



General Assembly

Distr.: General
25 September 2012

Original: English

Human Rights Council
Forum on Business and Human Rights
First session
4 - 5 December 2012

Background note by the Secretariat

Summary

In the present document, background information is presented with regard to the Forum on Business and Human Rights, the relevant international standards – the Guiding Principles on Business and Human Rights – and an overview is provided of the current context relating to the core substantive focus of the agenda of the Forum: trends and challenges in implementation of the Guiding Principles.

I. Introduction and background

1. Business activities are an integral part of society and play an important role in contributing to development. At the same time, the operations of business actors may also adversely affect the enjoyment of human rights. The impacts of business enterprises – of all sizes, from all regions and all sectors – on the full range of internationally recognized human rights have been firmly documented.¹ Moreover, allegations of business enterprises directly causing or contributing to or indirectly being linked to human rights abuses continue to be reported on a daily basis.²

2. The Human Rights Council, in its resolution 17/4 of 16 June 2011, unanimously endorsed the Guiding Principles on Business and Human Rights for implementing the United Nations “Protect, Respect and Remedy” Framework (A/HRC/17/31). This represents a historic milestone, as the endorsement effectively established the Guiding Principles as the authoritative global reference point for preventing and addressing adverse impacts on human rights arising from business-related activity.

3. The Guiding Principles were presented by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises after a six-year process of extensive multi-stakeholder consultations and research. They provide the normative and operational standard for the implementation of the United Nations “Protect, Respect and Remedy” Framework for business and human rights, which was introduced in 2008 by the Special Representative.³

4. The Guiding Principles are firmly grounded in existing international human rights law, as well as standards and practices that already existed before the Guiding Principles were drafted. While they do not create new legal obligations, they nevertheless are critical, as they bring much needed clarity and elaboration of the legal and policy implications of the respective duties and responsibilities of States and business enterprises with regard to human rights. They highlight what steps States need to take in order to ensure business respect for human rights; provide a blueprint for companies to know and show that they respect human rights, and to reduce the risk of causing or contributing to human rights harm; indicate steps that States and business need to take to ensure effective remedy for those whose rights have been adversely affected; and constitute a set of benchmarks for stakeholders to assess, engage in and promote business respect and accountability for human rights.

5. The Guiding Principles and the Framework are structured around three pillars:

- The State duty to protect against human rights abuses by third parties, including business enterprises, through policies, regulation, and adjudication;
- The corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address the adverse impacts with which they are involved;

¹ See the report of the Special Representative of the Secretary-General on business and human rights entitled “Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse” (A/HRC/8/5/Add.2).

² The independent Business and Human Rights Resource Centre is a key source of information. It posts reported allegations of human rights abuse involving companies as well as reported positive impacts (see www.business-humanrights.org/).

³ A/HRC/8/5. See also the reports of the Special Representative on operationalizing the Framework (A/HRC/11/13 and A/HRC/14/27).

- The need for greater access to remedy for victims of business-related abuse, both judicial and non-judicial.
6. In order to promote the dissemination and implementation of the Guiding Principles, the Human Rights Council through its resolution 17/4 established the Working Group on the issue of human rights and transnational corporations and other business enterprises, composed of five independent experts, for a period of three years.
7. The Human Rights Council also established the annual Forum on Business and Human Rights to serve, under the guidance of the Working Group, as a venue for stakeholders – including States, international institutions, regional organizations, business enterprises, civil society, affected individuals and groups and other relevant stakeholders – from all regions to engage in dialogue and cooperation on business and human rights towards the goal of effective and comprehensive implementation of the Guiding Principles. Specifically, the Forum should facilitate the discussion of trends and challenges in the implementation of the Guiding Principles, including challenges faced in particular sectors, operational environments, or in relation to specific rights or groups, as well as the identification of good practices.
8. In stating that the Forum should also promote dialogue and cooperation on issues linked to business and human rights, the Human Rights Council recognized the key importance of sustaining a broad-based multi-stakeholder approach to overcoming challenges in this domain, and to identifying opportunities and solutions.

