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**Submission to the Secretary General's Special
Representative on Business and Human Rights on
Proposed Guiding Principles for Business and Human
Rights**

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The Castan Centre welcomes the Draft Guiding Principles as an important step on the way towards true accountability for human rights abuses by corporations. We recommend that the Principles be strengthened in the following ways:

Principle 2 (see also preamble para 7): The statement that “States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction” is too definitive and does not reflect the current debate on the scope of the duty to protect. It is not for these Guiding Principles to categorically reject the existence of such a duty. The UN Committee on Economic Social and Cultural Rights, for example, has repeatedly stressed its view in its General Comments that such duties exist.¹ These statements cannot be simply brushed aside. It is certainly arguable that the duty of a State to protect human rights within its “jurisdiction” necessarily extends to the regulation of corporations domiciled in that State but operating abroad, either directly or through related entities. Therefore, the statement should, at the least, be softened, perhaps along the lines of the Special Representative’s 2007 report.² The possibility that such duties exist, and certainly the possibility that they might evolve, is a very real one.

Extraterritorial duties to protect for States certainly exist in discrete areas. For example, the Convention against Torture (“CAT”) casts a duty upon States parties to exercise compulsory jurisdiction over the crime of torture (see Articles 4-9). States must either prosecute those who are within jurisdiction and reasonably suspected of torture anywhere in the world, or extradite them to a State that will prosecute. If a home-based corporation perpetrates or is complicit in such torture, the CAT would probably require the prosecution at home of that corporation, as a corporation cannot be extradited (though business executives can be). Indeed, such limitations on the capacity of a State other than the home State to regulate and impose sanctions on a corporation, including the impossibility of extradition, inability to order the winding up of a company, lack of access to assets of the enterprise, and many other limitations, illustrate why many experts contend that home State regulation is necessarily implied by the State’s duty to protect human rights within its jurisdiction.

We recommend that Principle 2 be amended to say: “States should ensure that business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their global operations, including those conducted by their subsidiaries and other related legal entities.” By retaining the word “should”, rather than the mandatory “must” used in Principle 1, the Guiding Principles do not hold the extraterritorial regulation of enterprises by home States to be legally mandated, but strongly desirable. The action recommended for home States should be to take steps to regulate, monitor and enforce human rights standards for their enterprises as appropriate, rather than the very passive and indirect “encourage”. The commentary to Principle 2 should then be amended to make clear that the current status of an obligation for extraterritorial regulation by home States is a topic of debate.

¹ See also, eg, Commission on Human Rights, Report of the Special Rapporteur on the Right to Food, Jean Ziegler, UN doc. E/CN.4/2006/44, 16 March 2006, para 34.

² Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (2007), UN doc no A/HRC/4/035, para 15.

Principles 3-8 should be strengthened to say that States “must” do these things rather than “should” do them. The State has clear obligations under international human rights law to protect against violations by business entities, so States must take measures to ensure that such entities respect human rights.

Principle 5: The second paragraph of the commentary is too soft: “It is therefore important ... what measures may reasonably correct the situation”. A sentence should be added to say that the State is *obliged* to reasonably redress this situation, rather than merely consider the issue.

Principles 6-8 are somewhat confusing. They relate to the need for States to ensure human rights are respected by certain types of corporations, even though Principle 5 has already said that States must ensure respect for human rights by all corporations. The gist of these Principles is that the nexus and therefore the State obligation is stronger. However, all of these Principles represent State obligations, regardless of “policy rationales”. In particular, the statement that “States should find it easiest to ensure respect for human rights by State-owned or controlled enterprises”³ is troubling, as it implies that it might be acceptable for a State not to fulfil obligations that it finds to be difficult. We recommend replacing the existing text of Principle 6 with the following: “The State’s obligation to ensure respect for human rights by enterprises within its territory or jurisdiction includes enterprises owned or controlled by the State.”

