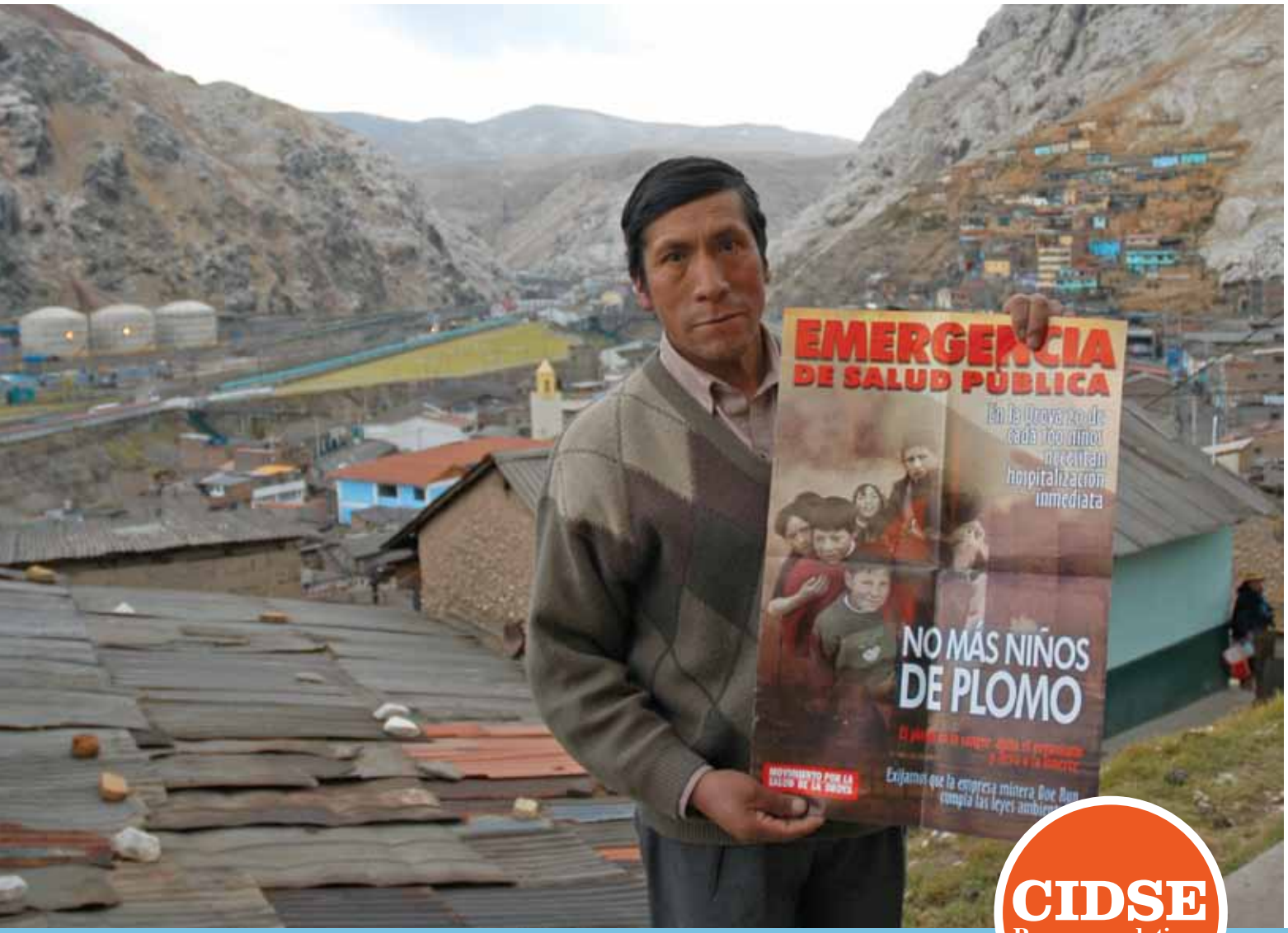

CIDSE Recommendations

Human Rights Due Diligence

Policy measures for effective implementation

- Identify and assess human rights risks
- Prevent and mitigate adverse human rights impacts
- Account for how human rights impacts are addressed

September 2013

CIDSE
together for global justice

In this **paper**

This document was written by the CIDSE Private Sector Working Group. The group is led by the following organisations: CAFOD (England & Wales), CCFD-Terre Solidaire (France), Fastenopfer (Switzerland), MISEREOR (Germany), Commission Justice et Paix (Belgium), Trócaire (Ireland), and Cordaid (Netherlands).