II. Trends in the implementation of the Guiding Principles

9. The first session of the Forum on Business and Human Rights is being held from 4 to 5 December 2012, only a year and a half after the Guiding Principles were endorsed. While States and business enterprises are expected to take immediate steps towards implementation in order to meet their respective duties and responsibilities as clarified by the Guiding Principles, the road towards full implementation has only just begun. This is also the case as regards uptake and application by other relevant stakeholders.
10. Implementation of the Guiding Principles is a long-term and continuous process which needs to take into account changing circumstances and challenges, with the overarching and ultimate goal of preventing and addressing adverse human rights impacts arising from business activities. This does not preclude any other longer-term developments of business and human rights standards.
11. Even prior to the Guiding Principles being presented to the Human Rights Council, stakeholders had begun applying the United Nations “Protect, Respect and Remedy” Framework. Informal mappings by the former Special Representative recorded significant uptake of the Framework by States, international institutions and mechanisms, regional organizations, business enterprises, civil society groups and others.⁴
12. The report of the Working Group submitted to the Human Rights Council at its twentieth session (A/HRC/20/29) provides a non-exhaustive overview of the positive steps taken towards the comprehensive dissemination and implementation of the Guiding Principles. In particular, it highlights the incorporation of the Guiding Principles into a

⁴ See Special Representative of the Secretary-General on business and human rights, “Applications of the U.N. ‘Protect, Respect and Remedy’ Framework”, June 2011. Available from www.business-humanrights.org/media/documents/applications-of-framework-jun-2011.pdf.

number of international standards and initiatives and efforts by regional intergovernmental organizations, States, national human rights institutions, business organizations and enterprises and civil society to advance implementation and dissemination (*ibid.*, paras. 22-39).

13. The report of the Working Group submitted to the General Assembly at its sixty-seventh session (A/67/285) outlines further strategic developments and initiatives undertaken to embed the Guiding Principles into global governance frameworks since their endorsement, and steps taken by stakeholders to promote dissemination and implementation. The report refers to recent developments in global governance involving United Nations entities and mechanisms, other intergovernmental initiatives and private and multi-stakeholder initiatives, as well as both upcoming and missed opportunities in this regard. It lists important initiatives aimed at the dissemination and implementation of the Guiding Principles by, among others, individual Governments, international institutions, regional intergovernmental organizations and mechanisms, national human rights institutions, business associations and networks, multi-stakeholder initiatives, non-governmental civil society organizations, trade union federations and academic stakeholders.

14. The report of the Secretary-General on how the United Nations system as a whole can contribute to advancing the business and human rights agenda and dissemination and implementation of the Guiding Principles (A/HRC/21/21 and Corr.1) also references several examples with regard to their uptake.

15. Thus, a considerable range of efforts are taking place across stakeholder groups, representing the first steps towards effective implementation of the Guiding Principles and suggesting that practices and trends may be emerging. As an initial observation, however, it is clear that much more at a greater scale, in width and depth, is needed.

16. More conclusive statements on current trends in implementation will be reached when more time has elapsed from the endorsement of the Guiding Principles. The first annual Forum will contribute to shedding light on these developments, by taking stock of a number of important initiatives and steps taken by stakeholders to date. Research and mappings focused on current implementation by States and led by the Working Group will be key in informing discussions.

III. Challenges in the implementation of the Guiding Principles

17. The Guiding Principles explicitly recognize current challenges and gaps in achieving effective implementation with regard to the State duty to protect, business responsibility to respect and access to remedy for victims. Important steps are under way; however the Working Group has emphasized that, notwithstanding promising developments and initiatives, “significant challenges and gaps exist towards achieving the effective dissemination and implementation” (see A/67/285, para. 14).

18. A cross-cutting fundamental challenge to effective and comprehensive implementation is the huge capacity-building needs among stakeholders, as noted both by the Secretary-General and the Working Group in their recent reports (see A/HRC/21/21 and Corr.1, and A/67/285). The Working Group has also noted a number of other challenges at a strategic level,⁵ including:

⁵ See A/HRC/20/29 and A/67/285.

