



The UN Protect,
Respect, Remedy
Framework and the
Guiding Principles:
**DRIVING
CHANGE?**

CIDSE Briefing
March 2013

CIDSE 
together for global justice

In this **paper**

Purpose of this briefing	3
1. An introduction to the Framework and the Guiding Principles	4
2. What are the opportunities and risks that the Guiding Principles offer for civil society groups?	5
3. How can civil society groups use the Guiding Principles to reduce abuses by companies?	7
Annex: The UN Business and Human Rights process	11

This document has been written by Anne Lindsay (CAFOD) with contributions by Daniel Hostettler (Fastenopfer), Elisabeth Stroscheidt (MISEREOR) and Denise Auclair (CIDSE), members of the CIDSE Private Sector Working Group. This group is led by the following organisations: CAFOD (England & Wales), CCFD-Terre Solidaire (France), Cordaid (Netherlands), Fastenopfer (Switzerland), MISEREOR (Germany) and Justice and Peace Commission (Belgium).

Its common objective is to close gaps in existing standards including through regulation and to provide solutions for communities facing negative impacts from business. The group focused on the work of the United Nations Secretary General's Special Representative for Human Rights and Transnational Corporations and Other Business Enterprises throughout the 2005-11 mandate, and is now engaged in its follow-up. For further information, see www.cidse.org/businessandhumanrights.

Contacts:

- Denise Auclair, Policy and Advocacy Officer, CIDSE, auclair@cidse.org, tel: +32 2 233 3758 – www.cidse.org.
- Anne Lindsay, Lead Analyst - Private Sector, CAFOD, alindsay@cafod.org.uk, tel: + 44 20 7095 5423 – www.cafod.org.uk.

Published in March 2013 by CIDSE, Rue Stévin 16, 1000 Brussels, Belgium

Cover picture: © Diego Cupolo

This paper is available in English, French and Spanish at www.cidse.org/resources

Purpose of this briefing

Businesses can have an impact on almost all human rights. That was one of the key findings of John Ruggie, United Nations Secretary General's Special Representative for Human Rights and Transnational Corporations and Other Business Enterprises from 2005 to 2011. After more than six years' work his mandate has now finished and his Guiding Principles for implementing the Protect, Respect and Remedy Framework were adopted by the UN Human Rights Council in June 2011. The detail of this process is set out in the Annex. John Ruggie recognised in his analysis that rapid globalisation had created "governance gaps" – companies' operations and economic and political influence reach across national borders over but international human rights law has failed to keep pace.

CIDSE partner organisations and local communities in the countries where they work such as Mexico, Peru, Colombia, the Philippines and Democratic Republic of Congo would certainly agree with that analysis. What is not yet clear is how the last six years of work at the UN will improve lives and mean that abuses of human rights by companies become a thing of the past. The Guiding Principles are not international legal obligations as John Ruggie was at pains to set out. We are now in the stage of implementation – their value and effectiveness on the ground depends on concrete actions from States and companies.

That is why the CIDSE Catholic development agencies have stressed that this next stage should not be just about disseminating the Guiding Principles. It should also include looking at evidence of how they are being used in concrete situations and gauging the impact that they have on human rights abuses by transnational companies and other enterprises. For CIDSE the value of the Guiding Principles will be the extent to which they change the behaviour of States and companies for the better. Such changes will not happen without action from civil society as well. This briefing shares key thoughts regarding the Protect, Respect and Remedy Framework and the Guiding Principles and encourages partner organisations to consider whether this approach is relevant to their own situation and, if so, how it could be used to reduce the risk of human rights abuses by business operations.

At this stage, there are many questions about the Framework and the Guiding Principles, for example how new concepts such as 'human rights due diligence' are defined for different companies and industries. CIDSE agencies believe there is a window of opportunity to help shape how the Guiding Principles are implemented and identify where further action is needed. This is very much an iterative process. We have already shared our thinking with partners in Zambia, the Philippines, Peru and Mexico and are keen to get feedback from you, based on your own knowledge and experience.



1. An introduction to the Framework and the Guiding Principles

Although the UN process has lasted for six years, it involved a relative small pool of people many of whom were already working on issues of corporate accountability and/or human rights. Now many more government officials, civil society groups and businessmen and men are trying to understand how the Guiding Principles are relevant to their everyday work. Getting informed is an important first step in trying to influence how the Guiding Principles are interpreted.

The UN Framework on Business and Human rights consists of three 'pillars':

- The State duty to protect human rights
- The corporate responsibility to respect human rights
- Access to remedy when abuses occur.