CIDSE's 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 Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises throughout the 2005-11 mandate, and is now engaged in its follow-up.

In 2012, CIDSE organised the Latin America consultation of legal and civil society experts for the Human Rights Due Diligence Project of the International Corporate Accountability Roundtable (ICAR), the European Coalition for Corporate Justice (ECCJ) and the Canadian Network on Corporate Accountability (CNCA). The consultation was hosted in Lima, Peru by CIDSE partner Comisión Episcopal de Acción Social (CEAS). The Project resulted in the expert report, '*Human Rights Due Diligence: The Role of States*,' by Professor Olivier de Schutter, Professor Anita Ramasastry, Mark B. Taylor, and Robert C. Thompson.

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Purpose of this briefing

Human rights due diligence has been receiving greater attention from policymakers, businesses and civil society groups since the adoption of the United Nations (UN) Protect, Respect and Remedy Framework in 2008 and its Guiding Principles on Business & Human Rights in 2011. This CIDSE briefing explains what human rights due diligence is and, referring to examples of existing practice in due diligence, how it should be implemented by businesses and the essential role of States in this regard. Taking examples of concrete situations on the ground, it argues that if effectively implemented, human rights due diligence can help to prevent and address human rights abuses.

Context: Conceptual framework and reality on the ground

Recent years have seen numerous examples and a continuing pattern of business involvement in human rights violations. These have led to unanimous recognition of the significant power imbalances between the capacities of States to meet their duty to protect citizens from human rights abuses by third parties, and the resources of transnational corporations and the scope and impacts of their operations. This is evident in many countries where CIDSE member organisations and our partners work, for example in Zambia where activities of copper mining companies have negatively impacted the rights to health and to safe working conditions of communities.

These "governance gaps" formed the basis for the elaboration of the 2008 UN Protect, Respect and Remedy Framework and the 2011 Guiding Principles for its implementation. The Framework is based on three pillars: 1) the State duty to protect human rights, 2) the corporate responsibility to respect human rights and 3) access to remedy where human rights are violated. In relation to the second pillar, the Guiding Principles recommend human rights due diligence as a central approach.

Human rights due diligence entails a company's responsibility to:

- Identify and assess human rights risks
- Prevent and mitigate adverse human rights impacts
- Account for how it addresses human rights impacts

Yet human rights due diligence by companies cannot be dissociated from the first and third pillars of the Framework. One of the key reasons for the governance gaps is the fact that, domestically, not all States are willing or able to meet their duty to protect, for reasons including corruption by economic actors or failing institutions. At the same time, the international context is often determinant. Obligations for transnational corporations to operate transparently are currently inadequate: for example, in Germany it is extremely difficult to know the source of raw materials used in the manufacture of a company's cars, in order to identify responsibility for the conditions and human rights impacts of this production.[1] Responsibility is further limited by the absence of legal liability between a parent company and its overseas subsidiaries or suppliers.

On the ground, access to justice and remedy is often denied to communities in countries such as Guatemala, the Philippines, India and the Democratic Republic of Congo, whose rights to land and livelihood are violated by the operations of transnational companies. In Peru and Colombia, human rights defenders exercising their right to peaceful protest related to business investments face criminalisation and even death. In Cameroon and Mexico, workers on plantations and in factories suffer unsafe working conditions and denial of the right to collective bargaining. Against this context, the Guiding Principles set out that the duty of the State is to take *"appropriate steps to prevent, investigate, punish and redress"* human rights abuse *"through effective policies, legislation, regulations and adjudication."* This includes obligations both domestic and global: *"States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."*[2]

Recommendation 1

States must use the means at their disposal to make human rights due diligence a requirement for businesses, everywhere they operate. States must also provide effective mechanisms for access to remedy, for cases where businesses do not meet this requirement and human rights violations occur.

Scope: Comprehensive human rights due diligence

Although the concept of human rights due diligence has received much more attention from politicians, businessmen and women and civil society groups as a result of the UN Guiding Principles, it is important to remember that this kind of due diligence already exists in practice. In fact, recent in-depth research has shown that States already use due diligence in regulation to set clear standards of behaviour for companies on a wide range of issues including anti-corruption and anti-trafficking measures, worker safety and consumer and environmental protection.[3] Clearly many of these examples of due diligence regimes also seek to address or prevent abuses of human rights by non-State actors – for example the right to life or freedom from cruel, inhuman and degrading treatment.