- (a) The need for ensuring that implementation practices by States and business enterprises and tools intended to support implementation are in alignment with the Guiding Principles;
- (b) Ensuring convergence of relevant global governance frameworks with the Guiding Principles, as well as greater synergies between efforts;
- (c) The lack of a central repository for collecting and sharing knowledge of implementation efforts, gaps and best practices;
- (d) The need to scale up dissemination and implementation of the Guiding Principles, including by ensuring a wider regional spread of efforts and uptake by new audiences, including Government and business actors in all regions;
- (e) Addressing the protection and remedy gaps relating particularly to certain groups of rights-holders at heightened risk of vulnerability, discrimination and marginalization in the context of business activities;
- (f) Developing good practices in multi-stakeholder dialogue at the national level on the implementation of the Guiding Principles.

19. Through its central aim of discussing challenges in the implementation of the Guiding Principles, the Forum will contribute to a greater understanding of perceived key challenges, and how they relate to all three pillars of the Guiding Principles and the Framework and the embedding of the Guiding Principles in global governance frameworks. The first annual Forum will specifically address key challenges faced by States, international and regional institutions, the United Nations system, business enterprises, civil society and affected stakeholders. Moreover, challenges relating to certain contexts, specific issues and stakeholder groups will also be addressed.

20. The following paragraphs provide an initial, non-exhaustive list of challenges relating to implementation that may be addressed in Forum discussions. Additional issues may be identified and elucidated through the discussions.

21. With respect to the State duty to respect, a wide range of challenges exist across regions, although their manifestations depend on specific contexts:

- (a) Deepening the understanding of what constitutes the most effective legal and policy measures, both preventative and remedial;
- (b) Interpreting the legal and practical boundaries of exercising extraterritorial jurisdiction;
- (c) Achieving effective enforcement of existing laws at the domestic level;
- (d) Providing effective guidance to business enterprises;
- (e) Knowledge with regard to practical steps the State should take for addressing situations involving groups at risk of higher vulnerability, in alignment with the Guiding Principles and relevant human rights standards;
- (f) Finding effective balance between incentives and sanctions and the “smart policy mix”;
- (g) Clarifying further operational implications with regard to the role of entities over which the State has ownership or control;
- (h) “Privatization”;
- (i) Effective strategies towards implementation when the State is involved in commercial transactions;

- (j) Ensuring both “horizontal” and “vertical” policy coherence in practice;
- (k) Clarifying the role of different Government agencies and departments and ensuring coordination between them;
- (l) Enabling national human rights institutions to fulfil their potentially key role in supporting the implementation of all three pillars;
- (m) Persistent perceived contradictions between protecting human rights in the context of business, both at home and overseas, on the one hand, and safeguarding “competitiveness”, investments and investment flows on the other;
- (n) Corruption, lack of transparency in Government-business relationships and political influence by corporate actors;
- (o) Capacity gaps across States in all regions.

22. Implementation of the corporate responsibility to respect faces challenges both at the operational and systemic levels, such as:

- (a) Linking human rights to the wider sustainability and business agenda in order to secure senior leadership commitment and time;
- (b) Assignment and oversight of how respect for human rights is managed internally;
- (c) Ensuring that due diligence processes are aligned with the Guiding Principles and human rights standards both in process and content;
- (d) Embedding human rights policy commitment into operational plans across diverse business functions;
- (e) Expanding traditional business risk to focus on risk to people, including developing adequate indicators to measure such risk;
- (f) Engaging stakeholders when identifying, assessing, managing and accounting for human rights impacts and mitigating strategies, especially in “high risk” contexts;
- (g) Knowledge with regard to practical steps the enterprise should take for addressing situations involving groups at heightened risk of vulnerability, in alignment with the Guiding Principles and relevant human rights standards;
- (h) Understanding, building and exercising leverage in the context of business relationships;
- (i) Operating in situations where national law is silent, unenforced or in conflict with recognized international human rights standards;
- (j) Effective communication and reporting, including on how company management systems and internal processes can be aligned with the Guiding Principles;
- (k) Supporting access to remedy, whether through operational-level grievance mechanisms or other mechanisms;
- (l) Engaging business associations and networks that have not been part of the business and human rights agenda to date in support of dissemination and implementation of the Guiding Principles.

