In addition to these model laws and exemplary materials, this legislative guide also “attempts to provide or refer the reader to examples of, or references to, national legislation currently in force or under parliamentary consideration.”⁵ Similarly, the Legislative Guide for the Implementation of the UN Convention Against Transnational Organized Crime and the Protocol Thereto provides guidance on how states can effectively combat transnational organized crime by presenting issues about substantive domestic criminal law, legislative amendments to ensure effective criminalization, and legislative and administrative measures to enhance legal assistance and law enforcement.⁶

III. The UN Is Currently Providing Legislative Guidance on Human Rights Due Diligence and Indigenous Populations

Specific guidance from the UN regarding corporate human rights due diligence is already being provided by the UN in a limited capacity. UN Special Rapporteur on Indigenous Rights, James Anaya, has begun addressing corporate human rights due diligence as it affects indigenous populations. In April 2011, Anaya issued a report prepared at the request of the Government of Suriname outlining a program for developing laws and administrative measures to secure the rights of indigenous and tribal people.⁷ This report included recommendations on how proponents of investment projects should conduct consultations with indigenous groups whose territories are affected by planned developments.

Anaya has also issued statements on specific conflicts between business interests and indigenous groups, calling on governments to improve regulations to address such conflicts in Costa Rica, Argentina and Guatemala.⁸ He has identified a lack of state mechanisms to protect indigenous land ownership as a major stumbling block in responsible and respectful development of excavation projects.⁹ In regards to the Marlin mine in Guatemala, Anaya attempted to provide “specific considerations and recommendations based on the rights set forth in international instruments,” noting that the current debate had been “furthered by the lack of domestic regulations on consultation and a series of misunderstandings about the content and scope of the regulations that

³ See, e.g., United Nations Office on Drugs and Crime, Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols, ¶¶ 7-13 (2003), available at http://www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf; see also, United Nations Office on Drugs and Crime, Legislative Guide for the Implementation of the United Nations Convention against Corruption, Forward (2006), available at http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf.

⁴ See, Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols at ¶ 12.

⁵ *Id.* at ¶ 13.

⁶ See, United Nations Office on Drugs and Crime, Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto (2004), available at http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf.

⁷ See, Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples’ land and related rights in Suriname, U.N. Doc. A/HRC/18/23/Add.7 (August 18, 2011).

⁸ The El Diquis HEP, lithium mining development, and Goldcorp's Marlin mine, respectively.

⁹ See, *Argentina must improve living conditions for indigenous groups – UN expert*, UN NEWS CENTRE, Dec. 8, 2011, available at <http://www.un.org/apps/news/story.asp?NewsID=40665&Cr=argentina&Cr1=> (last visited August 3, 2012).

do exist.”¹⁰ By way of example, Anaya’s work on behalf of indigenous rightsholders affected by the Marlin mine would be considerably furthered by the existence of a template regulation to guide Guatemala in its efforts to build corporate human rights due diligence laws.

IV. Human Rights Due Diligence Is an Area Demonstrably in Need of Universal, Standardized Guidance From the UN

The UN sparingly and cautiously takes on the role of developing regulations. Aid in implementation of specific international instruments, as described in Section II, is reserved for matters for which consistent and effective regulation across domestic borders is of paramount importance.¹¹ Implementation of human rights due diligence legislation pursuant to the Guiding Principles falls into this category. Legislative guidance from the UN would ensure consistency in how states and businesses address human rights impacts on indigenous and non-indigenous groups.

Because the Guiding Principles themselves do not set forth methods and systems for implementing human rights due diligence, it is incumbent on states to define how the Guiding Principles should be applied in practice, pursuant to their obligation to protect and promote human rights. This poses two distinct challenges: (i) neither states nor corporate actors currently have a well-developed understanding of how the Guiding Principles should be applied in practice; and (ii) to the extent efforts are made by states to implement the Guiding Principles, such human rights regimes, without standardization, create confusion for business enterprises operating in multiple countries.

In developing consistent standards relating to human rights due diligence at a global level, the UN can help corporations better understand the duties required of them with respect to human rights and help assure compliance throughout global operations. Without such guidance, individual states may attempt to create their own unique approach—varying from loosely structured recommendations to strictly enforced reporting procedures. This would result in a fragmented regulatory framework that would, in turn, unduly burden companies trying to manage international operations. This could impede international development and generate broad opposition to human rights due diligence. Alternatively, even worse, some states may disregard their duty to protect in this context completely, out of apprehension that creating legislation not based on a universal standard would make them less competitive for foreign investment. While becoming more proactive in recent years to implement safeguard policies that incorporate human rights, other international organizations, such as the World Bank and the International Finance Corporation, are not as well positioned to help states develop such legislation.¹² Concrete legislative guidance from

¹⁰ See, Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories, at 2, U.N. Doc. A/HRC/18/35/Add.3 (June 7, 2011).

¹¹ See, e.g., Legislative Guide for the Implementation of the United Nations Convention against Corruption, *supra* note 3, at Forward, explicitly referring to the “need for consistency and a degree of harmonization at the international level.”

¹² This is due to the role that the UN has assumed to date on this issue, by promulgating the 2008 Framework and the 2011 Guiding Principles as well as to the perception by some that, historically, promotion of foreign investment by these organizations was not met with an equal recognition of the importance of ensuring that policies and regulations were in place to protect human rights. See, e.g., Andrea Durbin, *Addressing Human Rights Risks: Too Risky for the World Bank*, AMNESTY INTERNATIONAL: HUMAN RIGHTS, TRADE AND INVESTMENT MATTERS, at 10-11 (2006) available at <http://www.amnestyusa.org/sites/default/files/pdfs/hrtradeinvestmentmatters.pdf>.

the UN would ensure that the major international issue of corporate human rights due diligence is not swept under the table due to lack of a universal standard and fear of discouraging investment.