Furthermore, when States privatise or outsource their own functions to a private enterprise, it must be made clear that there are parallel obligations. The State will continue to be held fully accountable under international law for the realisation of human rights within those outsourced services (for example, conditions in a privatised prison, or the provision of clean water when a utility has been privatised), in addition to the obligations of oversight of the enterprise that are triggered by the act of outsourcing.⁴ Principle 7 goes some way to addressing this situation, but does not make clear the existence of the State’s continuing obligations to respect, protect and fulfil the relevant human rights, over and above the obligations of due diligence relating to the private provider. We recommend that Principle 7 be reworded to clarify the nature of ongoing state obligations regarding privatisation and outsourcing.

The commentary to **Principle 8** should add a reference to the fact that export credit agencies and the like use public funds to support corporate actions. That support therefore constitutes State action, justifying corresponding responsibility to ensure that harm to human rights does not occur as a result. Such an additional sentence would make clear to the reader that there is a basis for

³ Commentary to Principle 6.

⁴ See further Adam McBeth, ‘Privatising Human Rights: What Happens to the State’s Human Rights Duties when Services are Privatised?’ (2004) 5 *Melbourne Journal of International Law* 133.

additional responsibility for such actions, over and above the State's general obligations to protect human rights from violations in the course of business activity discussed elsewhere in the Guiding Principles.

Principle 10: It is not clear if this Principle is talking about home or host States. The commentary makes it clear, but the Principles should be able to make sense without the commentary.

Principle 10(c) should be written in much stronger language. It is not clear whether "as appropriate" means that a State can *either* reduce *or* withdraw support, or whether it can consider it appropriate to do neither thing, and actually maintain support. A State must not maintain support for an entity that is involved in gross human rights abuses and fails to cooperate in addressing that situation.

The last two paragraphs of the commentary should be written in the language of "must" not "should".

Second last para of Principle 10 commentary should also mention, as an "appropriate consequence", the punishing of such companies (ie use of sticks rather than only withdrawal of carrots). In general, the Guiding Principles do not allude enough to the use of sticks.

Principle 11 makes an important point regarding the conduct of States within international institutions. We support this principle as drafted. However, the accompanying commentary is unduly soft. It should be made clear, for example, that States retain their obligations under international human rights law when they are participating in international institutions, and are therefore obliged to ensure that decisions taken in that setting do not breach their duties to respect, protect and fulfil human rights. The present commentary seems to focus only on the potential of international institutions to improve the realisation of human rights, but neglects the need to ensure that agreed rules or practices do not restrain the capacities of States to meet their human rights obligations (along the lines of para 11(a)).

Corporate Responsibility to Respect: The following point should be made clear.

Corporations are *legally obliged* not to perpetrate, or aid and abet, international crimes. This is likely to be a duty in domestic law, and also in international law. No entity may commit international crimes, such as genocide, war crimes, and crimes against humanity.

With regard to the many human rights abuses which are not recognised as international crimes, the corporate duty to respect is not only grounded in social expectations. It does have some basis in international law in the following way. States have an international legal duty to protect human rights, which entails a duty to ensure that private actors, such as corporations, respect human rights. If a State is fulfilling its duties, by definition a corporation has domestic legal obligations to respect human rights. While international human rights law does not directly impose a duty to respect human rights on corporations, compliance with human rights law requires that such a duty be imposed on corporations at the domestic level.

"Social expectations" provide a basis for corporate responsibilities to respect human rights where a State is failing in its duty to protect human rights, and also where a State lacks a relevant duty to protect, such as in the case where it has not ratified a human rights treaty (eg US has not ratified ICESCR, China has not ratified ICCPR) that recognises a particular norm. However, there is a practical

consensus that the entire UDHR is in fact customary international law, in which case all States have duties to protect the rights in the UDHR.⁵

Complicity: There should also be a separate Principle stressing that corporations should not be complicit in human rights violations by others, such as host States (perhaps elaborating on 12(b)). Complicity is hidden in the fourth paragraph of the commentary to Principle 15, which in our view is inadequate.

