EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS

SRSG John Ruggie's Draft Guiding Principles for the implementation of the United Nations 'protect, respect, and remedy framework'

Position Paper

of the

European Center for Constitutional and Human Rights

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EXECUTIVE SUMMARY

The European Center for Constitutional and Human Rights appreciates the opportunity to comment on the Guiding Principles for the implementation of the United Nation 'protect, respect, and remedy framework' drafted by Special Representative John Ruggie.

The ECCHR holds that the Draft Guiding Principles (DGPs) in their present state should not be submitted to the Human Rights Council. SRSG Ruggie risks undermining all efforts to strengthen corporate responsibility by proposing a re-statement of rules which is under-inclusive, weak and—in essential parts—of doubtful utility.

The key findings are summarized as follows and explained in detail thereafter.

- Welcomed and important provisions are those on procedural and institutional changes in order to ensure State policy coherence, and provisions on how enterprises should organize their business and apply, communicate, and revise due diligence mechanisms throughout the entire enterprise.
- Although SRSG Ruggie in his Draft Report points at the importance of the dichotomy of legitimate policy goals, the DGPs suggest only institutional and procedural changes, but lack *substantive* guidance on how economic/ developmental policy goals and human rights policy goals should be balanced, related, or put in hierarchical order.
- The Foundational Principle on the responsibility of the business enterprise's home State remains entirely vague and, as a result, abets home State inertia. In particular, the respective Commentary is rudimentary, over-emphasizes obstacles which could in practice hardly become relevant, and leaves the reader with the overall impression that the approach of home State responsibility is not viable.
- The DGPs fail to recognize any responsibility of corporate directors, under both criminal and civil law.
- SRSG Ruggie unnecessarily pre-empts the ongoing development of international law duties of private actors. His Commentary states firmly that international human rights instruments do not impose direct legal obligations on corporations, dis-respecting the many sources of international law that currently still, and more than ever, argue for the contrary.
- The DGPs do not delineate the responsibilities that corporations have for the realization of particular human rights. It will hence remain difficult to specify human rights

responsibilities under the Covenant on Economic, Social and Cultural Rights that are not specifically business-related (e.g. Article 13 on the right to education or Article 15 on the right to take part in cultural life).

- Part IV, on the access to remedy, ignores entirely the importance of access to preliminary, injunctive relief at courts.
- Part IV fails to recognize clearly both home and host State duties to provide access to redress before courts. Only a host State but no home State responsibility to provide for access to remedy is recognized. The provision on the host State duty to provide for remedy suggests that available alternative dispute resolution pre-empts the necessity for providing effective judicial mechanisms.

THE DRAFT REPORT AND DRAFT GUIDING PRINCIPLES

The challenges observed by SRSG Ruggie

The main part of SRSG Ruggie's Draft Report summarizes the institutional, procedural and circumstantial challenges that he has observed in the business and human rights context:

The Draft Report points out "**institutional misalignments**, from local levels to the global, between the scope and impact of economic forces and actors, . . . [creating] the permissive environment within which blameworthy acts by business enterprises may occur, . . . without **adequate sanctioning or reparation**. . . . The aim must be to shift from institutional misalignments onto a socially sustainable path." (Draft Report, ¶¶ 1 - 3)

Furthermore: "the modern **corporation itself** has evolved at an accelerated pace, and **embodies complex forms** that challenge conventional understanding and policy designs." (¶ 1)

"The worst . . . abuses . . . take place in **areas affected by conflict, or where governments otherwise lack the capacity or will to govern** in the public interest (¶ 2). . . . Some of the most serious corporate-related human rights abuses have involved companies in acts committed by official entities." (¶ 5)

The Draft Report points at ". . . **competing pressures** . . . **corporate influence** . . . the need for investment, jobs, as well as access to markets, technology and skills". (¶ 5)

"States are simultaneously subject to **several . . . bodies of international law**, such as investment law and trade law. . . . [A]bsent any internationally-recognized hierarchy of treaty obligations, States are unlikely to place every single human right they have recognized above their legal obligations in those other areas." (¶ 5)

Moreover, "business conduct is shaped directly by **laws, policies and sources of influence other than human rights law**: for example, corporate law, securities regulation, forms of public support such as export credit and investment insurance, pressure from investors, and broader social action. . . . [T]he units of Governments that directly shape business practices—in such areas as corporate law and securities regulation, investment promotion and protection, and commercial policy—typically operate in isolation from, are uninformed by, and at times undermine the effectiveness of their Government's own human rights obligations and agencies." (¶¶ 5, 6)

The Draft Report points at "failure to **enforce existing laws**" and is concerned that "for vulnerable and marginalized groups, there may be inadequate legal protection" (¶ 6)

"[T]hese developments [**csr**] have not acquired sufficient scale to reach a tipping point of truly shifting markets, . . . are typically self-defined rather than tracking internationally recognized human rights, . . . tend to remain weak and decoupled from firms' own core oversight and control systems". (¶ 9)

Finally, the Draft Principles draw attention to the "**lack of an authoritative focal point** around which the expectations and actions of relevant stakeholders could converge". (¶ 10)

The Draft Guiding Principles

In 2008, the UN Special Representative on Business and Human Rights, Professor John Ruggie, released a framework[1] to address the impact of corporations on human rights and the respective management gaps by states, business and societies. The framework, unanimously endorsed by the Human Rights Council in 2008, rests on three pillars:

- the state duty to protect against human rights violations within their jurisdiction, including those involving corporations;
- the corporate responsibility to respect human rights; and
- access by victims to effective remedies (both judicial and non-judicial).