As a result of consultations and research, John Ruggie set out how this 'Protect, Respect, Remedy Framework' could be implemented with a set of Guiding Principles.¹

State Duty to Protect

"States have a broad set of international human rights obligations which require that they respect, protect [...] and fulfil the human rights of individuals within their territory and/or jurisdiction. Regarding human rights abuses caused by third parties, States have a duty to protect against such abuses, including those by business, through appropriate policies regulation, and adjudication."

"This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."

The action of States will be decisive for effective implementation of the Guiding Principles. As part of meeting their duty to protect, "States should enforce laws that are aimed at, or have the effect of requiring business enterprises to respect human rights and periodically to assess the adequacy of such laws and address any gaps."²

Corporate Responsibility to Respect

Companies need to look at how their core business activities affect people's human rights. The responsibility to respect means that they avoid infringing on the rights of others and they address adverse human rights impacts with which they are involved. This applies irrespective of whether the State is meeting its duty to protect or not. Each company should have in place a human rights policy and a human rights due diligence process "to identify, prevent, mitigate and account for how they address their impacts on human rights." CSR projects cannot be used to 'off-set' human rights abuses.

Access to Remedy

John Ruggie's Guiding Principle 26 sets out that: "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing human rights-related claims against business, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy."

Access to remedy includes both judicial and non-judicial mechanisms. For example, this section of the Guiding Principles also sets out a more influential role for

¹ See Annex for more detail of the process and the UN Working Group

² Ruggie, A/HRC/17/31/Add.3, May 2011

National Human Rights Institutions as well as a set of criteria for company-based grievance mechanisms for individuals and communities.

The full text of the Guiding Principles is available in English, French, Chinese, Arabic, Spanish and Russian at: www.business-humanrights.org/Documents/UNGuidingPrinciples.

2. What are the opportunities and risks that the Guiding Principles offer for civil society groups?

It is important to have realistic expectations about the impact of the Guiding Principles. Multinational companies remain very powerful in terms of economic and political influence. There is often a big gap between governments' public commitments on human rights and their actions. There are already many other processes and international initiatives relating to business and human rights. Depending on the situation, it might be a better use of time and resources for citizens who have experienced human rights abuses to concentrate on other mechanisms, for example, bringing a court case against a company using national or regional courts, taking an OECD complaint, working with a UN Rapporteur or Treaty Body.³ However a realistic assessment of the strengths and weaknesses of the Guiding Principles is essential for identifying how they can be used to raise standards of corporate behaviour. An initial SWOT analysis is set out below.

Strengths of the Protect, Respect, Remedy Framework and the Guiding Principles

- }] The State duty to protect human rights is confirmed at the core of international law.
- }] John Ruggie states that Governments need to use a 'smart mix' of measures to

meet their duty to protect and address corporate abuses of human rights; this explicitly includes regulation as well as voluntary approaches such as guidance.

- }] They emphasize the need for States to ensure policy coherence, for example so that terms of investment agreements or free-trade agreements do not restrain governments' ability to meet their duty to protect.
- }] They set out important elements for human rights due diligence by companies to avoid infringing on the rights of others and to address any adverse impacts with which they are involved.
- }] They recognise that those affected by corporate abuses are rights-holders and reference the UN Declaration and key treaties as standards instead of defining the issue in terms of Corporate Social Responsibility where a company can pick and choose what it does.
- }] They recognise companies have responsibilities for human rights impacts in relation to their supply chains and business relationships.
- }] Confirmation that companies can have an impact on virtually all human rights.
- }] Explicit reference to vulnerable groups.
- }] Explicit recognition of the imbalance of power between companies and victims.
- }] Welcomed and endorsed by the UN Human Rights Council in June 2011.
- }] Meeting the Guiding Principles is seen as a minimum standard.

³ See for example Trócaire (2010) 'Business and Human Rights Manual' for a guide to the range of mechanisms at www.trocaire.org/sites/trocaire/files/pdfs/policy/BusinessHumanRightsManualFinal.pdf



Weaknesses of the Guiding Principles

- }] Language of the Guiding Principles is very general – this leaves a lot of room for interpretation.
- }] They represent guidance to States and companies not a new international legal obligation – no enforcement mechanisms yet sufficient to close the acknowledged governance gaps.
- }] Guiding Principles are weak in comparison to the conceptual Protect, Respect, Remedy Framework, e.g.
 - A rather ambiguous interpretation of the duty of home States (i.e. the State where a transnational company is headquartered) with respect to extraterritorial activities. Ruggie mentions that home States can take steps to prevent abuse abroad by business enterprises within their jurisdiction but doesn't explicitly say that they have to do this.

