

Preventing corporate involvement in mass atrocity crimes: Implementing the UN Guiding Principles on Business and Human Rights

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INTRODUCTION

From telecommunications companies disseminating hate speech to electronics and automotive companies with “conflict minerals” in their supply chains, or extractive companies and their security providers cooperating with abusive state security forces, there are numerous examples of the ways in which the business sector may be involved with serious human rights abuses amounting to mass atrocity crimes.

This briefing paper explores the implications of the global expectation that businesses should respect human rights, including by avoiding involvement in mass atrocity crimes. Specifically, it applies the lens of the UN Guiding Principles on Business and Human Rights, unanimously endorsed by the UN Human Rights Council in 2011, to the role of states in upholding the Responsibility to Protect (R2P), and highlights some key areas for further attention and action when it comes to business involvement in mass atrocity crimes.¹

CLARIFYING BASIC TERMS

The terminology used in this paper reflects the conceptually distinct, but potentially confusing, language used in the business and human rights versus R2P fields. R2P is focused on the *responsibility of states*, individually and collectively, to prevent mass atrocity crimes – namely genocide, war crimes, ethnic cleansing and crimes against humanity. Every state is expected to uphold this responsibility with regard to its own population. In doing so, it should be able to call upon capacity-building support from other states where needed through, for example, economic assistance, rule of law efforts, or direct mediation in more urgent situations. Only where such means are clearly and

demonstrably unsuccessful will coercive measures, exercised by the international community through the UN Security Council, be relevant.²

Turning to the business and human rights space, the 2011 UN Guiding Principles on Business and Human Rights (UNGPs) distinguish between the *state duty to protect* and the *corporate responsibility to respect* human rights.³ These form the first two pillars of the UN “Protect, Respect and Remedy” Framework, which was welcomed by the UN Human Rights Council in 2008. Both the Framework and the UNGPs were authored by the former Special Representative of the UN Secretary-General (SRSG) for business and human rights, Professor John Ruggie.

The three pillars of the UN Framework are:

- The **state duty to protect** human rights against abuse by third parties, including business, through appropriate policies, legislation, regulations and adjudication;
- The **corporate responsibility to respect** human rights, which means that businesses should act with due diligence to avoid infringing on the rights of others and address adverse impacts with which they are involved;
- The need for **greater access to effective remedy**, both judicial and non-judicial, for victims of business-related human rights abuse.

In the UNGPs, the *state duty to protect* is grounded in states’ international human rights law obligations. The UNGPs do not create any new legal obligations for states; rather, they clarify the policy implications of their existing duties under international human rights law to prevent and address human rights abuses by business.

The corporate *responsibility to respect* human rights reflects the global social expectation that businesses should avoid harming people through their own operations or through relationships with other entities, such as suppliers, joint venture partners or governments. This is very different from the normal meaning of “corporate social responsibility” (CSR).⁴

CSR typically involves voluntary actions by companies that are often philanthropic in nature, for example, building a school for a community living near a company’s facilities or encouraging staff to volunteer or donate to local charitable organizations. Some companies have more sophisticated understandings that involve aligning their sustainability efforts with their core business – for example, supporting micro-enterprise or women-led small businesses to build more resilient local communities and thus help develop local supply chains in the contexts where they operate.

KEY DEFINITIONS
<p>A company’s supply chain means a system of organizations, people, technology, activities, information and resources involved in moving a product or service from supplier to customer.</p>
<p>A company’s value chain encompasses the activities that convert input into output by adding value. It includes entities with which the company has a direct or indirect business relationship and which either supply products or services that contribute to the company’s own products or services, or receive products or services from the company.</p>
<p>Business relationships means the relationships a company has with business partners, entities in its value chain and any other state or non-state entity directly linked to its operations, products or services. They include indirect relationships in the value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.</p>

But the UNGPs are different: they reflect the expectation that all companies, regardless of whether they voluntarily commit to philanthropic or other efforts to promote or support human rights, should conduct their business with respect for peoples’ basic human dignity.⁵ This distinction is important in understanding what kinds of actions by companies are likely to be meaningful in mitigating the risk of their involvement in gross human

rights abuses amounting to mass atrocity crimes. It is also central to understanding what states can do to better encourage, incentivize or require such action by businesses.

GROUNDING THE DISCUSSION: WHAT DO WE MEAN BY CORPORATE INVOLVEMENT IN MASS ATROCITY CRIMES?