On 23 November 2010, the Draft Guiding Principles (DGPs) were released by SRSG Ruggie as a part of his mandate to operationalize and promote the framework. The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved, Draft Report ¶ 13.

The State duty to protect human rights

The DGPs recognize a duty of States to protect their own citizens by taking steps to prevent, investigate, punish and redress corporate human rights abuse (DGP 1), and recommend that States also encourage business enterprises based or operating within their jurisdiction to respect human rights abroad (DGP 2).

In particular, they should ensure policy coherence between governmental departments and institutions (DGP 3), maintain adequate human rights policy space when negotiating treaties or contracts with businesses (DGP 4), and promote respect for the duty to protect in multilateral institutions (DGP 11).

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[1] 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).

States should also "set out clearly their expectation" that businesses based in the State respect human rights (DGP 5), and "take steps to ensure" that businesses which it owns or provides support to respect human rights (DGPs 6 and 8). Furthermore, States should ensure oversight over businesses which perform outsourced State services (DGP 7), and "seek to ensure" respect for human rights by business enterprises when they conduct commercial transactions with them (DGP 9).

Particular help to ensure respect for human rights should be provided to business enterprises operating in conflict-affected areas, including by engaging with such enterprises to identify and mitigate human rights impacts (DGP 10).

The corporate responsibility to respect human rights

The draft principles provide that business' responsibility to respect human rights refers to internationally recognized human rights, applies across business activities and relationships with third parties, and applies to all businesses (DGP 12). They recommend that companies:

- adopt and express effective policies and processes to identify, prevent, mitigate and remediate any human rights impacts of their business activities (DGPs 13, 14);
- carry out human rights due diligence (DGP 15), in particular by identifying and assessing the actual and potential adverse human rights impacts of their activities and associated relationships (DGP 16);
- integrate the findings from their impact assessments (DGP 17);
- track performance, based on appropriate metrics and drawing feedback from internal and external stakeholders (DGP 18);
- communicate publicly on their response to actual and potential human rights impacts (DGP 19); and
- observe internationally recognized human rights where national law is weak, absent or not enforced (DGP 21).

The DGPs contain no guidance on specific human rights, but their Commentary simply provides that it is the full spectrum of internationally recognized human rights that business enterprises can impact on and should respect (DGP 12 Commentary).

Access to remedy

DGPs 23-29 provide guidance for provision of both state and non-state based grievance mechanisms. These mechanisms include judicial and non-judicial remedies, and collaborative industry and multi-stakeholder initiatives.

The DGPs recommend that companies establish or participate in effective, operational-level grievance mechanisms for individuals and communities who may be affected by their operations. Grievance mechanisms should be legitimate, accessible,

predictable, equitable, rights-compatible, transparent, and be based on dialogue and engagement.

EVALUATION

The DGPs do not further the business and human rights agenda significantly. Some provisions contain important proposals, but shortcomings in other, essential areas render the DGPs as a whole hardly useful.

Provisions on procedural and institutional changes in order to ensure State policy coherence are helpful and important. Also, detailed provisions on how businesses should establish, apply, communicate, and revise due diligence mechanisms throughout the entire enterprise and how they should organize their business are much needed.

However, the overarching issues of conflicting legitimate policy demands and of the role of home States are insufficiently addressed. Responsibilities of corporate directors are entirely ignored. The statement that there are no corporate duties at international human rights law is unnecessary and pre-empts and patronizes an ongoing legal discussion and development. The most immediate and obvious consequence of this unnecessary statement is that it renders futile all ATCA litigation before civil courts of the United States. Moreover, the meaning of particular human rights specifically in the business and human rights context is not delineated. In a supply chain, businesses human rights due diligence covers only the first link in the chain. As regards the access to remedy, the role of preliminary, injunctive relief is ignored. There is no clarification that the accessibility of alternative dispute resolution does not replace the provision of effective judicial mechanisms. Strikingly, there is no external monitoring mechanism whatsoever, leaving the implementation of the GPs up to exactly those actors that have so far notoriously failed.

Surprisingly, SRSG Ruggie's draft falls in some regards even clearly below the mark that he himself has set in previous reports.

I. The Dichotomy of Legitimate Policy Demands

An issue running through all parts of the 'protect, respect, and remedy framework' is that of legitimate policy demands which conflict with legitimate human rights demands. As SRSG Ruggie points out in ¶ 5 of his Draft Report, the protection of human rights is complicated by other legitimate policy demands coming into play, including the need for investment, jobs, as well as access to markets, technology and skills. Indeed, to give an example, defendants and several governments involved in the Khulumani/Ntsebeza litigation against corporations that reportedly aided and abetted with the former South African apartheid regime argued that US courts would impede international investment and trade if they allowed South African

apartheid victims to seek redress before US courts. Similarly, opponents of forceful dislocations in the course of hydropower infrastructure projects are often accused of being against development. And governments may often refrain from protecting human rights in fear of diminishing jobs and loosing foreign direct investment. The conflict between human rights and economic development—both of which imply legitimate demands—is at the heart of the business and human rights debate.

