



INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

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ICJ's comments on the draft "Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines" prepared by Paul Hunt, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

1. The International Commission of Jurists- ICJ congratulates the Special Rapporteur for this initiative that addresses an increasingly important international actor on a crucial issue for the realisation of the right to health. The strategic work framework and plan of work of the ICJ assigns particular importance to international initiatives and standard setting exercises in the fields of economic and social rights and on business and human rights.

2. During the last two years the ICJ's work on business and human rights has focused on two main aspects. Firstly the work of an Expert Legal Panel on corporate complicity and secondly, advocacy and strategic thinking in relation to the need for international intergovernmental standards on business and human rights issues. The ICJ's Expert Legal Panel on Corporate Complicity in International Crimes was established in 2006 to develop the legal and public policy meaning of corporate complicity in the worst violations of international human rights and humanitarian law that amount to international crimes. The Panel brings together renowned lawyers from a variety of legal traditions and disciplines, including: public international law, corporate law, criminal law, environmental law, international humanitarian law, human rights law and labour law.

3. After over eighteen months of work the Panel is now in the final stages of drafting its report, which will become public in the first half of 2008. At the ICJ we believe that many of the concepts and principles relevant in the context of complicity with international crimes and gross human rights violations may also be relevant in the context of possible violations of the right to health, not least because in certain circumstances violations of the right to health would amount to gross human rights violations (www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity).

4. The activities of pharmaceutical companies, including those of transnational nature, are increasingly relevant for the realisation of the right to the highest attainable standard of health as they are perhaps the main actor in the research, production and marketing of medicines.

5. The ICJ notes that the proposed guidelines are based on well-recognised human rights principles and norms. In particular, the ICJ welcomes that a key concept of the right to health, the element of accessibility, has been found as crucially relevant for pharmaceutical companies despite being originally developed for States. This exemplifies a trend in international law reaffirming and/or extending liability and responsibility of private persons or entities for acts that impair the enjoyment of human rights.



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6. However, questions remain about the nature of the Guidelines and its potential effectiveness. Given that pharmaceutical companies are primarily for-profit economic actors there are not clear incentives for these companies to follow the proposed Guidelines, making them largely optional and basically akin to recommendations of moral nature. To mitigate this problem, the Special Rapporteur may consider stronger and independent monitoring and accountability mechanisms that would exert pressure over pharmaceutical companies to comply with the Guidelines. It would also be important to add a saving clause stating that these Guidelines should not be interpreted as derogation from, modification or amendment of existing international human rights obligations of States to regulate the activities of pharmaceutical companies or as an excuse for not doing so.

7. The following comments are organised under subheadings adopted in the original draft Guidelines.

General

8. The ICJ believes that paragraph 4 of the draft Guidelines is problematic and needs to be strengthened and expanded to also cover applicable international law. In too many countries national legislation is inconsistent with the international obligations of the State in question. In these cases, pharmaceutical companies should be called on to respect relevant international law.

9. A company can engage in a legally wrongful act directly or indirectly. It can be the principal actor responsible for a wrongful act, or it can be a secondary actor that through certain conduct assists or encourages another principal actor to carry out a wrongful act. It can be indirectly responsible, for instance, if it encourages a State to act in a way that is inconsistent with its obligations (para.5), but it is important to recall that it may also engage in conduct that is directly damaging the protected rights. In this sense, perhaps a phrase may be included to open paragraph 5 to the effect that " companies should respect human rights, and should refrain from any conduct that negatively affects/harms the enjoyment of human rights, in particular the right to health". This phrase would encompass the need to avoid both the primary and secondary involvement of companies in human rights violations.

10. Furthermore, indirect participation may happen not only through acts of encouragement but also through acts that help, assist, facilitate or renders it possible the principal actor to adopt a course of conduct that is inconsistent with human rights obligations. Perhaps the current wording of paragraph 5 might be further expanded to include the instances in which companies can become involved in human rights violations beyond encouragement.

11. One of the main characteristics of pharmaceutical companies in a globalised world is their nature of transnational conglomerates operating through a network of subsidiaries, sub-contractors, joint ventures and other similar modalities. In this context it becomes crucial to address the responsibilities of parent companies with regard to their subsidiaries and subcontractors. The objective being to ensure that the whole transnational company does not avoid responsibility by operating through subsidiaries or by hiring sub-contractors. We would suggest the insertion of a paragraph on the duties of parent companies to take reasonable and



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necessary action to ensure that subsidiaries and sub-contractors do not adopt courses of conduct that would infringe the right to health. (paragraph 12 addresses subsidiaries but only in the context of disclosure of lobbying and advocacy positions. Paragraph 42 addresses partnerships of only private-public nature). This requirement should be developed in successive sections when it is needed. It might also be advisable to include a note about the responsibility of joint venture partners to ensure the actions of their partners while undertaking the joint venture do not infringe human rights.

Patents and licensing

12. The introductory paragraph to this section may be seen by some as recognition that some features of intellectual property rights protect human rights, which some scholars have taken up to argue that intellectual property rights are in fact human rights. It would be better to be more precise and refer to intellectual property rights law that defer to the protection of the right to health of patients.

Monitoring and accountability

13. As it stands, this section is focused only on monitoring the company's strategies and policies as well as on accountability in relation to the Guidelines themselves. However, it would be desirable to adopt a more victim-centered approach and underline the rights of victims of human rights violations in situations where various actors impede or curtail their access to medicines to an effective remedy and reparations under international law. It might be helpful to recall in this context the relevant obligations of states. Relevant paragraphs should be included to develop this principle, including by drawing on the Principles and Basic Guidelines on the right of victims of gross violations of international human rights norms and grave breaches of international humanitarian law to a remedy and to a reparation (adopted by the General Assembly A/RES/60/147 of 16 December 2005).