- Conservative approach to supply chain management issues and the legal relationship between a company and its subsidiaries – the so-called 'corporate veil'.
- }] Some very big gaps, in particular, what happens in situations where the State is unwilling or unable to protect and a company does not respect human rights?
- }] Insufficient guidance to States on how to address obstacles to justice for victims, including through legal routes.
- }] Lack of guidance with regard to situations of low intensity conflict.
- }] Important issues which are insufficiently addressed:
 - Trend of increasing criminalisation of human rights defenders.
 - The specific rights of indigenous peoples.
 - How to ensure effective participation and consultation of affected groups?

Selected opportunities and risks for civil society groups raised by the Guiding Principles

Opportunities	Risks/Threats
Increased recognition by governments and society of the impacts of businesses on human rights and the need to address gaps.	Not a new international legal obligation: <ul style="list-style-type: none"> - lack of political will. - lack of enforcement mechanisms.
Some governments committed to implementing the Guiding Principles at national level, e.g. through cross government action plans.	Governments may focus only on guidance and voluntary policies instead of adopting changes to the law where this is needed.
Wide range of rights identified – relevant to activities by companies in all sectors and countries.	If there is no requirement for due diligence by companies, they might chose to concentrate only on one or two preferred issues.
UN Working Group on Business and Human Rights can receive submissions from anyone.	<ul style="list-style-type: none"> - Northern focus of debate so far. - Transnational companies much more aware of UN process than affected communities.
Civil society can help to define how companies should carry out their corporate due diligence.	Will Guiding Principles actually change company practices?
Evaluation of impact will show very clearly any short-comings in implementation by States and companies.	Current focus is very much on dissemination and good practice examples.
Can develop into a universally accepted <u>minimum standard</u> .	Potential for different and conflicting interpretations of what Guiding Principles require from companies and States.

Seeing the Guiding Principles as a work in progress

If the Guiding Principles have these gaps and weaknesses, should we work with them? This is a question which each organisation must answer for itself. CIDSE members have identified a number of reasons for including a strategic approach to the Framework and the Principles as part of their advocacy towards government and companies.

-] They already are an important reference point politically and internationally and will become more important in future.
-] Now is the time when civil society groups can influence how they are interpreted. We should use this limited timeframe to draw on their strengths and lobby and work to address their weaknesses.

] Working on the Guiding Principles does not mean that we stop other work on other business and human rights issues or accountability mechanisms. Rather the Framework and the Guiding Principles offer a potential additional angle to existing work on preventing corporate abuses of human rights.

] We can refer to the Guiding Principles as a minimum standard and a starting point for business & human rights work. At the same time, we can also refer to strong interpretations of international law, such as the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, and the UN Guiding Principles on Extreme Poverty & Human Rights.

] Evidence of the actual impact of the Framework and the Guiding Principles will shape what comes next.

3. How can civil society groups use the Guiding Principles to reduce abuses by companies?

“Useful but vague” – that was the feedback from some local organisations in Zambia when they started looking at the text of the Guiding Principles for the first time. Their point was that the Principles were helpful but needed to be translated into practical actions and steps to be effective. To be fair, John Ruggie tried to draft the document in terms which meant that they could apply to all kinds of companies from very different sectors. This means that a lot depends on how they are interpreted in specific situations.

What should the State do to implement its duty to protect?

Ultimately the effectiveness of the Framework and the Guiding Principles will depend on how seriously governments take implementation. Only governments can now require companies to follow the principles by introducing national

legislation or including binding criteria. This is why a lot of civil society advocacy to date has looked at influencing how national governments meet their commitments.

During the development of the Guiding Principles, CIDSE members identified a number of crucial gaps to follow up on and monitor during the implementation phase. The most important of these is linking the three pillars – the UN Framework is a helpful concept but it will only work in practice if there is a clear link between the State duty to protect, the corporate responsibility to respect and access to remedy. Therefore Governments need to introduce measures which will require companies to respect human rights. Other areas which are worth considering when discussing the implications of the Framework and Guiding Principles with national governments include:



1. More thinking is needed on **effective access to remedy**, especially in situations where the host State cannot or will not provide justice to citizens – this is the weakest area of the Guiding Principles.
2. **Extraterritorial legislation** - CIDSE thinks there is much more scope for home governments where companies are headquartered to introduce measures which will complement and help host governments' attempts to monitor business impacts on the ground.
3. **Human rights due diligence** – governments will need to look concretely at how to integrate this as a requirement for companies into legal and regulatory frameworks, including sanctions.
4. **Protection of human rights defenders** – the criminalisation of civil society groups protesting against corporate activity is a worrying trend. This is something that the new UN Working Group on Business and Human Rights needs to take very seriously.
5. In many developing countries, existing laws are not being used effectively and government agencies lack resources. Therefore it might be helpful to emphasise that **effective enforcement** is a vital part of the State duty to protect: “In meeting their duty to protect, States should:
 - (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps.”

