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Operationalizing the 'Protect, Respect, Remedy' Framework



CIDSE submission to the UN OHCHR Consultation on Business and Human Rights



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Introduction

CIDSE welcomes this opportunity to contribute to the 5-6 October 2009 Office of the High Commissioner on Human Rights (OHCHR) Consultation on Business and Human Rights: Operationalizing the 'Protect, Respect, Remedy' Framework. As Catholic development agencies and members of the CIDSE Private Sector Group we have been following the mandate of the UN Special Representative on Business & Human Rights with interest¹. This statement highlights a number of key issues which we believe are particularly pertinent to the present multi-stakeholder consultation and the future direction of the Special Representative's work.

Our experience is based on work with our partner organisations in countries such as Cameroon, Chad, China, Colombia, the Democratic Republic of Congo, Honduras, Mexico, Peru, the Philippines, Timor-Leste and Zambia. This has included monitoring the impacts of companies in the developing world in industries such as oil, gas and mining, toys and electronics, participating in multi-stakeholder initiatives, and talking directly to businesses. On this basis, we wish to highlight specific recommendations for the future work of the Special Representative and his team. Two considerations are particularly relevant for the consultation, if the framework is to reduce the instances of human rights abuses by businesses and ensure that, where such abuses do occur, affected communities have access to justice.

The framework places considerable emphasis on the role of the state. While we would agree that states have the primary responsibility to promote and ensure the respect of human rights recognised in international law, there are many instances where states are either unable or unwilling to protect the human rights of their citizens. To address this fact, the operationalization of the framework should include a greater focus on use of extra-territorial legislation.

All the recommendations for operationalizing the framework should take into account the power imbalance between transnational companies (TNCs) and the individuals and communities who experience corporate abuses at firsthand. Companies have huge advantages in terms of influence and lobbying capacity, access to information, resources and legal and technical expertise. Practical ways to address this imbalance should therefore be built into the recommendations for each aspect of the framework.

¹ See for example CIDSE's submission to the Special Representative 'Recommendations to reduce the risk of human rights violations and improve access to justice', February 2008

Comments on particular aspects of the 'Protect, Respect, Remedy' framework

1. The State Duty to Protect

Extra-territorial legislation: effective regulation at the level of the corporation's home country has a crucial role to play in complementing initiatives to protect human rights within the territory where a company is operating. At the moment this approach seems to be under-utilized. Extra-territorial legislation is important for conflict areas and fragile states but should not be limited solely to this situation. After all there are many reasons why governments do not comply fully with their duty to protect human rights, including corruption, effective corporate lobbying and the fear of losing Foreign Direct Investment. We would like the theme of extra-territorial legislation to be developed further, both as an aspect of the state duty to protect and as part of the work on access to redress.

One example of how this would work in practice would be home governments introducing mandatory reporting and disclosure requirements for companies operating abroad. Public reporting on a country-by-country basis of payments to governments including taxes, as well as disclosure of social and environmental data (e.g. Human Rights Impact Assessments and social and environmental impact assessments) would be a helpful step towards greater accountability. Such a requirement will not relieve host states of their own obligations to respect, protect and fulfil human rights. Rather it will strengthen internal national procedures by increasing the information available to both civil society and government officials in the host countries where a TNC is operating, as well as in their home countries.

John Ruggie has already identified that governments take a rather narrow approach to managing the business and human rights agenda². Within the context of improving policy coherence, the Special Representative and his team could usefully open up a new area of debate by further investigating the operation and oversight of State pension funds and Sovereign Wealth funds with respect to human rights. The team has already looked at the proactive role played by the Norwegian Sovereign fund. A survey of other pension funds and sovereign wealth funds would help to establish the role that stronger oversight mechanisms could play in ensuring that such funds are not complicit in human rights abuses.

We believe that there is merit in the proposal to develop a UN-based source of expertise and advice to civil society, local and national governments in relation to business and human rights. An international advisory centre which offers expertise and resources to groups which would otherwise be at a disadvantage in negotiations with TNCs would be a start in addressing the imbalance of power. This has been recognised by UNCTAD for example in the context of contract negotiations between TNCs and governments in the developing world but is also applicable to human rights obligations³. Without a commitment for resources to support the state duty to protect in a concrete way, it is difficult to see how recommendations will lead to significant change.

2. The Corporate Responsibility to Respect

We agree with the Special Representative's judgement that businesses can impact on all internationally-recognized human rights. We would like to highlight practical steps which companies urgently need to take as part of the discussions as to what constitutes appropriate due diligence by companies. A major concern for CIDSE and its partner organisations is the trend towards criminalisation of public protest against proposed private sector projects or TNC activities⁴. Therefore due diligence should include the company assessing its dealings with local and national government, the police and armed forces and security firms and taking steps to prevent situations where people who peacefully protest against TNC activities are criminalised, threatened or even attacked.

Given the range of documented human rights abuses by oil, gas and mining companies, especially in relation to indigenous communities, extractive companies should adopt full Free Prior and Informed Consent (FPIC) as an essential element of their own due diligence procedures, rather than just following a stakeholder consultation process. The Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly in 2007 provides a minimum standard for the basis of a genuine consent process. Communities and host governments must have the time and information to prepare for the process in order to be in a position to make a well-informed decision about proposed projects.