Responsible business has a critical role to play in helping to create an environment in which mass atrocity crimes are less likely to occur. This can involve a range of contributions, from strengthening local economies, to building understanding and shared economic interests between different communities, to explicitly supporting efforts by state and non-state actors to promote peace and good governance. While a review of the existing literature on the multiple roles that business can play in contributing to peace is beyond the scope of this paper, there are clearly important insights to be gained for the R2P field.⁶

This paper focuses on the ways in which business may be actively involved in severe human rights abuses amounting to mass atrocity crimes, and how companies and states can do more to protect against this situation.

The UNGPs lay out three main ways in which business may be involved in human rights abuses. These are not intended to be legal in nature, but may often overlap with legal liability in practice. The three modes of involvement are:

- A company may **cause** such a crime if its actions, solely and directly lead to the abuse;
- A company may **contribute** to such a crime either by acting in parallel with other entities such that the cumulative effect of their behavior causes the crime, or by facilitating or motivating the commission of such abuses through a business relationship;
- A company’s operations, products or services may be **directly linked** to such a crime through the company’s business relationships, although the company itself did nothing to cause or contribute to the abuse.

The rest of this section explores these three modes through examples.

Causation

While causation is a common mode of involvement for other forms of corporate-related human rights impacts (such as labor rights abuses), research conducted under the former SRSG's mandate shows that it is likely to be less relevant when it comes to crimes that reach the level of genocide, war crimes, ethnic cleansing or crimes against humanity.⁷

To date, where causation has been involved, there has been striking evidence against a senior corporate director or officer and the case has been brought against them in their individual capacity. For example, Alfred Musema was the director of the Gisovu Tea Factory in Kibuye Prefecture during the 1994 genocide in Rwanda. The International Criminal Tribunal for Rwanda found him guilty of genocide and crimes against humanity due to various actions, including ordering employees of the tea factory (recognizable by their blue uniforms) to participate in such crimes and also participating directly in some himself.⁸

Broadly speaking, it is much more likely for a company to be involved in a mass atrocity crime either by contributing to its commission through a business relationship – often because the company is unaware of the risk of being involved in such crimes, or lacks the knowledge of the practical steps it can take to avoid involvement – or because its operations, products or services are directly linked to such crimes through a commercial relationship.⁹

Contribution

A company may contribute to mass atrocity crimes through a business relationship by facilitating or motivating another entity to commit an abuse.

The company may provide direct assistance in the form of supplies or transportation to public security forces that are then involved in the commission of mass atrocities. Some of the most well-known examples of this have occurred in the extractive sector. For example, the allegations against Anvil Mining (now part of China Minmetals) involving crimes committed in the Democratic Republic of the Congo (DRC).¹⁰

In 2004, the town of Kilwa was engulfed by fighting between the Armed Forces of the DRC (FARDC) and a group of armed rebels. A number of FARDC soldiers were later found guilty of war crimes against the civilian population. DRC prosecutors charged Anvil staff with

facilitating these crimes by providing transportation to the FARDC for the operation. The company argued that the army had requisitioned its planes and vehicles, and the staff members were acquitted. A series of investigations and civil law suits in home state jurisdictions (Australia and Canada) have been inconclusive.

Allegations have also been leveled against companies in the private security sector in the context of providing assistance to state armed forces. For example, the United States-based private security company Military Professional Resources Incorporated (MPRI) trained the Croatian army shortly before the launch of the army's Operation Storm in 1995 during the conflict in the Balkans. Operation Storm was intended to restore control over a large swath of territory and resulted in the flight of nearly the entire Serbian population of the area (between 150,000-200,000 people). While the International Court of Justice ultimately held that the operation did not involve genocide, it reaffirmed that serious crimes against the Serb civilians had taken place.¹¹ There have also been allegations that MPRI may have provided scenario planning and United States government satellite intelligence to Croatia, but this has been denied by the various parties.¹²

Companies may also facilitate mass atrocity crimes through their products or services. This has emerged as a particular risk in the Information and Communication Technologies (ICT) sector. For example, a telecommunications company may permit the dissemination of hate speech by political parties through its network that incites listeners to commit mass atrocity crimes. This occurred during the disputed 2007 presidential election in Kenya and the violence that followed. As a result, Safaricom, the country's largest mobile network operator, took specific steps to mitigate the risk that its services would be used for such purposes in the 2013 election, including developing a code of conduct to prevent such messages from being disseminated through its bulk SMS service.¹³

