**Comments of EarthRights International on the
Draft Guiding Principles for the Implementation of the
United Nations "Protect, Respect, and Remedy" Framework**

**Submitted to the Special Representative of the Secretary-General
on the issue of human rights and transnational corporations
and other business enterprises, John Ruggie**

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EarthRights International (ERI) welcomes the draft Guiding Principles to implement the "Protect, Respect, and Remedy" framework advanced by the Special Representative of the Secretary-General (SRSG). In general, the Guiding Principles represent a step forward in the codification of the human rights responsibilities of States with respect to business entities and the responsibility and best practices of businesses themselves. ERI submits the following comments in an effort to make the Guiding Principles more effective and useful, especially relating to several areas in which ERI has an interest and some expertise. We thank the SRSG for the opportunity to participate in this process and hope that our comments can be of assistance.

Principles 2 and 23: The role of home states with respect to abuses by corporations within their jurisdiction

ERI applauds the SRSG's focus on home State responsibility reflected in Principle 2, which is a substantial advance in recognizing the role that home States can and should play in preventing human rights abuses by businesses headquartered or domiciled in their territory. ERI welcomes the statement in Paragraph 8 of the preceding Report, in which the SRSG notes: "There are sound policy rationales for States seeking to ensure that enterprises which are domiciled in their territory and/or jurisdiction respect human rights abroad[.]" Principle 2, however, does not fully reflect this recommendation. Instead, Principle 2 is limited to suggesting that States should "encourage" businesses to respect human rights; the accompanying Commentary similarly states that "strong policy reasons exist for home States to encourage businesses domiciled in their territory and/or jurisdiction to respect human rights abroad." ERI urges the SRSG to revise Principle 2 to reflect the language of the Report, suggesting that States should consider measure to *ensure* that businesses respect human rights. ERI acknowledges that the Commentary (as well as Paragraph 7 of the Report) notes that States are neither required nor prohibited from "regulat[ing] the extraterritorial activities of businesses domiciled in their territory," but this should not limit the policy recommendations of the Guiding Principles. ERI also suggests that the Commentary outline more suggestions of measures that States can take in order to fulfill their obligations, in addition to transparency and criminal measures.
ERI suggests that the SRSG outline steps that States should consider in order to ensure respect for human rights in the global operations of their domiciled businesses.

ERI therefore recommends the following amendments to Principle 2 and the Commentary thereto:

1. Amend Principle 2 to read:

States should seek to ensure that ~~encourage~~ business enterprises domiciled in their territory and/or jurisdiction ~~to~~ respect human rights throughout their global operations, including those conducted by their subsidiaries and other related legal entities.

2. Change the relevant sentence of the Commentary to read:

The permissible options which may be available include domestic measures with extraterritorial implications, such as requirements on "parent" companies to report on their operations at home and abroad, affirmative extraterritorial regulation based on the nationality of the business entity or its regulation by a domestic stock exchange, extraterritorial regulation that may apply only in the absence of affirmative human rights measures by the "host" country, civil remedies for human rights abuses or complicity therein which are available against businesses subject to the State's jurisdiction for conduct arising anywhere, and ~~to direct extraterritorial jurisdiction such as~~ criminal regimes which rely on the nationality of the perpetrator no matter where the offense occurs.

Remedies are, of course, generally the subject of Part IV of the Guiding Principles. ERI appreciates the strong language of Principle 23, which is one of two Principles (together with Principle 1) which is expressed in clearly mandatory terms: States *must* take steps to provide access to effective remedies. ERI is concerned, however, that that this Principle is ambiguous with respect to remedies that home States may provide against business entities within their legal jurisdiction for acts that occur outside their territorial jurisdiction. This ambiguity arises from the use of the phrase "territory and/or jurisdiction"; it is not clear if "jurisdiction" in this context is intended to include extraterritorial jurisdiction. ERI therefore suggests that the Commentary make clear that a State's "jurisdiction" extends to abuses outside the State's physical territory when it is appropriate for the State to exercise jurisdiction over the business entity itself (such as when the business is a domiciliary of the State).

ERI proposes that the Commentary to Principle 23 be amended by adding the following:

The State duty to provide access to remedies extends, at a minimum, to all business-related human rights abuses within the State's territory. Where, consistent with international law, States exercise jurisdiction over the actions of businesses outside their territory (for example, because the businesses are domiciliaries of the State, or because the abuses themselves give rise to universal jurisdiction), States should also provide access to remedies for abuses within the reach of this extra-territorial jurisdiction. This is especially the case where remedies may be unavailable in the State in whose territory the business-related human rights abuse is primarily located.