What should companies do to meet their responsibility to respect?

A number of current research projects are looking at the concept of human rights due diligence. The European Commission is developing guidance for the oil and gas industry, employment agencies and the ICT sector. Much of the guidance being produced is written for businesses. For example, what systems and processes they need to adopt in order to meet the corporate responsibility to respect human

rights. However civil society groups have the opportunity to use the discussion about the corporate responsibility to respect to highlight existing abuses by companies and actions that they want to see companies take to avoid future cases.

Possible questions to ask in relation to company activity:

1. Are companies simply using the words of the Guiding Principles or have they made substantive changes to the content of their policies?
2. Can you link evidence of the impact that companies are having on workers, the communities and the environment with specific human rights in order to show that these issues must be covered by a company's own human rights policy and due diligence? For example, how are plans to develop mining concessions impacting on the right to water?
3. Given your knowledge of why abuses occur, what do you think human rights due diligence should look like for a particular company or industry in your country?

Some ideas to consider in work on mining

- } How are the rights of women being affected by the mining activity?
- } How are the rights of indigenous people being affected by the business? E.g. is ensuring a genuine process of Free, Prior and Informed Consent part of a mining company's human rights due diligence?
- } Access to justice: can we document examples of when this is not working and make clear recommendations about what specifically needs to change?
- } Evidence to show that the implementation of the Guiding Principles by governments and/or companies is substandard can be highlighted in research reports and shared with the new UN Working Group on Business and Human Rights at any time.

Likewise if particularly helpful measures have been adopted by a companies or local or national government this is a way to try to get others to follow suit.

The UN Working Group also holds an annual forum which took place for the first time on 4th and 5th December 2012 in Geneva.

Putting the Guiding Principles into practice: the extractives sector in Latin America

Gathering in Peru to discuss human rights due diligence in the Latin American context, CIDSE legal and civil society partner organizations from across the continent highlighted several pressing issues:

- }] In several countries, States are weak relative to powerful companies. For example, in Honduras once a company has been granted a concession, it has the right to decide whether it will allow government officials to enter or not for inspection purposes, taking over effective authority from the State. Due diligence will only be able to function properly when the rule of law and implementation of legal requirements are strengthened.
- }] Some States that have ratified ILO Article 169, on Free, Prior and Informed Consent (FPIC), have not yet implemented this. In others, in transcription into law FPIC often only requires consultation, not consent. There is a need for effective consent and binding respect for the results, as well as the inclusion of non-indigenous populations in FPIC.
- }] Criminalisation of social protest is increasing, including killings of and death threats against human rights defenders - effective protection is essential.
- }] There is a serious lack of transparency, often complicated by opaque corporate structures. For example, information pertaining to environmental impacts, e.g. regarding substances and chemicals used in mining processes, should be available in an accessible format since this is information of common interest. States should have to provide this information when it is asked for, and information should be kept up to date – this requires resources, and sanctions for non-compliance.
- }] In light of the above, home States also need to regulate to ensure that companies adhere to the same standards when operating in home States and abroad.

In addition to these points, feedback from CAFOD workshops in the Chocó region of Colombia, also highlighted the practical barriers that communities and activists face in being able to get access to basic information about companies' activities, including for example the size and location of concessions. Participants understood the impacts that companies could have on their rights and in this respect the framework made sense to them. In areas already troubled by violence, participants were sceptical of the State meeting its duty to protect.

For many local groups this was the first time that they had heard of the Framework or the Guiding Principles and they were unaware of national commitments to implementation. A key question was therefore how can those local communities, which the Protect, Respect, Remedy Framework is designed to help, actually be able to contribute to the debate and shape how the Guiding Principles are implemented in their country?



In order to understand what seeking to influence the implementation process might look like in concrete terms, here are some examples of how CIDSE member agencies are using the UN Protect, Respect, Remedy Framework and Guiding Principles in our work:

1. We lobby Members of Parliament and Governments on changes to the law.

The EU member states have been asked to produce action plans on how they will implement the Guiding Principles nationally. NGOs in the UK have used this process to call on the Government to introduce mandatory reporting by companies of their human rights impacts as part of company law.