ICT companies that provide monitoring and surveillance equipment or software to governments are likely to be at heightened risk of contributing to mass atrocity crimes in certain contexts. For example, criminal complaints have been brought against two French companies, Amesys and Qosmos, involving allegations regarding the provision of communications surveillance equipment that enabled torture: Amesys in relation to the former Gaddafi government in Libya,¹⁴ and Qosmos in relation to the Bashar al-Assad government in Syria – both civil war contexts where mass atrocity crimes were committed.¹⁵

Direct Linkage

Given the global supply chains of many companies today, perhaps the most common way in which a company may be involved in mass atrocity crimes is where the company itself has not caused or contributed to the crimes but its operations, products or services are directly linked to such crimes through its business relationships.

For example, companies in a wide range of sectors, including electronics, automotive and consumer goods, have been required or are under pressure to develop due diligence approaches to prevent “conflict minerals” from entering their global supply chains. The term originated in relation to the largely artisanal extraction of gold, tin, tantalum and tungsten in eastern DRC. Armed militias have identified these sites as fertile ground for extracting rents from the local miners and their families to fund their military campaigns. Artisanal and small-scale mining often involves life-threatening health and safety conditions. These risks are compounded in conflict minerals contexts by severe abuses such as murder, rape and forced labor perpetrated by militias that control the production process against those who are the most vulnerable, particularly women and children. Similar abuses have occurred in other conflict-affected areas such as Afghanistan, Central African Republic and Colombia.

A company’s operations may also be directly linked to mass atrocity crimes where it inherits an asset that was obtained in the course of such abuses being committed by another entity. For example, a government may have a policy that amounts to ethnic cleansing of a particular population, with their lands being confiscated by the state. The government then sells or rents the land to a local or international company for a large-scale infrastructure or agribusiness project, without the pressure of competing local land claims. A potential example of this could be companies benefiting from the forced dispossession of the Rohingya population in Rakhine State and other areas of Burma/Myanmar.¹⁶ A company may acquire the land directly from the government or through indirect ‘crony-led’ companies.¹⁷

To take a wider view, it is important for business actors to be aware of how they may exacerbate underlying tensions that can fuel mass atrocities, even if their actions are inadvertent. This can occur well before the point in time at which a business may be at risk of causing, contributing or being directly linked to such abuses. For example, a company in any sector may have discriminatory hiring or promotion practices that unfairly favor a privileged or politically powerful ethnic group. This practice causes immediate human rights

harm since it violates the right to non-discrimination of individuals outside that group. However, in certain contexts, it can also compound a shared sense of grievance and marginalization among the excluded ethnic group (or groups), which can feed directly into the kinds of ethnic tensions that are often seen in mass atrocity contexts, as was the case in Kenya before the 2007-08 election violence.

Such practices may therefore be a “leading indicator” of risks of mass atrocity crimes in certain settings in the same way that workers’ failure to use appropriate safety equipment can be a leading indicator of fatalities in the workplace. Companies from all sectors should be aware of such risks.

Taking Action

The UNGPs clarify what companies are expected to do to prevent and address negative human rights impacts, including potential involvement in abuses amounting to mass atrocity crimes. The actions that a business should take depends on how it may be involved with the abuses, based on the categories of causation, contribution and linkage. Those expectations are summarized in the following table:

<i>IF A COMPANY...</i>	<i>THEN IT SHOULD...</i>
Causes or is at risk of causing a negative impact	Mitigate/prevent the impact <i>AND</i> Remediate the harm
Contributes or is at risk of contributing to a negative impact	Mitigate/prevent the impact <i>AND</i> Contribute to remediating the harm <i>AND</i> Use or increase its leverage with the responsible parties to mitigate/prevent the remaining impact
Finds its operations, products or services are or are at risk of being directly linked to a negative impact	Use or increase its leverage with the responsible parties to seek to mitigate or prevent the impact Remediation is not required under the UNGPs, though the company may choose to engage in it

Leverage is a critical concept in the UNGPs; it means the ability to influence the behavior of the entity that is causing the harm or committing the crime. To avoid being involved in human rights abuses, companies need to use the leverage that they have, and where necessary, build leverage, to address human rights risks. This is particularly important where those risks are systemic or very severe in nature, or are the result of the behavior of other actors, such as state security forces.