Principle 4: The role of human rights in investment treaties

ERI is pleased to see that Principle 4 includes attention to human rights in investment treaty regimes. We suggest that the role of human rights in these treaty regimes deserves some additional detail, however, because it may not be entirely clear to States how they should "maintain adequate domestic policy space." Because States are bound by human rights law, there is no reason not to insist that this is expressly recognized in investment treaties, particularly because some scholars have made arguments to suggest that bilateral investment treaties, as a form of *lex specialis*, can prevail over both customary international law (except *jus cogens* norms) and human rights treaties.

We suggest that Principle 4 be amended to read:

> **States should maintain adequate domestic policy space to meet their international human rights obligations when pursuing business-related policy objectives with other States or business enterprises, particularly when they enter into investment treaties, which should expressly recognize the State's international human rights obligations, or contracts.**

Alternatively, or additionally, we suggest amending the Commentary by adding the following language at the end, drawn from the recommendations in the High Commissioner's 2003 report on Human Rights, Trade and Investment (E/CN.4/Sub.2/2003/9):

> *States can ensure that they maintain the ability to meet their human rights obligations by including an explicit reference to the promotion and protection of human rights among the objectives of investment agreements, or by expressly recognizing that the investment treaty does not affect the State's obligations under human rights law.*

Principle 5: The need for State legislation

ERI supports the SRSG's recognition of the State's paramount role in enforcing laws related to human rights and assisting businesses to comply. We are concerned, however, with the first example in the Principle, which may imply that States may opt out of this obligation by simply failing to enact laws that provide for liability for business enterprises. The Guiding Principles should make it clear that customary international law provides no basis for distinction between natural and legal persons as respects the conduct that violates its norms. States, as part of their obligation to give effect to international law, must enact *and* enforce laws and regulations that allow for liability for business entities whose conduct violates any norm of customary international law that imposes direct obligations on non-State entities.

We suggest that adding an example before the first example in Principle 5:

a. **Enacting legislation and regulations to provide for liability for business entities whose conduct violates any norm of customary international law that imposes direct obligations on non-State entities;**

Principles 6: The State as business actor

ERI is pleased to see that the SRSG appropriately recognizes, in Principle 6, that the State should respect human rights in its State-owned business operations. ERI is concerned, however, that the language of this Principle might give the erroneous impression that State-owned entities are subject only to the human rights obligations of businesses, not the human rights obligations of States themselves; there is no statement in the Guiding Principles that a State's human rights obligations extend to State-owned enterprises and instrumentalities. The rule adopted in the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts (2001) is that State responsibility extends to State-owned entities that are exercising public functions, or where the State controls the entity. *See* Commentary to Article 8. Principle 7 reflects the former rule, and begins with a strong statement that "States do not relinquish their international human rights obligations by outsourcing the delivery of services." A similar statement in Principle 6, extending to State-controlled entities, is warranted. Furthermore, the Commentary to Principle 7 suggests that contracting "may entail both reputational and legal consequences for the State." The Commentary to Principle 6, however, bifurcates the "policy rationale" and "legal obligations" with respect to State-owned enterprises, and does not expressly indicate the legal obligations of States with respect to State-owned enterprises.

ERI therefore suggests the following amendments to Principle 6 and the Commentary thereto:

1. Amend Principle 6 to read:

   States should take steps to ensure that human rights are respected by business enterprises that are owned ~~or controlled~~ by the State. This includes encouraging, and, where appropriate, requiring, such enterprises to undertake effective human rights due diligence processes. Where the State actively controls such business enterprises, the international human rights obligations of the State attach to such enterprises.

2. Amend the relevant sentence of the Commentary to read:

   Therefore, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights~~, quite apart from any legal obligations States may have in certain circumstances~~. Where a State controls the enterprise, as opposed to mere ownership, the enterprise's conduct is attributable to the State and the full range of the State's international human rights obligations attach to the enterprise.

An alternate approach would be to leave Principle 6 as currently written, and expand Principle 7 to cover both outsourcing to private companies and the operations of State-controlled enterprises.

