July 31, 2012

The International Corporate Accountability Roundtable (ICAR) is a coalition of leading human rights, environmental and development groups working to promote robust frameworks for corporate accountability, strengthen current measures and to defend existing laws, policies and legal precedents.

The U.S. government was not represented on the United Nations Human Rights Council when it welcomed the UN “Protect, Respect and Remedy” Framework on Business and Human Rights in 2008, but it endorsed the U.N. Guiding Principles on Business and Human Rights: Implementing the UN “Protect, Respect, Remedy” Framework¹ (UNGPs) at the Council in June 2011.² The State Department has since hosted a workshop with representatives of multinational corporations on implementing the UNGPs.³ On July 30, 2012, the State Department is hosting a Civil Society Workshop to discuss opportunities and limitations on implementing the UN Framework and the UNGPs. As part of this Workshop, ICAR recommends that the U.S. government (a) develop a national implementation plan for the UN Framework and UNGPs, (b) ensure the development and protection of robust remedies for human rights violations, and (c) use its regulatory authority to mandate human rights due diligence, independent monitoring and public reporting.

The State Department should develop a government-wide national implementation plan for the UNGPs.

A national plan for the implementation of the UNGPs should articulate how the U.S. government will comply with its duty to protect human rights against abuses by companies across government agencies and departments.⁴ It should include options for regulating

⁴ Human Rights Council, supra note 1, at 6-13.
corporate respect for human rights, as well as incorporate a comprehensive mapping of existing remedies that are in place for redress from human rights related harms and identifying weaknesses and gaps.

A number of governments are already in the process of developing national implementation plans. The European Union invited its Member States to develop national implementation plans as part of its “EU Strategy on Corporate Social Responsibility 2011-2014.” EU governments are committed to the process. The UK government established a cross-government steering group to develop a national strategy on business and human rights. The Netherlands’ parliament passed a motion requesting the government to provide a national implementation plan. Denmark organized a conference in May as part of the Danish Presidency of the Council of the European Union to provide recommendations to the European Commission and EU Member States on setting priorities for the implementation of the UNGPs.

We encourage the U.S. government to follow the lead of these countries in developing a national implementation plan that serves as the baseline in a strategy for state implementation of the UNGPs. In developing such a plan, the U.S. government should consider the guidelines developed by the European Group of National Human Rights Institutions (European Group of NHRI). These guidelines were released in June 2012 and include procedural recommendations to create a plan that is clearly identifiable and separate from existing corporate social responsibility plans, perform an initial national baseline study and gap analysis to inform credible and strategic milestones, assign clear ownership of the plan to a relevant

5 Id., at 13-22.
6 Id., at 22-27.
government agency, and conduct periodic monitoring and reporting on progress.\textsuperscript{12} Furthermore, the process should be “participatory, ensuring inclusion of rights-holders exposed to conditions of vulnerability.”\textsuperscript{13} At a minimum, the European Group of NHRIs recommends that national implementation plans provide detailed recommendations across all three pillars of the UNGPs and include “achievable targets, milestones for delivery, and performance indicators for state and business actors.”\textsuperscript{14}

In addition, the national implementation plan should not be confined to the Executive, and should include other branches of government, including a plan for the Legislative and Judicial branches to ensure that they too fulfill the U.S. government’s commitment to the UNGPs. Further, the U.S. government must ensure that all three pillars of the UN Framework receive equal attention in moving towards commitments to the UNGPs. Thus, development of guidance or capacity building for the corporate responsibility to respect must not be pursued as an alternative to or at the expense of legal and regulatory measures to be developed under the state duty to protect or access to remedy. Next, the U.S. government must ensure there is outreach to, and substantive engagement with, civil society groups and impacted communities in the development of its national implementation plan. We recommend that the U.S. government conduct annual assessments of its national implementation plan, and enable civil society inputs in developing these assessments. Finally, ICAR encourages the U.S. government to set an example by promoting this implementation plan, and working in a multi-lateral way to ensure that other states, as part of their duty to protect human rights, conduct a similar analysis of their ongoing implementation of commitments under the UNGPs. Peer-review mechanisms should also be explored for assessing state practice in line with commitments under these implementation plans.\textsuperscript{15}

\textbf{The U.S. government should ensure the development and protection of robust remedies for human rights violations.}

The need for recourse, including through legal remedies when harm occurs, is paramount. Due diligence measures serve a valuable purpose as a means for companies to understand and address human rights related risks. They should not, however, be offered as means to evade liability. Where harm occurs, the state must ensure an effective remedy is available to the victims and businesses must meet their responsibility to respect human rights by cooperating with complaints processes, including judicial processes, as appropriate.\textsuperscript{16} The right to remedy must be upheld, irrespective of whether due diligence processes were followed in a situation

\begin{itemize}
\item \textsuperscript{12} Id., at 1.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} The U.S. government may consider existing peer-review models, including the United Nations Universal Periodic Review mechanism, the mechanism for the Review of Implementation of the UN Convention against Corruption, the OECD Working Group on Bribery peer-review monitoring system, and the voluntary peer review of National Contact Points under the OECD Guidelines for Multinational Enterprises.
\item \textsuperscript{16} Human Rights Council, supra note 1, at 20-21.
\end{itemize}
that results in harm. As part of their duty to protect, states must take appropriate steps, through judicial, administrative, legislative or other means, to ensure victims have access to effective remedy. These include strengthening existing mechanisms of redress and removing barriers to ensure effective access, and creating new remedial mechanisms where needed.