Leverage can be built in various ways, for example, by engaging with peer companies or industry associations in order to develop a common position on an issue, or through bilateral engagement with individual governments to try to persuade them to take action (for example, by emphasizing the economic costs of conflict for business and society at large), or with non-governmental organizations (NGOs) or international organizations that have particular expertise and/or a critical role to play in preventing mass atrocities. Leverage can also be built through multi-stakeholder initiatives that bring together a broader group of actors with complementary skills and perspectives. A number of these approaches have been adopted by companies in existing efforts to prevent and address corporate involvement in serious human rights abuses.

MEETING THE NEW GLOBAL EXPECTATIONS OF BUSINESS: THE BLUEPRINT FOR COMPANIES IN THE UNGPS

Since their endorsement, the UNGPs have become the authoritative global standard on business and human rights. The expectations of companies in the UNGPs have been incorporated into a range of relevant international frameworks that guide or direct business behavior, including the Organization for Economic Development and Cooperation (OECD) Guidelines for Multinational Enterprises, the International Finance Corporation's Performance Standards, and in various commitments and other statements from regional bodies, including the African Union, Association of East Asian States' Intergovernmental Commission on Human Rights, European Union (EU) and Organization of American States. They are also increasingly being incorporated in national law and policy.

Aspects of the corporate responsibility to respect are reflected in existing domestic criminal, consumer protection, environmental, labor and other laws in many

countries. Furthermore, as of November 2015, nine EU member states had published National Action Plans (NAPs) on the UNGPs (Denmark, Finland, Lithuania, the Netherlands, Norway, Sweden and the United Kingdom, with Italy and Spain producing initial plans). Public sources indicate that NAPs are being developed in a wide range of other states including Argentina, Azerbaijan, Belgium, Brazil, Burma/Myanmar, Chile, Colombia, France, Germany, Greece, Guatemala, Ireland, Jordan, Latvia, Malaysia, Mauritius, Mexico, Morocco, Mozambique, Portugal, Scotland, Slovenia, Switzerland and the United States. The rapid growth in national reporting requirements for companies with regard to their management of human rights risks has also been driving greater attention to the UNGPs.¹⁸

Implementing the corporate responsibility to respect involves adopting company policies and processes that focus on the risks to people, rather than just the risks to business. This includes:

- A policy commitment to respect human rights that is embedded throughout the company;
- Human rights due diligence processes to:
 - assess the company's actual and potential human rights impacts;
 - integrate the findings of those assessments and take action to prevent or mitigate potential impacts;
 - track the company's performance; and
 - be prepared to communicate about the company's performance;
- Processes to provide remedy to those harmed where the company identifies that it has caused or contributed to a negative impact.

To effectively prevent and address human rights risks, companies need to understand the perspectives of those who may be impacted. This means engaging wherever possible with potentially affected stakeholders, or with their legitimate representatives. Where such engagement is not possible, companies may be able to gain insights through consultation with credible proxies for their views, including independent experts, human rights defenders and others in civil society or relevant international organizations.

The UNGPs make clear that companies should respect international human rights standards wherever they operate, including seeking ways to do so when faced with

conflicting domestic requirements. Where national standards conflict with international human rights standards, companies need to explore the scope for action through, for example, seeking clarification from the government, challenging the provisions (directly or through an industry association), learning from the approaches of peer companies or consulting with independent experts and local stakeholders about how to manage the conflict.

This is especially important in contexts where there is formally entrenched discrimination against certain groups or other legal provisions that could create a heightened risk of mass atrocity crimes. Businesses that decide to enter into, or operate in, such contexts need to be able to show that they can do so in a way that meets their responsibility to respect human rights by taking account of the heightened risks involved.¹⁹

The UNGPs state that businesses should “treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate” (Principle 23). This reflects the expanding web of potential corporate legal liability arising from the incorporation of the Rome Statute of the International Criminal Court in jurisdictions already providing for corporate criminal responsibility, as well as the growing number of extraterritorial civil claims relating to alleged corporate involvement in gross human rights abuses.²⁰ Directors and company staff may also be subject to individual liability for involvement in mass atrocity crimes.