Principle 10: International crimes versus gross human rights abuses

ERI applauds the SRSG's comprehensive approach to management of the heightened risk of gross human rights abuses in conflict-affected areas, and we believe that the SRSG has correctly recognized that businesses may be both primary and contributing actors in the commission of such abuses. Moreover, we firmly support the SRSG's suggestion that a multilateral approach may be necessary to address the gaps in regulation and enforcement related to business commission of and contribution to gross human rights abuses in conflict zones.

We are concerned, however, by what may be perceived as the conflation of two distinct (but related) concepts: gross human rights abuses and international crimes. As the SRSG recognizes in the Commentary to Principle 21, some international crimes may be included within the category of gross human rights abuses, but the latter term is broader. Although "gross human rights abuses" is not necessarily a precise term of art within international human rights law, we take this to mean serious violations of the customary international law of human rights. One definition of such conduct is abuses that are "particularly shocking because of the importance of the right or the gravity of the violation." Restatement (3rd) of the Foreign Relations Law of the United States § 702 cmt. m. Furthermore, the list of acts that violate norms of customary international law for non-state actors is broader than the list of international crimes, as it includes, for example, complicity in State-sponsored gross human rights abuses. (The category of international crimes may also include acts that have little relation to human rights.)

The SRSG should make clear that, with respect to companies, the heightened dangers arising out of conflict are not limited to those acts that are designated as international crimes, nor are States' heightened obligations in the context of conflict so limited. Rather, conflict increases the risk that companies will conduct themselves so as to commit or contribute to gross human rights abuses, including but not limited to those acts for which customary international law prescribes direct obligations for non-state entities. In general, ERI would recommend removing most references to international crimes from the Guiding Principles, to avoid giving the impression that businesses' legal obligations end with the avoidance of commission or complicity in such crimes, and the controversy over what may or may not be an international crime.

ERI therefore suggests the following amendments to Principle 10 and the Commentary thereto:

1. Amend the final example in Principle 10 to read:

   Ensuring that their current policies, regulation and enforcement measures are effective in addressing the risk of business commission of or contribution to gross human rights abuses~~involvement in situations which could amount to the commission of international crimes~~.

2. Amend the relevant sentence of the Commentary to read:

   Because there is a heightened risk of businesses committing or contributing to gross human rights abuses ~~international crimes~~ in conflict-affected areas, States also should review whether their policies, regulation and enforcement measures effectively address this heightened risk.

Finally, we take the SRSG's suggestion of multilateral approach to mean that he believes an international treaty mechanism might be one appropriate tool to tackle issues of extraterritorial jurisdiction, liability, and enforcement for corporate involvement in gross human rights abuses in conflict zones. If this is the case, we believe he should say so more explicitly. Moreover, we do not believe that this mechanism should be limited to the conflict context, and we are concerned that by including this reference in the Commentary to this Principle but not in other parts of the Guiding Principles, the SRSG will artificially limit the possible scope of a legally binding agreement on this subject.

Principle 12: The legal obligations of non-State actors

ERI understands and applauds the SRSG's insight that business operations can negatively affect the enjoyment of the full range of human rights recognized in the international community. The foundational principles of the corporate "responsibility to respect" reflect the universality of human rights—that all enterprises, regardless of size and type of activity, are expected to conform their conduct to these standards.

With respect, however, we submit that the SRSG has too categorically drawn the line between the legal obligations of States and companies. The Commentary to Principle 12 is mostly correct when it points out that the International Bill of Rights and the core ILO Conventions do not impose direct legal obligations on business enterprises. (The Universal Declaration is the exception: its preamble states that "every individual and every organ of society" should respect the rights enumerated, and Article 30 makes clear that no "State, group or person" may violate the rights set forth.) Nonetheless, this statement may give the misleading impression that business entities are exempted from legal obligations that apply to other non-state actors; in fact, these instruments generally do not impose direct legal obligations on *any* non-State entity. Yet some of the standards enshrined in these instruments correspond to conduct that is proscribed under norms of customary international law that apply directly to non-State actors, such as genocide, war crimes, crimes against humanity, slavery and slavery-like practices, and complicity with State-sponsored abuses. These are not controversial propositions; rather they are well settled principles of international law. It is crucial that SRSG recognize that in none of these cases does customary international law distinguish acts committed by natural persons from those committed by legal persons, although it is left to states to craft the legal remedies that define the form and scope of liability for these actions.