What is new as a result of the Guiding Principles is that:

} **Human rights due diligence is explicitly applied to the full range of human rights,** } There is a more active role set out for companies– asking them to have a **clear policy** that looks at all potential human rights impacts **using the International Bill of Human Rights**[4] and the principles concerning fundamental rights set out in **the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work** as minimum standards, to put this policy into practice and to report on its effectiveness,

} A **more active role is recognised for rights holders and civil society groups,** including trade unions and non-governmental organisations (NGOs).

A critical question is therefore, how can States ensure that companies do indeed adopt this much more comprehensive approach to identifying and addressing their human rights impacts? The 2012 report, *'Human Rights Due Diligence: The Role of States'*, provides a helpful starting point for States looking to implement the Guiding Principles effectively.

It identifies approximately 100 examples of different due diligence mechanisms in existence today and argues that, rather than one single procedure, States should use a combination of approaches. While there is a clear trend nationally and globally in development of due diligence mechanisms as a way to make sure that companies respect established standards, progress has been piecemeal and some sectors are more advanced than others.

A key issue is implementation in relation both to a company's own activities, and within its business relationships. This has been complicated by the growing complexity of corporate structures, described by former UN Special Representative John Ruggie as "the most visible manifestation of globalisation today: some 70,000 transnational firms, together with roughly 700,000 subsidiaries and millions of suppliers spanning every corner of the globe."[5]

In this context, a group of human rights experts examined interpretations of extraterritoriality in international law and in 2011 issued an expert opinion, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.[6] According to Principles 24 and 25, States must take measures to ensure that transnational corporations do not impair the enjoyment of these rights, wherever they are in a position to do so. This applies in cases where the harm or threat of harm originates on the State's own territory, or where the corporation, or its parent or controlling company, is domiciled or registered, or has its centre of activity, in the State concerned. A State's obligation to protect thus does not end at its own territorial borders.

Extraterritoriality already exists in practice in a number of due diligence regimes. For example when it comes to dealing with corruption and money laundering, States have recognised that the nature of the problem demands an international response. So in addition to adopting the UN Convention against Corruption in 2003, various countries have introduced Know Your Customer legislation. Consumer law which makes manufacturers or importers responsible for the safety of their products already requires businesses to engage in due diligence throughout their supply chain to a limited extent. Additionally, the requirement for companies to disclose due diligence measures in their global supply chains has been put in place with respect to human trafficking and conflict minerals.[7] The implementation of the Guiding Principles is an opportunity to build on this ongoing development and ensure that corporate due diligence becomes more comprehensive and effective in relation to all human rights. States have a range of policy tools and mechanisms at their disposal, depending on the nature of the human rights harms that they seek to prevent. In particular, States could make far greater use of legal tools to ensure that businesses carry out effective human rights due diligence. These include for example:

- Criminal liability,
- Civil liability,
- Better use of existing administrative regulations,
- Integrating evidence of human rights due diligence into procurement requirements,
- Integrating evidence of human rights due diligence into the approval of licences and permits,
- Requiring evidence of human rights due diligence as a condition for any State investment or support, including for export activities and overseas development projects,
- Making sure the definition of directors' duties allows companies to respect human rights,
- Corporate reporting on human rights risks and impacts and the effectiveness of their due diligence processes.[8]

Recommendation 2

Policy responses must recognise the cross-border reach of today's business relationships and the growing complexity of corporate structures.

Effective implementation of human rights due diligence

Below, we take a closer look at the three elements that comprise human rights due diligence – identify and assess, prevent and mitigate and account –, quoting from the Guiding Principles. Drawing upon cases from our work with partner organisations in Latin America, Africa and Asia, we demonstrate that voluntary approaches have been inadequate and put forward our definition of effective human rights due diligence, supported by examples of existing measures by States.

Identify and assess human rights risks

"In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should… involve meaningful consultation with potentially affected groups and other relevant stakeholders…"[9]

In 2012, a series of protests concerning extractive projects in indigenous regions in Peru, notably Espinar and Cajamarca, were marked by several deaths and led to the declaration of a state of emergency. These events demonstrate that effective consent processes with affected people, led by the government and not manipulated by companies in the absence of the State taking on this role, would have been crucial in order to respect indigenous rights and to avoid violent conflict.