MEETING THE STATE DUTY TO PROTECT: THE POLICY GUIDANCE IN THE UNGPS

The UNGPs help states understand how they can better encourage, incentivize and require business respect for human rights, including by:

- Creating greater policy coherence between their human rights obligations and their actions with respect to business by enforcing existing laws, identifying and addressing any policy or regulatory gaps, and providing effective guidance to business;
- Fostering business respect for human rights both at home and abroad, including where there is a state-business nexus (such as where there is state ownership of business, where the state procures

good or services from business, or through export credit or trade support to businesses);

- Helping ensure that businesses operating in conflict-affected areas do not commit or contribute to gross human rights abuses, including by helping them understand the risks and appropriately sanctioning them where they are involved in such abuses;
- Seeking to ensure, through their participation in multilateral institutions, that those institutions do not hinder states from meeting their own duty to protect against business-related human rights abuses;
- Encouraging multilateral institutions to promote business respect for human rights and to support states in meeting their duty to protect, including through technical assistance and capacity-building support; and
- Taking appropriate steps to ensure access to remedy for those harmed by business-related abuses through effective judicial and non-judicial mechanisms.

What are some examples of current approaches that states can build on to encourage, incentivize or require companies to undertake to avoid involvement in mass atrocity crimes?

States should not assume that business prefers silence or a lack of guidance from government on human rights issues. Business involvement in human rights violations may be unintentional, for example where it results from a lack of understanding of the relevant international human rights standards or of the policies and processes that companies should adopt to meet those standards in practice. The state has a critical role to play in helping to provide that clarity.

Generally speaking, most states do not clearly convey their expectations of businesses when it comes to preventing and addressing involvement in human rights abuses amounting to mass atrocity crimes. In each of the examples above, there are practical steps that the companies involved could have taken to avoid or mitigate the risk of involvement in such crimes. For example, states can raise awareness of the UNGPs and relevant industry or issue-specific initiatives with business, incentivize or require business to report on how they are implementing human rights due diligence processes, or

highlight and share good practices adopted by companies. There are a number of existing initiatives that states should be aware of in this regard.

With respect to the extractive and private security sectors, leading initiatives include:

- The Voluntary Principles on Security and Human Rights, which were established in 2000 and are intended to guide companies in maintaining the safety and security of their operations in a way that also helps ensure respect for human rights. The initiative involves nine governments, including the United Kingdom, United States, Colombia and Ghana, as well as leading extractive companies and NGOs, and it includes detailed guidance on how companies should engage with both public and private security forces to try to mitigate the risk of the kinds of situations described in Part 2 above.²¹
- In 2008, 17 states agreed on the “Montreux Document,” a set of approaches to improve respect for human rights in the private security sector.²² As of November 2015, 53 states supported the document.²³ Subsequently, state, industry and civil society actors negotiated the International Code of Conduct for Private Security Service Providers (ICoC), which broadly aligns with the UNGPs. An increasing number of companies are members of the ICoC Association, the oversight mechanism for the Code that was established in 2013.²⁴

In the ICT sector, relevant approaches include:

- The Global Network Initiative (GNI) is a multi-stakeholder initiative involving online and software companies and civil society experts. It has developed a set of principles to guide company members in ensuring respect for freedom of expression and privacy rights throughout their operations, in line with the UNGPs. GNI is now engaging with a group of telecommunications companies to explore how these issues play out in their distinct operations, products and services.²⁵
- There have been policy discussions in the United Kingdom about how to encourage greater human rights due diligence by companies exporting particular ICT products or services, while recognizing the need for individuals living under repressive regimes to have access to innovative technologies.²⁶

Approaches that focus on heightened due diligence and transparency requirements for high-risk contexts include:

- In 2001 the OECD published Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, which is closely aligned with the understanding of human rights due diligence in the UNGPs.²⁷ The guidance has been integrated into the tools of the Regional Initiative against the Illegal Exploitation of Natural Resources of the International Conference on the Great Lakes Region (ICGLR), which is working to break the connections between mineral revenues and the financing of armed groups.²⁸ The ICGLR also has a work-stream on the prevention of genocide, war crimes and crimes against humanity.
- The OECD Guidance has been endorsed by the United States Department of State, which encourages companies to draw upon it in meeting the requirements of section 1502 of the Dodd-Frank Act that establishes mandatory reporting on conflict minerals due diligence. The EU Parliament is currently considering mandatory certification requirements on EU importers of minerals from conflict-affected areas.
- Both companies and NGOs have expressed support for the United States State Department’s Responsible Investment Reporting Requirements for United States companies operating in Burma/Myanmar above a \$500,000 investment threshold.²⁹ Company reports submitted in line with the guidelines have gone into detail about their efforts to manage human rights risks involved in conducting business in Burma/Myanmar, including land-related risks.³⁰

What more should states specifically be doing to address these risks in conflict-affected and other high-risk contexts?