We therefore suggest the following amendments to Principle 12 and the Commentary thereto:

1. Amend the first paragraph of Principle 12 to read:

 In addition to the legal obligations applicable to them pursuant to customary international law, b~~B~~usiness enterprises should respect human rights, which means to avoid infringing on the human rights of others and to address adverse human rights impacts they may cause or contribute to.

2. Amend the last three sentences of the third paragraph of the Commentary to read:

> *~~Moreover,~~ The rights enshrined in these instruments are the core standards against which other social actors hold enterprises to account for their adverse impacts. While the instruments themselves for the most part do not impose direct legal obligations on non-State actors ~~business enterprises~~, enterprises can infringe on any of the rights these instruments recognize. Moreover, customary international law prohibits private actors from violating a number of norms that reflect some of these rights or from being complicit in State-sponsored violations. Customary international law does not distinguish between natural persons and legal persons with respect to conduct that violates these norms. This is distinct from the contours of the remedy and forms of liability to which businesses are subject for violations of international norms of conduct~~question of legal liability~~, which remain~~s~~ defined largely by national law provisions in relevant jurisdictions.*

Principle 15: Defining complicity in human rights abuses

ERI welcomes the SRSG's acknowledgement, in the Commentary to Principle 15, that "the weight of international legal opinion indicates that the relevant standard for aiding and abetting [international] crimes is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime." As noted above, however, the avoidance of complicity should be recognized as extending beyond international crimes to gross human rights abuses in violation of customary international law. Additionally, aiding and abetting is not the only mode of complicity recognized in international law. While ERI recognizes that the SRSG is not promulgating a legal text per se, we encourage the SRSG to recognize the possibility that other modes of complicity may be applicable.

We therefore suggest the following change to the relevant sentence of the Commentary:

> *In relation to complicity in gross human rights abuses in violation of customary international law ~~crimes~~, the weight of international legal opinion indicates that the relevant standard for aiding and abetting such abuses ~~crimes~~ is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of the abuse ~~a crime~~. International law may also prohibit other modes of complicity, such as joint participation.*

Principle 21: Recognition of businesses' human rights legal obligations

We applaud the SRSG's recognition of the potential for tension between national and international law, and for insisting that businesses must find ways to comply with international norms regardless of domestic obligations. However, for the reasons enumerated above, this Principle gives inadequate weight to the direct force international law exerts on business enterprises, as it does on all non-state actors. We are particularly concerned that the Commentary suggests that it is a legitimate and acceptable option under international law for States to decline to offer a remedy against business entities for conduct by businesses that violates norms of customary international law. The SRSG should make clear that this is not an option and is, of itself, a violation of international law. Additionally, while the Principle itself references "international crimes," the Commentary to the Principle more appropriately

references "gross human rights abuses," which it correctly notes may include international crimes.

We therefore suggest the following amendments to Principle 21 and the Commentary thereto.

1. Amend the final recommendation in Principle 21 to read:

Treat the risk of causing or contributing to gross human rights abuses in violation of customary international law ~~crimes~~ as ~~though it were~~ a legal compliance issue.

2. Amend the relevant sentence of the commentary to read:

Business enterprises should be aware that international law provides no basis for distinction between legal and natural persons with respect to the conduct that constitutes commission of or contribution to gross human rights abuses. ~~In jurisdictions where business enterprises themselves cannot be held criminally liable, or where international standards are interpreted so as not to include civil~~In addition to the direct responsibility ~~liability~~ of business enterprises as legal entities, corporate directors, officers and employees nevertheless may be subject to individual responsibility for acts that amount to international crimes or other gross human rights abuses.

Principle 24: Legal barriers to access to remedies

ERI applauds the SRSG for recognizing the fact that both legal and logistical barrier both prevent human rights claimants from accessing a judicial remedy, and hinder State enforcement from enforcing the norms of international law against business enterprises. The more detailed the guidance the SRSG can give States on how to lower barriers and what the various costs and benefits are of any given policy decision in this realm, the more useful these principles will be as a blueprint for an effective remedy. We believe, however, that the SRSG has overlooked an important factor in his list of legal barriers: the form of the judicial remedy allowed by States to hold businesses accountable for violating international norms of conduct.

We therefore recommend that the SRSG add an example to the legal barriers section of the Commentary to Principle 24:

- *where States do not recognize criminal liability for corporate entities for international crimes or other violations of international human rights law that are applicable to non-state entities*