23. Since the endorsement of the Guiding Principles, some civil society groups have worked closely with business enterprises and Governments on initiatives aimed at implementing the Guiding Principles. Others have contributed to tools and guidance materials in order to advance implementation by States and business. Some have highlighted good practice examples of implementation. Other civil society groups have

reported on and campaigned against alleged corporate human rights abuses and the failure of Governments to meet their duty to protect, as well as noted continued challenges in achieving access to remedy for victims, pointing to key gaps in the implementation of the Guiding Principles.

24. Civil society faces challenges in furthering implementation of the Guiding Principles, both externally and internally. External challenges include: challenges of affected communities with engaging business enterprises in meaningful processes when faced by potential adverse human rights impacts, including accessing adequate information from companies or Governments; and violence and threats to human rights defenders' personal security if investigating or reporting on potential or alleged abuses involving business enterprises or the Government. Internal challenges, on the other hand, may relate to the resource and capacity constraints of civil society groups and actors.

25. The Guiding Principles point to some key barriers in ensuring access to effective remedy for victims, including access to judicial remedy. Challenges in some countries are systemic, for example judicial systems being inaccessible, too costly, too slow or lacking independence; and the absence or inadequacy of mediation procedures or company-based grievance mechanisms. Other challenges are jurisdictional, where victims have no effective grievance mechanism available in the country where the abuse occurred and are unable to seek remedy elsewhere. With regard to non-judicial grievance mechanisms, stakeholders continue to monitor how mechanisms aligned with the Guiding Principles work in practice. Key challenges for such mechanisms include ensuring that they do not undermine the legitimate role of trade unions, nor preclude access to judicial mechanisms.

26. A specific set of challenges to implementation of the Guiding Principles exist in areas affected by conflict and widespread violence, where the most egregious business-related human rights abuses take place. While such situations require urgent action, "there remains a lack of clarity among States with regard to what innovative, proactive and, above all, practical policies and tools have the greatest potential for preventing or mitigating business-related abuses in situations of conflict".⁶

27. Specific challenges to implementation also exist for particular stakeholder groups. For example, with regard to small and medium-sized enterprises, challenges arise due to the low levels of awareness of the Guiding Principles and human rights standards for business and a lack of dedicated guidance tools, as well as significant resource and capacity gaps in ensuring steps towards implementation. Groups that are particularly vulnerable to negative human rights impacts include children, indigenous peoples and marginalized population groups. The challenging nexus of the role of the State, business activities and the situation of indigenous peoples, for example, is one that cuts across all three pillars.

28. Some challenges to the implementation of the Guiding Principles are confined to specific issues or sectors. Links between finance in various forms and business impacts on human rights still need further clarifications in operational terms. The role of public finance – involving both international and national institutions – presents a number of questions, such as aspects relating to policy coherence, appropriate due diligence measures, stakeholder engagements and grievance mechanisms. The role of private investors equally raises a number of issues. Further, ensuring management of human rights risks in State-investor contracts remains a challenge, despite the work of the former Special Representative and the principles for responsible contracts (A/HRC/17/31/Add.3) presented as an addendum to the Guiding Principles.

⁶ Report of the Special Representative of the Secretary-General on business and human rights (A/HRC/17/32), p. 1.

IV. Concluding remarks

29. Through discussions at the Forum, participants will strive to further identify emerging trends and challenges in the implementation of the Guiding Principles, and shed light on opportunities, solutions and priorities for the way forward, towards effective implementation of the Guiding Principles by relevant stakeholders.