The U.S. government’s duty includes ensuring that our judicial system offers an accessible and effective judicial remedy for human rights abuses associated with corporate conduct by companies subject to jurisdiction in the United States, regardless of where the abuses occurred. We are particularly concerned about access to judicial remedy in light of the Solicitor General’s recently filed brief\(^{17}\) in Kiobel v. Royal Dutch Petroleum, Inc.,\(^{18}\) concerning the extraterritorial reach of the Alien Tort Statute (ATS).\(^{19}\) The Solicitor General argues that the “circumstances of this case” mandate dismissal of an action brought by twelve Nigerian plaintiffs, now permanent U.S. residents. The brief anticipates harmful foreign relations consequences would arise if a U.S. court were to examine corporate complicity in the torture, extrajudicial killings, and crimes against humanity allegedly committed by members of the Nigerian military. The Solicitor General’s position, if adopted by the Supreme Court, would drastically weaken or close off a critical avenue for redress for victims of human rights abuses.

As an intervention in support of the corporate defendant in the case and favoring a radical curtailment of the ATS, the U.S. government position directly conflicts with the UNGPs assertion that states must consider ways to reduce “barriers that could lead to a denial of access to remedy.”\(^{20}\) We note that the State Department was absent from the Solicitor General’s brief, although historically it has always led or joined the government’s views on the ATS,\(^ {21}\) and had signed an earlier brief\(^ {22}\) in the same case arguing that corporations should not be immune from liability for committing human rights abuses. As it seeks to implement the UNGPs, the U.S. government must now ensure that avenues for redress such as the ATS are not limited, but rather promoted as remedial mechanism for victims of human rights abuses.

---


\(^{19}\) 28 U.S.C. § 1350 (West, Westlaw through P.L. 112-139).

\(^{20}\) Human Rights Council, supra note 1, at 23.


The U.S. government should use its regulatory authority to mandate human rights due diligence.

To uphold the duty of states to protect human rights, states must take effective regulatory measures to ensure business entities respect human rights, including by imposing binding requirements on business entities to carry out human rights due diligence.23 Strong, effective human rights due diligence procedures are fundamental to ensure that human rights are respected in company actions both inside and outside their home territory. States should also mandate independent monitoring in appropriate cases and public reporting of companies’ human rights impacts to verify compliance. These requirements should cover all business relationships, including suppliers, contractors, security forces, business partners and recipients of financing.

Section 1502 of the Dodd-Frank Act24 provides an example of mandating human rights due diligence through U.S. regulatory authority. Section 1502 seeks to combat the trade in conflict minerals from eastern Democratic Republic of Congo (DRC) by requiring companies sourcing from DRC or adjoining countries to carry out supply chain due diligence, commission an independent third party audit of their due diligence, and publicly disclose the steps they have taken. We urge the Securities and Exchange Commission (SEC), to bring life to the full intent of the law when it issues the final rules for this provision by requiring companies to adopt robust due diligence measures to detect and address conflict in their supply chains.

The due diligence requirements for Section 1502 should be based on the Organization for Economic Cooperation and Development’s (OECD) *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*.25 The OECD Guidance is the most detailed blueprint on human rights due diligence to date and applies to any conflict and high-risk area. In a July 15, 2011, statement, the State Department said “The Department specifically endorses the guidance issued by the [OECD] and encourages companies to draw upon this guidance as they establish their due diligence practices.”26

Furthermore, the U.S. government should investigate its own procurement policies and financing and contracting agreements, and use its leverage in international financial institutions to ensure that human rights due diligence practices are requirements for state support or contracts. An analysis of how to pursue such aims through regulation should be presented as part of the national implementation plan.

In an effort to facilitate the adoption of mandatory due diligence, ICAR is conducting an extensive research project to bring clarity to the ways in which states can, by law and regulation, require due diligence pertaining to human rights. This project, known as the “Human Rights Due Diligence Project,” will conclude at year-end with the release of principles and commentary based on an extensive consultation process with legal experts from across the world. We believe that these principles will be instructive in showcasing the number of different policy options that states have to ensure human rights due diligence is conducted by corporate actors.

We offer the suggestions above in an effort to help ensure that the U.S. government acts on its commitment to implement the UN Framework and the UNGPs. ICAR looks forward to continued engagement on this important issue.

27 For more information, visit http://accountabilityroundtable.org/campaigns/human-rights-due-diligence/.