Even though SRSG Ruggie acknowledges the importance of the dichotomy of legitimate policy demands and sets forth provisions for policy coherence, the DGPs and the respective Commentary lack a vision of how these policy demands can be conciliated. To the contrary: the frequent use of the undefined terms "appropriate and effective", "adequate" and "discretion" throughout the Principles and Commentary, as well as the remark that "the Guiding Principles are not a toolkit ... one size does not fit all" (¶ 14 of the Draft Report) facilitate the entering of legitimate economic policy demands into the human rights discussion. DGP 3 does well in calling for *institutional* and *procedural* changes that are indeed necessary for achieving policy coherence. But the problem runs deeper and remains untouched: *material* guidance is needed on how conflicting policy demands inter-relate, how they should be either balanced or put in a hierarchical order.

Perhaps, the most convincing way to conciliate the two opposing sets of legitimate demands is based on the 'principles of justice' of legal philosopher John Rawles: Policy demands in the interest of society as a whole *can* justify individual detriments, but not if the result is an infringement of a basic set of liberties and rights shared equally by all mankind. In other words: the goal of economic development cannot trump individuals' human rights, but can well come into play as long as human rights are protected, respected, and remedied.

SRSG Ruggie apparently shares this view where he states briefly in ¶ 5 of his Draft Report: "Of course, none of these factors absolves States of their human rights obligations." Strikingly, however, this important cognition of SRSG Ruggie reflects nowhere in the DGPs. It is therefore advisable that a paragraph as follows is included in the Introduction of the Guiding Principles:

> **Where there are signs of business enterprises' involvement in human rights violations, legitimate economic objectives, including the need for investment, jobs, as well as access to markets, technology and skills, shall not be used by States or business enterprises as a reason for refraining from or postponing adequate measures to realize their respective human rights duties and responsibilities.**

The inclusion of this paragraph by the Human Rights Council should be viable, as it is, structurally, a copy of the 'precautionary principle', which addresses a comparable dichotomy of legitimate environmental and developmental policy demands. The precautionary principle is widely-spread in many domestic environmental laws, and since the 1992 Rio Declaration

on Environment and Development[2] has played an important role in many areas of international environmental law.[3]

As a result of the implication of this principle in the human rights context, States and business enterprises would be expected to take adequate, speedy steps to avert the violation. Alternatively, they would have the chance to demonstrate that the circumstances which are perceived as signs of business enterprises' involvement in human rights, are erroneously perceived so.

II. The State Duty to Protect

DGP 2: Home State responsibility

The home State responsibility is one of the most important approaches to business respect for human rights, because the State in which a corporation is domiciled can influence its conduct significantly, by regulation, criminal or civil adjudication or mere public statements. DGP 2, however, induces hardly any expectations of home States encouraging business enterprises' respect for human rights abroad, in particular because the Commentary over-emphasizes international law constraints which would in practice hardly become relevant. DGPs 3-11 contribute no meaningful specifications to DGP 2, except for the rare event that the home State itself is involved in the business enterprise.

Most notably, all that DGP 2 provides is that home states "should encourage" companies to respect human rights abroad. While the term "should" already indicates a small degree of expectation, "encourage" does not necessarily imply more than a few soft words. This guiding principle does not reflect the state of international law. In particular regarding the International Covenant on Economic, Social and Cultural Rights, the State duty to protect does not carry a restriction based on territory or jurisdiction.[4] If jurisdictional aspects are to be considered this has to be done with a view to the purpose of human rights treaties, namely the protection of human rights. This means that extraterritorial human rights jurisdiction is only limited by the rights of other States under the purpose of the Covenant, i.e. home States acting extra-territorially to protect human rights must not interfere with the host State's

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[2] See, for instance, Art. 15 of the 1992 Rio Declaration on Environment and Development: "Where there are threats of serious irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

[3] Scott LaFranchi, *Surveying the Precautionary Principle's Ongoing Global Development: The Evolution of an Emergent Environmental Management Tool*, 32 Boston College Environmental Affairs Law Review (2005) 679-720.

[4] AS the UN Committee on Economic, Social and Cultural Rights points out:

> "To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law."

UN Committee on Economic, Social and Cultural Rights, General Comment 14: *The right to the highest attainable standard of health*, E/C.12/2000/4 (11 August 2000) ¶ 39. Also see General Comment 15.33 (and similarly General Comments 12.36 and 19.54), stating that States should "take steps to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries."

implementation of its obligation to protect its citizens. This, however, is well-understood and does not merit the sweeping statements of the draft.

The Commentary weakens DGP 2 even further:

Firstly, the Commentary addresses with no word the most common way to encourage, namely to verbally draw attention and suggest change. It must be stressed that States face no constraints under international law when "encouraging" anybody in the literal, merely verbal way, certainly not when they publically "encourage" corporations domiciled within their jurisdiction, and very certainly not when this verbal encouraging aims at respect for rights that are backed by international consent. This is a simple and crucial point to note. Instead, the Commentary emphasizes that there is nothing easy about the role of the business enterprise's home State.