V. UN Guidance Would Assist States in Meeting Existing Human Rights Obligations

Implementation of the Guiding Principles—which effectively re-contextualize human rights in a modern, multinational corporate world—presents a daunting task for both companies and states. However, it is important to recognize that the Guiding Principles do not create *new* human rights to be respected by business enterprises and protected by states. The business sphere is merely a new context in which states must consider *existing* human rights. The human rights recognized in the Guiding Principles are those codified in well-accepted international instruments, namely the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and the International Labour Organization’s (“ILO”) Declaration on Fundamental Principles and Rights at Work.¹³ The vast majority of states have agreed to uphold the human rights standards set forth in these international covenants through ratification. For example, 114 countries are party to the ICCPR, 160 countries are party to the ICESCR and 185 countries have endorsed the principles and rights set forth in the ILO’s Declaration on Fundamental Principles and Rights at Work by joining the ILO as members.¹⁴

Each of these international instruments acknowledges that recognition of universal human rights is to be accompanied by mechanisms to protect such rights and to provide a remedy in the event they are violated. Article 2 of both the ICCPR and the ICESCR explicitly bestow on states the obligation to take the necessary steps, including implementation of legislative measures, to give effect to the rights recognized in the covenants.¹⁵ The UN has taken on the responsibility to provide advisory services and technical assistance to member states to this end.¹⁶

Guidance from the UN on the issue of human rights due diligence would not impinge state sovereignty, as the UN would not be requiring states to accept new duties or implement UN-

¹³ See, Human Rights Council, 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, A/HRC/17/31 (March 21, 2011) (Guiding Principle 12 defines “human rights” to mean, at a minimum, “all internationally recognized human rights,” which includes rights enumerated in the International Bill of Rights (*i.e.*, the Universal Declaration of Human Rights, the ICCPR, and the ICESCR) and principles concerning fundamental rights set out in the ILO’s Declaration on Fundamental Principles and Rights at Work).

¹⁴ For a description of those countries who are parties to and have ratified the ICCPR and the ICESCR and who are members of the ILO, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en, <http://www.ilo.org/public/english/standards/relm/country.htm>.

¹⁵ See, International Covenant on Civil and Political Rights, art. 2, December 16, 1966, 999 U.N.T.S. 171 (“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”); International Covenant on Economic, Social and Cultural Rights, art. 2, December 16, 1966, 993 U.N.T.S. 3. (“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”).

¹⁶ See, Vienna Declaration and Programme of Action, art. II § 16, U.N. Doc. A/CONF.157/23 (July, 12 1993) (stating that the United Nations “should assume a larger role in the promotion of human rights. This role could be given shape through cooperation with Member States and by an enhanced programme of advisory services and technical assistance.”)

mandated legislation.¹⁷ Instead, such guidance should be considered part of the UN's provision of advisory services to promote human rights recognized by states in previously ratified instruments—in the newly accepted context of business.

VI. Guidance From the UN Should Incorporate Existing Impact Assessment and Monitoring Frameworks

In most countries, legislation currently exists that sets forth standards and procedures relating to assessment of risk, mitigation and monitoring of environmental, health and social impacts of large-scale capital projects. The establishment of such laws was the result of recognition by states of their duty to ensure environmental protection during development projects; the assessment process has then generally been outsourced to private consultants with the requisite expertise to provide companies with the information necessary to ensure such protection. Human rights impact assessment regulations can be organically created from these established procedures for environmental impact assessment, based on (i) the newly recognized duty of states to ensure protection from environmental as well as human rights impacts and (ii) the need to establish a standardized procedure for companies to complete the due diligence necessary to identify and mitigate both types of impacts.

Establishment of legislative guidance from the UN on human rights due diligence could build on well-established impact assessment, mitigation and monitoring frameworks and thus capitalize on 40 years of precedence. From a business perspective, guidance from the UN on a standardized human rights due diligence procedure that tracks the language of, and could be incorporated into, such existing regulations would increase the comprehensiveness of existing regulatory structures and employ a legal framework that could be easily understood and implemented by companies already familiar with environmental, social and health baseline and impact studies.

VII. Conclusion

The UN's Human Rights Counsel has established a Working Group on business and human rights to, among other things, promote the dissemination and implementation of the Guiding Principles. Pursuant to its mandate, the Working Group has begun the process of interacting with states to integrate the Guiding Principles into domestic legislation.¹⁸ Using its expertise, the Working Group should also assume the crucial role of issuing a legislative guide, such as those discussed in Section II, that outlines model legislation on human rights due diligence based on existing frameworks for impact assessment, mitigation and monitoring. The Working Group has limited resources, however, and would benefit significantly from support from other parts of the UN as well, particularly in guiding implementation of new legislation. Such a joint effort is critical to transforming the widely accepted abstract principles on the states' role in overseeing corporate human rights duties into actionable, concrete guidelines, as contemplated in the Guiding Principles. Such guidelines would then, in turn, provide a solid basis for the creation of a comprehensive and universal human rights due diligence regulatory structure.

¹⁷ See, G.A. Res. 60/147, Preamble, U.N. Doc. A/RES/60/147 (March 21, 2006) (making clear that, in providing a remedy for human rights violations, states “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”).

¹⁸ See, Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HRC/20/29 (April 10, 2012).