This was a topic of particular attention during the former SRSG’s mandate. The SRSG ran a series of workshops to help generate such proposals, including representatives from Belgium, Brazil, Canada, China, Colombia, Guatemala, Nigeria, Norway, Sierra Leone, Switzerland, United Kingdom and United States.

The workshops were structured as brainstorming sessions to identify policy options to help prevent and deter business involvement in gross abuses, including

mass atrocity crimes, in conflict-affected areas. These included options for home states (i.e. the state where a company is incorporated or has its headquarters), host states (a place other than the home state where the company has operations) and neighboring states (states that are in close proximity to the relevant host state). Participating states were not expected to reach consensus or endorse any particular proposal.³¹

The workshops confirmed the importance of all states – home, host and neighboring – in seeking to address issues early with relevant companies before conditions on the ground deteriorate. Where the host state is unable to meet its duty to protect against business-related abuses under the UNGPs (or indeed its role in upholding its R2P), home states of transnational corporations have a role to play in assisting both those companies and the host state to prevent business involvement in mass atrocity crimes. Neighboring states can provide important additional support.

The workshops also highlighted the need to improve policy coordination on these issues among key government departments and agencies in home states (including foreign affairs, development, trade and export credit), as well as with embassies in host states where multinational companies are operating. In addition, greater coordination is needed with the relevant industry-specific ministries in the host state (e.g. mining or telecommunications).³²

The workshops generated a number of practical steps that states can take, many of which merit further exploration from an R2P perspective. For example, home states could provide greater capacity-building support to host states from the very earliest stages of business investment in a country.

Appropriate technical support is critically important in getting the terms of “investor-state contracts” (that is, agreements between private sector investors and the host state) right. The Principles for Responsible Contracts were presented at the same time as the UNGPs in an addendum report by the former SRSG.³³ They provide detailed guidance for state and company negotiators on how to integrate human rights into such agreements. Several West African governments, including Liberia and Sierra Leone, have been at the forefront of efforts to strengthen their ability to integrate social and environmental considerations into such agreements.³⁴

Where a host state requires a company to make direct payments to the state’s security or military forces (versus arranging that through the broader tax system), home

states could work with the host state to ensure that appropriate legal agreements and oversight mechanisms are in place to govern the use of such payments.

Where human rights risks are evident or start to escalate, specific steps by states to strengthen engagement with companies can include:³⁵

- Requiring companies to have human rights policies or due diligence processes in place before providing them with further support (e.g. the recent Canadian extractive sector CSR policy that ties respect for the UNGPs to export credit and trade promotion services);³⁶
- Sharing information with companies about the human rights risks in specific operating contexts, including tailored bulletins;
- Using a “travel advisory”-type warning system to trigger heightened due diligence by business or greater engagement (whether between embassies and companies’ local subsidiaries or between capital and corporate headquarters) about the risk of mass atrocity crimes;
- Training trade promotion officers to understand how companies can be involved with human rights abuses, including mass atrocity crimes, and how they can talk to them about this risk, or potentially creating a duty on them to do so (as some states do with corruption risks, for example).³⁷

While many companies are responsible, or seek to be so, the workshops highlighted the need for states to distinguish between cooperative and uncooperative companies and adopt different strategies with regard to each. Relevant approaches by states to deal with uncooperative companies could include:³⁸

- Intervening with senior company individuals at headquarters level (if the company is a multinational);
- Publicly questioning (in the media or in parliament) the company’s approach and/or distancing the state from its operations;
- Involving neighboring states or a regional body in investigation, monitoring or sanctions;
- Refusing to do business with such companies through procurement or trade support.