In the Philippines, CIDSE members Fastenopfer (Switzerland) and MISEREOR (Germany), together with Bread for All (Switzerland), commissioned a human rights impact assessment by the Institute for Peace and Development (Germany) of plans by Sagittarius Mines Inc., a subsidiary of the Anglo-Swiss mining company Glencore Xstrata, to exploit the biggest copper and gold mine in Asia in Tampakan. Against a background of a combination of government failure, a poor and marginalised indigenous population and armed conflict, the June 2013 study concluded that it would be impossible to conduct the mine project without a serious impact on human rights.[10] The absence of a credible company-conducted assessment shows that voluntary standards were insufficient.

Part of any due diligence approach must be to include affected people in decision-making processes, and to consult human rights defenders, providing prior and exhaustive information. States must have access to all relevant information on the social, environmental and human rights impacts of planned company operations, in order to carry out a genuine Free, Prior and Informed Consent (FPIC) process with indigenous peoples.[11] According to the UN Special Rapporteur on the rights of indigenous peoples James Anaya, the role of the State is important "because of the significant disparities in power, negotiating capacity and access to information that typically exist between corporations and indigenous peoples." Companies must "mitigate power imbalances and avoid outcomes that are not compliant with human rights standards."[12]

In Peru, the financial regulatory authority proposed in early 2013 a draft regulation requiring banks to ask their extractive business customers to have environmental and social impact assessments and social conflict prevention mechanisms, as a step in lending decisions.[13]

Where legal requirements already exist, as with FPIC in Peru and the Philippines, effective implementation of human rights due diligence requires strengthened and consistent enforcement by States. In this case, FPIC must be properly carried out, with binding respect for the outcome.

It must also be meaningfully applied to affected rural and urban communities that are non-indigenous. The consent process is an essential step for a company in identifying and assessing human rights risks, which also plays a key role in preventing and mitigating adverse human rights impacts.

Recommendation 3

The regulatory process for approval of licences and permits should include binding guidelines for human rights due diligence, including the obligation to undertake human rights impact assessments and obtain community consent, sharing all information needed.

Peru: Right to Prior Consultation

In Peru, the Law of the Right to Prior Consultation with Indigenous or Native Peoples guarantees the consultation rights embodied in the 1989 Convention (No. 169) of the International Labour Organisation on Indigenous and Tribal Peoples. The law requires Peruvian government agencies to engage in meaningful consultations, with an opportunity to influence the decision, before implementing "plans, programs [or] projects," that "directly affect [the] collective rights, physical or cultural identity, quality of life and development" of indigenous and tribal people.[14]

India: Environmental Impact Assessment

A significant number of States require companies to prepare Environmental Impact Assessments as part of the process of granting a licence or permit. In India, the 1986 Environment Protection Act provides for a public participation process, including a public hearing in the locality concerned, where stakeholders can comment on project documents. Criminal penalties for providing false or misleading information, or omitting required information, apply both to the head of the government agency responsible and to the head of the company proposing the project.[15]

Prevent and mitigate adverse human rights impacts

"… business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes and take appropriate action… Actual impacts… should be a subject for remediation."[16]

The due diligence process and its identification of risks and impacts must influence company decision making about core business activities, and not simply come as a procedural step after a decision to invest. For example, in 2012, CIDSE member CCFD-Terre Solidaire (France) and its partners Tamil Nadu Land Rights Federation and Sangam (India), together with the legal association Sherpa and trade union CGT (France), filed a complaint with the Organisation for Economic Cooperation and Development (OECD) against the French company Michelin regarding breaches of the OECD Guidelines for Multinational Enterprises at its tyre factory in Tamil Nadu, India. While Michelin made several philanthropic gestures for neighbouring populations, in medical care and bakery training for example, there is no evidence that it undertook effective due diligence ahead of its decision to begin operations in India. The complaint alleges that Michelin ignored social protest related to the project and failed to demonstrate adequate measures to prevent negative social and environmental effects on local and indigenous communities.[17]

Stakeholder dialogue is needed throughout the life cycle of a project, including mechanisms to raise issues and problems. If social protest does occur, a considered approach to due diligence means that the business is not complicit in its criminalisation, but respects and take social protest seriously as a legitimate expression of affected rights holders.[18] Therefore, not only do States have the duty to protect human rights defenders and to guarantee

the right to freedom of expression and assembly of affected people, but companies also have the responsibility to avoid any negative impact on human rights defenders, including by security guards.