Secondly, the Commentary depicts the role of the home State as a most confused issue, so "complex and sensitive" [sic] that it appears hardly viable: According to the Commentary, States are "not generally" prohibited from regulating extraterritorial activity, i.e. they can do so provided there is a "recognized jurisdictional basis", and that the exercise of jurisdiction is "reasonable".[5] The only clarification that the Commentary then provides is that "various factors contribute to perceived and actual reasonableness", elaborating exactly one of these various factors, namely a requirement of "multilateral consent". The reader is left with the wrong idea that hardly anything can be expected of the home State.

In particular, the Commentary and Draft Report are not drawing a distinction which SRSG Ruggie himself has recently deemed to be "critical" and "usually obscured",[6] namely the distinction between direct regulation on actors or activities abroad (i.e. regulation which assumes an extra-territorial effect) and regulation that merely attaches to activities abroad (and is intended to be applied within the home state). The distinction is critical, because the former kind of regulation can cause tension at international law with the principle of state sovereignty, while the latter does not. For instance, regulation requiring a business enterprise to not take over possession of a plot of land until the previous inhabitants are adequately compensated for their loss could violate the host State's sovereignty, if the home state sought to enforce its regulation on host State territory. Albeit currently, such wide-reaching home State action is politically hardly viable. For a more realistic example, regulation requiring the compensation of damages caused abroad relies on the firm basis of the home State's own sovereignty, in particular on its territorial jurisdiction, exercised within the home State. Several directives of the European Council already demand that corporations headquartered in the European Union report on the economic condition of their subsidiaries registered on non-EU territory.[7] Territorial legislation attaching to extraterritorial activity raises no concerns on the level of international law, and is hence a feasible approach. The Commentary fails entirely to even mention this important aspect.

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5 The same cautious statement can be found in the Draft Report at ¶ 7.

6 SRSG Ruggie's Report to the Human Rights Council of 9 April 2010, at ¶ 48.

7 Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts of companies with limited liability; Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis; Directive 98/78/EC of the European Parliament and of the Council of 27 October 1998 on the supplementary supervision of insurance undertakings in an insurance group.

One would think that SRSG Ruggie is aware of all this, since he himself reported on two international expert workshops convened on his behalf in Brussels and New York on the issue of extraterritorial jurisdiction.[8] The experts of the workshop in Brussels agreed that a nationality link supports jurisdiction of States where universal jurisdiction (for a limited number of international crimes) is not applicable.[9] Meaning, as regards DGP 2 and the responsibility of the home State: International law grants a home State jurisdiction, because of the business enterprise's domicile in the home State. This simple rule really only appears complex, if one phrases it like the Commentary does: "...nor are [home States] generally prohibited from [regulating extraterritorial activities] provided there is a recognized jurisdictional basis... ."[10] Furthermore, the limiting requirement of "reasonableness" attaches to the *exercise* of extraterritorial jurisdiction and demands respect for another State's sovereignty, i.e. the non-intervention in foreign internal affairs.[11] The Brussels workshop clearly could not agree that the principle of non-intervention in internal affairs is concerned at all where States seek to protect internationally recognized human rights abroad from "their" corporations.[12] Simply put: corporate violations of international human rights might be not so much an internal affair of the host State, but an affair that also concerns the home State. The participants of the New York workshop had a quite clear view on the issue, as SRSG Ruggie reported:

> [T]here was broad agreement that neither the treaty regime nor customary international law currently impose an obligation on States to regulate, as opposed to allowing States the freedom to do so (which they clearly have under the doctrine of "active personality"). <u>This provides that a State is entitled to exercise extraterritorial jurisdiction to regulate the activities of its nationals abroad</u>.[13]

SRSG Ruggie has also previously analyzed the position of several UN treaty bodies on the exercise of extraterritorial jurisdiction in the business and human rights context and concluded that they do not oppose such action but in some situations have encouraged it.[14] He noted that *generally* extraterritorial jurisdiction must meet a reasonableness test, in particular the non-intervention in another State's internal affairs, but could not find any source of law according to which non-forceful extra-territorial protection of human rights can constitute an intervention into the internal affairs of another State, and hence violate international law.[15]

In contrast thereto, SRSG Ruggie's Commentary sets forth that a business enterprise's home State must act with not just "perceived" but "actual reasonableness", which involves "various factors", such as "multilateral agreement". These requirements may become relevant in the unlikely event of a military intervention of the home State. But realistically,

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8 SRSG Ruggie, Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops (15 February 2007), A/HRC/4/35/Add.2.

9 Ibid, ¶ 42.

10 DGP 2, Commentary, second sentence.

11 Supra fn.6, SRSG Ruggie, Summary of legal workshops (15 February 2007), at ¶ 42.

12 Ibid, ¶ 43.

13 Ibid, ¶¶ 27-28, emphasis added.

14 John Gerhard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 American Journal of International Law (2007), 819, at 829.

15 Ibid, at 830.

they have little to do with home State encouragement of business respect for human rights abroad. Possibly, a home State would simply make public statements, or as DGPs 5 c and 10 would suggest, a home State might send a consultant abroad to advise or investigate one of "its" business enterprises on alleged human rights violations. Would these measures constitute an intervention in the sovereign host State's internal affairs, in the sense that they violate international law? One looks in vain at the DGPs for guidance, faces obscure requirements such as "various factors" and is eventually left with the impression of a hardly viable undertaking.