Principle 12: This Principle suffers from a lack of specificity. Perhaps companies could be referred here to useful resources, such as the *Human Rights Translated* booklet,⁶ and other resources which explain the meaning of human rights to companies, and give suggestions on how they can comply with such rights. Such resources could be listed in an Annex to the report.

There should also be a strong suggestion that other core treaties are included in the rubric of human rights, such as the Convention on the Rights of the Child, CERD, CEDAW, and so on. After all, CRC, CERD and CEDAW have been ratified by more States than the two Covenants.

Also, the Special Representative should consider whether to elevate the last paragraph of the commentary to be a Principle in itself.

Principle 14: Add that the business enterprise should *enforce* those policies, including through the disciplining of offending employees, directors or executive staff.

Due diligence – general: It should be made clear that the due diligence process may on occasion lead businesses to conclude that a particular project cannot go ahead, because the human rights risks are too great, or simply cannot be foreseeably mitigated.

Furthermore, a due diligence process, including tracking and monitoring of performance, is more credible if an independent expert body is involved, rather than if it is a process that is purely internal to the business. An appropriate recommendation should be made in this regard.

Principles 15 to 19 primarily address recommended methods within corporations for monitoring, reporting on and remedying human rights issues. As these are largely framed as internal policy matters rather than legal matters, we are refraining from commenting on these Principles in detail, although no particular inference should be drawn from our silence.

Principle 20 should state more clearly that the appropriate response in the event of a breach is to provide a full remedy. The responsibility to respect human rights expressed in Principle 12 is only

⁵ Regardless of the original status of the UDHR as a non-binding instrument, States today clearly treat it as a source of legal obligations, indicating its likely customary status. For instance, the new process of universal periodic review requires that States report against the standards of the UDHR.

⁶ Castan Centre for Human Rights Law, International Business Leaders Forum, United Nations Office of the High Commissioner for Human Rights, UN Global Compact, *Human Rights Translated: A Business Reference Guide* (United Nations, 2008). This book, which has been endorsed in previous reports by the Special Representative, is available from a number of sources, including <http://www.law.monash.edu.au/castancentre/publications/human-rights-translated.pdf>

meaningful if it carries a corresponding commitment to provide an appropriate remedy. The language of that aspect of Principle 20 should be strengthened.

Principle 21: It should be made clear that it is quite rare for legal compliance in host (or home) States to actually *compel* human rights abuses. Examples would include compulsory sex discrimination in Saudi Arabia and bans on the permissibility of unionism in China. But, the second paragraph of the commentary seems to allude to a situation that is simply implausible. No State is realistically going to demand, in its domestic law, that a business enterprise actually perpetrate or be involved with gross abuses. A law might *permit* such abuses but it won't *compel* them. The difference between laws which compel abuse (which make compliance difficult for companies) and laws which allow abuse (but which also allow compliance) should be made clear, so that companies are not tempted to hide behind domestic laws when they merely allow human rights abuses.

In any case, that second paragraph should make clear that if legal compliance actually demanded the perpetration of gross human rights crimes, the business really has to withdraw its operations. It is completely incompatible with the responsibility to respect to continue to operate in such circumstances. The language in this part of the commentary should be amended to make clear that voluntarily operating in conditions that compel gross human rights abuses is unacceptable. Though, again, we don't believe such circumstances realistically arise in practice.

Remedies – general: It should be made clear that States *must* provide for judicial remedies. Non-judicial remedies serve a purpose, and it is desirable for the Principles to talk about them, but the impression must not be given that a State has a choice to provide only for non-judicial remedies.

We thank the Special Representative of the Secretary General and his team in advance for their consideration of our submission. We are available to answer queries, if necessary, via email at castan.centre@monash.edu