2. We dialogue with companies about the standards that they should use.

In efforts to raise standards in global supply chains multinational companies have been much more interested in addressing some abuses than others. For instance, many retail companies are very worried about the reputational risk to their brand if their products are linked to child labour. However codes of conduct and agreements with suppliers have frequently ignored problems with other core labour rights such as Freedom of Association and the Right to Collective Bargaining. The Guiding Principles are clear that companies have to consider the impact of their activities on all human rights. This is useful in direct conversations with businesses.

3. We do research to show the impact of business activities.

CIDSE agencies are starting to think about how to gather evidence for evaluation of the Guiding Principles. In the end, the credibility of

the UN Framework and Guiding Principles will depend on results. If businesses simply re-badge existing policies this will not lead to any improvements. Partners working on mining in Africa have raised concerns that the Guiding Principles could be used as a stalling tactic by some unscrupulous companies rather than an opportunity to address their own policies and practices. This highlights why evaluation is important right from the start.

Relevant questions can be built into existing research projects and monitoring activities. For example, are governments protecting against human rights abuses by taking steps “to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”? How are businesses meeting their responsibility to respect human rights with a “due-diligence process to identify, prevent, mitigate and account for how their address their impacts on human rights”? Reliable evidence will help the UN Working Group appointed in September 2011 to evaluate the Guiding Principles impact in practice, as well as helping to identify any gaps where the Guiding Principles need to be extended or strengthened in order to reduce instances of human rights abuses by companies.

Next steps

Questions, comments and feedback on this CIDSE briefing are very welcome. Please contact: Denise Auclair, CIDSE (auclair@cidse.org) and Anne Lindsay, Lead Analyst - Private Sector, CAFOD (alindsay@cafod.org.uk).

Annex: The UN Business and Human Rights process

2005 - 2008	<p>First mandate</p> <p>First mandate of two years by the UN Human Rights Commission (John Ruggie is named Special Representative to the Secretary General on Business and Human Rights.)</p> <p>Reactions to and critique of the final report of the first mandate and the extension of the mandate to 2008.</p> <p>Presentation in 2008 of the final report which defines a framework based on three pillars: Protect, Respect, Remedy. The Framework is adopted unanimously by the Human Rights Council, achieving international recognition.</p>	<p>First mandate: ap.ohchr.org/documents/S/CHR/resolutions/E-CN_4-RES-2005-69.doc</p> <p>Report 2007: A/HRC/4/35 ohchr.org/english/bodies/chr/special/sp_reportshrc_4th.htm</p> <p>Report 2008: A/HRC/8/5 ap.ohchr.org/documents/alldocs.aspx?doc_id=14100</p>
2008 - 2011	<p>Second mandate</p> <p>Second mandate of three years of the Human Rights Council. The task: operationalize the Protect, Respect, Remedy Framework.</p> <p>The reports of 2009 and 2010 develop and refine the thinking of the Framework.</p> <p>Presentation in June 2011 of the final report including the Guiding Principles for implementing the three pillars of the Framework.</p> <p>End of Ruggie's mandate.</p>	<p>Second mandate: A/HRC/RES/8/7 ap.ohchr.org/documents/alldocs.aspx?doc_id=14340</p> <p>Report 2009: A/HRC/11/13 ohchr.org/EN/Issues/Transnational-Corporations/Pages/Reports.aspx</p> <p>Report 2010: A/HRC/14/27 ohchr.org/EN/Issues/Transnational-Corporations/Pages/Reports.aspx</p> <p>Report 2011: A/HRC/17/31 ohchr.org/EN/Issues/Transnational-Corporations/Pages/Reports.aspx</p>
2011 - 2014	<p>UN Working Group</p> <p>Working Group is created as the follow-up mechanism to the Ruggie mandate.</p> <p>The mandate of the Working Group is for three years and deals with the dissemination and implementation of the Guiding Principles.</p>	<p>Mandate: A/HRC/RES/17/4 ohchr.org/EN/Issues/Business/Pages/ResolutionsDecisions.aspx</p>

CIDSE members



Austria



Belgium



Belgium



Canada



England and Wales



France



Germany



Ireland



Italy



Luxembourg



the Netherlands



Portugal



Slovakia



Scotland



Spain



Switzerland



USA

} CIDSE is an international alliance of Catholic development agencies. Its members share a common strategy in their efforts to eradicate poverty and establish global justice. CIDSE's advocacy work covers global governance; resources for development; climate justice; food, agriculture & sustainable trade; and business & human rights.