And, where specific abuses are alleged:

- Commencing prosecutions against appropriate individuals or the company itself (where corporate liability for such crimes exists);
- Imposing unilateral or multilateral sanctions on an individual director or on the business;
- Putting the name of an individual or company forward for listing by the UN Security Council for supporting parties to a conflict.³⁹

In his final report to the Human Rights Council in 2011 that contained the UNGPs, the former SRSG also recommended that states consider defining the risks or activities that would prompt the sorts of responses identified above, especially in relation to uncooperative companies, through further multilateral discussions given states' general reluctance to put their own businesses at a competitive disadvantage.⁴⁰ In 2014 the UN Human Rights Council created an open-ended Intergovernmental Working Group on the question of a binding treaty on business and human rights, which met for the first time in July 2015. It is clear that approaches in this space will, and need to, continue to evolve.

NEXT STEPS

During the six-year mandate of the former SRSG, it was often challenging to engage justice ministries in discussions about how best to advance business respect

for human rights. R2P provides an important opportunity in this regard. National R2P Focal Points that are located within legal or justice departments can play a critical role in reaching out to colleagues in trade, foreign affairs, commercial and other ministries about the nexus between their work and existing or planned government initiatives on business and human rights. In addition, R2P Focal Points that are housed within foreign affairs departments are likely to be well-placed to engage legal colleagues because of the natural connections between R2P and justice-related issues.

While there is clearly much more work to be done to develop and strengthen prevention and accountability efforts around corporate involvement in mass atrocity crimes, as the practical workshops convened by the SRSG with key states showed, without greater policy coherence between relevant state actors domestically, such efforts will remain limited in their reach and impact.

Hopefully this briefing paper can help stimulate further discussions, and action, by states on the nexus between business and R2P.

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¹ This paper builds on an initial discussion of these issues by government officials from a range of African, Asian, European, Latin American and North American countries and other experts during the fourth annual meeting of the Global Network of R2P Focal Points in Gabarone, Botswana in June 2014. It is intended as a first step in understanding the implications of the UNGPs for the R2P agenda and aims to generate further discussion and ideas.

² See "The Responsibility to Protect: Background Briefing," Global Centre for the Responsibility to Protect, p 2.

³ One of their major and widely recognized contributions has been to clearly set out the respective duties of states and the responsibilities of companies to ensure that businesses operate with respect for human rights.

⁴ For a recent paper on the relevance of the private sector to R2P prevention efforts see Tessa Alleblas, "The Responsibility to Protect and the Private Sector: Making the Case for Private Sector Involvement in Mass Atrocity Prevention," 2015. The paper highlights valuable examples of approaches by companies to conflict prevention but takes the traditional understanding of CSR as a voluntary approach as its main lens.

⁵ Note that companies that sign on to the UN Global Compact's 10 principles commit to not only respect but also support human rights. The UNGPs provide guidance on how companies can meet the Global Compact's principles concerning respect for human rights.

⁶ See, in particular, Jane Nelson, "The Business of Peace: The Private Sector as a Partner in Conflict Prevention and Resolution," 2000, Alexandra Guáqueta, "Local Business, Local Peace: The Peacebuilding Potential of the Domestic Private Sector," 2006. See generally the resources available through the UN Global Compact's Business for Peace initiative, available at: https://www.unglobalcompact.org/issues/conflict_prevention/ and the Business & Human Rights Resource Centre's Business, Conflict and Peace Portal, available at: <http://business-humanrights.org/en/conflict-peace/latest-news-on-conflict-peace>.

⁷ Special Representative of the UN Secretary-General for Business and Human Rights, "Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse," May 2008, UN Doc A/HRC/8/5/Add.2.

⁸ See <http://www.unictr.org/en/cases/ictr-96-13>.

⁹ Note however the conviction of the Dutch businessman Frans van Anraat for complicity in war crimes resulting from his sale of the raw materials needed for the production of chemical weapons to Saddam Hussein. The chemical weapons were used, among other occasions, during the genocidal Al-Anfal campaign against the Kurds in northern Iraq.

¹⁰ The following draws on the description, available at: <http://business-humanrights.org/en/anvil-mining-lawsuit-rem-dem-of-congo>.

¹¹ See <http://www.bbc.com/news/world-europe-31104973>.

¹² See “Prelude” for a summary of sources in http://en.wikipedia.org/wiki/Operation_Storm#CITEREFBBC_News3_February_2015.

¹³ For a detailed account of the company’s efforts see <http://www.ihrb.org/pdf/DD-Safaricom-Case-Study.pdf>. Note also the ICC case currently against Joshua Arap Sang, the head of operations for Kass FM in Nairobi alleging that he contributed to various crimes against humanity during the violence: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/Pages/icc01090111.aspx. See also Alleblas, note 3 above, on the role of the Kenya Private Sector Alliance in supporting peaceful elections in 2013 specifically through working with the media, pp 13-16.