National police forces are often deployed to protect mine sites. For example in May 2012 two members of a local Catholic organisation who were investigating human rights abuses were detained by the police for two days following a community protest near Glencore Xstrata's new Tintaya site in Peru. They were later released from prison, but the threat of charges against them has not yet been definitively dropped.[19] And in 2012 the European Centre for Constitutional and Human Rights (Germany) and the Colombian trade union, SINALTRAINAL, supported by MISEREOR, filed a criminal complaint in Switzerland against Nestlé, alleging negligence in the 2005 killing of trade unionist Luciano Romero by paramilitaries. A former employee of Nestlé's Cicolac powdered milk factory in Colombia, Romero had been falsely accused of being a guerrilla combatant by his employers. Despite being informed of the threats made against Romero, Nestlé senior managers failed to use the resources at their disposal to prevent the murder.[20]

States have constructed various incentive structures to encourage companies to conduct due diligence, including preventive and mitigation measures. The incentives promote respect by business for standards set down in administrative regulations, such as those governing environmental protection, labour rights, consumer protection or anti-corruption. Enforcement of these rules can combine administrative penalties such as fines; criminal law sanctions and the possibility of civil action.[21]

Recommendation 4

States should provide for criminal, civil and administrative liability of business enterprises for crimes and harms to human rights, where they fail to act with due diligence, including with regard to the security of human rights defenders.

Switzerland: Criminal liability

In Switzerland Article 102 of the Criminal Code (2003) concerning corporate criminal liability, states that "If a felony or misdemeanour is committed in an undertaking in the exercise of commercial activities and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the undertaking, then the felony or misdemeanour is attributed to the undertaking."[22]

Germany: Civil liability

Most legal systems provide that, where an employer has delegated certain duties to an employee, the employer remains civilly liable for any damage caused by that employee's negligence, unless the employer has acted with due diligence in order to prevent the fault from being committed. Representative of this is Germany's Civil Code, Section 831(1), which includes a specific provision on "liability for vicarious agents."[23]

France: Administrative liability

In France, the environmental statute Act No. 2008-757 imposes administrative liability on companies to encourage them to conduct due diligence. It states: "In cases of imminent threat of injury, the operator [of a facility] shall, without delay and at his expense, take preventive measures in order to prevent the occurrence or mitigate its effects. If the threat persists, it shall promptly inform the authority… of its nature, of the prevention measures it has taken and of their results."[24]

Account for how human rights impacts are addressed

"In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them."[25]

The private sector influences many aspects of our lives, so it is appropriate that companies with global power be accountable to people affected by their decisions. To achieve this, public reporting is critical, but research on companies in the London Stock Exchange FTSE 100 index shows many do not meet existing reporting requirements or report on significant human rights impacts.[26] The European Commission estimates that only 2,500 out of the 42,000 large European Union (EU) companies formally disclose non-financial information each year.[27] Much of the information available is not comparable or consistent. Reporting is currently focused on the needs of investors, and even then the current lack of transparency and accessibility of information does not help the development of good quality, socially responsible investment practices. Furthermore there is insufficient recognition of the need for companies to be accountable to society more broadly, including workers, producers and consumers.

Access to information for stakeholders (consumers, communities affected by economic activity, trade unions, governments, NGOs, etc.) is essential to prevent, monitor and punish abuses. Corporate non-financial reporting is not an end in itself; it must be based on specific indicators, which are reliable, relevant and comparable. For example, the Mexican labour rights organisation CEREAL, partner of CIDSE member CAFOD (England & Wales), has identified that repeated use of agencies and temporary contracts is a significant feature of global information and communications technology supply chains, having one of the biggest impacts on the rights of electronics workers.

Companies therefore need to be more transparent about such business practices and models, for examples by reporting on the presence of independent trade unions, collective contracts with inactive unions and Key Performance Indicators relating to the proportion of workers on temporary contracts and/or employed via agencies.[28] For reporting to be credible, there should be a formal requirement to incorporate the opinions of stakeholders including civil society organisations and trade unions. Its scope must also include application of the transparency obligation to subsidiaries.