The result is devastating: DGP 2 and its Commentary abet home State inertia by providing States with new bases for refraining from encouraging business respect for human rights abroad, and by not providing any guidance on when home States should become active. The Commentary to DGP 2 can hardly be regarded as a clear, "guiding" re-statement, and certainly not one of existing international law. It is puzzling that guiding principles which are built on the "primary role of States"[16] contain a Foundational Principle on home States that lacks clarity, consistency with previous views of their author and consistency with current international law.

DGP 3 and 4: Ensuring policy coherence

Separatism has been highlighted as an immense obstacle to human rights considerations in institutions and processes which do not primarily pursue a human rights agenda.[17] SRSG Ruggie recognizes the problem, but the solution he proposes is not sufficient.

A wide-spread mindset is that one can apply the rules and obligations that flow from trade law without having to engage in non-trade questions about customary international law, general principles of international law and the like.[18] Human rights concerns are seen as only further complicating a matter, and as best dealt with by others. SRSG Ruggie refers to the problem of separatism in ¶ 5 of his Report.

DGP 3 contains the expectation that states should ensure that all their agencies which influence business practice should be informed, trained and supported in order to observe the State's human rights obligations. This principle is a good and important step, since agencies may indeed often render decisions neglecting the human rights implications of the respective case, simply because they are focused on their field of specialization.

DGP 4, however, is a questionable provision. According to DGP 4, States "should maintain adequate domestic policy space" to meet their international human rights obligations, particularly when they enter into investment treaties or contracts. The worrisome implication here is that States are able to—expressly or tacitly—waive their human rights policy space. But instead of stating that States *should not* do so, GP 4 should provide that States *do not* waive their policy space tacitly, and *cannot* waive it expressly.

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16 See Ruggie's Introduction to the DGPs, para. 1 lit. a.

17 Voyiakis *Foxes and Hedgehogs* (2008) 109.

18 Ibid; as global business consultant agency KPMG currently puts it remarkably concise: "Cutting through complexity."

The basis for this view is to be found in the law of treaties. A look into the 1969 Vienna Convention on the Law of Treaties reveals that it is by no means necessary for States to expressly maintain adequate domestic policy space. According to the general rule of interpretation of treaties, Article 31(3) of the Vienna Convention, "any relevant rules of international law applicable in relations between the parties" shall be taken into account when interpreting a treaty. Paying due respect to Article 31(3) of the Vienna Convention, one could hardly come to the conclusion that an investment treaty implies the waiver of human rights policy space. In particular regarding customary international human rights, it appears difficult to see how a State could legally give up the policy space necessary for fulfilling its existing international human rights obligations. DGP 4 should therefore be freed from the implication that States can give up human rights policy space and be amended to read:

> **4. Business-related policy objectives with other States or business enterprises, particularly investment treaties or contracts, <u>shall not withstand</u> an adequate domestic policy space of either State to meet their international human rights obligations.**

DGP 5: Fostering business directors' respect for human rights

DGP 5, the provision on "Fostering Business Respect for Human Rights", fails to meet the mark that SRSG Ruggie himself set in previous reports.

In his Report to the Human Rights Council of 9 April 2010, at ¶¶ 39-41, SRSG Ruggie outlined as one of four key policy tools for fostering rights-respecting corporate structures the importance of specifying directors' duties. Eight months later, one would expect the specification of directors' duties at both criminal and civil law to still be a key element of fostering business respect for human rights.

However, the respective provision of the DGPs and their Commentary entirely miss out this point. According to DGP 5 a, States should set out expectations for the business enterprise, including enforcing laws that require the business enterprise to respect human rights. The term "business enterprise" does not include corporate officers (see definition of "business enterprise" in Annex B to the Draft Report). The distinction is important. Without responsibilities of directors, directors can consider themselves un-accountable both within the multinational enterprise and towards third parties. This would constitute a significant moral hazard.

DGP 5 should therefore be amended as follows:

> **5. … States should set out clearly their expectation for all business enterprises and business directors …**
>
> **a. Enforcing laws that require business enterprises and directors to respect human rights; ...**

DGP 10: Conflict-affected areas

DGP 10 rightly draws special attention to areas where human rights abuses are relatively likely to occur due to an instable situation within the host state. However, the term "conflict-affected area" lacks specification.

The Commentary reveals that SRSG Ruggie had in mind—at least predominantly—situations of armed conflict. This would include wars and civil wars. However, a systemic failure of the host state to protect human rights is similarly likely where the use of force is rather latent. Where a group of people has acquired control over the government infrastructure of a country against the will of the population and since stabilized its oppressive regime (as for instance in Burma), it can hardly be expected that the very group of people will protect its citizens' human rights when foreign corporations seek to invest in the country.

It should therefore be pointed out in the Commentary or in the definitions section that "conflict-affected area" includes armed conflicts as well as areas under oppressive control and low-intensity conflict situations.