Providing better guidance for companies on the corporate responsibility to respect is a re-occurring theme within the Special Representative's statements and reports. Greater understanding within businesses of how to meet their human rights obligations will certainly be invaluable, however, guidance must be coupled with measures which mean that the corporate responsibility to respect human rights becomes a reality for all companies, not merely a self-selecting group. In this context, we would like to see further work to explore how the concept of due diligence could be embedded into national legislation.

2 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, April 2008

3 UNCTAD World Investment Report 2008

4 See for example CIDSE, January 2009, Impacts of extractive industries in Latin America

3. Access to More Effective Remedies

CIDSE partner organisations from Cameroon, Colombia, Mexico, Nigeria and the Philippines have been able to participate in two UN level discussions in Geneva and in regional meetings in Africa, Asia and Latin America. However we are aware that there are many organisations and individuals who have not been able to share their views and expertise in these fora. During the next stage of developing more concrete proposals around access to remedy, we believe that it is essential that the Special Representative is able to discuss his draft recommendations with those with direct experience of the difficulty of seeking access to justice. Therefore we would like to see further regional meetings in Latin America, Asia and Africa between the Special Representative and civil society groups over the next eighteen months of his mandate. This would give people from the global South the chance to respond to the proposals for operationalising the framework to see if they would be effective from an affected communities' perspective.

Judicial mechanisms: in order to reduce the legal and practical barriers to accessing justice, we support developing recommendations around the scope of Directors' Duties within company law; looking at the links between a company and their subsidiaries in relation to corporate liability and making it easier for victims of corporate abuses to bring class actions.

CIDSE member agencies also believe that there is merit in examining how the burden of proof can be reduced for affected communities through preventative measures. For example this would include exploring the idea highlighted by MISEREOR partner organisation SALIGAN in the Philippines context of using of court protection orders. Under SALIGAN's proposal, businesses wishing to enter into a community would have to apply for exemption from any protection order. The onus would be on the company to demonstrate to the court that their operation would not have a negative impact on the human rights and the environment before any new project could be considered. A community could still oppose such application for exemption but in this case, the burden of evidence would be shifted on the company⁵.

Quasi-judicial mechanisms: There is an imbalance of power when companies are able to use the mechanism in international trade law and given by so-called "host-government-agreements" to put pressure on countries and demand compensation for costs incurred to them due to the improvement and/or implementation of human rights or environmental legislation. We are grateful that the Special Representative does take up this important topic in his reports. We would like to encourage him to further elaborate on the possibility of establishing international quasi-judicial mechanisms through which companies could be held accountable for human rights abuses.

Non-judicial mechanisms: drawing on our partners' experience of direct and more structured dialogue with companies in countries such as Mexico and Nigeria, non-judicial mechanisms do have a useful role as a supplement to, but not a substitute for, judicial mechanisms.

To inform the further development of recommendations for effective grievance mechanisms at the company level, it is important that John Ruggie and his team draw on extensive trade union experience in this field. This is also important as from our experience some high-profile TNCs are still surprisingly suspicious of the core labour rights of freedom of association and the right to collective bargaining. Drawing on mature examples of industrial relations would demonstrate that grievance mechanisms are not just a risk management tool of the company but can be an effective approach based on the expression of the fundamental rights of workers.

4. Next Steps: Looking Beyond 2011

Given the range of issues and challenges identified over the last four years in relation to business and human rights, it is important to begin considering now what will happen at the end of the Special Representative's mandate. We would like to see a follow-up special procedure identified, for example a UN Special Rapporteur or Working Group on the specific issue of Business and Human Rights to make sure that the current discussions and recommendations lead to lasting changes. Such a special procedure will mean that as the measures supporting the framework are implemented, resources are available at international level to evaluate their impact on business and human rights, including through investigation of particular cases.

We are very happy to contribute to future discussions with the Special Representative and his team on ways of taking the pieces of work identified above forward.

This document was written by Anne Lindsay (CAFOD) and Elisabeth Strohscheidt (MISEREOR) with inputs from Mark Cumming (Trócaire) on behalf of the CIDSE Private Sector Group.

⁵ Access to Remedies: Submission to the UN OHCHR Consultation on Business and Human Rights Sentro ng Alternatibong Lingap Panligal (SALIGAN), The Philippines www.saligan.org; saligan@saligan.org



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Mining in the Democratic Republic of Congo (© Richard Wainwright)

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

The CIDSE Private Sector Group is led by the following member organisations: CAFOD (United Kingdom), CCFD-Terre Solidaire (France), Fastenopfer (Switzerland), MISEREOR (Germany), SCIAF (Scotland), Trócaire (Ireland) and VnM-FOCSIV (Italy). Its common long-term objective is to close gaps in existing standards through regulation and to provide solutions for communities facing negative impacts from business. The group has focused on the mandate of the United Nations Secretary General's Special Representative for Business and Human Rights. For further information, see the CIDSE website page on "Business and Human rights" (www.cidse.org).