The coalition of organisations led by the United Kingdom-based investor AVIVA is challenging the status quo, highlighting the limitations of voluntary sustainability reporting regimes over the last 20 years.[29] However CIDSE believes that it is important to go beyond the 'comply or explain' model that AVIVA is championing. Such an approach will not deliver the change needed, especially with regard to reporting by laggard companies. In order to design an effective corporate reporting regime, we need to learn from existing experience. For example, results from the Danish 'comply or explain' law on Corporate Social Responsibility reporting have been mixed: "Auditors have assessed that a majority of the businesses reporting in accordance with the wording of the legal requirement have chosen to comply with it, although providing only a minimum of information and short descriptions."[30]

Where legislation exists on reporting, implementation and enforcement are key for effective results. For example, in France the 2010 Grenelle II Act included a measure to improve the company reporting requirements in place since 2001. However, the 2011 decree implementing the Act provided two separate sets of reporting indicators for companies listed on the stock exchange and non-listed companies, encouraging companies subject to the more restrictive set not to disclose, and

limiting comparability. The decree also removed the requirement for companies to publish information about the social and environmental impacts of activities of their global subsidiaries, precisely where most violations occur. The decree thus undermined the intention of the original legislation and the credibility of company reporting.

As well as providing accurate, publicly available information, reporting requirements can play a part in helping to prevent human rights abuses. Understanding that the business is legally required to report on its particular risks and impacts can encourage a virtuous circle of feedback within the company. With more systematic identification of current impacts on human rights and potential risks plus analysis of the effectiveness of existing policies, senior management will be better informed and able to take mitigating action before problems occur.

Recommendation 5

States must ensure that businesses are more transparent and citizens can access relevant, accurate information on their activities and impacts on human rights and the environment. A robust reporting model should be based on specific risks and impacts, not 'comply or explain.'

United States: Reporting on conflict minerals in supply chains, and on human rights and environmental impacts in Myanmar

In the United States, the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1502 requires companies to report on their due diligence with respect to conflict minerals in their supply chains originating in the Democratic Republic of Congo, with the goal of helping to end human rights abuses caused by the conflict. A company that finds conflict minerals in its supply chain must determine and disclose whether those minerals directly or indirectly financed or benefited armed groups.[31]

The 2013 Burma Responsible Investment Reporting Requirements establish that as a condition for receiving a licence to operate in Myanmar, U.S. companies in all sectors investing more than $500,000 must submit reports, with the objective of addressing impacts on economic development and political reform following the easing of U.S. sanctions in 2012. Reports must provide information on human rights, labour rights, land rights including the details of land transactions, community and stakeholder engagement, environmental protection, anti-corruption, security arrangements, and risk prevention and mitigation."[32]

European Union: Reporting on human rights and environmental impacts

In the spring of 2013, the European Union began consideration of a legislative proposal requiring mandatory reporting by corporations on their human rights and environmental impacts. In their review of the proposal, European governments and the European Parliament will need to take into account experience with existing measures, including the weak, minimal results of the Danish 'comply or explain' model and the lack of effective implementation of the requirement in France.

Changes needed for robust EU requirements on non-financial reporting:[33]

- There needs to be a more explicit wording linking the requirement for companies to report on environmental matters, social and employee-related matters, respect for human rights, anti-bribery and corruption matters to **the risks and impacts** of the particular business,

- Reporting on significant risks and harm **in supply chains** needs to be included. In the wake of the horsemeat scandal and the death toll from recent incidents in garment factories in Bangladesh, it is clear that problems with supply chains can represent a significant risk to companies, the communities in which they operate and customers. Companies need to know what is happening in their supply chains and show that they are aware of and are managing risks appropriately,

} There needs to be **greater coverage** of businesses. As UN Special Representative John Ruggie explicitly recognised in the Guiding Principles, businesses of all sizes can have an impact on human rights.[34] However the definition of 'large' companies proposed in the current draft regulation is those with more than 500 employees. At the very least, it would be better to use the usual EU definition of companies with **more than 250 employees. Subsidiaries** must be covered by the transparency requirements,

} **Key Performance Indicators** are important for getting clear, comparable data. Good quality **guidance** for businesses and enforcement mechanisms at the member state level are also needed for these measures to be effective.

Further actions for effective human rights due diligence

As an approach focused on prevention of human rights violations, human rights due diligence has significant potential. Drawing on the preceding sections on the steps of identify and assess, prevent and mitigate and account, this section sets out further actions for effective human rights due diligence, that cut across these three components.

A clear definition

As outlined in this paper, experience with some elements of human rights due diligence, such as consent processes and reporting, demonstrate that it risks becoming a box-ticking exercise. In order to act as a real tool to help businesses identify and prevent adverse impacts on human rights, it must be more precisely defined by States and properly implemented.