DGP 11: Multilateral institutions

The State responsibility to ensure that multilateral institutions do not restrain the ability of host States to meet their duty to protect (under DGP 1) is an important contribution of DGP 11 a. What is missing in lit. a is a reference to the responsibility of home States to encourage respect for human rights abroad, by regulation or other means (under DGP 2), and it appears difficult to read the home State responsibility into lit. b, especially because lit. b appears to focus on collective action (see the third paragraph of the Commentary).

The reason may be that SRSG Ruggie does not expect a multilateral institution to take an issue with a home State's encouraging of "its" respect for human rights abroad (e.g. by fines or import quotas). Perhaps, however, it may be recommendable to amend DGP 11 as follows:

> **11. States, when acting as members of multilateral institutions that deal with business-related issues, should:**
>
> **a. Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect <u>and responsibility to encourage/protect</u> nor hinder business enterprises from respecting human rights; ...**

The responsibility of market States

The DGPs should be amended so as to reflect the responsibility of market States.

If a business enterprise offers products for sale on the market of a State in which neither its headquarter is located nor the human rights violation occurs, that "market State" plays a significant role. The "market State" (neither home State under DGP 1 nor host State under DGP 2) should encourage, at least verbally, the respective business enterprise to ensure that the products sold to customers in the market State are not related to human rights violations.

For instance, governments should encourage, at least verbally, the French business Total to not sell on their respective markets petrol that, as allegations suggest, originates from Total's controversial Yadana pipeline in Burma.

The market State approach is relatively simple. It does not raise concerns with State sovereignty, in particular the principle of non-intervention, since the approach relates to the sale of products on the market State's own territory. Tensions with international economic law, in particular the GATT, may occur, but could and should be adequately dealt with (see DGPs 4 and 11, and exception clauses such as Art. XX of the GATT).

III. The Corporate Responsibility to Respect Human Rights

The rejection of international law duties of corporations

In attempting to re-state existing international law responsibilities and elaborate on their implications,[19] the DGPs distinguish between *duties* of States[20] and *responsibilities* of business enterprises.[21] The Commentary to DGP 12 states more clearly: "[T]hese instruments [the International Bill of Human Rights and the eight International Labor Organization core conventions] **do not impose** direct legal obligations on business enterprises".

SRSG Ruggie's broad rejection of corporate duties under international law is not a re-statement of current international law, contradicts his own previous observation as to the unresolvedness of the issue, and is not necessary in order to promote the 'protect, respect, and remedy framework'.

Of course, SRSG Ruggie is entitled to have the opinion that there are no international human rights duties of business enterprises, and the arguments that he may have would be heard with great interest. However, considering different sources of international law, it is difficult to let SRSG Ruggie's opinion pass as what he claims it to be, namely the re-statement of current international law (Draft Report, ¶ 13). The wording of the International Bill of Human Rights itself addresses "every individual and every organ of society".[22] The UN Sub-Commission on the Promotion and Protection of Human Rights took the view that a re-statement of international law must contain international law human rights duties of business enterprises.[23] Of course, the UN Sub-Commission's Draft Norms were not adopted in 2004 (due to business enterprises' massive objections). However, the Sub-Commission's opinion was and is at least arguable. Domestic court decisions, in particular from the United States of America under the Alien Tort Claims Act, also indicate the existence of international human rights duties of corporations. Several legal experts have contributed compelling arguments.[24] There is, however, still no consensus. As *Maassarani*, *Drakos* and *Pajkowska*

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19 Draft Report, ¶ 13.

20 Title of Part II of the DGPs.

21 Title of Part III of the DGPs.

22 See Universal Declaration of Human Rights, adopted and proclaimed by the UN General Assembly on 10 December 1948, Preamble.

23 The Sub-Commission's Draft Norms (even though they failed to be adopted) were meant by their drafters to be a re-statement of international law and contained business enterprises duties; Meeting of 13 August 2003, UN document E/CN.4/Sub.2/2003/12/Rev.2.

24 Bilchitz, David "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?" 12 *Sur International Journal on Human Rights* (2010) 199; Chirwa, Danwood Mzikenge "In search of philosophical justifications and suitable models for the horizontal application of human rights" 8 *African Human Rights Law Journal* (2008) 294; idem "The long march to binding obligations of transnational corporations in international human rights law" 77 *South African Journal on Human Rights* (2006) 22; Clapham, Andrew "The Role of the Individual in International Law" 21 *European Journal of International Law* 25 (2010); idem *Human Rights Obligations of Non-State Actors* (2006); Francioni, Francesco "Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations" in: *Economic Globalisation and Human Rights*, editor: Francesco Francioni (2007); Frey, Barbara "The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights", in 6 *Minnesota Journal of Global Trade* (1997) 153; Haas, Robert "Business Role in Human Rights in 2048" 26 *Berkeley Journal of International Law* (2008) 400; Halpern, Iris "Tracing the Contours of Transnational Corporations'

pointed out in 2007:

> A constellation of institutional, political and historical forces has thus far inhibited the emergence of an international human rights legal framework that can bind corporate entities.[25]

Sadly, this inhibition of the emergence of international corporate duties has thus far not been tackled by SRSG Ruggie. In an article published in the American Journal of International Law in 2007, SRSG Ruggie evasively drew the conclusion: "The issue remains unresolved."[26] He later went as far as stating that respecting human rights "is not an obligation that *current* international human rights law *generally* imposes directly on companies".[27] It is unfortunate and unnecessary that SRSG Ruggie now goes one step further and even pre-empts all development of the debate by repudiating the debate's very existence.