¹⁴ See <http://business-humanrights.org/en/amesys-lawsuit-re-libya-0#c18496>.

¹⁵ See <http://business-humanrights.org/en/qosmos-lawsuit-re-syria>.

¹⁶ See generally, http://www.globalr2p.org/regions/burma_myanmar; on recent government plans see <http://www.hrw.org/news/2014/10/03/burma-government-plan-would-segregate-rohingya>.

¹⁷ The latter is a pervasive problem in Myanmar. See pp 20-22 in <http://www.shiftproject.org/publication/conducting-meaningful-stakeholder-consultation-myanmar>.

¹⁸ See, in particular, the UN Guiding Principles Reporting Framework: www.UNGPreporing.org.

¹⁹ See Shift, *Human Rights Due Diligence in High-Risk Circumstances*, 2015, available at: <http://www.shiftproject.org/publication/human-rights-due-diligence-high-risk-circumstances-practical-strategies-businesses>.

²⁰ See, the ICRC publication that explains how international humanitarian law is relevant for companies: <https://www.icrc.org/eng/resources/documents/misc/business-ihl-150806.htm> and the “Red Flags” quick reference tool at <http://www.redflags.info>.

²¹ See <http://www.voluntaryprinciples.org> and the Implementation Guidance Tools, available at: http://www.voluntaryprinciples.org/files/Implementation_Guidance_Tools.pdf. See also the Security and Human Rights Knowledge Hub, available at: <http://www.securityhumanrightshub.org>.

²² The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Contractors during Armed Conflict of 17 September 2008.

²³ See <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html>.

²⁴ See <http://icoca.ch>.

²⁵ See <https://www.globalnetworkinitiative.org>.

²⁶ See the guidance developed on human rights due diligence in the export context for cyber security companies by the Cyber Growth Partnership:

http://www.techuk.org/images/CGP_Docs/Assessing_Cyber_Security_Export_Risks_website_FINAL_3.pdf.

²⁷ See <http://www.oecd.org/corporate/mne/mining.htm>.

²⁸ See <http://www.icglr.org/index.php/en/natural-resources>.

²⁹ Available at: <http://www.humanrights.gov/wp-content/uploads/2013/05/responsible-investment-reporting-requirements-final.pdf>.

³⁰ See, pp 11-17 of The Coca-Cola Company’s initial 2013 report, available at: <http://photos.state.gov/libraries/burma/895/pdf/TCCCStateDepartmentResponsibleInvestment%20in%20MyanmarReport121213.pdf>.

³¹ A report on the workshops was included as one of the four addenda to the report containing the Guiding Principles in 2011: Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and human rights in conflict-affected regions: Challenges and options towards state responses*, UN Doc. A/HRC/17/32, 27 May 2011, Summary, available at: <http://www.shiftproject.org/publication/business-and-human-rights-conflict-affected-regions-challenges-and-options-towards-state>.

³² In the humanitarian space, a 2014 study makes the interesting observation that while voluntary private sector engagement in crisis contexts has to date focused on disaster-affected situations, it is likely to increase in conflict contexts in countries where the government is particularly sensitive to sovereignty concerns and may be wary of UN or other state-supported service providers. See Steven A Zyck and Randolph Kent, “Humanitarian Crises, Emergency Preparedness and Response: The Role of Business and the Private Sector,” July 2014, pp 13-14.

³³ Available at: <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>. See also the self-study tool from the OHCHR, available at: <http://www.ohchr.org/EN/Issues/Business/Pages/trainingmodules.aspx>.

³⁴ The African Legal Support Facility established by the African Development Bank provides support to African governments on the negotiation of complex commercial transactions with private investors: <http://negotiationsupport.org/matrix/african-legal-support-facility>.

³⁵ See workshop report, para 16.

³⁶ See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>.

³⁷ See the United Kingdom’s *Business and Human Rights Toolkit: How United Kingdom overseas missions can promote good conduct by United Kingdom companies*, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35451/business-toolkit.pdf.

³⁸ See workshop report, paras 17 and 18.

³⁹ As the UNGPs note, such steps are in addition to states’ existing obligations under international criminal law and international humanitarian law in situations of armed conflict: commentary to Guiding Principle 7.

⁴⁰ See workshop report para 21.