Recommendation 6

States should define clearly what constitutes human rights due diligence, and incorporate this into binding legal and administrative measures.

A condition for State support

The SOCAPALM palm oil plantation in Cameroon is the subsidiary of a complex legal structure involving the four holding companies of Bolloré in France, Financière du champ de Mars in Belgium, and SOCFINAL and Intercultures in Luxembourg. An OECD complaint filed by Sherpa, MISEREOR and its Cameroonian environmental partner organisations CED and FOCARFE concerns both violations of the right to land and livelihood in the communities surrounding the company's plantation, as well as the buying arrangements with local planters and the right to decent working conditions on the plantation itself. The complaint documents breaches in collection agreements with local planters, and for plantation workers exposure to injury due to unsafe transport, lack of protective equipment, unsanitary housing conditions, precarious subcontracting arrangements and denial of the right to collective bargaining. In June 2013 the French National Contact Point issued its final statement, concluding that through their relations with SOCAPALM, all four companies violated the OECD Guidelines, and recommending that the companies implement an action plan for remediation.[35]

Human rights due diligence in the agricultural sector is all the more necessary, in light of increasing government promotion and support for private sector agricultural investment as a means to reduce global hunger and foster development, as exemplified by the G8 New Alliance for Food Security and Nutrition in Africa.[36]

Much emphasis is being placed on integration of smallholder producers into international value chains. However, given the concentrated market power of agribusiness and food industry corporations, whether these represent fair contract arrangements, or actually lead to

rights violations, will be determined by factors such as how risks and benefits are shared between the producer and the buyer and, crucially, the respect for the right of joint organisation of producers.[37]

While States should require human rights due diligence by all business enterprises, they have a special obligation to do so within the State-business nexus.

As an economic actor the State plays a key exemplary role, and so must take all necessary measures to avoid providing finance or other guarantees for projects that pollute the environment or violate human rights. Thus, export credit agencies must demand that their client companies undertake a process of due diligence on the potential impact of their activities. Agencies should set up complaints procedures for actual or potential victims whose rights are threatened or have been denied by corporate operations. Any company found to have been involved in cases of rights violations, should be excluded from export promotion.

Parent company liability

An essential pillar of the Protect, Respect and Remedy Framework, effective mechanisms for access to remedy serve both as an incentive for businesses to undertake proper human rights due diligence, and to repair harm done where they fail. At present, company law does not capture the reality of multinational corporations and their accountability is extremely limited by the 'veil' of corporate legal personality.

It is therefore necessary to remove the legal separation between the parent company and its subsidiaries and/or sub-contractors in the supply chain, when the former exercises control over them (whether via a contractual or a capital relationship). This requires the recognition of a duty of care for the parent company vis-à-vis entities acting under its effective control. Already, German labor law provides for corporate liability in relation to a business's subcontractor and its employees.[38]

Recommendation 7

States should make investment and guarantees by national financial institutions conditional upon meeting human rights, social and environmental requirements, and establish redress mechanisms.

Recommendation 8

States must enact parent company liability for human rights violations by its subsidiaries and subcontractors in its supply chain.

United States: Condition for State-supported investments

The United States Overseas Private Investment Corporation screens projects applying for insurance against a set of criteria that includes labor standards (rights to organise and to bargain collectively, minimum age for labor, prohibition of forced labor and acceptable conditions of work). Misrepresentations and failure to disclose information could lead to cancellation of insurance.[39]

France: Parent company-subsidiary responsibility

Several French laws address the issue of liability, the parent company-subsidiary corporate veil and the notion of control and responsibility. For example in competition law, the financial relationship between the parent company and subsidiary and the lack of commercial autonomy of the subsidiary incurs the responsibility of the parent as to anti-competitive behavior by the subsidiary. In commercial law, control of a corporation is established by the criterion of voting rights and incurs the responsibility of the parent for the subsidiary's activities. In accounting law, a company's influence over other companies, judged against a set of indices, incurs the obligation to present consolidated group accounts.[40]

Conclusion

The UN Protect, Respect and Remedy Framework and its Guiding Principles on Business and Human Rights have helped to give shape to human rights due diligence as a useful approach in preventing and addressing human rights abuses. Experience on the ground and case examples reveal the limits of voluntary approaches, demonstrating the need for a more comprehensive set of legal tools that match the cross-border reach of today's business relationships. Research by experts and work by civil society groups shows that many legal measures already exist, which States can use and build upon to establish robust human rights due diligence regimes.