A more realistic re-statement would need to express that the question of corporate obligations under the International Bill of Human Rights and eight International Labor Organization core conventions is currently un-resolved and debated:

> *The question in how far these instruments ~~do not~~ impose direct legal obligations on business enterprises is currently unresolved.*

SRSG Ruggie's broad rejection of international duties of corporations could have a dramatic, negative effect on all international human rights litigation against businesses. This is most obvious regarding cases pending before the courts of the United States under the Alien Tort Claims Act. SRSG Ruggie's view furthermore obstructs the creation of a world court hearing *inter alia* business and human rights cases.

DGP 12: The rights covered by the responsibility to protect

DGP 12 sets forth the responsibility of business enterprises to respect internationally recognized human rights. As the Commentary provides, business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, and hence, the substantive scope of the responsibility to protect comprises, at a minimum, the International Bill of Human Rights and in the eight International Labor Organization core conventions.

Human Rights Obligations in the Twenty-First Century" 14 *Buffalo Human Rights Law Review* (2008) 128; Geldermann, *Heiner Völkerrechtliche Pflichten multinationaler Unternehmen* (2009); Kamminga, Menno T. and Saman Zia-Zarafi "Liability of Multinational Corporations Under International Law: An Introduction" in: ibid (ed.) *Liability of Multinational Corporations under International Law*, The Hague (2000) 1; Köster, Konstantin *Die völkerrechtliche Verantwortlichkeit privater (multinationaler) Unternehmen für Menschenrechtsverletzungen* (2010), and others.

[25] Maassarani, Tarek F., Margo Tatgenhorst Drakos and Joanna Pajkowska "Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment" 40 *Cornell International Law Journal* (2007) 135 at 136.

[26] John Gerhard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 American Journal of International Law (2007), 819, at 825.

[27] Report of SRSG Ruggie to the UN Human Rights Council of 9 April 2010, A/HRC/14/27, ¶ 55, emphasis added.

The DGPs do not delineate the responsibilities that corporations have for the realization of particular human rights. It will hence remain difficult to specify human rights responsibilities under the Covenant on Economic, Social and Cultural Rights that are not specifically business-related (e.g. Article 13 on the right to education or Article 15 on the right to take part in cultural life).

DGP 12 b, 15 c: Due diligence throughout supply chains

The DGPs address the important issue of respect for human rights throughout a supply chain, but they only scratch it at its surface without grasping the full extent of supply chains.

DGPs 12 b and 15 c reflect the idea that human rights violations in supply chains can be addressed effectively by providing for responsibilities which reach only as far as to the respective next link in the chain. DGP 12 b sets forth that the responsibility to respect „applies across a business enterprise's activities and through its relationships with third parties associated with those activities". In particular, the human rights due diligence should extend beyond a business enterprise's own activities to include relationships with suppliers and other entities that are associated with the enterprise's activities (DGP 15 c). SRSG Ruggie seems to assume that a due diligence throughout the entire chain is ensured if each link scrutinizes only the respective next link.

This assumption, however, is credulous. Human rights violations often occur far deeper than at the level of a business enterprise's supplier. Enterprises do businesses routinely using intermediaries at myriad levels to perform functions such as manufacturing, sourcing, financing, and hiring within their supply chain. A relatively simple supply chain might look like this:[28]

1. Cotton is picked, perhaps by children in Uzbekistan who are forced by police to leave school for the harvest.
2. This cotton might be traded to a Chinese firm which gathers material from a number of different countries.
3. The trader sells it to a Bangladeshi company that weaves it into fabric.
4. Fabric is sold to an apparel factory in India where it finally becomes something recognizable as a t-shirt.
5. A Hong Kong based agent might place an order in the Indian factory on behalf of a US retailer which has no direct contact with the factory.

Of course, a top-level due diligence throughout the entire supply chain would require the input of considerable effort and resources by the retailer. However, such a burden upon the retailer would be justified in several situations, for instance if a trader in a supply chain does not alter a service or product significantly but mainly acquires and transfers property rights. In that case, there will not be much to scrutinize at the immediate link and human rights due diligence should extend to the next link in the chain. Also, it should extend directly to links at

[28] Daniel Viederman, *Slavery in supply chains: what companies can do* (6 December 2010) http://www.institutehrb.org/blogs/guest/slavery_in_supply_chains.html.

which substantial components of a product or service are being provided, in particular in industries and geographical regions where substantiated allegations of human rights violations are common.

DGP 12 and 15 and their Commentary should therefore set out that a business enterprise's due diligence can extend to levels beyond the first link under certain circumstances.

DGP 12 c: Subsidiaries and the responsibility to respect

DGP 12 c furthermore provides that the responsibility of business enterprises to respect internationally recognized human rights extends throughout its whole corporate structure.

This provision is convincing. It is, due to existing corporate structures, rather easy for a parent company to observe and mitigate negative human rights impacts of its subsidiary, despite any physical distance between a parent company and its subsidiary.

