

Comments on the Proposed Elements for guidance on the role of business in relation to human rights defenders in line with the UN Guiding Principles on Business and Human Rights

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Conectas Human Rights welcomes the invitation to comment on the draft discussion paper *Identifying Elements for Guidance on Human Rights Defenders and the Role of Business*, by the UN Working Group on Business and Human Rights (Working Group or WG). This initiative is timely and much appreciated. This document analyzes the proposed elements for guidance and provides brief responses to some of the questions placed by the WG.

As an introductory observation, the Working Group has an essential role to play in framing the issue of human rights defenders in public debate. However obvious it might be for those familiarized with the role of defenders that they are a group particularly vulnerable to rights' violations, the perception of the wider public about the issue is not clear-cut. In countries like Brazil, human rights defenders' struggles are often connected with historical injustices, such as land concentration and violence against rural workers. In such scenarios, human rights defenders inevitably find themselves navigating in complex and deep-rooted political disputes that set apart different segments of society, thus making them even more vulnerable to attacks and hostility.

I. Pillar One: State Duty to Protect

Guiding Principles 1 and 2

In 2004, the Brazilian State created the Human Rights Defenders Protection Program, seeking to protect the life and physical integrity of those who work defending human rights in the country. Human rights defenders included in the program are offered a set of protection measures, including public hearings aiming to resolve conflicts, following up on investigations and complaints, dissemination of information on the defender's activities, temporary removal of the defender from its current place of work and police protection in cases of particular risk and vulnerability. It was considered a good state practice, but, in the past few years, the program has been suffering a severe crisis that has considerably weakened its effectiveness. Today, it only exists in seven states, out of 27 (Bahia, Minas Gerais, Espírito Santo, Pernambuco, Rio de Janeiro, Rio Grande do Sul, and Ceará). Where creating and implementing such programs, states must:

- Create independent and specialized agencies and police units to receive complaints and to promote the protection of human rights defenders;
- Providing these agencies with the necessary funds and resources to carry out the protection programs;
- Respect the right to free, prior, and informed consultation when developing and implementing protection programs aiming to protect human rights defenders from indigenous and other traditional communities, in accordance with the ILO Convention 169;
- Carry out the protection programs efficiently and in a timely manner;
- Communicate clearly and effectively the existence of such programs, ensuring that human rights defenders are aware of their right to request protection.

National human rights institutions also play a critical role in protecting the rights of human rights defenders. The Brazilian National Human Rights Council (CNDH) is composed by 11 members of the Brazilian government and 11 representatives of civil society and it has the purpose of promoting and human rights through preventive, protective, remedial measures. CNDH has a Permanent Commission on Human Rights Defenders and the Criminalization of Social Movements, which visits areas with an increased risk of attacks against human rights defenders and produces reports with recommendations on how to address these risks. Recently, it published a report on the situation of human rights defenders in the state of Rondônia, in which it identified risks to human rights defenders resulting from conflicts related to the activity of corporations in the state.

Guiding Principle 3

With regards to the way in which states can better provide guidance and enforce laws relating to how business can respect the rights of human rights defenders, it is important to mention legislative and administrative provisions creating reporting obligations. According to the Resolution N. 4327/2014 of the Central Bank of Brazil, banks are required to develop socio-environmental policies and to establish an action plan to implement the provisions set out in their policies. To comply with the new rule, many banks created or adapted their previous socio-environmental policies. The Brazilian National Bank for Economic and Social Development (BNDES), for example, increased the dialogue with stakeholders and started to disclose more information on its fundings, including projects abroad. However, the Resolution lacks minimum substantive requirements for the Environmental & Social Policies. As a result, financial institutions still resist adopting a more proactive attitude in protecting human rights and rarely include any kind of language about the protection of human rights defenders. Therefore, when imposing reporting obligations to business enterprises, states must include the obligation to disclose information on measures that such companies adopt in order to prevent, mitigate and remedy violations against human rights defenders.

Additionally, there are certain business sectors and geographic areas that present heightened risks of abuses against human rights defenders. In Brazil, defenders working in areas marked by conflicts related to land and the environment are particularly targeted. In 2015, the figures reached 50 killings, 144 threats, and 59 attempted murders related to land conflicts in Brazil. 90% of them occurred in the states of Rondônia, Pará, and Maranhão. Mapping areas and sectors in which human rights defenders face greater risks of attacks is critical to identify measures capable of preventing harms. States should provide guidance on how businesses may incorporate such contextual issues into their operations, and how this should be embedded in the human rights due diligence.

Guiding Principles 4, 5 and 6

States might factor in business engaging in activity that poses risks of adverse human rights impacts to defenders by:

- Including clauses in international investment agreements calling investors to respect the rights of human rights defenders and to create an environment in which defenders can work without fear of reprisals and prosecution;
- Conditioning the provision of funds to development projects to the existence of safeguards focused on the protection of human rights defenders;

- Barring a company involved in attacks against human rights defenders from participating in tender and procurement processes and from accessing public funding.

The safeguards contained in public contracts, development banks' policies and international investment agreements should explicitly acknowledge the right of defenders to present complaints before dispute-settlement and grievance mechanisms, and to be afforded hearings where they can present their concerns about the behaviour of companies and agents acting on their behalf.

II. Pillar Two: Corporate Responsibility to Respect

Guiding Principles 11 - 15

With regards to the degree of involvement that business enterprises may have with adverse human rights impacts, it is important to mention that attacks against defenders working in the field of business and human rights are not necessarily perpetrated by corporate actors. In many cases, police forces and other state officials violate the rights of human rights defenders to defend the interests of private entities. Business enterprises *contribute to* these attacks when they know, or should know, that there is an increased risk of attacks against defenders related to their operations and, still, they refrain from taking concrete steps in order to prevent them.

Guiding Principles 16 - 21

Best practices in human rights due diligence provide that business enterprises must hold meaningful and adequate consultation with the communities potentially affected by the human rights impacts related to their operations. All the risks should be disclosed to the potentially affected communities, who must also be granted the opportunity to effectively influence and shape the measures to prevent, mitigate and remedy these risks. Human rights defenders should be included in this process. Defenders play a critical role in identifying potential risks and in creating solutions to address them. Therefore, business enterprises should incorporate the participation of human rights defenders throughout the entire due diligence process. Additionally, it is important to conduct human rights due diligence focused on identifying, preventing, mitigating, and accounting for risks to human rights defenders in particular. Human rights defenders face a particular set of risks and harms, and a general due diligence process may not be able to identify them.

III. Pillar Three: Access to Remedies

Guiding Principle 26

Access to effective remedies remains a major weakness in the implementation of the UNGPs. A potential good example can be mentioned. According to the Brazilian Constitution, Federal Courts may have jurisdiction over cases involving serious human rights violations with the express purpose of guaranteeing the compliance with international human rights treaties to which Brazil is a party, including gross human rights violations against human rights defenders. The provision lacks concrete criteria and legal certainty to be applied and the cases have to undergo a lengthy procedure in order to be heard by Federal Courts. Still, it may guarantee that effective remedies are provided in cases in which state courts are not impartial and are more susceptible to be influenced by corporate interests. This type of remedy adds one layer of protection to the work of human rights defenders, and the WG could provide further guidance on its legal design and operationalization.