We are now in a crucial phase for the effectiveness of the Guiding Principles, in which States must move to set out more clearly the expectation that businesses will respect human rights across their operations and take steps to protect against human rights abuse, through effective legislation and regulations. In this light, the role of States in enforcing human rights due diligence is essential.

Effective human rights due diligence will require rigorous home State regulation, with adequate implementation, including sanctions against companies that do not undertake human rights due diligence as required. The same applies to host State regulation, where adequate resources must be invested in implementation and compliance, so that companies are not allowed to ignore or contravene regulatory measures in the absence of the rule of law. Local civil society groups will have to continue their struggles, supported by their international partners, to build pressure for changes in corporate behavior. They will look to States to take effective steps to require human rights due diligence, that will bring lasting change and prevent violations of human rights.

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2 Principles 1 and 2.

3 ICAR, ECCJ and CNCA (2012), *Human Rights Due Diligence: The Role of States* (hereafter, 'HRDD expert report').

4 Consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (Guiding Principle 12).

5 United Nations (2006), *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,* E/CN.4/2006/97.

6 The group included current and former members of international human rights treaty bodies, regional human rights bodies and former and current Special Rapporteurs of the United Nations Human Rights Council. Its expert opinion can serve as a source of international law.

7 HRDD expert report, p. 47.

8 *Ibid*, p. 61-3.

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18 Criminalisation of social protest is an increasing trend and a systemic problem, see CIDSE et al. (2012), *The criminalization of human rights defenders in Latin America - An assessment from international organisations and European networks.*

19 See www.cafod.org.uk/News/Press-Centre/Press-releases/Xstrata-mine-protests-update.

20 ECCHR and MISEREOR (2012), 'Special newsletter on the criminal complaint against Nestlé in the case of the murdered Colombian trade unionist Luciano Romero.' The complaint was dismissed by the office of public prosecution, which delayed proceedings until the matter could be declared as having exceeded the statutory time limit. This decision has been appealed.

21 HRDD expert report, pp. 5, 19.
22 See www.admin.ch/ch/e/rs/3/311.0.en.pdf.
23 HRDD expert report, p. 17.
24 The statute implements an EU Directive on environmental liability. HRDD expert report, p. 20.
25 Guiding Principle 21.
26 See for example *The Reporting of Non-Financial Information in Annual Reports by the FTSE100* prepared by Professor Adrian Henriques, Middlesex University, for the CORE Coalition, 2010.
27 European Commission, 16 April 2013, 'Disclosure of non-financial and diversity information by certain large companies and groups (proposal to amend Accounting Directives) - Frequently asked questions'.
28 See 'CAFOD and CEREAL Feedback on the draft Guidance for the ICT industry on implementing the Guiding Principles on Business and Human Rights,' February 2013.
29 AVIVA Earth Summit 2012, Briefing Note II, 'A Convention on Corporate Sustainability Reporting.'
30 Danish Commerce and Companies Agency (2010), *Corporate Social Responsibility and Reporting in Denmark: Impact of the legal requirement for reporting on CSR in the Danish Financial Statements Act*.
31 HRDD expert report, pp. 46-47.
32 U.S. Department of Treasury General License No. 17. U.S. Department of State fact sheet on Burma Responsible Reporting Requirements, June 2013.
33 See also 'Making EU Corporate Reporting Work for People, Planet and Companies,' European Coalition for Corporate Justice position paper, July 2013.
34 Guiding Principle 14.
35 MISEREOR et al. (2010), 'The Impact of the Privatization of SOCAPALM on Communities and the Environment in Cameroon,' Briefing paper; and OECD Watch Quarterly Update June 2013. During mediation, the parties agreed that the action plan for remediation would cover, among others, community dialogue, reduction of environmental nuisances, public services, local development, workers' rights and conditions of work, transparency and compensation of local communities for their losses of resources and lands.
36 CIDSE and EAA (2013), *Whose Alliance? The G8 and the Emergence of a Global Corporate Regime for Agriculture*.
37 Benjamin Luig, MISEREOR for the German NGO Forum on Environment & Development (2013), *'Business case' Hungerbekämpfung, der fragwürdige Beitrag von Agribusiness und Nahrungsmittelindustrie zur Ernährungssichercheit*.
38 HRDD expert report, p. 50.
39 HRDD expert report, p. 34.
40 Study carried out by Sherpa for CCFD-Terre Solidaire, March 2012.

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