For a parent company, taking the responsibility to respect serious does not come at significantly increased effort and costs, because the means for acquiring relevant information and exercising control are already in place: Parent companies usually select and appoint a number of their subsidiary company's directors from among their own personnel. As a result, some of the leading personnel of parent and subsidiary company are identical, serving both companies simultaneously. The parent thereby secures a flow of important information and some control over the subsidiary's activities, both in order to safeguard the prospects of its financial investment. Little structural changes are necessary to respect human rights. Only, the information and decision-making procedures should take into account the safeguarding of human rights of third parties as well.

The parent company's assessment of its subsidiary's human rights impact is facilitated further by several factors: the geographical location of the subsidiary's factories or service facilities, the kind of industry, the circumstances of the specific project, the previous stance of the company's partners on human rights, the conditions provided for in agreements between the relevant actors, revelations by civil society organizations or news outlets.

DGP 13: The responsibility to organize

DGP 13 contains a responsibility to have in place policies and processes, appropriate to the size and circumstances of the business enterprise, that enable the enterprise to identify, prevent, mitigate and remediate adverse human rights impacts.

This provision is well compatible with the "duty to organize" under German tort law (*Organisationspflicht*). According to the *Organisationspflicht*, with increasing size and complexity of a business enterprise, it becomes increasingly important that adequately skilled personnel and supervisors are appropriately equipped with means to ensure a flow of important information and control on circumstances relevant for the well-being of the enterprise itself or for third parties. A violation of the duty to organize can give rise to a claim of third parties for the compensation of damages.

The effect of the DGP-13 responsibility to organize, if adopted by the Human Rights Council, on the duty to organize under domestic tort laws would be significant. It would support the view that courts should apply the concept of *Organisationspflicht* more or less as it is understood in German law even in the global business context.

DGP 15 - 19: Human rights due diligence

DGP 15 - 19 on human rights due diligence could contribute in a similar way to domestic laws, even though the "due" diligence is not meant to function itself as a legally enforceable duty.

Domestic tort laws may contain concepts of negligence under which a person's duty to safeguard other persons' well-being increases when he or she opens a source of danger for access to third persons, introducing it into a sphere of inter-activity with the society around it. For instance under German law, there is the widely recognized concept of *Verkehrssicherungspflicht* (which loosely translates to "duty to safeguard traffic" or "duty to safeguard inter-activity with society").[29]

The responsibility of human rights due diligence under the DGP is remarkable in this context. It is well compatible with concepts such as that of the German *Verkehrssicherungspflicht*. It implies that, in the cross-border, global business context, the scope of a business's responsibility to safeguard others is not so much depending on notions of physical proximity or remoteness. Considering today's global mobility and available information technologies, it can be reasonably well expected of a multinational enterprise to utilize legal and practical means to influence dangerous circumstances which it contributes to abroad.

IV. Access to Remedy

DGPs 23-29 provide for a multi-faceted system of remedies, judicial and non-judicial mechanisms, State-based and non-State-based grievance mechanisms.

DGP 23: The relationship between remedies

It should be clarified in the Commentary that available or activated grievance mechanisms do not withstand access to remedies before courts. In particular, the wording of DGP 23 suggests that States' duty to provide access to remedy is fulfilled if "efficient" access to grievance mechanism is provided. But although grievance mechanisms may be effective to some extent, their processes and outcomes are limited by definition, and therefore claimants should at all

[29] In two judgments of the years 1902 and 1903 respectively, the German Imperial Court held that a person who owns a plot of land with a tree that has partly grown across the plot boundary and become old and brittle, has a duty to safeguard third persons from injuries, and that the owner of publically accessible real estate must safeguard third persons from slipping on frozen rain water (judgment of 30 October 1902, RGZ (1902) 373 and judgment of 23 February 1903, RGZ (1903) 53). This duty developed significantly and is today widely applied in German tort law in cases of negligence.

times be able to pursue litigation before courts. Only courts can issue enforceable orders for discovery or introduction of evidence, and judgments which can be recognized and enforced in several States. Furthermore, non-judicial grievance mechanisms may not necessarily operate as speedily as courts, and can deter claimants from other roads to remedy until they are blocked (see comment on DGP 29, below).

DGP 23: Injunctive relief

The Foundational Principle, DGP 23, provides only for a State duty to provide access to remedy once human rights violations occur, but not when they are imminent. However, particularly infrastructure projects such as the Merowe hydropower dam in Sudan are being carried out over several years, increasingly threatening the neighboring population with flooding. It would be most helpful if the population had access to speedy injunctive relief both in the home and host State of the respective construction companies, and did not have to wait for access to remedy until its all is set under water.

DGP 23: The home State responsibility to provide access to remedy

A further shortcoming of the foundational principle of Part IV of the DGPs is that there is no recognition of the *home* States' responsibility to provide access to remedy. DGP 23 and the rest of Part IV recognize nothing more than a host State duty to provide access to remedy. States, however, also have a responsibility and duty to provide access to remedy if corporations based on their territory violate human rights abroad. At this point, the DGPs do not even recognize a responsibility. They thereby abet home State inertia.

The ECCHR would like to reiterate its appreciation of the opportunity to contribute to this discussion and hopes to further its development towards building a solid, reliable and workable framework that permits the business community to respond adequately to the human rights challenges it faces.

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